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THE UNCONSTITUTIONAL PROSECUTION OF THE TALIBAN UNDER THE MILITARY COMMISSIONS ACT

Commander Syed N. Ahmad, JAGC, USN*

*We further our mission of destroying the enemy by propagandizing his troops, by treating his captured soldiers with consideration, and by caring for those of his wounded who fall into our hands. If we fail in these respects, we strengthen the solidarity of the enemy.*¹

This article addresses one aspect of the Military Commissions Act of 2006 (hereinafter MCA)²: the constitutionality of declaring members of the

* Syed N. Ahmad, Commander, Judge Advocate General's Corps, U.S. Navy. The author appreciates the outstanding instruction provided by Professor Gary D. Solis, Georgetown University Law Center, for whose course this article was originally submitted as a paper, the patience shown by the article's editor, LCDR Dave Lee, the translation assistance of Pierre-Thomas Taponier, and, most important, the never-ending forgiveness shown by my wife as I tried to enhance my original paper into this article. The views expressed (and any errors made) in this article are the author's and are not attributable to the U.S. government. The author's positions and opinions do not represent the views of the U.S. Navy, Defense Department, or any other U.S. governmental agency.

¹ MAO TSE-TUNG, ON GUERRILLA WARFARE 93 (Samuel B. Griffith trans., Frederick A. Praeger 1961) (1937).

² Military Commissions Act of 2006, Pub. L. No 109-366, 120 Stat. 2600 (2007). Outside the scope of this article are a number of other issues involving the MCA which are of arguable legality and wisdom, and which warrant further research (other than the already anticipated issues involving coerced statements, ex post facto offenses, and habeas corpus).

Jurisdiction

The status of members of Al Qaeda. Currently, they, like the Taliban, are listed as a group as unlawful enemy combatants in the MCA. This may be too simplistic however. Arguably, as the conflict with Al Qaeda has changed from a non-armed conflict to an international armed conflict to a non-international armed conflict within Afghanistan and Iraq, so too has the status of various members of Al Qaeda captured during each type of conflict -- common criminals, protected persons, possibly (but factually unlikely) prisoners of war, unlawful combatants, and individuals protected under Common Article 3.

Use of commissions for resident aliens. 10 U.S.C. §§ 948a(3), 948c (treating resident and nonresident aliens the same). M. E. Bowman, *National Security and the Fourth and Fifth Amendments*, in NATIONAL SECURITY LAW 1059, 1068 n.55 (John Norton Moore & Robert F. Turner eds., 2005) ("A line of cases beginning with *Reid v. Covert*, 354 U.S. 1 (1957), make clear that the Constitution does travel with U.S. citizens with respect to governmental actions. As for aliens, a substantial connection to the United States would be required for similar treatment."); cf. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*,

111 YALE L.J. 1259, 1298-1304 (2002) (questioning whether equal protection violated when aliens in general are subject to military commissions, but U.S. citizens are not).

Procedural Rules

Application of customary international law in the commissions. 10 U.S.C. § 948b(g). Although the MCA prohibits the use of the Geneva Conventions as a basis of rights in court, the act is silent as to whether customary international law may be an alternate source of rights. In fact, Rule for Military Commission 201(a)(3) and Military Commission Rule of Evidence 201A(b) leave open the possibility that international law may, in fact, be used. MANUAL FOR MILITARY COMMISSIONS II-12, III-4 (2007). As many provisions of the Geneva Conventions have become customary international law, if not principles of *jus cogens*, any effort to exclude the conventions, without excluding customary international law, may be ineffective. David Glazier, *Full and Fair By What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 59 (2006) ("Even if the MCA is construed to foreclose further litigation over [Common Article 3] or the full Geneva Conventions, there may be room for the potential judicial application of international human rights law ("IHRL") or customary law of war provisions."); cf. Carlos Manuel Vazquez, *Agora: Military Commissions Act of 2006: The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 71, 98 (2007) ("[T]he ambiguities in the provisions of the [MCA] that arguably curtail judicial enforcement of the Geneva Conventions should be resolved, to the extent possible, in such a way as to preserve the judicial role in enforcing those important treaties."). *But see* Memorandum from Jay S. Bybee, U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes, General Counsel to the Dep't of Def., Application of Treaties and Laws to Al Qaeda and Taliban Detainees, 32-37 (Jan. 22, 2002), reprinted in THE TORTURE PAPERS 81, 111-16 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) (customary international law does not constitute federal law).

Potential closure of the hearing for national security purposes. 10 U.S.C. § 949d(d). The accused shall be present for all proceedings, unless he causes a disruption, the members are deliberating, or it is an ex parte session (the latter two, the public would have no right to witness). It appears that if an issue of national security arises before the members in open court, the accused – who is alleged to be an enemy combatant – will be entitled to be present. It is an issue, however, whether the decision to allow the accused to be present will or should open the door to allowing the public – and press – to be present as well. See Katherine Flanagan-Hyde, Note, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 613 (2007) ("[T]he public's right of access to trials of terror detainees will be implicated if trials proceed under the recently enacted modified military commission procedures."). Moreover, it is unclear whether Rule for Military Commissions 804(a), which permits the exclusion of the accused for national security related in camera and ex parte sessions, is broader than 10 U.S.C. 949d(d).

Definition of Offenses

Failure to punish crimes against peace. Article 6 of the Nuremberg Tribunal Charter permitted the punishment of crimes against peace: "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: Crimes against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing" DOCUMENTS ON THE LAWS OF WAR 177 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter LAWS OF WAR]. Although Osama Bin Laden declared war on the United States, the MCA does not attempt to punish crimes against peace. Osama Bin Laden, Declaration of War against the Americans Occupying the Land of Two

Taliban unlawful enemy combatants subject to punishment by a military commission.³ This article argues that the declaration that detained Taliban⁴ are unlawful enemy combatants is in violation of the law of war, and, as a result, Congress exceeded its authority under Article I, section 8, clause 10 of the U.S. Constitution⁵ by subjecting members of the Taliban to trial by a military commission.

In Part I, this article provides a background on the issues. Part II discusses the meaning of the term “lawful enemy combatant.” Part III discusses the nature of conflict between the United States and the Taliban. Parts IV and V demonstrates that the Taliban are prisoners of war under both the Geneva Conventions and customary international law. Part VI discusses the inapplicability of commissions for prisoners of war. Part VII discusses the constitutional issue. Part VIII concludes the article.

Holy Places (Aug. 23, 1996),

<http://www.jihadunspun.com/BinLadensNetwork/statements/dowaa.html>.

Offenses of terrorism and material support to terrorism under the law of war. 10 U.S.C. § 950v(b)(24)-(25). Although terrorism is routinely condemned, there is no international definition for it. John F. Murphy, *The Control of International Terrorism*, in NATIONAL SECURITY LAW, *supra*, at 457, 458 (2005) (“[T]here is at present no generally accepted definition of ‘international terrorism,’ as demonstrated by the cliché, ‘[o]ne man’s terrorism is another man’s heroism.’”). In fact, Article 8 of the Rome Statute of the International Criminal Court does not list terrorism or material support to terrorism in its list of crimes that violate the laws and customs of international armed conflict. Rome Statute of the International Criminal Court, art. 8, Jul. 17, 1998, 2187 U.N.T.S. 90, 94-98. As a result, it is arguable as to whether terrorism is a law of war violation (it is clearly a criminal offense however).

Offense of conspiracy. 10 U.S.C. § 950v(b)(28). There are two issues associated with conspiracy. To begin with, conspiracy might not be an offense under the law of war. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777-2786 (2006) (Stevens, J.). Moreover, the MCA inexplicably adds an additional requirement to its offense of conspiracy by requiring the accused to commit the overt act himself (a requirement not present in the Uniform Code of Military Justice, Article 81, Conspiracy, which permits the overt act to be committed by any co-conspirator). It is unclear whether the law of war requires this, or whether it even requires an overt act. *Cf.* 21 U.S.C. § 846 (conspiracy for drug offenses); *United States v. Shabani*, 513 U.S. 10, 11 (1994) (no overt act required for conspiracy charge under § 846).

³ 10 U.S.C. §§ 948a(1)(i), 948c.

⁴ This article addresses only members of the Taliban captured between October 7, 2001 (the start of combat operations) and December 22, 2001 (the control of Afghanistan by Afghan leadership under the Bonn Accords), S.C. Res. 1383, ¶ 2, U.N. Doc. S/RES/1383 (Dec. 6, 2001). Any members of the Taliban captured after the control of Afghan leadership are not prisoners of war, as there is no longer an international armed conflict in effect. Instead, it is a Common Article 3 conflict (a non-international armed conflict).

⁵ U.S. CONST. art. I, § 8, cl. 10 (Congress shall have power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

I. BACKGROUND

The Taliban began as a small group of religious students, primarily of Pashtun ethnicity, in Afghanistan in early 1994.⁶ “In Pushto [(the language of Pashtuns)] the word *taliban* generally denotes students studying in *deeni madaris* (religious institutions).”⁷ The military structure of the Taliban is “shrouded in ... secrecy.”⁸ At least before September 11, 2001, the political and military leader was Mullah Mohammed Omar.⁹ Under him, there was a “chief of general staff and then chiefs of staff for the army and air force.”¹⁰ There was a military *shura* (council), which “was a loose body that planned strategy and implemented tactical decisions; however, it appears to have had no strategic decisionmaking or enforcement authority.”¹¹

There were “at least four army divisions and an armoured division ... [with a] regular Taliban army [that] has never numbered more than 25,000 to 30,000 men”¹² It is not entirely clear, but it appears that 30% of this number includes “Pakistani *madrassa* students, who ... served for short periods of time before returning home and sending back fresh recruits.”¹³ The army did consist in part of “professional and trained soldiers drawn from the former communist army. These Pashtun tank drivers, gunners, pilots and mechanics ... serve in the armies of whoever controls Kabul.”¹⁴ Although “there is no clear military structure with a hierarchy of officers and commanders,” members have been disciplined for infractions such as looting.¹⁵ It appears that the Taliban ultimately have elements of both a regular army (including tanks, armored fighting vehicles, fighter aircraft, transport helicopters, etc.)¹⁶ and a “*lashkar* or

⁶ PETER MARSDEN, *THE TALIBAN, WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN* 43-44 (1998).

⁷ KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON* 12 (1999) (“*Talib* is an Arabic word, the literal meaning of which is one who is seeking something for himself. It is derived from the word *talab*, meaning desire. In Urdu it is generally affixed with another word to clarify what is being sought ... [h]ence the Urdu word *Talib-e-ilm* is a person in search of knowledge i.e., a student.”).

⁸ AHMED RASHID, *TALIBAN, ISLAM, OIL AND THE NEW GREAT GAME IN CENTRAL ASIA* 99 (2001).

⁹ *Id.* at 5, 99.

¹⁰ *Id.* at 99.

¹¹ Hekmat Karzai, *Strengthening Security in Contemporary Afghanistan: Coping with the Taliban*, in *BUILDING A NEW AFGHANISTAN* 56, 61 (Robert I. Rotberg ed., 2007).

¹² RASHID, *supra* note 8, at 99-100.

¹³ *Id.* at 100.

¹⁴ *Id.* The author refers to these soldiers as mercenaries. Although this may be true in a colloquial sense, these individuals would not be considered mercenaries under international law because they are nationals and/or residents of Afghanistan and they do not receive any salary in excess of that paid to the regular armed forces.

¹⁵ *Id.* at 99-100.

¹⁶ Anthony Davis, *How the Taliban Became a Military Force*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN* 43, 48 (William Maley ed., 1998).

traditional militia force, which has long historical antecedents amongst the Pashtun tribes.”¹⁷

Although the Taliban did not use traditional organized military tactics, they nonetheless fought other militias in trying to control Afghanistan.¹⁸ Moreover, it does not appear that all members of the Taliban wore a fixed distinctive sign, but some apparently did – they wore “distinctive white turbans”¹⁹ When discussing surrender with opposing militias, they would use their Taliban flag (pure white with religious writing in green) to approach.²⁰

By September 11, 2001, the Taliban ruled approximately ninety percent of Afghanistan; however, the Taliban were not recognized by the United States as the legitimate government of Afghanistan (and in fact, only three countries recognized them as such).²¹ The Northern Alliance held control over the remaining ten percent of Afghanistan, and held Afghanistan's seat in the United Nations General Assembly.²²

On September 11, 2001, the United States was attacked by members of Al Qaeda, who used four hijacked airplanes as weapons. The leadership of Al Qaeda was located in Afghanistan in an area under the control of the Taliban. Although there is significant evidence that indicates a close relationship between the two groups, it appeared that Al Qaeda was an independent actor.²³ The United States demanded that the Taliban turn over members of Al Qaeda.²⁴ The Taliban refused, unless proof was provided of Al Qaeda's involvement and turnover could be provided to a third country.²⁵ In light of the Taliban's refusal,

¹⁷ RASHID, *supra* note 8, at 100. John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 219 (2003) (“At best, it appears that Taliban fighters are members of a militia. Indeed, the Central Intelligence Agency has recognized that Afghanistan has no national military, but rather a number of tribal militias factionalized among various groups.”).

¹⁸ MATINUDDIN, *supra* note 7, at 59-109 (detailing Taliban's military campaign from 1994 to 1997).

¹⁹ MARSDEN, *supra* note 6, at 46.

²⁰ MATINUDDIN, *supra* note 7, at 60.

²¹ BARRY CARTER ET AL., INTERNATIONAL LAW 69 (2003).

²² *Id.*

²³ Despite conflicting statements among different U.S. officials, the most convincing evidence that the two were separate entities, at least before 7 October, comes from President Bush, who, when he demanded Bin Laden and other terrorist members, made no such demand for the Taliban leadership. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 243 (2002). It is hard to imagine that if Al Qaeda were part of the Taliban, the Taliban leadership would have been excused from any demands against it in response to the horrific attacks on September 11th.

²⁴ *Id.*

²⁵ *Id.* at 245.

on October 7, 2001, the United States initiated combat operations against the Taliban and Al Qaeda in Afghanistan as a legitimate exercise of self-defense.²⁶

During the combat operations, the United States captured a number of individuals, who were later transferred for detention at the U.S. naval base in Guantanamo Bay, Cuba. Of the approximately five hundred detainees (including members of Al Qaeda, Taliban, and other groups) whose status was initially reviewed, about 110 were originally suspected of being exclusively members of the Taliban (as opposed to members of, or associated with, Al Qaeda).²⁷

On November 13, 2001, the President issued a military order that authorized the trial of members of Al Qaeda by military commission.²⁸ The Taliban were not discussed in this order. Later, on February 7, 2002, the President determined that "the provisions of [the Geneva Conventions (hereinafter Geneva)²⁹] will apply to our present conflict with the Taliban.... Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, [the President] determine[d,

²⁶ Letter from John D. Negroponte, Permanent Representative of the United States to the United Nations, to President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), <http://www.un.org/terrorism/letters.html>.

²⁷ U.S. Dep't of Defense documents concerning Combatant Status Review Tribunal (CSRT) Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, *available at* <http://www.dod.mil/pubs/foi/detainees/>. The exact figures of those found to be exclusively Taliban and those that are still detained as of May 23, 2007 were unavailable.

²⁸ Military Order, 66 Fed. Reg. 57831-36 (Nov. 16, 2001).

²⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. These are the four treaties that make up what is commonly known as the Geneva Conventions.

Every state is a now party to the Geneva Conventions. Press Release, International Committee of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-news-210806?opendocument>. Only two states were not parties to the Convention as of 7 October 2001: Nauru and Marshall Islands. Both countries have done so, as have two states created since 7 October 2001, Montenegro and Timor-Leste.

One might assert that Niue is not a party to the Geneva Conventions, and therefore, the conventions are not universal. This is incorrect. Niue has a free association with New Zealand, that is, it is protected by New Zealand generally for external and defense matters. In fact, they have no military and they are not a member of the United Nations. Government of Niue website, <http://www.gov.nu>. As Niue is not considered a "state" in international law, its failure to be a party to the Geneva Conventions is irrelevant. Although the Cook Islands have the same status as Niue as a free association with New Zealand, and the Cook Islands are a party to the Geneva Conventions, they are not required to be -- the Cook Islands ratification is of no legal significance on the universal acceptance issue.

however,] that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva."³⁰

In *Hamdan v. Rumsfeld*, the Supreme Court of the United States ruled against the government's effort to try an alleged member of Al Qaeda by military commission.³¹ In response to the *Hamdan* decision, Congress enacted the MCA, which authorizes the trial by military commission of members of the Taliban (and Al Qaeda).

II. LAWFUL ENEMY COMBATANTS UNDER THE MCA ARE PRISONERS OF WAR

The MCA utilizes the following definitions to describe those subject to its jurisdiction:

The term "unlawful enemy combatant" means – "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)"

The term "lawful enemy combatant" means a person who is – "(A) a member of the regular forces of a State party engaged in hostilities against the United States"³²

There is, however, no definition of the term "enemy combatant" in the law of war.³³ The term "combatant" has been used since 1868³⁴ in various

³⁰ Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 820, 823-24 (2004) (quoting Memorandum from President George W. Bush to the Vice President, the Secretaries of State and Defense, the Attorney General, and Other Officials 1-2 (Feb. 7, 2002)).

³¹ The Court did not have the issue of the legality of trials for members of the Taliban before it, and, naturally, therefore, it did not address it. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

³² 10 U.S.C. § 948a.

³³ According to two prominent, current sources, the term "enemy combatant" was used in the original 1864 Geneva Convention: "Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties." International Committee of the Red Cross, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, Aug. 22, 1864, art. 6, available at <http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument> (last visited on May 23, 2007); THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiri Toman eds., 2004) (citing 3 EDWARD HERTSLET, THE MAP OF EUROPE BY TREATY 1864-1875, at 1621-1626 (1875)). This appears to be incorrect.

The French language text is the authentic text. THE LAWS OF ARMED CONFLICTS, *supra*, at 365. The French text does not use the term "combattants." "Les combattants" was the French word for combatants, as evidenced by its use in the Additional Articles Relating to the Condition of the

agreements, including Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (hereinafter AP I), which in essence defines a combatant as one who has "the right to participate directly in hostilities."³⁵ Upon capture, such combatants are considered to be prisoners of war under AP I.

The modifiers "lawful" or "unlawful" have not been used in law of war agreements; instead they, along with "enemy," were first used by the Supreme Court:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.³⁶

It is understandable that the modifier "enemy" would be used in a domestic context (both by the Supreme Court and Congress), where one side is in fact labeled as the "enemy," as opposed to the international context, where each side considers the other the enemy. In addition, the modifiers "lawful" and "unlawful" are useful to describe those protected by the law of war as a prisoner of war and those who are not so protected. This presumably was the Supreme Court and Congress' basis to use such terms.

Wounded in War, art. 6, Oct. 20, 1868, 22 Stat. 946, 948 (U.S. only party; not ratified by any state) [hereinafter 1868 Geneva Convention]. The U.S. translation of the original convention is more accurate, using instead the term "enemy soldiers." Convention for the Amelioration of the Condition of the Wounded on the Field of Battle, art. 6, Aug. 22, 1864, 22 Stat. 940, 944, 1 Bevans 7, 10.

³⁴ "The appreciation of these circumstances is entrusted to the humanity of all the combatants." 1868 Geneva Convention, *supra* note 33, art. 6, 22 Stat. at 948.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3, 23 [hereinafter AP I].

³⁶ *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (footnotes omitted).

In order to analyze these newly defined MCA concepts of lawful and unlawful enemy combatant, a "translation" into law of war terminology is helpful. First, a captured lawful enemy combatant should be considered the same as an enemy prisoner of war: in fact, the MCA uses some of the same standards to determine who is a lawful enemy combatant that the law of war uses to determine who is entitled to prisoner of war status.³⁷ Second, it follows that a captured unlawful enemy combatant should be considered the same as one who does not qualify for prisoner of war protections.

The next step is to determine the law that applies to the conflict in which these individuals were detained.

III. THE UNITED STATES AND TALIBAN WERE ENGAGED IN AN INTERNATIONAL ARMED CONFLICT

The United States and Afghanistan are parties to the Geneva Conventions.³⁸ The Geneva Conventions, Common Article 2 apply "to all cases of ... armed conflict which may arise between two or more of the High Contracting Parties ... The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."³⁹ Such international armed conflict includes war and any other "difference between two or more States[, which leads] to the intervention of members of the armed forces [or other individuals who meet the conditions under GC III, Article 4]."⁴⁰ In light of the presence of

³⁷ 10 U.S.C. § 948a (2006); GC III, *supra* note 29, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40. The MCA provides lawful status to members of the armed forces of a Party, even if the government is not recognized by the United States, in compliance with GC III, article 4, subparagraphs (A)(1) and 4(A)(3). It also provides protections for militia, volunteer corps or organized resistance movements *belonging to a Party in the conflict* if they meet four conditions listed in GC III, article 4(A)(2).

However, the MCA is silent as to the status for members of militia and volunteer corps *forming part of the armed forces*; in other words, it does not address the requirement in GC III, article 4(A)(1), to afford such individuals prisoner of war status, as will be discussed.

Moreover, the MCA is silent as to the protections for persons who accompany the armed forces, members of crews, and inhabitants who take up arms to resist invading forces (*levée en masse*), for whom GC III, article 4, subparagraphs (A)(4)-(A)(6), provide protection as prisoners of war. The MCA is also silent on individuals captured during occupation or individuals who are interned, who are both discussed in GC III, article 4(B).

³⁸ LAWS OF WAR, *supra* note 2, at 355, 361.

³⁹ GC III, *supra* note 29, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136. Within the Geneva Conventions, the 12 articles that are part of all four treaties are called the "Common Articles." For convenience's sake, citations to the common articles will normally only be to GC III.

⁴⁰ JEAN DE PREUX ET AL., COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., A.P. de Heney trans., International Committee of the Red Cross 1960). There is a similar commentary for each of the other three Geneva Conventions. These commentaries, however, are not part of the Geneva Convention's preparatory work. Instead,

U.S. troops in Afghanistan, who conducted combat operations against the Taliban, it is clear that the U.S. and the Taliban were engaged in a Common Article 2, international armed conflict. This requires the application of all the Geneva Conventions.

One might argue that the United States was acting on behalf of the Northern Alliance in its internal conflict against the Taliban, and as a result, it was not engaged in an international armed conflict with Afghanistan (or the Taliban).⁴¹ This is generally not recognized as valid under the law of war, but instead, such a situation would normally be recognized as both an intra-state and an inter-state conflict.⁴² The parties belonging to the state are engaged in the intra-state conflict. If a state intervenes on one side in a civil war, it is considered to be in an inter-state conflict with the other side. Article 2's requirements are to be read broadly: "By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations."⁴³ Moreover, as a factual matter, the United States did not consider itself involved in an internal armed conflict with the Taliban. Such conflicts are referred to as Common Article 3, or non-international armed, conflicts. In his February 7 determination, the President stated that "common Article 3 of Geneva does not apply to ... Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"⁴⁴ Therefore, the United States operations were part of an international armed conflict.⁴⁵ The next question to resolve is the status of the participants in this armed conflict.

IV. DETAINED TALIBAN ARE PRISONERS OF WAR (I.E. LAWFUL ENEMY COMBATANTS) UNDER THE GENEVA CONVENTIONS

The President of the United States asserted that the Taliban do not qualify for protections as prisoners of war. Initially, the rationale was that the Geneva Conventions did not apply at all to the conflict, but on February 7, 2002, the position was clarified: "Although [the United States] never recognized the

the commentaries are "the personal work of its authors[.]" who "were closely associated with the discussions of the Diplomatic Conference of 1949" *Id.* at 1.

⁴¹ W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 506 (2003) ("Until the collapse of the Taliban regime in December 2001, a strong case could be made that this was an internal conflict between non-state actors in a failed state.")

⁴² YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14-15 (2004).

⁴³ PREUX ET AL., *supra* note 40, at 22.

⁴⁴ Murphy, *supra* note 30, at 824.

⁴⁵ DINSTEIN, *supra* note 42, at 14-15.

Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs."⁴⁶ As the White House Press Secretary explained further, the reason for the lack of status was that the Taliban apparently did not meet the requirements of the Geneva Conventions:

Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention. Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al-Qaeda.⁴⁷

In essence, the requirements for "other militias and volunteer corps" belonging to a Party were placed onto the requirements for the armed forces, and for militias and volunteer corps forming part of the armed forces. In enacting the MCA, Congress has reaffirmed the President's treatment of members of the Taliban with respect to their prisoner of war status. The President and Congress are incorrect, however, in their application of the law of war for three reasons: First, the Taliban appear to be the armed forces of a Party; second, the four conditions do not apply to the armed forces; and third, if there is any doubt on the matter, it must be decided through a GC III, Article 5 tribunal.

First, as discussed early, the Taliban had an army. It included elements that were more along the lines of a militia, but maintained a basic warfighting structure – overall leader, chief of staff, divisions of soldiers. These should be considered the regular armed forces of Afghanistan (in which case, the lack of recognition of the Taliban as the ruling government is not relevant, in light of

⁴⁶ Press Release, White House, Fact Sheet on Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

⁴⁷ Ari Fleischer, Statement by the Press Secretary on the Geneva Conventions (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

GC III, article 4(A)(3)).⁴⁸ Moreover, even if one considers them to be a militia or volunteer corps, they clearly formed part of the armed forces – as there would be no other regular army of which to speak. The question of whether they were part of the forces is a question of domestic, that is, Afghani law.⁴⁹

Second, the four conditions do not apply to the armed forces of a Party (or militia or volunteer corps forming part of such armed forces). “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁰ The plain meaning of Article 4 makes clear that the four conditions only applies to other militia and volunteer corps belonging to the Party (that is, those not forming part of the armed forces). The four conditions are not listed for the armed forces, or militia and volunteer corps forming part of the armed forces.

The preparatory work⁵¹ of the Geneva Conventions confirms that the four conditions were not meant to apply to the armed forces. There was originally a proposal to apply the four conditions to the armed forces. The Soviet delegate, General Slavin, noted that such an application of the four conditions would be contrary to the 1907 Hague Convention and he successfully persuaded the other members of the working group to eliminate any requirement

⁴⁸ GC III, *supra* note 29, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.

⁴⁹ HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 36 (1978). A state cannot use domestic law, however, to violate the requirements of the law of war. *Id.*

⁵⁰ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]; see SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 127 (2d ed. 1984) (“When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.”) (quoting Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3)).

Technically, the Vienna Convention does not apply because the Geneva Conventions predate it (and not all states, including the United States, are parties to the Vienna Convention). Vienna Convention, *supra*, art. 4, 1155 U.N.T.S. at 334. Nonetheless, Article 4 indicates that those rules in customary international law that coincide with the rules agreed upon in the Vienna Convention still apply. Articles 31-33 of the Vienna Convention “constitute a general expression of the principles of customary international law relating to treaty interpretation.” SINCLAIR, *supra*, at 153; see also LORD MCNAIR, THE LAW OF TREATIES 345-489 (1961) (discussing pre-Vienna Convention rules of interpretation); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 184-206 (2000) (discussing current rules of interpretation).

⁵¹ Preparatory work are a proper means of interpretation. Vienna Convention, *supra* note 50, art. 32, 1155 U.N.T.S. at 340 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”); see SINCLAIR, *supra* note 50, at 141-42 (“there can be little doubt that [] recourse [to *travaux préparatoires* or preparatory work] is permissible in carefully controlled circumstances.”).

for the members of the armed forces to satisfy the four conditions in the final (later ratified) text of the Geneva Conventions.⁵²

Finally, if there is any doubt as to the status of the detained individuals, they are entitled to have a tribunal determine their status, in accordance with GC III, Article 5.⁵³ Although the Taliban detainees have undergone a hearing called the Combatant Status Review Tribunal (hereinafter CSRT), CSRT merely determines whether the detainee is an enemy combatant or not; it does not address whether he is a lawful combatant or whether he is entitled to the protections of GC III, Article 4.⁵⁴ Proper Article 5 hearings would clarify the various factual issues that exist – such as whether members of the Taliban were part of an armed forces, wore a fixed insignia, carried arms openly, complied with the law of war, were part of a militia, were under the command of a superior officer, etc. These facts could conclusively resolve any doubts about the status of the Taliban as prisoners of war. Nonetheless, as the Article 5 default is "prisoner of war," the Taliban needed to be treated as prisoners of war until a proper tribunal determines otherwise.⁵⁵

V. DETAINED TALIBAN ARE PRISONERS OF WAR UNDER CUSTOMARY INTERNATIONAL LAW

⁵² 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 466-67, 561-63. One prominent commentator asserted that the failure to list the four factors with the regular armed forces "does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his activities prior to and at the time of capture have not met these requirements." LEVIE, *supra* note 49, at 36-37. His justification was that the Soviet delegate to the Geneva Conventions had "appeared to argue" that the four conditions were not required for members of the armed forces, and he believed the Soviet delegate's argument was not widely accepted at the time he wrote. Despite the commentator's assertion, it appears that the Soviet delegate's view was the one widely accepted in 1949, let alone in 1977 when the commentator wrote, and it is the one that must be accepted even now.

⁵³ "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal." GC III, *supra* note 29, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42.

⁵⁴ Press Release, Dep't of Def., Combatant Status Review Tribunal Order Issued (July 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>; Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>; Deputy Sec'y of Def., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

⁵⁵ Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 673 (2006).

One might argue that "[i]t has long been understood ... that regular, professional 'armed forces' must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of articles 4(A)(1) and (3) of [GC III] do not abrogate customary law."⁵⁶ The typical reference to the customary laws of war is the 1874 Brussels Declaration and the 1899 and 1907 Hague Conventions. This is incorrect.

A. Brussels Declaration and Hague Conventions

In 1874, fifteen delegates met in Brussels to examine a draft of an international agreement concerning the laws and customs of war submitted to them by the Russian Government (hereinafter 1874 Brussels Declaration).⁵⁷ It was never ratified, but its provisions were influential in later developments in the law of war.

The French text is the authentic text.⁵⁸ Article 9 states as follows: "Les lois, les droits et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes"⁵⁹ It then lists four conditions that must be met.⁶⁰

An accurate translation of the French text above is as follows: "The laws, rights, and duties of war does not apply only to the army, but also to militia and volunteer corps fulfilling the following conditions"

The translation normally provided, however, is slightly different: "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions"⁶¹ There are two differences between the translations. First, the French uses the singular for the army and not the plural, as does the translation provided by this article; the common translation inexplicably uses the plural. Second, it is clearer that the four conditions do not literally apply to the army, under the article's translation;

⁵⁶ Yoo & Ho, *supra* note 17, at 219-220; Memorandum from Jay S. Bybee, U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, at 4 (Feb. 7, 2002) (*available at* <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html>).

⁵⁷ THE LAWS OF ARMED CONFLICTS, *supra* note 33, at 21.

⁵⁸ *Id.*

⁵⁹ ACTES DE LA CONFERENCE DE BRUXELLES DE 1874, at 61.

⁶⁰ 1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

THE LAWS OF ARMED CONFLICTS, *supra* note 33.

⁶¹ *Id.*

it is not as clear in the common translation, which confuses some to believe that the four conditions apply to armies.

The 1899 Hague Convention Respecting the Laws and Customs of War on Land was the first international agreement to recognize members of the army as prisoners of war.⁶² Soon thereafter, the 1907 Hague Convention Respecting the Laws and Customs of War on Land (hereinafter 1907 Hague Convention) replaced the 1899 convention.⁶³ The United States is a party to the 1907 Hague Convention; Afghanistan is not. Nonetheless, as it reflects customary international law, its principles are applicable to this conflict.⁶⁴ Under the 1907 Hague Convention, members of the army – and militia and volunteer corps that constitute or form part of it -- had a right to be prisoners of war.⁶⁵

The Hague Conventions and the 1874 Brussels Declaration use identical language on this issue, except that Hague Conventions added that volunteer corps could be part of the army in the last sentence of the article (the Brussels Declaration indicated only militia could be part of the army).⁶⁶ The Hague Conventions' English translation makes the same error described above that is made for 1874 Brussels Declaration.⁶⁷ Article 1 of the Annex in the 1907 Hague Convention should be translated as follows: "The laws, rights, and duties of war does not apply only to the army, but also to militia and volunteer corps fulfilling the following conditions" Using the translation provided by this article makes it clear that the army does not have to meet the four conditions (nor do the militia or volunteer corps that form part of the army).

Even if the common English translation were accurate, the language still makes a distinction between two types of "militia and volunteer corps" – those that are not part of the army and those that are part of the army. The only reasonable explanation for two types of "militia and volunteer corps" is that the former needs to meet the four conditions explicitly, and the latter does not. If this reading were incorrect, then there would have been no need to list the "militia and volunteer corps" twice in the article.⁶⁸ Only a reading that distinguishes the requirements for an army (and militia and volunteer corps that

⁶² Convention with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, Annex art. 1, 3, 32 Stat. 1803, 1811-12.

⁶³ LAWS OF WAR, *supra* note 2, at 68.

⁶⁴ *Id.* at 8, 68.

⁶⁵ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex art. 1, 3, 36 Stat. 2277, 2296 [hereinafter 1907 Hague IV].

⁶⁶ *Id.* at 2295-96. The numbering of the articles is also different.

⁶⁷ *Id.*

⁶⁸ *Cf.* Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) (in interpreting congressional statute, Federal Sovereign Immunities Act, Supreme Court noted that "[d]istinctions among descriptions juxtaposed against each other are naturally understood to be significant").

are part of the army) from a militia and volunteer corps that is not part of the army avoids the conclusion of meaningless language in the documents.

As long as the Taliban are members of the army, or members of a militia or volunteer corps that is part of the army,⁶⁹ they qualify for prisoner of war protections under customary international law.⁷⁰ They do not need to meet the four conditions to qualify – only other volunteer corps and militia ("other" in the sense that they were not part of the army) would need to meet the requirements.⁷¹ Any failure to meet the four conditions does not change their status,⁷² but may result in their punishment for a violation of the law of war.

⁶⁹ Admittedly, crucial facts concerning the organization of Taliban are unknown. The article can not resolve these factual questions, other than by recommending the use of a tribunal to answer them (GC III Article 5 tribunals). The current hearings conducted by the U.S. military ("Combatant Status Review Tribunals") do not discuss such matters.

⁷⁰ After the 1907 Hague Convention, the next significant development in customary international law was the Geneva Conventions of 1929 and 1949, the latter of which has already been discussed. The Vienna Convention, recognizes the usefulness in interpreting a treaty by examining a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Vienna Convention, *supra* note 50, art. 31, 1155 U.N.T.S. at 340. The Geneva Conventions make clear that the four requirements do not apply to the army.

Finally, it should be noted that the latest development in customary international law, AP I, has reduced the requirements for prisoner of war status by requiring prisoner of war status for any group under command responsible to the Party for the conduct of its subordinates. AP I, *supra* note 35, art. 43, 1125 U.N.T.S. 3, 23. Neither the United States nor Afghanistan are parties to AP I.

In fact, the United States has objected to its provisions concerning prisoner of war status. In his transmittal letter to the Senate for advice and consent of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 1977, 1125 U.N.T.S. 609, President Reagan indicated that the U.S. would not submit AP I for ratification for several reasons, including the fact that one "provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war." S. TREATY DOC. NO. 100-2, at IV (1987).

The United States' unwillingness to ratify Additional Protocol I is significant. If a state "is important in a particular area of activity[, it] can, by its opposition, prevent any rule of general ... customary law from developing." COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 27 (2000), http://www.ila-hq.org/html/layout_committee.htm. Clearly in the law of war, the United States, with one of the largest and most active militaries, is important in this area of law, and therefore, its objection to the provisions on expanding prisoner of war status prevents the creation of customary international law on this issue. *Contra* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 87 Int'l Review of the Red Cross 175, 198 (2005) (finding as a principle of customary international law: "The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."). If Henckaerts were correct, it would bolster the Taliban's claims because there would no longer be a requirement for a fixed insignia (except when engaged in an attack or military operation preparatory to an attack).

⁷¹The Supreme Court, however, in interpreting the 1907 Hague Convention, stated "Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." *In re Yamashita*, 327 U.S. 1, 15 (1946). General Yamashita was tried by military commission, for failing

B. State Practice

State practice may be used to interpret a treaty or establish customary international law.⁷³ In 1863, the Lieber Code was promulgated to the Union Army for its use against the South in the American Civil War. It was the first codification of the rules of warfare, based on the existing customs and usages of the law of war. It addressed prisoners of war:

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the Army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.⁷⁴

The code had an expansive view on who should qualify as a prisoner of war, as it included all soldiers and all men who rise up to meet an invasion, with no further conditions required to be met on their part.

Likewise, William Winthrop, a noted jurist on military law,⁷⁵ wrote that the "class of persons entitled upon capture to the privileges of prisoners of war comprises members of the enemy's armies," and those civilians allowed with the

to control members of his command, who committed brutal atrocities during the Japanese occupation of the Philippines. There are two reasons to minimize the importance of this language from *Yamashita*. First, the language was used in a different context, as there was no issue as to whether General Yamashita was a member of the armed forces. Instead, the Court was applying the language to establish his responsibilities over those under him – not his status as a prisoner of war. Second, the Taliban appeared to be commanded by a person responsible for their actions – and so even applying this requirement would not remove their prisoner of war status.

⁷² George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 895 (2002); *contra* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335 (2002) ("Any claim that the Taliban are a 'regular army' exempted from these qualifying conditions stumbles on the explicit language of the precedent 1907 Hague Rules of Land Warfare and the 1874 Brussels Declaration." Wedgwood also cites the Commentary to GC III, art. 3, that suggests armed forces are required to comply with the four conditions listed for "other" militia (footnotes omitted)).

⁷³ Vienna Convention, *supra* note 50, art. 31(3)(b), 1155 U.N.T.S. at 340.

⁷⁴ U.S. Sec'y of War, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 49 (1863), *in* THE LAWS OF ARMED CONFLICTS, *supra* note 33, at 10.

⁷⁵ "[T]eachings of the most highly qualified publicists of the various nations [are also a] subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38, para. 1(d), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ].

army; he did not indicate any requirement for other conditions to be imposed on such members to obtain prisoner of war status.⁷⁶

The current U.S. Army Manual on the law of war provides in relevant part:

74. Necessity of Uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.⁷⁷

Members of the armed forces lose their prisoners of war status only when they pass enemy lines for spying or sabotage. Simply wearing civilian clothes does not cause the loss of status. Similarly, the U.S. Navy publication concerning the law of naval warfare holds that only feigning civilian status warrants loss of prisoner of war status, but that, nonetheless, if arms are carried openly, the U.S. policy is to treat such individuals as prisoners of war.⁷⁸ Under the United States' own regulations, the Taliban should have the status of prisoners of war.⁷⁹

In fact, one commentator, employed as the Law of War Chair, Office of General Counsel, Department of Defense, in discussing the use of civilian clothes for special forces, noted some disagreement within academic circles and courts, but nonetheless declared that "[m]ilitary personnel wearing non-standard uniform or civilian clothing are entitled to prisoner of war status if captured."⁸⁰

⁷⁶ 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1229 (2d. ed., 1896).

⁷⁷ DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 74 (1956).

⁷⁸ U.S. Naval War College, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations 12-9 (1997) ("Illegal Combatants. It is prohibited to kill, injure or capture an adversary by feigning civilian, non-combatant status. If determined by a competent tribunal of the captor nation to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished. It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture.").

⁷⁹ In fact, the United Kingdom has reduced its requirements for prisoner of war status, in light of Additional Protocol I, and allows the retention of prisoner of war status – even if he is not wearing a uniform -- when the combatant carries arms openly in "exceptional situations of conflict." U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 145 (2004).

⁸⁰ Parks, *supra* note 41, at 513. He did not provide his opinion as to whether the Taliban should be considered prisoners of war, and simply referred to the President's determination on this issue. *Id.* at 507-08 n. 23.

Further, he states that the "[w]earing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy."⁸¹

A final consideration is the practice of the parties in this conflict. To begin with, the Northern Alliance, the U.S. ally, was also not wearing uniforms or other fixed insignia.⁸² Moreover, civilian agents of the Central Intelligence Agency were intermixed with the Northern Alliance and provided significant support.⁸³ The Nuremberg trials attempted to avoid victor's justice by applying the law consistently between the Allies and the Nazis. For example, the tribunals did not punish unrestricted submarine warfare, because the Allies (as acknowledged by Admiral Nimitz) also conducted the same unrestricted warfare.⁸⁴ In addressing whether members of the Taliban are entitled to prisoner of war status, the role of forces allied to the, and official agents of the, United States needs to be taken into account.⁸⁵

Regardless, U.S. and Northern Alliance military forces were able to target the Taliban successfully,⁸⁶ and so they had a way to distinguish the Taliban from civilians – which is the reason for the condition of a fixed insignia. The Commentary to GC III indicates that the failure to provide a fixed insignia, even if it applies to members of the armed forces, is a duty of the state: "It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians."⁸⁷ It seems contrary to the nature of the Geneva Conventions to hold a member of the armed force responsible for a violation whose duty belongs to the state.

⁸¹ *Id.* at 512-13.

⁸² Parks, *supra* note 41, at 498 n.8 ("[N]either Taliban/al Qaeda nor Northern or Southern Alliance forces wore a uniform.").

⁸³ BOB WOODWARD, BUSH AT WAR (2002) (CIA agents played a crucial role in supporting the Northern Alliance against the Taliban).

⁸⁴ H. Levie and J. Grunawalt, *Law of War and Neutrality*, in NATIONAL SECURITY LAW, *supra* note 2, at 321, 338.

⁸⁵ In fact, the United States, in light of the size and extensive use of its armed forces, should be very cautious in attempting to limit prisoner of war status for members of the armed forces. Instead, the United States should strictly follow the rules, in order to provide the maximum protection to its armed forces.

⁸⁶ *See, e.g.*, BOB WOODWARD, *supra* note 83, at 300-01 (U.S. military able to target Taliban forces around Mazar-e Sharif, leaving thousands of Taliban killed or captured); ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, AMERICAN SOC'Y OF INT'L LAW, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 28 (2002), at <http://www.asil.org/taskforce/goldman.pdf> (suggesting that if the Northern Alliance and Taliban could tell who was the enemy, then the requirement of fixed insignia was met).

⁸⁷ PREUX ET AL, *supra* note 40, at 52.

As for the compliance with the law of war in their actions (also raised by the White House Press Secretary), there is nothing in the law of war that discusses a government's support for a terrorist group – this is a *jus ad bellum* issue (laws that apply in deciding whether to use force against another state), not a *jus in bello* issue (laws that apply during the conflict with another state). Although the United States was justified under international law to remove the Taliban from power in Afghanistan, the Taliban's support to Al Qaeda can not cause every member of the armed force to lose their prisoner of war status. As many of the battles were quite conventional, clearly some Taliban were complying with the law of war. Once an international armed conflict began, if the Taliban focused their killing on U.S. military members, they would be acting appropriately under the law of war (although the means they may use are not unlimited and they can not commit acts of perfidy, for example). One would need further facts to justify this rationale articulated by the White House as a basis to remove their prisoner of war status. For the violations of the law of war that did occur,⁸⁸ they could be prosecuted for them even as prisoners of war.

C. Judicial Decisions

Courts⁸⁹ have suggested that the removal of uniforms or a fixed insignia removes one's ability to claim prisoner of war status. "However, the fact that members of an armed force are not in uniform does not affect their status and rights as combatants and to be treated as such."⁹⁰ In *Ex parte Quirin*, 317 U.S. 1 (1942), during World War II, eight German soldiers came ashore secretly into the United States from a German submarine. Although they wore their German uniforms when they landed, they removed them, and from then on wore civilian attire. They had been trained in sabotage, brought explosives with them, and had been instructed "to destroy war industries and war facilities in the United States."⁹¹ After being captured,⁹² they were tried by

⁸⁸ Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F.L. Rev. 1, 29-35 (2004) (detailing various infractions of the law of war committed by the Taliban).

⁸⁹ Judicial decisions are a "subsidiary means for the determination of rules of [international] law." ICJ, *supra* note 75, art. 38, para. 1(d), 59 Stat. at 1060.

⁹⁰ L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 110 (1993).

⁹¹ *Ex Parte Quirin*, 317 U.S. at 21.

⁹² One of them, George John Dasch, informed the FBI of the plot. U.S. Federal Bureau of Investigation, *George John Dasch and the Nazi Saboteurs*, <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (last visited on May 23, 2007). All eight receive death sentences. Six were executed. Dasch and Ernest Peter Burger, who also cooperated with the FBI, received commuted sentences of 30 years and life imprisonment, respectively. They were later granted clemency from serving the rest of their sentence in 1948 on condition of deportation back to Germany. (On a historic note, apparently, Dasch lived until 1992, petitioning to return to the U.S. unsuccessfully on several occasions; in the end, he led his life in relative comfort and contentment in Germany. Genforum, *George John Dasch*,

military commission for violation of the law of war, giving intelligence to the enemy, espionage, and conspiracy to commit the foregoing. During the proceedings, the Supreme Court reviewed the legality of using the military commissions against them. The Court held that these individuals were unlawful combatants, that is, not prisoners of war, and as a result, they were subject to the commissions. The holding was based on the two crucial facts that the eight German soldiers entered the United States secretly and then removed their uniforms.

Quirin is clearly distinguishable from the situation involving the Taliban. These Germans were charged with being, and acted analogously to, spies (even though their main purpose was to sabotage). Spies have traditionally not been protected as prisoners of war.⁹³

Similarly, in *Bin Haji Mohamed Ali v. Public Prosecutor*, [1969] 1 A.C. 430 (U.K. House of Lords appeal taken from the Federal Court of Malaysia),⁹⁴ in 1965, two Indonesian soldiers in civilian attire bombed a civilian building in Singapore (then still under the control of Malaysia). During the trial, they requested prisoner of war status under GC III. Their request was rejected. On appeal, after reviewing the requirements for status as a prisoner of war, the Council stated:

[I]t is not necessary to attempt to define all the circumstances in which a person coming within the terms of Article I of the Regulations and of Article 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.⁹⁵

After reviewing the U.K. and U.S. law of war manuals, and *Quirin*, the Council ruled that they were not entitled to prisoner of war status because they committed sabotage in civilian clothes.⁹⁶ Again, this is clearly distinguishable from the Taliban – who did not cross any enemy lines, but instead were acting inside their country.

<http://genforum.genealogy.com/dasch/messages/9.html> (in response to genealogy request, individual writes about his meetings with Dasch before he died) (last visited on May 23, 2007).

⁹³ 1907 Hague IV, *supra* note 65, Annex art. 29-31, 36 Stat. at 2303-04; AP I, *supra* note 35, art. 46, 1125 U.N.T.S. at 24-25.

⁹⁴ *Bin Haji Mohamed Ali v. Public Prosecutor*, [1969] 1 A.C. 430, <http://www.helpicrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/383128666c8ab799c1256a1e00366ad3!OpenDocument>

⁹⁵ *Id.*

⁹⁶ *Id.*

Finally, in *United States v. Lindh*,⁹⁷ the defendant was an American citizen, who had traveled to Afghanistan and was captured while fighting on behalf of the Taliban; the defendant requested combatant immunity as a member of the Taliban. In rejecting his claim, the court ruled that “the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force” (citing the 1874 Brussels Declaration, 1907 Hague Convention, and the Geneva Conventions) and that the defendant had not met his burden in demonstrating that the Taliban met the four conditions (especially in light of the deference to be provided to the President, who had already determined the Taliban to be unlawful combatants). The court indicated that any other result would be absurd – by allowing armed forces to have fewer requirements than others.⁹⁸ This is not absurd however. The court erred in finding that the four conditions apply.

First, the declaration and agreements themselves make the distinction. No doubt part of the reason was the expectation that armed forces would meet these conditions – however, the Brussels declaration added the language about militias forming part of the army, solely to address individuals who did not necessarily have fixed distinctive insignia, as indicated in the preparatory work - - the Swiss delegate indicated they did not possess an armed force, and their military did not have fixed insignia, but they desired their militia to be protected.⁹⁹ Second, even if the armed forces have to meet the four requirements, there is no obligation for the armed forces as a whole to meet all four – this is in contrast to other militia and volunteer corps belonging to the Party, where the text of GC III, Article 4(A)(3) suggests that the militia and volunteer corps must meet the four conditions as a group. Accordingly, each member of the Taliban has the ability to show how he met the four conditions, if they were to apply to them.¹⁰⁰ Finally, the requirement for armed forces applies to the states, and not the individuals – there is nothing *absurd* with permitting individuals who join the armed forces of the state to have greater protections than individuals who join non-state sanctioned and unorganized efforts to wage war.

⁹⁷ 212 F. Supp. 2d 541, 557 n.35, 558 (E.D. Va. 2002).

⁹⁸ *Id.* at 557 n.35.

⁹⁹ ACTES DE LA CONFERENCE DE BRUXELLES DE 1874, at 29 (session of August 14, 1874).

¹⁰⁰ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (“[T]he President’s broad characterization of how the Taliban generally fought the war in Afghanistan cannot substitute for an Article 5 tribunal’s determination on an individualized basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status.”) (citation omitted), *rev’d sub. nom. on other grounds*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. den., 127 S. Ct. 1478 (2007).

In the end, the law is clear that the members of the Taliban – until arguably shown otherwise by the introduction of facts for each member individually¹⁰¹ – are entitled to protections as prisoners of war.

VI. UNDER THE LAW OF WAR, PRISONERS OF WAR MAY NOT BE PROSECUTED BY MILITARY COMMISSION

GC III, Article 102 states:

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the cases of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.¹⁰²

Members of the U.S. armed forces are subject to trial by court-martial under the Uniform Code of Military Justice (hereinafter UCMJ); if they are U.S. citizens (as the vast majority are), then they are subject to trial by the MCA.¹⁰³ If members of the Taliban are prisoners of war, then they must be prosecuted by court-martial under the UCMJ.

One might question the validity of this rule, in light of the military commissions conducted during World War II. For example, in *In re Yamashita*, the Supreme Court rejected the above argument, when faced with the identical issue involving the 1929 Geneva Conventions predecessor of Article 102:

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be

¹⁰¹ Not only can this be addressed in an Article 5 hearing, but this could also be addressed as a preliminary, jurisdictional matter at the military commission. *Cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality) (in the absence of a proper tribunal to determine a U.S. citizen's classification as an enemy combatant, "a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.").

¹⁰² GC III, *supra* note 29, art. 102.

¹⁰³ 10 U.S.C. § 948c ("Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.").

applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.¹⁰⁴

The drafters of the 1949 Geneva Conventions were well aware of the Supreme Court's decision in *Yamashita* and they worked to correct what they believed was an incorrect ruling:

The International Committee of the Red Cross followed with some concern the course of justice in the various countries where proceedings were instituted against prisoners of war in respect of offences committed prior to their capture. In its opinion, it was dangerous not to afford to the accused the guarantees provided by an international convention which, as has been seen above, do not exceed those accruing from the procedural laws of most States.¹⁰⁵

The drafters of GC III added a new article that specifically resolved this issue: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."¹⁰⁶ Under this article, prisoners of war cannot be punished by military commission, as they were during and after World War II.

VII. CONGRESS'S ATTEMPT TO PROSECUTE THE TALIBAN IS UNCONSTITUTIONAL

The United States government follows international law. Article VI of the U.S. Constitution treats treaties as part of the "supreme Law of the Land." In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Supreme Court noted that:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or juricial decision, resort must be had to the customs and usages of civilized nations

The decision has two significant elements: first, customary international law applies and not just treaties; second, an executive or legislative act can supersede the effect of customary international law (as well as a treaty). A casual application of *The Paquete Habana* might lead one to the conclusion

¹⁰⁴ *Yamashita*, 327 U.S. at 20-21 (footnotes omitted).

¹⁰⁵ PREUX ET AL., *supra* note 40, at 414.

¹⁰⁶ GC III, *supra* note 29, art. 85.

that Congress's effort to punish the Taliban, even if illegal under international law, is permissible under domestic law (because it would be done under a controlling legislative act, the MCA).

This would be an incorrect application however. Although the following assertion appears to have not been raised or resolved in U.S. courts (including the Supreme Court) yet, this article asserts that, unlike most situations where Congress acts,¹⁰⁷ when Congress attempts to punish one for a war crime, it must do so in accordance with customary international law, or the law of nations. Article I, section 8, clause 10 of the U.S. Constitution states that the Congress shall have the power "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations[.]" If Congress were to define and punish an offense that was not *against the law of nations*, Congress would exceed its constitutional authority.

This constitutional clause was inserted into the Constitution because the Articles of Confederation did not have such a clause, and there was a concern that leaving it to the thirteen states to punish such offenses would "consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."¹⁰⁸ Although this demonstrates a desire for congressional vice state authority, it also implicitly indicates a desire to limit such offenses to those that violate the law of nations. The United States understood compliance with the law of nations was a significant aspect of maintaining peace with other nations.¹⁰⁹

Justice Story defined the clause as follows:

Offences against the law of nations are quite as important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations.... It is obvious, that this power has an intimate connexion and relation with ... the rights and duties of the national government in peace and war, arising out of the law of nations.¹¹⁰

¹⁰⁷ Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 848 (1989) ("The obligations of the United States to foreign states and their citizens are defined principally in the international arena; the extent to which American law acknowledges the law of nations is largely irrelevant. Domestically, in the context of either a United States citizen or a foreigner urging American law to follow international doctrines, the issue always revolves around an initial decision of whether to constrain our own institutions.").

¹⁰⁸ THE FEDERALIST NO. 42, at 265 (James Madison).

¹⁰⁹ THE FEDERALIST NO. 3, at 43 (John Jay) (in discussing the causes of war and the treaties that the United States had entered, Jay wrote "[i]t is of high importance to the peace of America she observe the law of nations toward all these powers ...").

¹¹⁰ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1158 (1833).

The definition of “offenses” is not at issue. Instead, it is the *punishment* of offenses. Punishment may be defined as “suffering or confinement inflicted on a person by authority of law and the judgment or sentence of a court for some crime or offense committed by him.”¹¹¹ Punishment necessarily includes “the court” imposing the sentence. In this case, Congress has directed that a military commission will impose the sentence; however, as discussed above, a military commission may not impose a punishment against prisoners of war. To do so, Congress would, in an ironic gesture, have to violate the law of nations, as reflected in GC III, article 102, which it has never done before in its punishment of law of war offenses.

Congress can be regarded to have first used this authority, during the Civil War, to punish “spies and guerillas ... by sentence of military commission”¹¹² Spies were first to be punished,¹¹³ and later punishment for guerillas, presumably unlawful combatants, was authorized for the offenses of “robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war”¹¹⁴ The authority to punish spies remained, even after the enactment of the Revised Statutes of 1874.¹¹⁵ Congress first authorized the punishment of violations of the law of war –without a requirement for one to be a guerilla -- in 1916: Article of War 12 stated that “[g]eneral courts-martial shall have power to try any person ... who by the law of war is subject to trial by military tribunals”¹¹⁶ Further, Article 15, stated that “[t]he provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of *offenders* or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.”¹¹⁷ The Uniform Code of Military Justice maintains this authorization to punish only for offenders and offenses that violate the law of war.¹¹⁸

The Supreme Court has discussed the nature of this authority. In *United States v. Arjona*, 120 U.S. 479, 486 (1887), a case involving the possession of a metallic plate that could be used to counterfeit foreign bank

¹¹¹ BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

¹¹² 2 WINTHROP, *supra* note 76, at 1296. Although Congress had also authorized its use against persons subject to its lawful jurisdiction (such as members of the military, as well as certain civilian members of the army), *id.* at 1299-1300, for others, it was limited to spies and guerillas.

¹¹³ 12 Stat. 731, 737 (Act of March 3, 1863, sec. 38).

¹¹⁴ 13 Stat. 356 (Act of July 2, 1864, chapter 215).

¹¹⁵ 2 WINTHROP, *supra* note 76, at 1300.

¹¹⁶ 39 Stat. 619, 652.

¹¹⁷ *Id.* at 653 (emphasis added).

¹¹⁸ 10 U.S.C. §821.

notes, the Court stated that “if the United States can require this of another [that is, punish counterfeiting], that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other.”

In *Quirin*, the Supreme Court noted that it has always “recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”¹¹⁹ More important, the Court recognized that the Congress does have a limitation on its constitutional authority:

By the Articles of War, and especially Article 15, Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.¹²⁰

As the Article of War simply referred to the law of war, the Court did not have to address the issue of Congress exceeding the law of war – and its constitutional authority – in *Quirin*.

Although the Supreme Court has not provided a precise definition Article 1, section 8, clause 10’s uses of the term *law of nations*, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-15 (2004), the Supreme Court addressed the Alien Tort Statute’s use of the term “law of nations,” and noted that it has several elements:

[T]he first covering the general norms governing the behavior of national states with each other This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial. See 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (hereinafter Commentaries) (“[O]ffences against” the law of nations are “principally incident to whole states or nations”). The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor There was,

¹¹⁹ *Quirin*, *supra* note 36, 317 U.S. at 27-28.

¹²⁰ *Id.* at 28 (emphasis added).

finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately addressed could rise to an issue of war.... It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted ATS with its reference to tort.

The same analysis should be applied to the Constitution's use of the term *law of nations*, as it was the first Congress under the Constitution (in 1789) that enacted the term analyzed in *Sosa*. While technically possible, it is unlikely the first Congress would use the term "law of nations" differently than the Constitution had used the term. Applying the *Sosa* analysis suggests that the congressional grant of authority to define and punish offenses should be limited, especially in light of the Constitution's intentional omission of any police power to Congress. Moreover, *Sosa* suggests that the judiciary has a significant role in the resolution of these offenses.

The congressional limit to define and punish offenses (and lawful or unlawful combatants to an armed conflict) under the present-day law of nations should be the same as it is for torts under *Sosa*, namely those that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."¹²¹

In assessing this limit, one should look to the sources of the law of nations: "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."¹²² In the Taliban's situation, the writing of jurists is mixed. The general usage and practice of nations, however, as evidenced by the Geneva Conventions and the U.S. military's own views on the subject, indicate that members of the Taliban are prisoners of war. Finally, the majority of the courts that have addressed the issue and have dealt with significantly different facts that are not present here (Taliban detainees seized in their country, and not behind enemy lines; of course, *Lindh*, did address the issue involved here). At worse (under the perspective of Congress), the sources as a whole point to the

¹²¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

¹²² *United States v. Smith*, 18 U.S. 153, 160-61 (1820).

treatment of the Taliban as prisoners of war, and, therefore, Congress, through the MCA, cannot punish them as if they were not prisoners of war. At best, no conclusion under the law of war can be reached, which means it is **not** against the law of nations, and, therefore, Congress is still without constitutional authority to punish the Taliban.¹²³ This conclusion does not leave Congress without authority in this area. Congress could prosecute the Taliban, for any offenses they committed under the law of war, through the UCMJ, as this would clearly be authorized under the law of nations.

Members of the Taliban who are tried by military commission may invoke this right: it is clear that under the law of war if a member of the Taliban "is not held as a prisoner-of-war and is to be tried by the captor for an offence arising out of the hostilities, he is entitled to assert his entitlement to prisoner of war status before a judicial tribunal."¹²⁴

One final note on this issue: one might argue that the Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952), and the Court's opinion in *Hamdan*, 126 S. Ct at 2774, n. 23, suggest that in matters of national security, when the President acts pursuant to an express "authorization of Congress, his authority is at its maximum" Although it may be true in most cases, in this case, it is crucial that Congress does not have authority under Article I, section 8, clause 10 to punish unless it is against the law of nations. As Congress lacks the constitutional authority to enact this specific section of the statute,¹²⁵ concerning the punishment of the Taliban by military commission, then, this specific section does not deserve the "strongest of presumptions and the widest latitude of judicial interpretation."¹²⁶

VIII. CONCLUSION

Hostilities still exist in Afghanistan. As the Security Council noted a few months ago, while security situation has improved, situation remains precarious with the "threat of suicide attacks and other forms of terrorism by the Taliban ... posing a serious threat to the nation-building process."¹²⁷ The Security Council recently reiterated its concern in light of "the increased violent and terrorist activities by the Taliban"¹²⁸

¹²³ Other constitutional grants of authority to Congress, such as rules for capture, rules for the armed forces, and foreign commerce clause, do not appear applicable to the promulgation of the MCA.

¹²⁴ GREEN, *supra* note 90, at 190.

¹²⁵ The issue of the President's inherent power to conduct military commissions is not ripe, as he intends to exercise his authority under the MCA. It is possible that the President's authority is not limited as Congress's is.

¹²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹²⁷ U.N. SCOR, 61st Sess., 5570th mtg. at 3, U.N. Doc. S/PV.5570 (2006).

¹²⁸ S.C. 1746, U.N. SCOR, 62nd Sess., 5645th mtg. at 2, U.N. Doc. S/RES/1746 (2007).

The opening quotation from Mao is especially telling. As the United States continues its efforts against a guerilla force in Afghanistan, the most successful leader of guerillas noted the value of treating detainees appropriately. Any failure to abide by the law of war only makes success – even against non-traditional enemies – that much more difficult. Despite one might think at first, this article is an effort to *improve* our ability to succeed against the enemy by arguing for the strict compliance with the law of war – even on behalf of the enemy, when it does not. Ultimately, the United States is most likely to succeed against all its enemies if it follows the law of war, including its punishment of members of the Taliban. Hopefully, it will.

THE CONTINUING FALLOUT FROM CRAWFORD: IMPLICATIONS FOR MILITARY JUSTICE PRACTITIONERS

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I. INTRODUCTION

The existence of a right to confront one's accusers can be traced to Roman times.¹ The origin of the right of a criminal defendant in the United States to confront one's accusers is found in the common law.² While not without limitation,³ the Confrontation Clause, codified as part of the Bill of

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¹ See *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (citing *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)); see also Frank R. Herman & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994).

² See *Crawford*, 541 U.S. at 43. "The common-law tradition is one of live testimony in court subject to adversarial testing . . ." *Id.*

³ "[T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates these limitations." *Id.* at 54. Thus, the Confrontation Clause is not offended where a criminal defendant had a prior opportunity to cross-examine an unavailable declarant. Additionally, when a defendant is responsible for the unavailability of a declarant, "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds . . ." *Id.* at 62.

Rights in the Sixth Amendment of the United States Constitution,⁴ provides a criminal defendant⁵ with the right to face one's accuser and subject him to the "crucible of cross-examination."⁶

In 2004, the United States Supreme Court issued an opinion in *Crawford v. Washington*⁷ which dramatically changed the constitutional jurisprudence germane to the admissibility of hearsay⁸ evidence. In *Crawford*, the Court opined that under the Sixth Amendment's Confrontation Clause, testimonial⁹ hearsay is inadmissible at a criminal trial unless the declarant¹⁰ is shown to be unavailable¹¹ and the party against whom the statement is admitted had a prior opportunity for cross-examination.¹² This decision partially¹³

⁴ The Sixth Amendment's Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

⁵ There is no constitutional right to confront one's accuser in a civil trial. JOHN HENRY WIGMORE, WIGMORE'S CODE OF EVIDENCE § 1342 (3d ed. 1942).

⁶ *Crawford*, 541 U.S. at 61.

⁷ *Id.* at 36.

⁸ "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(c) (2005) [hereinafter MCM].

⁹ "Testimony," . . . is typically '[a]' solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

¹⁰ "A 'declarant' is a person who makes a statement." See MCM, *supra* note 8, MIL R. EVID. 801(b).

¹¹ It is important to understand that unavailability for Confrontation Clause purposes is not the same as unavailability for hearsay purposes. Military Rule of Evidence 804(a) defines unavailability in pertinent part as follows:

"Unavailability as a witness" includes situations in which the declarant— (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or (6) is unavailable within the meaning of Article 49(d)(2). See MCM *supra* note 8, MIL R. EVID. 804(a). Though "[i]t [may] seem[] counterintuitive[.], . . . a witness who professes no memory of an event described in an earlier statement is available for confrontation purposes but unavailable for hearsay purposes." *United States v. Rhodes*, 61 M.J. 445, 450 (2005) (holding that a statement against interest admitted against an accused does not violate the Confrontation Clause even if the declarant testifies that he has no recollection of the out-of-court statement at issue).

¹² See *Crawford*, 541 U.S. at 53-54. In trials by courts-martial, the prior opportunity to cross-examine an unavailable declarant may be satisfied if the accused was given the opportunity to cross-examine the declarant during a deposition pursuant to Rule for Courts-Martial (RCM) 702. See MCM, *supra* note 8, R.C.M. 702. Additionally, the prior opportunity to cross-examine an unavailable declarant may be satisfied if the accused was given the opportunity to cross-examine the declarant during an Article 32 investigation. See UCMJ art. 32 (2005).

overruled *Ohio v. Roberts*,¹⁴ which previously allowed courts to admit testimonial hearsay if the statement possessed adequate indicia of reliability. Despite changing the constitutional landscape regarding the admissibility of testimonial hearsay, the Court expressly declined to spell out a comprehensive definition of the term testimonial.¹⁵ The Court's failure to provide detailed guidance concerning when hearsay statements are testimonial has predictably led to inconsistent interpretation and application of *Crawford* by both state and federal courts.

The post-*Crawford* era of uncertainty has important implications for the military justice system. Military justice practitioners view the Confrontation Clause's applicability to both testimonial and nontestimonial hearsay as an issue of great importance. Many questions remain about the extent to which the Confrontation Clause places limitations on the government's ability to introduce verbal or documentary hearsay into evidence. A review of the continuing fallout from *Crawford* reveals that courts continue to struggle as they attempt to navigate their way to the true meaning of the Confrontation Clause.

This article attempts to make sense of the Supreme Court's opinions in both *Crawford* and *Davis v. Washington*¹⁶ through an examination of both the core and perimeter of the Confrontation Clause. Additionally, this article argues that courts should not create a new exception to the Confrontation Clause. In this context, this article opines that both a per se rule excluding business and public records from Confrontation Clause scrutiny and the extension of the *Davis* primary purpose test beyond the scope of police interrogations are contrary to the Framers' intent. Part II of this article reviews and analyzes the Court's decision in *Crawford*. Part III examines whether the *Ohio v. Roberts* requirement of adequate indicia of reliability continues to govern nontestimonial hearsay in trials by courts-martial and, if not, what the implications are for military justice practitioners. Part IV analyzes whether the Supreme Court established a bright line rule that all hearsay statements contained within business or public records are per se nontestimonial. Finally, Part V discusses how courts should treat dual purpose hearsay documents that serve both testimonial and nontestimonial purposes.

¹³ The Court's opinion in *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007) discussed *infra* Part III.B, makes it clear that post-*Whorton*, *Ohio v. Roberts*, 448 U.S. 56 (1980), is completely overruled.

¹⁴ 448 U.S. 56 (1980).

¹⁵ The Court stated: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68.

¹⁶ 126 S. Ct. 2266 (2006).

II. CRAWFORD: WHAT WAS OLD IS NOW NEW

A. *Crawford v. Washington*

In *Crawford v. Washington*,¹⁷ the Supreme Court granted certiorari to determine whether the admission of Sylvia Crawford's hearsay statements introduced by the State of Washington in the trial against Michael Crawford, violated the Sixth Amendment's Confrontation Clause.¹⁸ Michael Crawford was accused of stabbing Kenneth Lee, a man that allegedly tried to rape his wife.¹⁹ In response to these allegations, the State charged Michael with assault and attempted murder.²⁰ The altercation between Michael and Mr. Lee occurred at Lee's apartment on 5 August 1999.²¹ Later that evening, the police arrested both Michael and Sylvia Crawford.²² Subsequent to their arrests, both Michael and Sylvia were provided *Miranda*²³ warnings.²⁴ In the course of being interrogated, both Michael and Sylvia provided statements to police detectives regarding the events leading to Lee's stabbing.²⁵ While much of their statements were the same, Sylvia's recollection of the fight between Michael and Mr. Lee was arguably different than the statement Michael provided.²⁶

At his trial, Michael raised a self-defense claim.²⁷ Pursuant to the Washington State marital privilege,²⁸ Sylvia was barred from testifying without

¹⁷ 541 U.S. at 36.

¹⁸ *Id.* at 42. Though *Crawford* is a Washington State case, the Confrontation Clause is equally binding in both federal and state criminal prosecutions. *See id.* (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)) (holding that the Sixth Amendment's Confrontation Clause was incorporated by the Due Process Clause of the Fourteenth Amendment).

¹⁹ *Crawford*, 541 U.S. at 38.

²⁰ *Id.* at 40.

²¹ *Id.* at 38.

²² *Id.*

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that during a custodial interrogation, the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, that anything he says will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him). The dictates of *Miranda* are binding on military courts. *See United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967) (holding that the principles enunciated by the Supreme Court in *Miranda v. Arizona* apply to interrogations of military personnel suspected of violations of the Uniform Code of Military Justice).

²⁴ *Crawford*, 541 U.S. at 38.

²⁵ *Id.* at 38-40.

²⁶ *Id.* at 39.

²⁷ *Id.*

²⁸ WASH. REV. CODE § 5.60.060(1) (1994).

Michael's consent.²⁹ In an attempt to counter Michael's claim of self-defense, the State sought to introduce Sylvia's prior tape-recorded statements to the police.³⁰ The State argued that Sylvia's statements to the police qualified as a statement against penal interest because she facilitated the assault by leading Michael to Lee's apartment.³¹ Michael objected to introduction of Sylvia's statements and argued that admission of these statements would violate the Sixth Amendment's Confrontation Clause.³² The trial court, relying on *Roberts*,³³ overruled Michael's objection and allowed the State to play Sylvia's statements to the jury, even though she was an unavailable witness who was not previously subjected to cross-examination.³⁴ In the end, the jury convicted Michael of assault.³⁵

B. Historical Analysis of *Ohio v. Roberts* and the Confrontation Clause

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."³⁶ Despite the explicit language contained in the Confrontation Clause, in 1980, the *Roberts* Court held that the Confrontation Clause does not preclude admission of an unavailable witness's out-of-court statement if the statement "bears adequate 'indicia of reliability.'"³⁷ In his petition for writ of certiorari, the petitioner, Michael Crawford, argued that the Court's holding in *Roberts* is contrary to the historical meaning of the Confrontation Clause and should therefore be reconsidered.³⁸ In response, the Court analyzed its holding in *Roberts*³⁹ by tracing the genesis of the Confrontation Clause.⁴⁰

²⁸ WASH. REV. CODE § 5.60.060(1) (1994).

²⁹ *Crawford*, 541 U.S. at 40.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ In *Ohio v. Roberts*, the Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement "bears adequate 'indicia of reliability.'" See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The adequate indicia of reliability required by *Roberts* is satisfied when the hearsay statement: (1) fits within a firmly rooted exception to the hearsay rule; or (2) if it possesses particularized guarantees of trustworthiness. See *id.*

³⁴ *Crawford*, 541 U.S. at 40.

³⁵ *Id.*

³⁶ U.S. CONST. amend. VI.

³⁷ *Roberts*, 448 U.S. at 66.

³⁸ *Crawford*, 541 U.S. at 42.

³⁹ 448 U.S. at 66.

⁴⁰ *Crawford*, 541 U.S. at 43-56.

The Court deduced that the right of confrontation was guaranteed by an overwhelming majority of states during the Revolutionary era.⁴¹ The Court specifically noted that the Sixth Amendment became part of the Bill of Rights which was ratified by the states on 15 December 1791.⁴² In reviewing the historical texts, the Court opined that “history supports two inferences about the meaning of the Sixth Amendment.”⁴³

First, the principal evil at which the *Confrontation* Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like [Sir Walter] Raleigh’s; . . . that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.⁴⁴

The second inference advanced by the Court is as follows: [The] Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the “right . . . to be confronted with the witnesses against him,” is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.⁴⁵

C. A Shift in Confrontation Clause Jurisprudence

Subsequent to its analysis germane to the genesis of the right to confront one’s accusers, the *Crawford* Court determined the Confrontation Clause applies to “‘witnesses’ against the accused—in other words, those who

⁴¹ *Id.* at 48 (stating that the states that guaranteed the right to confrontation during the Revolutionary period are: Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire) (citing 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235, 265, 278, 282, 287, 323, 342, 377 (1971)). *Id.*

⁴² *Crawford*, 541 U.S. at 49.

⁴³ *Id.* at 50.

⁴⁴ *Id.* In 1603, Sir Walter Raleigh was convicted of treason and sentenced to death. *Id.* at 44. At his trial, the evidence against him included *ex parte* statements made by his alleged accomplice, Lord Cobham. *Id.* Though Raleigh demanded to be confronted by his accuser, the judges denied his request and the jury ultimately convicted him. *Id.*

⁴⁵ *Id.* at 53-54 (citations omitted).

‘bear testimony.’”⁴⁶ Further, the Court opined that testimonial hearsay is not admissible against a criminal defendant unless: (1) the declarant is unavailable to testify; and (2) the defendant had a prior opportunity to cross-examine the unavailable declarant.⁴⁷ In partially overruling *Roberts*, the Court stated:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protections to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability’. . . . To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by the crucible of cross-examination.⁴⁸

Despite the *Crawford* Court’s decision to change the constitutional landscape regarding admissibility of testimonial hearsay, the Court expressly declined to spell out a comprehensive definition of the term testimonial.⁴⁹ However, the Court did provide lower courts some minimal guidance by identifying three forms of core testimonial evidence: (1) ex parte in-court testimony or its functional equivalent; (2) extrajudicial statements in formalized trial materials; and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used at trial.⁵⁰

The Court chose to be cryptic regarding the specific types of statements that are testimonial hearsay. However, its opinion nevertheless shows a concerted effort to interpret the Confrontation Clause in a manner that guards against the inherent dangers of testimonial hearsay. Thus, though the Court did not provide comprehensive guidance regarding what qualifies as testimonial hearsay, courts should analyze Confrontation Clause issues in a manner consistent with the Court’s intent as articulated in *Crawford*.

III. **ROBERTS’S APPLICATION TO NONTESTIMONIAL HEARSAY**

A. **Nontestimonial Hearsay and the Confrontation Clause**

While the Supreme Court’s decision in *Crawford v. Washington*⁵¹ clearly overruled *Ohio v. Roberts*⁵² by restoring the unavailability and cross-

⁴⁶ *Id.* at 51.

⁴⁷ *See id.* at 53-54.

⁴⁸ *Id.* at 61.

⁴⁹ “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68.

⁵⁰ *See id.* at 51-52; *see also* United States v. Magyari, 63 M.J. 123, 130 (2006).

⁵¹ 541 U.S. at 36.

examination requirements to statements involving testimonial hearsay,⁵³ in *Crawford*, the Court continued to equivocate regarding the Confrontation Clause's applicability to nontestimonial hearsay.⁵⁴ The Court's failure to squarely address this issue left courts guessing whether *Roberts* remained applicable to nontestimonial hearsay. Those that believe the Court is seeking to expand the reach of the Confrontation Clause concluded that post-*Crawford*, nontestimonial hearsay continued to be subject to Confrontation Clause scrutiny. However, a careful review of the Court's opinions in *Crawford v. Washington*⁵⁵ and *Davis v. Washington*,⁵⁶ will lead us to the conclusion that the Court has suggested that nontestimonial hearsay is no longer subject to Confrontation Clause scrutiny.

In *Crawford*, the Court stopped short of expressly holding that the Confrontation Clause is only applicable to testimonial hearsay,⁵⁷ as suggested by both academics⁵⁸ and members of the Court.⁵⁹ Instead, in dicta, the Court stated that exempting nontestimonial statements from Confrontation Clause scrutiny would be "consistent with the Framers' design to afford the States flexibility in their development of hearsay law."⁶⁰ Surprisingly, the Court did not issue another opinion germane to the Confrontation Clause until its 2006 term, where the Court once again suggested that nontestimonial hearsay was no longer subject to Confrontation Clause scrutiny.⁶¹

During the Supreme Court's 2006 term, the Court, in a continuing effort to interpret the Confrontation Clause in light of the Framers' intent, issued an important decision in *Davis v. Washington*.⁶² The facts of *Davis* happen all too often in the United States. The petitioner, Adrian Davis, was accused of felony violation of a domestic no-contact order.⁶³ Davis's former girlfriend, Michelle McCottry, made an initial telephone call to a 911 emergency operator

⁵² 448 U.S. 56 (1980).

⁵³ *Davis v. Washington*, 126 S. Ct. 2226, 2275 n.4 (2006).

⁵⁴ See Major Michael R. Holley, "It Was Impossible to Get a Conversation Going, Everybody Was Talking Too Much": Synthesizing New Developments in the Sixth Amendment's Confrontation Clause, *ARMY LAW.*, June 2006, at 15 ("[T]he [Supreme] Court seemed to strongly suggest that nontestimonial statements are altogether exempted from Confrontation Clause scrutiny.").

⁵⁵ 541 U.S. at 36.

⁵⁶ 126 S. Ct. at 2226.

⁵⁷ *Crawford*, 541 U.S. at 61.

⁵⁸ *Id.* (citing A. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-131 (1997)).

⁵⁹ *Crawford*, 541 U.S. at 61 (citing *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

⁶⁰ *Crawford*, 541 U.S. at 68.

⁶¹ See *Davis*, 126 S. Ct. at 2273.

⁶² *Id.* at 2266. *Davis* was the first of two consolidated cases. The second case is *Hammon v. Indiana*. *Id.*

⁶³ *Id.* at 2271.

on 1 February 2001.⁶⁴ However, prior to speaking to anyone, she terminated the call.⁶⁵ In response, a 911 operator reversed the call and Michelle answered.⁶⁶ During the ensuing conversation, Michelle responded to the 911 operator's questions by stating she was being assaulted by Davis.⁶⁷ By the time the police arrived, Davis had fled the house.⁶⁸ At Davis's trial, Michelle did not testify.⁶⁹ Despite Davis's objection, the government was allowed to introduce the recorded 911 telephone conversation between Michelle and the 911 emergency operator.⁷⁰ In the end, the jury convicted Davis as charged.⁷¹ After the Supreme Court of Washington affirmed his conviction, the United States Supreme Court granted certiorari.⁷²

The issue before the Court on appeal was whether a Confrontation Clause violation occurred due to admission of the 911 recording.⁷³ In affirming Davis's conviction, the Court opined that "[Michelle] simply was not acting as a witness; she was not *testifying*."⁷⁴ As such, the Court held that Michelle's statements to the 911 emergency operator were nontestimonial.⁷⁵ However, more importantly for purposes of analyzing whether nontestimonial hearsay is subject to the Confrontation Clause, is what the Court did not do.

After holding that Michelle's statements to the 911 emergency operator were nontestimonial, the Court did not analyze whether Michelle's statements bore adequate indicia of reliability. This analysis, of course, was previously required by the Court's holding in *Roberts*.⁷⁶ Inexplicably, the Supreme Court did not expressly overrule *Roberts* when given an opportunity to do so. The language in the *Davis* Court's opinion however, strongly suggested that nontestimonial hearsay was no longer subject to Confrontation Clause scrutiny.⁷⁷ For example, in its opinion, the Court stated:

A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within

⁶⁴ *Id.* at 2270.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2270-71.

⁶⁷ *See id.* at 2271.

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.* at 2272.

⁷³ *See id.* at 2270.

⁷⁴ *Id.* at 2277.

⁷⁵ *See id.*

⁷⁶ *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁷⁷ *See Davis*, 126 S. Ct. at 2273-75.

the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.⁷⁸

A fair reading of the above quotation reveals that the Court draws a clear line of demarcation between testimonial and nontestimonial hearsay. Specifically, statements that have testimonial characteristics (testimonial hearsay) are subject to the Confrontation Clause because they cause the declarant to be a witness against an accused. However, importantly, statements that do not have such characteristics (nontestimonial hearsay), while subject to traditional limitations upon hearsay evidence, are not subject to Confrontation Clause scrutiny. This narrow view of the Confrontation Clause is entirely consistent with the text of the Confrontation Clause itself which provides a criminal defendant the right to confront those that bear witness against him.

Though the Court did not expressly overrule *Roberts*, its analysis in both *Crawford* and *Davis* concerning the Confrontation Clause's limited application, strongly suggested that nontestimonial hearsay was no longer subject to Confrontation Clause scrutiny. As one commentator noted,⁷⁹ post-*Davis*, this inference is consistent with the opinions of most courts that have examined this issue.⁸⁰ However, to be sure, post-*Davis*, many courts,⁸¹

⁷⁸ *Id.* at 2273 (citations omitted).

⁷⁹ See generally Duncan N. Stevens, *Non-testimonial Hearsay after Crawford and Davis: No Constitutional Floor?*, 4 WHITE COLLAR CRIME REP. 2 (2006) (discussing whether nontestimonial hearsay remains subject to Confrontation Clause scrutiny).

⁸⁰ The Seventh Circuit Court of Appeals opined that *Davis v. Washington* overruled *Ohio v. Roberts*. See *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) ("*Davis v. Washington* appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause."); see also *United States v. Ellis*, 460 F. 3d 920, 923 (7th Cir. 2006) (citing *Davis*, 126 S. Ct. at 2273-76) (nontestimonial statements are not subject to the Confrontation Clause); *United States v. Feliz*, 467 F. 3d 227, 231 (2d Cir. 2006) (citing *Davis*, 126 S. Ct. at 2274) (reversing its prior holding in *Mungo v. Duncan* and opining that "*Davis* made clear that the right to confrontation only extends to testimonial statements, or, put differently, the Confrontation Clause has no application to nontestimonial statements."); *United States v. Billingslea*, No. 03-12483, 2006 WL 3201100, at *1 (11th Cir. Nov. 7, 2006) ("Only testimonial statements by a witness are subject to the Confrontation Clause."); *United States v. Clemmons*, 461 F. 3d 1057, 1061 (8th Cir. 2006) (nontestimonial statements do not implicate a criminal defendant's right to confrontation); *United States v. Ballesteros-Selinger*, 454 F. 3d 973, 975 (9th Cir. 2006) (without determining its reliability under the dictates of *Ohio v. Roberts*, the court stated "[w]e hold that the memorandum of oral decision issued by the [immigration judge] is nontestimonial, and therefore its admission . . . did not violate the Confrontation Clause."); *Jarrell v. State*, 852 N.E. 2d 1022, 1027 (Ind. Ct. App. 2006) (holding that admissibility of nontestimonial hearsay is "governed by Indiana law."); *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006) ("Nontestimonial statements are not subject to scrutiny under the Confrontation Clause."); *State v. Fischer*, No. S-06-069, 2007 WL 120647, at *5 (Neb. Jan. 19, 2007) ("If . . . statements are nontestimonial, then no further Confrontation Clause analysis is required."); *State v. Reardon*, No. L-05-1275, 2006 WL 2196458, at *2 (Ohio Ct. App. 2006) ("Only

including all military courts,⁸² continued to apply the *Roberts* requirement of “adequate ‘indicia of reliability’”⁸³ when analyzing the admissibility of nontestimonial statements.

B. *Whorton v. Bockting* and the Death of Confrontation Clause Scrutiny of Nontestimonial Hearsay

On 28 February 2007, the Supreme Court issued an opinion in *Whorton v. Bockting*⁸⁴ which resolved the issue of whether post-*Crawford* and *Davis*, nontestimonial hearsay remains subject to Confrontation Clause scrutiny.⁸⁵ The issue before the Court on appeal was whether *Crawford* applies retroactively to cases on collateral review.⁸⁶ In answering this question in the negative, the

statements that are testimonial in nature trigger the Confrontation Clause provisions.”); Craig W. Albee, *Confrontation Clause Issues After Crawford and Davis*, Sept. 29, 2006, <http://www.wisspd.org/html/training/ProgMaterials/Conf2006/CVsW.pdf> (Sept. 29, 2006) (*Davis* appears to hold that nontestimonial statements are not subject to Confrontation Clause). *But see* United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006) (*Roberts* continues to apply to nontestimonial hearsay). The Seventh Circuit’s opinion in *Thomas* obviously conflicts with its holdings in both *Tolliver* and *Ellis*. However, the court’s opinions in *Tolliver* and *Ellis* were issued approximately two weeks and one month, respectively, after its opinion in *Thomas*. Thus, it’s reasonable to surmise that nontestimonial hearsay is no longer subject to Confrontation Clause scrutiny within the Seventh Circuit’s jurisdiction.

⁸¹ See United States v. Boyett, No. 3:06-CR-30026-01, 2006 WL 3313746, at *3 n.1 (W.D. La. Nov. 14, 2006) (applying *Ohio v. Roberts* to nontestimonial statements); *People v. Gash*, No. 05CA0936, 2006 WL 3316844, at *3 (Colo. App. Ct. Nov. 16, 2006) (holding that it’s necessary to “determine whether [nontestimonial statements] violate [a] defendant’s federal confrontation rights.”); *State v. Slater*, 908 A.2d 1097, 1108 (Conn. App. Ct. 2006) (“*Crawford* left untouched the *Roberts* approach with respect to nontestimonial statements.”); *State v. Hosty*, Nos. SC03-511, SC03-512, 2006 WL 3228789, at *5 (Fla. Nov. 9, 2006) (“[W]e find that the statements the victim made to her teacher were not testimonial, and so we analyze the statute’s constitutionality in permitting those statements under the framework provided in *Roberts*.”); *Head v. State*, 912 A.2d 1, 13-14 (Md. Ct. Spec. App. 2006) (opining that Confrontation Clause scrutiny applies to nontestimonial statements); *Harkins v. State*, 143 P.3d 706, 715 n.54 (Nev. 2006) (“[A] nontestimonial statement . . . is subject to analysis under *Ohio v. Roberts*.”); *State v. McKenzie*, No. 87610, 2006 WL 3095671, at *4 (Ohio Ct. App. 2006) (citing United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006), for the proposition that *Roberts* continues to apply to nontestimonial hearsay); *Commonwealth v. Holton*, 906 A.2d 1246, 1254-55 (Pa. Super. Ct. 2006) (“[W]e apply the two-prong test enunciated in *Ohio v. Roberts* to determine the admissibility of . . . ‘non-testimonial’ statements.”); *Walter v. State*, No. 06-04-00173-CR, 2006 WL 3299514, at *3 (Tex. App. Nov. 15, 2006) (“[N]ontestimonial statements are still governed by *Ohio v. Roberts*.”).

⁸² See United States v. Scheurer, 62 M.J. 100, 106 (2005) (“[T]he *Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements.”); United States v. Rankin, 64 M.J. 348, 353 (2007) (holding that *Roberts* continues to govern admissibility of nontestimonial hearsay); United States v. Magyari, 63 M.J. 123, 128 (2006) (applying the *Roberts* framework to nontestimonial hearsay).

⁸³ *Ohio v. Roberts*, 448 U.S. at 66 (1980).

⁸⁴ *Whorton*, 127 S. Ct. at 1173.

⁸⁵ See *id.* at 1183.

⁸⁶ See *id.* at 1180.

Court clarified its holding in *Crawford* regarding whether nontestimonial hearsay remains subject to Confrontation Clause scrutiny.⁸⁷

In *Whorton*, Justice Alito, writing for a unanimous Court, unambiguously stated that “[u]nder *Crawford*, . . . the Confrontation Clause has no application to [nontestimonial statements] and therefore permits their admission even if they lack indicia of reliability.”⁸⁸ The Court’s decision to squarely address this important issue has resolved a conflict that previously divided both state and federal courts.⁸⁹

C. Military Court’s Treatment of Nontestimonial Hearsay

Following the Supreme Court’s opinion in *Crawford v. Washington*,⁹⁰ the CAAF, in *United States v. Scheurer*,⁹¹ considered whether nontestimonial hearsay is subject to Confrontation Clause scrutiny. The issue on appeal was whether the appellant’s right to confront his accusers was violated by the admission of hearsay statements made by the appellant’s wife to one of her co-workers.⁹² Just as in *Crawford*, the appellant’s wife was found unavailable to testify because of a spousal privilege.⁹³ However, unlike in *Crawford* where the hearsay statements were made to government agents, in *Scheurer*, the statements at issue were made to a casual acquaintance.⁹⁴ The CAAF, citing *Crawford*, determined that the wife’s statements to a casual acquaintance, as opposed to government agents, were nontestimonial because they did not bear testimony against the appellant.⁹⁵

Next, after determining the hearsay statements at issue were nontestimonial, the CAAF considered whether nontestimonial hearsay

⁸⁷ See *id.* at 1183.

⁸⁸ *Id.* As illustrated by the discussion in Part III.D, this decision has far reaching implications for military justice practitioners.

⁸⁹ See *supra* notes 80-82 and accompanying text.

⁹⁰ 541 U.S. 36 (2004).

⁹¹ 62 M.J. 100 (2005).

⁹² See *id.* at 104. In *Scheurer*, the appellant’s wife, an enlisted member of the Air Force, engaged in numerous conversations with a co-worker. *Id.* at 102. During these conversations, the appellant’s wife discussed the drug use she committed with her husband and a high school student. *Id.* During two of these conversations, the wife’s co-worker wore a wire for the Air Force Office of Special Investigations “to facilitate recording of the wife’s statements.” *Id.* As a result, these conversations were preserved for future use at trial. *Id.* During a motion’s hearing, the appellant moved to exclude his wife’s statements to her co-worker. *Id.* In denying the appellant’s motion to exclude the statements, the military judge ruled that the statements at issue were admissible under Military Rule of Evidence 804(b)(3) as statements against interest. *Id.* at 102-03.

⁹³ *Id.* Under Military Rule of Evidence 504(a), the witness spouse, not the accused, decides whether to testify. MCM, *supra* note 8, MIL. R. EVID. 504(a).

⁹⁴ See *Scheurer*, 62 M.J. at 104.

⁹⁵ *Id.* at 105-06 (citing *Crawford*, 541 U.S. at 51).

statements remain subject to Confrontation Clause scrutiny.⁹⁶ Citing numerous cases⁹⁷ decided after *Crawford*, but before *Davis* and *Whorton*, the CAAF held that the “*Ohio v. Roberts* requirement for particularized guarantees of trustworthiness⁹⁸ continues to govern confrontation analysis for nontestimonial statements.”⁹⁹ In light of the Supreme Court’s reluctance to expressly overrule *Roberts* when provided with an opportunity to do so in *Crawford*,¹⁰⁰ the CAAF’s ruling was entirely reasonable.¹⁰¹ However, post-*Whorton*,¹⁰² CAAF should revisit whether the admission of nontestimonial hearsay in trials by courts-martial remains subject to Confrontation Clause scrutiny.

D. *Whorton’s* Impact on Trials by Courts-Martial

Post-*Whorton*, an issue of great importance to military justice practitioners is whether the admission of nontestimonial hearsay in trials by courts-martial remains subject to Confrontation Clause scrutiny. As discussed below, the CAAF is not always constrained by the Supreme Court’s interpretation of the Constitution.¹⁰³ Therefore, it appears that as of this writing, under *Scheurer*, discussed in Part III.C, the admissibility of nontestimonial

⁹⁶ See *Scheurer* 62 M.J. at 106.

⁹⁷ See *id.* (citing, e.g., *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005) (“*Roberts* remains controlling for purposes of nontestimonial statements.”); *United States v. Hendricks*, 395 F.3d at 179, n.7 (3d Cir. 2005) (nontestimonial statements remain subject to Confrontation Clause scrutiny); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (nontestimonial statements remain subject to *Roberts*); and *United States v. Horton*, 370 F.3d 75 (1st Cir. 2004) (*Roberts* continues to apply to nontestimonial hearsay statements).

⁹⁸ Though the CAAF held that the *Roberts* requirement for “particularized guarantees of trustworthiness” continues to govern confrontation analysis for nontestimonial statements, presumably they meant to state that the *Roberts* requirement of adequate indicia of reliability continues to govern confrontation analysis for nontestimonial statements. This is an important distinction in that under *Roberts*, the Court only requires a showing of particularized guarantees of trustworthiness where a statement is offered into evidence by way of a hearsay statement that is not firmly rooted. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Where a hearsay statement is firmly rooted, the *Roberts* requirement of adequate indicia of reliability is automatically satisfied without having to look to the statement itself. See *id.*

⁹⁹ *Scheurer*, 62 M.J. at 106.

¹⁰⁰ See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹⁰¹ In *United States v. Magyari*, 63 M.J. 123 (2006), which was decided six weeks prior to *Davis v. Washington*, 126 S. Ct. 2266 (2006), the CAAF reiterated that “the ‘*Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements.” *Id.* at 127-28 (citing *Scheurer*, 62 M.J. at 106). Post-*Davis*, the CAAF continues to apply the *Roberts* requirement of adequate indicia of reliability to nontestimonial hearsay. See *United States v. Rankin*, 64 M.J. 348, 353 (2007) (holding that *Roberts* continues to govern admissibility of nontestimonial hearsay).

¹⁰² 127 S. Ct. 1173 (2007).

¹⁰³ See H. F. “Sparky” Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 26. The author of this article was previously the Chief Judge of the CAAF.

hearsay in trials by courts-martial remains subject to Confrontation Clause scrutiny.¹⁰⁴

As a former Chief Judge of the CAAF has noted, “[w]hen the Supreme Court construes a statute, the CAAF is bound by its construction. When the Supreme Court construes the Constitution, however, the CAAF must consider the extent to which that constitutional provision applies to the military justice system.”¹⁰⁵ As such, though *Whorton* is binding on Article III courts, it is not necessarily binding on the military justice system. Until the CAAF reconsiders its opinion in *Scheurer*, notwithstanding the Supreme Court’s opinion in *Whorton*, the *Roberts* requirement of “adequate ‘indicia of reliability’”¹⁰⁶ continues to govern the admissibility of nontestimonial hearsay in trials by courts-martial.

E. Implications for Military Justice Practitioners if Nontestimonial Hearsay in Trials by Courts-Martial is no Longer Subject to Confrontation Clause Scrutiny

Pursuant to *United States v. Scheurer*, discussed in Part III.C, when a statement is nontestimonial, *Roberts* continues to govern Confrontation Clause analysis.¹⁰⁷ Under *Roberts*, Confrontation Clause scrutiny of nontestimonial hearsay does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement “bears adequate ‘indicia of reliability.’”¹⁰⁸ The *Roberts* requirement of adequate indicia of reliability is satisfied if the hearsay statement: (1) fits within a firmly rooted exception to the hearsay rule; or (2) if it possesses particularized guarantees of trustworthiness.¹⁰⁹

¹⁰⁴ Interview with MAJ Nicholas Lancaster, Professor, Criminal Law Department, The Judge Advocate General’s Legal Ctr. & Sch., in Charlottesville, Va. (Mar. 13, 2007).

¹⁰⁵ Gierke, *supra* note 103, at 26.

¹⁰⁶ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁰⁷ *Scheurer*, 62 M.J. at 106.

¹⁰⁸ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁰⁹ *Id.* In *Lilly v. Virginia*, the Supreme Court defined a firmly rooted hearsay exception as follows: “[A] hearsay exception [is] ‘firmly rooted’ if, in light of ‘longstanding judicial and legislative experience,’ it rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’ This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over time ‘to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath’ and cross-examination at trial. *Lilly v. Virginia*, 527 U.S. 116, 126 (1999) (citations omitted). In *Idaho v. Wright*, the Supreme Court stated that “‘particularized guarantees of trustworthiness’ must be shown from the totality of circumstances.” *Idaho v. Wright*, 497 U.S. 805, 819 (1990). Further, and importantly, the *Wright* Court also opined that it is impermissible to consider extrinsic corroborating evidence as a “factor in determining whether a particular hearsay statement possesse[s] sufficient indicia of reliability.” *Id.* at 823. *But see* *United States v. Ureta*, 44 MJ 290, 297 (1996) (holding that a military judge did not err in considering

There are at least three significant effects on military justice practice if nontestimonial hearsay is not subject to Confrontation Clause scrutiny. Each of the three hypothetical scenarios below illustrate these effects.

First, if nontestimonial hearsay remains subject to the Confrontation Clause as interpreted by *Ohio v. Roberts*¹¹⁰ and its progeny, the President will remain constrained in fashioning new exceptions to the hearsay rule.¹¹¹ As an example, assume the President, pursuant to his authority under Article 36(a) of the Uniform Code of Military Justice, wants to craft a new exception to the military rules of evidence. The new exception would allow admissibility of nontestimonial hearsay statements made by a child victim of a sexual crime.¹¹² The new rule states “the statement may be admitted by the court upon its determination by a preponderance of evidence that the statement is reliable.” Further, the language of the rule states that “when determining whether a hearsay statement made by a sexual assault victim who is under the age of 12 at the time the statement was made is reliable, the court may weigh and consider the existence of corroborating evidence which is extrinsic to the hearsay statement itself.”

This additional language would allow military judges to consider, as an example, medical examinations conducted prior or subsequent to the child’s hearsay statement. Such extrinsic corroborating evidence might indeed weigh heavily when a court is determining whether the child’s statements are reliable. If nontestimonial hearsay is not subject to Confrontation Clause scrutiny, a court may consider corroborating evidence that is extrinsic to the hearsay statements in assessing their reliability. However, as discussed below, if nontestimonial hearsay remains subject to Confrontation Clause scrutiny, *Roberts* and its progeny—specifically, *Idaho v. Wright*,¹¹³ would prohibit a court from considering corroborating evidence that is extrinsic to hearsay statements when determining their reliability.

Under *Roberts*, if the government offers a child sexual assault victim’s nontestimonial hearsay statements into evidence, absent unavailability and a prior opportunity to cross-examine the child, the statements are inadmissible

extrinsic corroborating evidence in assessing the reliability of a hearsay statement because the evidence was deemed to be “part of ‘the circumstances surrounding the making of the statement.’”

¹¹⁰ 448 U.S. at 56.

¹¹¹ The President of the United States promulgates the rules of procedure and evidence set forth in Parts II and III of the Manual for Courts-Martial. See UCMJ art. 36(a) (2005).

¹¹² A hypothetical scenario such as this was suggested by Michael R. Dreeben, amicus curiae for the United States in the case of *Crawford v. Washington*. See Michael R. Dreeben, Prefatory Article: *The Confrontation Clause, The Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxx-xxxii (2005).

¹¹³ 497 U.S. 805, 820-25 (1990).

unless the court determines they “bear adequate ‘indicia of reliability.’”¹¹⁴ However, since this is a new exception to the hearsay rule, it is, by its nature, not a firmly rooted exception. Thus, under *Roberts*, the child’s statements are only admissible if the court determines they have particularized guarantees of trustworthiness.¹¹⁵ However, if nontestimonial hearsay remains subject to Confrontation Clause scrutiny, pursuant to *Wright*, the military judge cannot consider corroborating evidence that is extrinsic to the child’s statements when determining whether such statements are reliable.¹¹⁶ As such, even if a prior or subsequent medical examination corroborates the child’s statements to medical personnel, a parent, etc., the military judge cannot accord this extrinsic corroborating evidence any weight. Without the corroborating evidence as a factor for the court to consider in determining the statement’s reliability, a military judge might deny the government’s attempt to admit the statements.

As a practice point, trial counsel might find it beneficial to argue that notwithstanding the CAAF’s decision in *United States v. Scheurer*,¹¹⁷ a military judge may consider extrinsic corroborating evidence (e.g. medical reports or verbal statements) when determining whether nontestimonial hearsay statements are reliable.

Second, if nontestimonial hearsay is no longer subject to Confrontation Clause scrutiny, the government can easily admit out-of-court statements via an exception to the hearsay rule. As an example, Sailors Smith and Jones are charged with raping Soldier Adams. The two Sailors are being tried separately. During Sailor Smith’s court-martial, the trial counsel seeks to admit a statement against interest¹¹⁸ made by Sailor Jones. Specifically, the trial counsel wants to

¹¹⁴ *Roberts*, 448 U.S. at 60.

¹¹⁵ *See id.*

¹¹⁶ *Wright*, 497 U.S. at 805. *But see* *United States v. Ureta*, 44 MJ 290, 297 (1996) (holding that a military judge did not err in considering extrinsic corroborating evidence in assessing the reliability of a hearsay statement because the evidence was deemed to be “part of ‘the circumstances surrounding the making of the statement.’”).

¹¹⁷ 62 M.J. 100, 106 (2005).

¹¹⁸ A statement against interest is defined in Military Rule of Evidence 804(b)(3) as follows:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of statement. *See* MCM, *supra* note 8, MIL R. EVID. 804(b)(3).

elicit from Marine Sullivan that during a casual conversation, Sailor Jones stated: “I feel terrible that me and Sailor Smith raped Soldier Adams—she did not deserve to be treated that way.” Of course, the defense objects to this question on the grounds that it constitutes inadmissible hearsay. Assuming the military judge determines the statement is nontestimonial and that it qualifies as a statement against interest, what factors must the court consider in determining the statement’s admissibility?

As discussed in Part III.C, in *United States v. Scheurer*,¹¹⁹ the CAAF opined that the *Ohio v. Roberts*¹²⁰ requirement of adequate indicia of reliability continues to govern the admission of nontestimonial statements.¹²¹ Under *Roberts*, a statement cannot be admitted via a hearsay exception that is not firmly rooted unless a court determines the statement possesses particularized guarantees of trustworthiness.¹²² A statement against interest is not a firmly rooted exception to the hearsay rule.¹²³ Thus, under the CAAF’s holding in *Scheurer*,¹²⁴ a military judge may not admit Sailor Jones’s statement unless the court finds that the statement possesses particularized guarantees of trustworthiness.¹²⁵ However, as discussed below, if nontestimonial hearsay is no longer subject to Confrontation Clause scrutiny, different rules apply.

If the CAAF revisits its holding in *Scheurer* and holds that nontestimonial hearsay is not subject to Confrontation Clause scrutiny, with the exception of Military Rule of Evidence 807,¹²⁶ reliability factors are no longer of any consequence to the admission of hearsay.¹²⁷ As such, under the facts of this

¹¹⁹ 62 M.J. at 100.

¹²⁰ 448 U.S. 56 (1980).

¹²¹ *Scheurer*, 62 M.J. at 106; *see also* *United States v. Rankin*, 64 M.J. 348, 353 (2007) (holding that *Roberts* continues to govern admissibility of nontestimonial hearsay); *United States v. Magyari*, 63 M.J. 123, 128 (2006) (applying the *Roberts* framework to nontestimonial hearsay).

¹²² *See Roberts*, 448 U.S. at 66.

¹²³ *See Lilly v. Virginia*, 527 U.S. 116 (1999). Additionally, residual hearsay is not a firmly rooted exception to the hearsay rule. *See Idaho v. Wright*, 497 U.S. 805 (1990).

¹²⁴ 62 M.J. at 100.

¹²⁵ *Id.* at 106.

¹²⁶ Military Rule of Evidence 807 states in relevant part:

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

MCM, *supra* note 8, MIL R. EVID. 807. Though premised on the Supreme Court’s holding in *Ohio v. Roberts*, Military Rule of Evidence 807 is a statutory rule. That said, the CAAF will likely determine that the statutory requirement of circumstantial guarantees of trustworthiness continue to govern nontestimonial statements admitted pursuant to this hearsay exception.

¹²⁷ Of course, government counsel may nevertheless be restricted in admitting unreliable nontestimonial hearsay statements by state constitutions, statutes, or case law.

scenario, a military judge can admit Sailor Jones's statement against interest against Sailor Smith without analyzing whether the statement has particularized guarantees of trustworthiness.

Third, if nontestimonial hearsay remains subject to Confrontation Clause scrutiny, "the government must convince an appellate court beyond a reasonable doubt that the [erroneous admission of such evidence] was not prejudicial."¹²⁸ As an example, assume Sailor Smith is charged with rape. At Sailor Smith's court-martial, over objection of the defense, the government introduces an out-of-court statement pursuant to the excited utterance exception to the hearsay rule.¹²⁹ After a lengthy trial by members, Sailor Smith is convicted of rape and sentenced to ten years confinement, a Bad Conduct Discharge, and total forfeitures.

During appellate review, the Navy-Marine Court of Criminal Appeals (NMCCA) determines the statement at issue is nontestimonial. Further, the court opines that pursuant to its prior holdings, the statement did not qualify as an excited utterance. The next issue the court must decide is what standard of review to apply when determining whether Sailor Smith's conviction should be reversed. Under *United States v. Scheurer*,¹³⁰ because nontestimonial hearsay remains subject to Confrontation Clause scrutiny,¹³¹ the erroneous admission of this statement constitutes constitutional error. As such, the NMCCA must reverse Sailor Smith's conviction unless the government is able to convince the court beyond a reasonable doubt that the error was not prejudicial.¹³²

However, assume the CAAF revisits its decision in *Scheurer* and opines that admissibility of nontestimonial hearsay is not subject to Confrontation Clause scrutiny. Under this scenario, the trial court's erroneous admission of the statement is a nonconstitutional error. Thus, the possibility that Sailor Smith's conviction will be reversed is greatly diminished. The NMCCA can no longer require the government to show beyond a reasonable doubt that the error was not prejudicial.¹³³ Instead, the NMCCA must apply the "less demanding test of harmless error"¹³⁴ under Article 59(a)¹³⁵ when determining

¹²⁸ See *United States v. Powell*, 49 M.J. 460, (1998) (citing *United States v. Adams*, 44 M.J. 251, 252 (1996)); see also *United States v. Adams*, 44 M.J. 251, 252 (1996) ("If the errors were of a constitutional dimension, the test is whether the reviewing court 'is able to declare a belief that it was harmless beyond a reasonable doubt.'" (citing *United States v. Bins*, 43 M.J. 79, 86 (1995))).

¹²⁹ An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See MCM, *supra* note 8, MIL R. EVID. 803(2).

¹³⁰ 62 M.J. at 100.

¹³¹ *Id.* at 106.

¹³² See *Powell*, 49 M.J. at 460 (citing *United States v. Adams*, 44 M.J. 251, 252 (1996)).

¹³³ See *id.*

¹³⁴ See *United States v. Turner*, 28 M.J. 487, 490 n.5 (C.M.A. 1989).

whether the erroneous admission of the nontestimonial hearsay statement requires reversal of Sailor Smith's conviction.

As the scenarios above illustrate, the determination of whether the Confrontation Clause applies to nontestimonial hearsay in trials by courts-martial is an issue of great importance to military justice practitioners. If we accept, as we must, that the purpose of the Confrontation Clause is to test the reliability of testimonial hearsay through the "crucible of cross-examination[.]"¹³⁶ then it is illogical to read a secondary purpose into this clause. After all, if the Framers intended differing levels of protection for testimonial and nontestimonial statements, they would have made this distinction in the Sixth Amendment itself. Thus, the more logical approach is for the CAAF to hold that Confrontation Clause scrutiny is not required for statements that do not bear testimony. As such, when provided with an opportunity, the CAAF should reexamine its decision in *United States v. Scheurer*¹³⁷ and conclude that nontestimonial hearsay is no longer subject to Confrontation Clause scrutiny.

IV. **CRAWFORD'S IMPACT ON CONFRONTATION CLAUSE SCRUTINY OF BUSINESS AND PUBLIC RECORDS**

A. ***Crawford's* Discussion of the Nontestimonial Nature of Business Records Should Not Be Interpreted as Establishing a Per Se Rule Excluding Business and Public Records from Confrontation Clause Scrutiny**

The Supreme Court's refusal to adopt a comprehensive definition of the term "testimonial"¹³⁸ has led to inconsistent opinions in state and federal courts regarding the Confrontation Clause's applicability to business and public records. Currently, some courts assume that any statements contained within

¹³⁵ Article 59(a) states: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." See UCMJ art. 59(a) (2005).

¹³⁶ In *Crawford*, the Supreme Court stated that "[when] testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

¹³⁷ 62 M.J. 100, 106 (2005).

¹³⁸ The Supreme Court explicitly refused to adopt a comprehensive definition of the term "testimonial" in *Crawford v. Washington*. Instead, the Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68. Further, in *Davis v. Washington*, the Court again passed on an opportunity to provide a comprehensive definition of the term "testimonial." See *Davis*, 126 S. Ct. at 2266.

business and public records are per se nontestimonial.¹³⁹ However, other courts opine that Confrontation Clause scrutiny remains applicable to statements contained within the contours of business or public records.¹⁴⁰

In *United States v. Ellis*,¹⁴¹ the Seventh Circuit Court of Appeals held that statements contained within a business record are per se nontestimonial.¹⁴² The facts of *Ellis* are not unique; instead, they occur across the country everyday. *Ellis* was pulled over by law enforcement after a police officer noticed he was driving erratically.¹⁴³ Though *Ellis* failed initial field sobriety tests, a subsequent field test used to determine the presence of alcohol in his system was negative.¹⁴⁴ Subsequent to these tests, *Ellis* agreed to have his blood and urine tested at a local hospital for the presence of drugs.¹⁴⁵ After being taken into custody, an inventory search of *Ellis*'s vehicle led to the discovery of a loaded .22 caliber revolver.¹⁴⁶ Further, the laboratory results of *Ellis*'s blood and urine revealed the presence of methamphetamine in his system at the time of his arrest.¹⁴⁷ Based on this evidence, *Ellis* was charged with being a user of a controlled substance in possession of a firearm in violation of 18 U.S.C. § 922(g)(3).¹⁴⁸

As part of its case and, over *Ellis*'s objection that was premised on *Crawford v. Washington*,¹⁴⁹ the government introduced a certified copy of the results of *Ellis*'s blood and urine tests.¹⁵⁰ The government successfully argued that although the records were prepared pursuant to a criminal investigation, they were nevertheless admissible under the business records exception¹⁵¹ to the

¹³⁹ See *infra* note 164. Courts which opine that statements contained within business records are per se nontestimonial premise their opinions on a scintilla of dicta found in the majority's opinion in *Crawford*. Specifically, in *Crawford*, the majority stated that "[m]ost of the [historic] hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy." *Crawford*, 541 U.S. at 56.

¹⁴⁰ See *infra* note 180.

¹⁴¹ 460 F.3d 920 (7th Cir. 2006).

¹⁴² See *id.* at 924.

¹⁴³ *Id.* at 921.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* at 922.

¹⁴⁸ 18 U.S.C. § 922(g)(3) states in pertinent part: "It shall be unlawful for any person who is an unlawful user of . . . any controlled substance to ship or transport in interstate commerce, or possess in or affecting commerce, any firearm or ammunition . . ." 18 U.S.C. § 922(g)(3) (LEXIS 2007).

¹⁴⁹ 541 U.S. 36 (2004).

¹⁵⁰ See *Ellis*, 460 F.3d at 922.

¹⁵¹ Business records are defined under Federal Rule of Evidence 803(6), which provides in pertinent part as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity--A memorandum, report, record, or data compilation, in any form, of acts, events,

hearsay rule.¹⁵² Instead of calling the analysts that performed the scientific tests to the witness stand, the government admitted the laboratory records during the testimony of the arresting officer.¹⁵³ During his testimony, the officer testified that he took Ellis to the hospital, watched a lab technician draw Ellis's blood, and watched Ellis urinate in a cup.¹⁵⁴ The records that were admitted against Ellis indicated the reason for the tests was "Reasonable Suspicion/Cause" and that the blood drug-screen was requested by the arresting officer.¹⁵⁵ Further, the records stated that the tests conducted by the hospital and two different companies, each indicated Ellis had methamphetamine in his system at the time of his arrest.¹⁵⁶ The jury convicted Ellis of being a user of a controlled substance in possession of a firearm.¹⁵⁷

In affirming Ellis's conviction, the Seventh Circuit held that the records introduced by the government were nontestimonial even though "they were created under police supervision and *during* an investigation for the purpose of determining whether a crime had been committed."¹⁵⁸ In short, the court held that even though the declarants knew their statements would be used to prove an essential element of a crime at a later trial, these statements were nevertheless nontestimonial. In support of its holding, the *Ellis* court relied on a scintilla of dicta found in the Supreme Court's opinion in *Crawford*.¹⁵⁹

The *Ellis* court's support for asserting business records are per se nontestimonial is premised on the majority's response in *Crawford* to Chief Justice Rehnquist's statement in his concurring opinion that "there were always exceptions to the general rule of exclusion"¹⁶⁰ of testimonial hearsay.¹⁶¹ Specifically, in dicta, the Court stated that most of the historic exceptions to the

conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(b)(6).

¹⁵² *Ellis*, 460 F.3d at 924.

¹⁵³ *Id.* at 922.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 924.

¹⁵⁹ *See id.* at 924 (citing *Crawford v. Washington*, 541 U.S. 36, 56 (2004)).

¹⁶⁰ *Crawford v. Washington*, 541 U.S. 36, 73 (2004) (Rehnquist C.J., concurring in judgment).

¹⁶¹ *See id.* at 56.

exclusion of hearsay evidence “covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”¹⁶² From this sentence, the *Ellis* court broadly asserts that *Crawford* makes “it . . . clear that statements embodied in a business record are [per se] nontestimonial.”¹⁶³ To fully understand the ramifications of the *Ellis* court’s opinion, one must follow this reasoning to its logical conclusion.

Under *Ellis*, any statement contained in a business record, even one that clearly bears witness against a criminal defendant, is per se excluded from Confrontation Clause scrutiny. The Seventh Circuit’s interpretation of *Crawford* removes prior testimony from Confrontation Clause scrutiny merely because the testimonial statement itself is contained within a statutorily created exception to the hearsay rule. Though this interpretation of *Crawford* has been adopted by many courts,¹⁶⁴ a careful reading of *Crawford* suggests this line of reasoning has already been rejected by the Supreme Court.

In *Crawford*, the Court explicitly rejected Chief Justice Rehnquist’s assertion in his concurring opinion that the testimonial nature of a statement does nothing to undermine the wisdom of a hearsay exception.¹⁶⁵ Importantly, the Court did not qualify this statement. The Court did not agree that the wisdom of the business or public records exceptions to the hearsay rule eliminates the necessity to subject testimonial statements contained therein to Confrontation Clause scrutiny. Instead, in rejecting the line of reasoning advanced by the Chief Justice, the Court stated:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern

¹⁶² *Id.*

¹⁶³ *Ellis*, 460 F.3d at 924 (citing *Crawford*, 541 U.S. at 56).

¹⁶⁴ See also *United States v. Hagege*, 437 F.3d 943, 958 (9th Cir. 2006) (business records are not subject to Confrontation Clause scrutiny); *United States v. McIntosh*, No. 05-1782, 2006 WL 1158897, at *1 (7th Cir. May 3, 2006) (unpublished order) (business records are not testimonial evidence); *United States v. King*, 161 F. App’x. 296 (4th Cir. 2006) (unpublished opinion) (citing *Crawford*, 541 U.S. at 56 for the proposition that business records are not testimonial evidence); *United States v. Jamieson*, 427 F. 3d 394, 411 (6th Cir. 2005) (business records are not testimonial); *United States v. Feliz*, 467 F. 3d 227, 233-234, 237 (2d Cir. 2006) (business and public records are not testimonial evidence even when the declarant knows the statement will be used in a later trial); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (“[D]rug certificates are well within the public records exception to the Confrontation Clause.”); *State v. Forte*, 629 S.E.2d 137, 143-44 (N.C. 2005) (holding that reports properly classified as business or public records are nontestimonial).

¹⁶⁵ *Crawford*, 541 U.S. at 56 n.7.

hearsay exception, even if that exception might be justifiable in other circumstances.¹⁶⁶

A fair reading of this passage reveals that despite the Court's dicta in *Crawford*,¹⁶⁷ testimonial statements remain subject to Confrontation Clause scrutiny even when cloaked within a business or public record. For further support of this position, one need not look further than the Supreme Court's opinion in *California v. Green*.¹⁶⁸ In *Green*, the Court stated: While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest . . . the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.¹⁶⁹

Thus, while hearsay rules and the Confrontation Clause are similar, they are not conterminous.¹⁷⁰ The right to be confronted by one's accuser is a fundamental right¹⁷¹ that is embodied in the Confrontation Clause.¹⁷² The Confrontation Clause, unlike the rules of hearsay, is not governed by the vagaries of the rules of evidence.¹⁷³ If the Court intended to render the Confrontation Clause powerless to prevent law enforcement involvement in the production of testimony, it's fair to reason they would have made this clear. Instead, in *Crawford*, the Court noted that "leaving the regulation of [testimonial] out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."¹⁷⁴ Thus, in partially overruling *Ohio v. Roberts*¹⁷⁵ with respect to testimonial statements, the Court opined that the Confrontation Clause, coupled with the rules of evidence, govern the admissibility of testimonial statements.¹⁷⁶

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 56.

¹⁶⁸ 399 U.S. 149 (1970). Though *Green* was decided in 1970, post-*Crawford*, *Green* remains relevant because it stands for the proposition that the Confrontation Clause and the hearsay rules are not conterminous. *See id.* at 155-56. As such, though a testimonial hearsay statement contained within a business record may satisfy the business record exception to the hearsay rule, courts are nevertheless required to subject such statements to Confrontation Clause scrutiny prior to admitting them into evidence against a criminal defendant.

¹⁶⁹ *Id.*

¹⁷⁰ *See Dutton v. Evans*, 400 U.S. 74, 86 (1970).

¹⁷¹ *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (holding that the Sixth Amendment's right to confrontation is a fundamental right).

¹⁷² The Sixth Amendment's Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

¹⁷³ *See Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹⁷⁴ *Id.* at 51.

¹⁷⁵ 448 U.S. 56 (1980).

¹⁷⁶ *See Crawford*, 541 U.S. at 61.

As discussed below, while a hearsay exception may be the vehicle for a document's admissibility, "the vehicle does not determine the [testimonial] nature of the out-of-court statement."¹⁷⁷

As the Second District Court of Appeal of Florida in *Johnson v. State*¹⁷⁸ opined: "[An] out-of-court statement does not lose its testimonial nature merely because it is contained in a business record."¹⁷⁹ Instead, as many courts have held,¹⁸⁰ it's requisite to determine the testimonial nature of statements contained within a business or public record. When a statement does not bear witness against a criminal defendant, the Confrontation Clause is not applicable. However, when a statement bears witness, absent waiver by forfeiture,¹⁸¹ the Confrontation Clause requires that the accused be given an opportunity to be confronted by his accuser.

¹⁷⁷ *Johnson v. State*, 929 So. 2d 4, 8 (Fla. 2d DCA 2005) (holding that "the admission of [a] Florida Department of Law Enforcement report as a business record without giving appellant the right to examine the author of the report was reversible error.").

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 8.

¹⁸⁰ *See Shiver v. State*, 900 So. 2d 615, 618 (1st DCA 2005) (holding that part of a breath test affidavit admitted under the business records exception to the hearsay rule constituted testimonial hearsay evidence because "it contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial."); *Martin v. State*, 936 So. 2d 1190, 1191 (1st DCA 2006) (holding that admission of a Florida Department of Law Enforcement report that indicated seized substances were contraband in lieu of presenting the person that performed the tests, violates the Confrontation Clause even though the report was admitted as a business record); *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006) (holding that a lab report identifying a seized substance from a criminal defendant as cocaine was testimonial evidence); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (overruling its prior decision in *Derosa v. District Court*, 985 P. 2d 157 (1999) and holding that although an affidavit of a person who withdraws blood for chemical analysis is admissible under a state statute, such affidavits are testimonial statements and as such, "their admission, in lieu of live testimony, . . . violate[s] the Confrontation Clause."); *State v. Berezansky*, 899 A.2d 306, 312 (N.J. Super. Ct. App. Div. 2006) (holding that a laboratory certificate "prepared specifically in order to prove an element of [a] crime and offered in lieu of producing the . . . individual who actually performed the test" is a violation of the Confrontation Clause); *People v. Lebrecht*, 823 N.Y.S.2d 824, 826-27 (N.Y. Sup. Ct. 2006) (holding that *Crawford* requires "scrutiny of the contours of state law business record jurisprudence to determine whether such a record, otherwise admissible as a business record under state law, nevertheless remains testimonial in nature, entitling an accused to confront its preparer."); *People v. Pacer*, 6 N.Y.S.3d 504, 509 (N.Y. App. Div. 2006) (rejecting the government's assertion that business and public records are not subject to Confrontation Clause scrutiny); *Tennessee v. Henderson*, 554 S.W.2d 117, 118 (Tenn. 1977) (citing *Pointer v. Texas*, 380 U.S. 400 (1965)) (holding that even though laboratory records fall within the business records exception to the hearsay rule, courts must nevertheless determine whether admission of such documents violate the Confrontation Clause).

¹⁸¹ Forfeiture by wrongdoing is defined as follows: "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MCM, *supra* note 8, MIL. R. EVID. 804(b)(6). The Supreme Court has held that "the rule of forfeiture extinguishes confrontation claims on essentially equitable grounds . . ." *Crawford*, 541 U.S. at 61 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

B. Post-*Crawford* Analysis of Military Court’s Treatment of Hearsay Statements Contained Within Business and Public Records

In the wake of *Crawford v. Washington*,¹⁸² military courts continue to struggle with the proper application of the Confrontation Clause to statements contained within business and public records. Though *Crawford* was decided more than two years ago, surprisingly few military cases germane to *Crawford*’s application to business and public records have been decided. During its 2006 term, the CAAF, in the case of *United States v. Magyari*,¹⁸³ provided guidance on *Crawford*’s application to business and public records for the first time.

In *Magyari*, the appellant was convicted of wrongful use of methamphetamine.¹⁸⁴ Like most drug use cases in the military, the government’s case was premised on a positive urine sample that was obtained in the course of a random urinalysis.¹⁸⁵ In lieu of calling the multitude of lab technicians that performed the scientific tests on the appellant’s urine, the government called a quality assurance officer from the Navy Drug Screening laboratory.¹⁸⁶ Though the quality assurance officer was not personally involved in handling the appellant’s urine, he testified about the procedures used at the laboratory and how the appellant’s positive results were generated.¹⁸⁷ On appeal, the appellant argued that the statements contained within the laboratory reports were testimonial hearsay and that their admission was a violation of the Confrontation Clause.¹⁸⁸

¹⁸² 541 U.S. at 36.

¹⁸³ 63 M.J. 123 (2006); *see also* *United States v. Wahila*, No. S30910, 2006 WL 3523771, at *1 (A.F. Ct. Crim. App. Nov. 17, 2006) (“Data entries made by laboratory technicians testing urine samples submitted as part of a random urinalysis inspection program are not testimonial hearsay within the meaning of *Crawford*.”); *United States v. Shand*, No. 36552, 2006 WL 3085718 (A.F. Ct. Crim. App. Oct. 19, 2006) (holding that a laboratory report containing the results of a random urinalysis is nontestimonial hearsay); *United States v. Spain*, No. S30878, 2006 WL 2843621, at *1 (A.F. Ct. Crim. App. Sept. 11, 2006) (holding that a laboratory report containing the results of a random urinalysis is nontestimonial hearsay); *United States v. Stafford*, No. S30928, 2006 WL 2547779, at *1 (A.F. Ct. Crim. App. Aug. 31, 2006) (holding that a laboratory report containing the results of a random urinalysis is nontestimonial hearsay); *United States v. Ryan*, No. 9900374, 2005 WL 3591183, at *4 (N-M. Ct. Crim. App. Dec. 30, 2005) (unpublished) (“[A] report of laboratory analysis of a urine sample prepared in accordance with standard scientific and technical procedures and admitted as a business record does not comprise the type of ‘testimonial hearsay’ condemned in *Crawford*.”); *United States v. Rankin*, 64 M.J. 348, 349 (2007) (holding that service record entries documenting an accused’s period of unauthorized absence are nontestimonial hearsay). *See infra* Part V.C for an in-depth discussion of the CAAF’s opinion in *Rankin*.

¹⁸⁴ *Magyari*, 63 M.J. at 124.

¹⁸⁵ *Id.* at 125.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 126.

In ruling on *Crawford's* application to statements contained within business records, the CAAF opined as follows:

As spelled out below, in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not testimonial in nature.¹⁸⁹

Under the facts of the appellant's random urinalysis case, his urine sample was not obtained in furtherance of a law enforcement investigation.¹⁹⁰ As such, the statements contained within the laboratory reports admitted under the business record exception were held to be nontestimonial.¹⁹¹ However, the CAAF was very specific in their holding.¹⁹² The court stated: "[W]e reach this conclusion based on the facts of this case."¹⁹³ The CAAF did not equivocate in rejecting the government's contention that business and public records are per se nontestimonial. Instead, the court held that "[t]he government's contention that lab reports are inherently not testimonial because they are business and public records goes too far."¹⁹⁴ Importantly, albeit in dicta, the CAAF further opined that laboratory reports may be testimonial when they are "prepared at the behest of law enforcement in anticipation of a prosecution"¹⁹⁵ As discussed below, this language has significant implications for military justice practitioners.

Under *Magyari*, "laboratory results or other types of routine records [business or public records] may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence."¹⁹⁶ While unfortunate for the government,

¹⁸⁹ *Id.* at 124-25 (internal quotations omitted).

¹⁹⁰ *See id.* at 127.

¹⁹¹ *See id.*

¹⁹² *See id.* at 127.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (citing *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005)).

¹⁹⁶ *Id.* What was not discussed by the court was the significance of the actual testing procedures. The first test from the Command urinalysis inspection is tested to determine if any illegal substance in the urine is above the Department of Defense cutoff levels for that respective substance. The cutoff level is directly tied to the ability of the government to prosecute under Article 112a UCMJ. Once a specimen tests above the cutoff level, the sample is retested at least twice using more sensitive equipment to verify the original positive test. Once this is done and the government is pursuing charges, a litigation package is prepared concerning the positive specimen results. At the point that the first "screening" test is positive above the Department of Defense cutoff, all lab personnel know the specimen is being tested with an eye towards prosecution, although there does not have to be a prosecution. The Command could certainly use administrative means to punish and/or separate a person from the military. But the fact that the Command could do something other

when records are prepared in furtherance of a specific investigation, *Magyari* appears to require that an accused be confronted by the personnel that performed the tests contained in the report.¹⁹⁷ Though *Magyari* is binding on all service courts, the NMCCA has opined that the Confrontation Clause is not applicable to laboratory reports prepared in furtherance of a specific criminal investigation.¹⁹⁸

In *United States v. Harcrow*, the appellant was arrested in his home by civilian authorities for failure to appear in civilian court on charges unrelated to his court-martial.¹⁹⁹ During the course of the appellant's arrest, "law enforcement personnel seized drug paraphernalia, some of which contained residue of heroin and cocaine."²⁰⁰ At the appellant's court-martial, the government admitted reports containing the results of laboratory testing of residue on metal spoons and plastic bags that were seized from the appellant's residence.²⁰¹

The reports from the Commonwealth of Virginia, Department of Criminal Justice Service, Division of Forensic Science, indicated there was heroin and cocaine residue on the metal spoons and plastic bags.²⁰² Citing to *Magyari*²⁰³ and opinions from two other jurisdictions,²⁰⁴ the *Harcrow* court stated: "Our superior court has recently held that Navy Drug Screening Laboratory documents reporting the results of urinalysis testing are not testimonial hearsay and are, as business records, admissible under a firmly rooted hearsay exception."²⁰⁵ While the CAAF in *Magyari* held that laboratory documents reporting the results of a *random* urinalysis were nontestimonial, the

than try the case should be irrelevant when the results can be used at trial. If this were not the case, any lab report could be moved from the testimonial stage since the Command could decide to use administrative procedures for any crime. According to *Magyari*, once the government initiates testing with an eye towards prosecution, the lab results can become testimonial. The court did not address the retesting issue in *Magyari* at all (nor did the Defense object at trial or call the lab witnesses to the stand). If the court is properly presented with the underlying facts of testing procedures, these secondary lab results can be testimonial under *Crawford*. Phone Interview with LCDR Kevin Gerrity, Military Justice Department Head, Naval Justice School, Newport, RI (Sep. 28, 2007).

¹⁹⁷ *See id.*

¹⁹⁸ *United States v. Harcrow*, No. 200401923, at *8-9 (N-M. Ct. Crim. App. Oct. 30, 2006) (unpublished).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 63 M.J. 123 (2006).

²⁰⁴ The *Harcrow* court cited to *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (holding that reports certifying the results of laboratory drug tests are public records and, accordingly, are not testimonial) and *People v. Johnson*, 18 Cal.Rptr. 3d 320 (Cal. Ct. App. 2004) (stating in dicta that a chemical analysis report was nontestimonial). *Harcrow*, No. 200401923 at *8-9.

²⁰⁵ *Id.* at 8 (citing *Magyari*, 63 M.J. at 127-28).

court said much more than that.²⁰⁶ However, with no further Confrontation Clause analysis, the *Harcrow* court affirmed the appellant's conviction and opined that the forensic laboratory reports were nontestimonial.²⁰⁷

What is most troubling about the *Harcrow* court's opinion is its reliance on *Commonwealth v. Verde*,²⁰⁸ a Supreme Judicial Court of Massachusetts case. In *Verde*, a suspected controlled substance was found in the defendant's residence.²⁰⁹ This substance was tested by a laboratory chemist that determined the substance was cocaine.²¹⁰ At trial, the government presented the chemist's report of findings in lieu of her live testimony.²¹¹ Though the report was prepared in furtherance of a specific criminal investigation, the court found no Confrontation Clause violation.²¹² In affirming the defendant's conviction, the *Verde* court opined that because the report was admitted under the public records exception,²¹³ there was no Confrontation Clause violation.²¹⁴ The reason the *Harcrow* court's reliance on *Verde* is troubling is because of the CAAF's clear language in *Magyari*. In *Magyari*, the CAAF unambiguously stated that the testimonial nature of a report is not premised on its characterization as a business or public record.²¹⁵ Yet, the *Verde* court clearly held that laboratory records are nontestimonial simply because they are admissible under the public records exception.²¹⁶

In sum, the *Harcrow* court disregarded the CAAF's statement in *Magyari* that laboratory reports may be testimonial when "prepared at the behest of law enforcement in anticipation of a prosecution."²¹⁷ Instead of following *Magyari*, the *Harcrow* court found no Confrontation Clause violation even though the statements admitted into evidence against the appellant were prepared at the behest of law enforcement in anticipation of a specific

²⁰⁶ The CAAF was quite clear that admission of the records indicating the accused tested positive for methamphetamine in lieu of live testimony did not violate the Confrontation Clause because the accused's urine was not obtained at the behest of law enforcement in furtherance of a specific criminal prosecution. *See Magyari*, 63 M.J. at 127.

²⁰⁷ *See Harcrow*, No. 200401923 at *9.

²⁰⁸ 827 N.E.2d 701 (Mass. 2005).

²⁰⁹ *Id.* at 703.

²¹⁰ *Id.*

²¹¹ *See id.* at 704.

²¹² *See id.* at 705.

²¹³ The *Harcrow* court incorrectly stated that the drug certificates at issue in *Verde* were admitted under the business records exception. However, because the business and public records exceptions to the hearsay rule have come to be nearly one in the same, this error is immaterial. *See United States v. Harcrow*, No. 200401923, at *8 (N-M. Ct. Crim. App. Oct. 30, 2006) (unpublished).

²¹⁴ *See Verde*, 827 N.E.2d at 705.

²¹⁵ *See United States v. Magyari*, 63 M.J. 123, 127 (2006).

²¹⁶ *Verde*, 827 N.E.2d at 705.

²¹⁷ *Magyari*, 63 M.J. at 127.

prosecution.²¹⁸ The *Harcrow* court's reliance on *Verde* is misplaced and in direct contradiction to the CAAF's opinion in *Magyari*.²¹⁹ As such, the CAAF should reverse the decision of the NMCCA's decision in *Harcrow* and explicitly state again that business and public records are not per se excluded from Confrontation Clause scrutiny.²²⁰

C. Suggested Approach for Analyzing the Admissibility of Hearsay Statements Contained Within Business or Public Records

Certain business or public records will never contain testimonial declarations. For instance, logbooks containing annotations regarding the time a ship sets out to sea, the beginning and ending of flight operations, or the amount of rainfall on a given day. These documents are not made in anticipation of litigation and, under no conceivable scenario, can such declarations be deemed to bear witness against a criminal defendant. When the government seeks to introduce documents such as these into evidence, it's only limited by the vagaries of the respective jurisdiction's hearsay rules. As such, when the government seeks to admit such documents, it need only comply with the jurisdiction's rules pertaining to the business or public records exception to the hearsay rule. However, as discussed below, the government's burden becomes more substantial when it seeks to introduce documents that contain testimonial statements.

When the government seeks to introduce documents that contain testimonial hearsay. Limitations are arguably placed on this evidence by both the Confrontation Clause and the jurisdiction's hearsay rules.²²¹ For example, when a Sailor misses ship's movement, military regulations require that a NAVPERS form 1070/613²²² entry be made.²²³ Specifically, regulations require the following entry:

²¹⁸ See *Harcrow*, No. 200401923 at *9.

²¹⁹ See *Magyari*, 63 M.J. at 127.

²²⁰ Despite the CAAF's rejection of the government's argument in *United States v. Magyari* that business and public records are per se nontestimonial, the government will not concede this point. As late as 11 August 2006, in a brief to the CAAF in the case of *United States v. Rankin*, the government cited *Crawford v. Washington* for the proposition that business records are per se nontestimonial. See Brief of Appellee at 7, *United States v. Rankin*, No. 06-0119 (CAAF Aug. 11, 2006) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

²²¹ The current state of the law in this area is unsettled and will remain so until the Supreme Court directly addresses this issue.

²²² A NAVPERS 1070/613 serves "as a chronological record of significant miscellaneous entries which are not provided for elsewhere or where more detailed information may be required to clarify entries on other pages of the U.S. Navy Enlisted (Field) Service Record." U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1070-320 (22 Aug. 2002).

²²³ U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1600-040 (9 Sept. 2004).

[Sailor X on] (date): Missed sailing of this vessel from (place of sailing) on (date), enroute to (destination). Member (had/did not have) knowledge of the scheduled time for movement, and (had/did not have) knowledge of the ship's destination. Movement of this vessel (was/was not considered substantial – i.e., not merely a shift of berths in homeport, etc.).²²⁴

This required entry is designed to provide the government with the means to prove the elements of the government's case against a Sailor through use of documentary evidence. Each of the requisite annotations are elements of the charge of missing ship's movement.²²⁵ Thus, because the statements contained within the NAVPERS 1070/613 allege the Sailor knew of the ship's scheduled movement, presumably,²²⁶ the declarant is bearing witness against the Sailor.

When the government seeks to introduce this document into evidence, it must satisfy both the Confrontation Clause and the military rules of evidence. The government may easily satisfy the business or public records exception to the hearsay rule by showing the document was generated in the ordinary course of business. However, prior to conducting a hearsay analysis, a court must first determine whether admission of the document would violate the Confrontation Clause due to the existence of testimonial statements contained therein.²²⁷ If a court determines the document contains testimonial statements, absent waiver by forfeiture,²²⁸ the government must produce the declarant of the testimonial statements.²²⁹ The Confrontation Clause dictates that under the facts of this scenario, the Sailor must be given an opportunity to test the reliability of the declarant's assertions "through the crucible of cross-examination."²³⁰

²²⁴ *Id.*

²²⁵ See UCMJ art. 87 (2005).

²²⁶ There are no judicial opinions addressing this issue.

²²⁷ See *Tennessee v. Henderson*, 554 S.W.2d 117, 118 (1977). In *Henderson*, a case decided by the Supreme Court of Tennessee, the court held that laboratory reports admitted into evidence against a criminal defendant must satisfy the Confrontation Clause and the business records exception to the hearsay rule. See *id.*

²²⁸ See *supra* note 181 for a detailed explanation of the forfeiture doctrine.

²²⁹ See *Diaz v. United States*, 223 U.S. 442, 450-52 (1912) (holding that absent waiver, when the government seeks to introduce an autopsy report against an accused, the government must comply with both the rules of hearsay and the Confrontation Clause). Thus, under *Diaz*, an accused is "entitled to meet witnesses [against him] face to face." *Id.* at 451. This rule of constitutional jurisprudence retains its force even when the testimony the witness provides is contained within a business or public record.

²³⁰ See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

D. Practical Implications for Military Justice Practitioners in Light of *Magyari*

The CAAF's opinion in *United States v. Magyari*²³¹ has profound implications for military justice practitioners. Specifically, post-*Magyari*, "lab results or other types of routine records may become testimonial where a defendant is already under investigation and where the testing is initiated . . . to discover incriminating evidence."²³² Three examples of common situations are: (1) command-directed urinalysis; (2) DNA/blood tests; and (3) calibration certificates.

First, if the government seeks to admit a report of the results of a urinalysis prepared in anticipation of prosecution, it must afford the accused an opportunity to cross-examine the technicians that prepared the report. As an example, assume a Sailor is suspected of wrongful use of cocaine. During the course of an investigation, the Sailor provides a voluntary or involuntary urine sample.²³³ Subsequently, the Navy Drug Screening Laboratory notifies the command that the Sailor's urine tested positive for cocaine. During the ensuing court-martial, the government, over objection of the defense, seeks to introduce a urinalysis laboratory report. The laboratory report contains data entries made by technicians that performed tests on his urine. The issue for the military judge is whether the data entries contained in the urinalysis report are testimonial statements. Under *Magyari*, because the Sailor's urine was tested in furtherance of a specific prosecution, the data entries are likely testimonial.²³⁴ Thus, under the facts of this scenario, the Confrontation Clause dictates that the Sailor be given an opportunity to cross-examine each of the technicians that performed tests on his urine.

Second, if the government seeks to admit the results of DNA or blood tests performed in furtherance of a specific prosecution, the accused must be given the opportunity to cross-examine the technicians that conducted the forensic tests. Assume a female is raped while at her residence in base housing. The base police suspect a certain Sailor committed the rape. In furtherance of their investigation, the police obtain a vial of the accused's blood and send it to a laboratory to be tested. The tests reveal that the accused's DNA matches the DNA retrieved from the rape victim after she was assaulted. During the Sailor's court-martial, the government, over objection of the defense, seeks to introduce

²³¹ 63 M.J. 123 (2006).

²³² *Id.* at 127.

²³³ A Sailor can be ordered to provide a urine sample by a competent military authority that determines probable cause exists to believe that his urine contains evidence of illegal drug use. *See* MCM *supra* note 8, MIL R. EVID. 315.

²³⁴ *See Magyari*, 63 M.J. at 127.

the results of the DNA test. The issue for the military judge is whether the data entries contained in the results of the DNA test are testimonial statements. Under *Magyari*, because the test was conducted in furtherance of a specific prosecution, the data entries are likely testimonial.²³⁵ Thus, the Confrontation Clause dictates that the Sailor be given an opportunity to cross-examine each of the technicians that performed tests on his blood.

Third, an affidavit certifying that a breathalyzer machine was properly calibrated is probably nontestimonial hearsay. Assume a Sailor is pulled over by base police that witness him strike a pedestrian with his automobile. Subsequently, the police administer two breath tests which determine the Sailor's blood alcohol level to be .162 and .145. During the Sailor's court-martial, the government, over objection of the defense, seeks to introduce an affidavit certifying that the breathalyzer machine was properly calibrated when the tests were administered to the accused. The issue for the military judge is whether this affidavit is testimonial. Under *Magyari*, the affidavit would likely be deemed nontestimonial because the calibration tests were not performed in furtherance of a specific prosecution.²³⁶ As such, pursuant to the business or public records exception to the hearsay rule, the government can introduce the affidavit in lieu of the person that performed the calibration tests.

V. Treatment of Dual Purpose Hearsay Documents that Serve both Testimonial and Nontestimonial Purposes

Section IV analyzed the question of whether the Supreme Court established a bright line rule that all hearsay statements contained within business or public records are per se nontestimonial. This section analyzes whether dual purpose hearsay documents containing matters that serve both testimonial and nontestimonial purposes are subject to Confrontation Clause scrutiny.

V. TREATMENT OF DUAL-PURPOSE HEARSAY DOCUMENTS THAT SERVE BOTH TESTIMONIAL AND NONTESTIMONIAL PURPOSES

A. Determining Whether *Davis v. Washington's* Primary Purpose Test Extends Beyond the Context of Police Interrogations

In *Davis v. Washington*,²³⁷ discussed *supra* Part III.A, the Supreme Court opined that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that *the primary*

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ 126 S. Ct. 2266 (2006).

purpose of the interrogation is to enable police to meet an ongoing emergency.”²³⁸ An issue of great importance to military justice practitioners is whether the primary purpose test enunciated in *Davis*²³⁹ is limited to police interrogations. As discussed below, the *Davis* “primary purpose test” has limited application. A careful analysis reveals that the primary purpose test established in *Davis*²⁴⁰ should not be used to determine the testimonial nature of hearsay statements contained within documentary evidence.

In *Davis*, the issue before the Court on appeal was whether a Confrontation Clause violation occurred due to the admission of a 911 recording between the petitioner’s girlfriend and a 911 emergency operator.²⁴¹ In its opinion, the Court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that *the primary purpose of the interrogation* is to enable police to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecution.²⁴²

In affirming *Davis*’s conviction, the Court held that the statements to the 911 emergency operator were nontestimonial.²⁴³ The Court concluded “that the circumstances of [the girlfriend’s] interrogation objectively indicate the primary purpose [of the interrogation] was to enable police assistance to meet an ongoing emergency.”²⁴⁴

In analyzing whether the *Davis* “primary purpose test” has application beyond police interrogations, it’s requisite to consider the Court’s carefully chosen language. As one commentator has noted, “*Davis* phrases the [primary purpose] inquiry in terms of ‘the primary purpose of the interrogation,’ rather than the ‘primary purpose of the statement.’”²⁴⁵ If the Court intended for this primary purpose test to extend beyond police interrogations, its holding would have focused on the declarant’s statements. Instead, the Court’s holding focuses

²³⁸ *Id.* at 2273 (emphasis added).

²³⁹ *See id.* at 2273-74.

²⁴⁰ *See id.*

²⁴¹ *See id.* at 2270.

²⁴² *Id.* at 2273-74 (emphasis added).

²⁴³ *Id.* at 2277.

²⁴⁴ *Id.*

²⁴⁵ Craig W. Albee, *Confrontation Clause Issues After Crawford and Davis*, Sept. 29, 2006, <http://www.wisspd.org/html/training/ProgMaterials/Conf2006/CVsW.pdf>.

exclusively on the primary purpose of the interrogator's questions.²⁴⁶ Thus, absent guidance from the Supreme Court, the *Davis* primary purpose test should not be used to determine the testimonial nature of hearsay statements contained within documentary evidence. As I explain in Part V.B, such application of the *Davis* primary purpose test is equivalent to creating a new exception to the Confrontation Clause.

B. Adoption of a Primary Purpose Test to Determine the Testimonial Nature of Dual Purpose Hearsay Documents is Equivalent to Creating a New Exception to the Confrontation Clause

The purpose of the Sixth Amendment's Confrontation Clause is to ensure reliability of evidence.²⁴⁷ The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."²⁴⁸ It simply does not follow that this constitutional right can be disregarded so long as a testimonial statement serves a separate and distinct primary nontestimonial purpose.

An issue of great importance facing courts today is how to properly analyze the testimonial nature of documentary hearsay that serves both testimonial and nontestimonial purposes. Should a court's analysis be premised on the declarant's primary purpose for making the statements? Or, instead, should a court's analysis focus on whether the "statements [were] made under circumstances that would cause a reasonable witness to believe they could be used at trial."²⁴⁹ As posited below, when determining whether a statement is

²⁴⁶ For purposes of its opinion, the *Davis* Court considers the acts of 911 operators to be the acts of the police. See *Davis*, 126 S. Ct. at 2274 n.2.

²⁴⁷ See *Crawford v. Washington*, 541 U.S. 36, 61 (2004). "[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee." *Id.* As noted by the Army Court of Criminal Appeals:

The Supreme Court has stated that the Confrontation Clause envisions: "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

United States v. Simpson, 60 M.J. 674, 676 (Army Ct. Crim. App. 2004) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

²⁴⁸ *Crawford*, 541 U.S. at 61.

²⁴⁹ *Id.* at 52.

testimonial, a court must assess whether the statement bears testimony against an accused.²⁵⁰

The Confrontation Clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁵¹ In *Crawford*,²⁵² the Supreme Court determined that the Confrontation Clause applies to “‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”²⁵³ The Court did not state that the right to confrontation is limited to testing the reliability of testimonial statements made for the primary purpose of future use at trial. Instead, the Court held that statements are testimonial and subject to Confrontation Clause scrutiny when “[they are] made under circumstances that would cause a reasonable witness to believe they could be used at trial.”²⁵⁴

It is one thing to state that a criminal defendant has no right to test the reliability of a nontestimonial statement. However, it’s fallacious to hold that a statement that bears witness against a criminal defendant is not subject to Confrontation Clause scrutiny simply because it also serves a primary nontestimonial purpose. After all, despite the statement’s dual purpose nature, the need to test its reliability is not diminished. To hold otherwise is equivalent to replacing the *Ohio v. Roberts* reliability morass²⁵⁵ with a new exception to the Confrontation Clause.

Though one court has held otherwise,²⁵⁶ a criminal defendant has a right to subject testimonial statements to “the crucible of cross-examination”²⁵⁷ even if the statements are not made for the primary purpose of future use at trial. As discussed in the hypothetical below, the fact that a testimonial statement serves a separate and distinct nontestimonial purpose does not make such statement nontestimonial.

A good example of a dual purpose hearsay document is a NAVPERS 1070/606 (“Page 6”). Assume a Sailor is absent without leave for a period of seven years. Pursuant to an arrest warrant, the Sailor is arrested and returned to military control. In compliance with Navy regulations, a legal clerk makes a

²⁵⁰ See *id.* at 51.

²⁵¹ U.S. Const. amend. VI.

²⁵² 541 U.S. at 36.

²⁵³ *Id.* at 51.

²⁵⁴ *United States v. Magyari*, 63 M.J. 123, 126 (2006) (citing *Crawford*, 541 U.S. at 51-52).

²⁵⁵ 448 U.S. 56, 66 (1980).

²⁵⁶ See *United States v. Rankin*, 64 M.J. 348, 352 (2007) (adopting a primary purpose test); see also *infra* Part V.C for an in-depth analysis of the *Rankin* opinion.

²⁵⁷ *Crawford*, 541 U.S. at 61.

data entry on a NAVPERS form 1070/606.²⁵⁸ The data entry states the Sailor's unauthorized absence was terminated by apprehension. This data entry is premised on a nontestimonial purpose. That is, the legal clerk made the entry because she is required to do so pursuant to Navy regulations.²⁵⁹ However, does this nontestimonial purpose negate the possibility that the legal clerk's data entry is testimonial hearsay? To answer this question, consider one form of core testimonial evidence identified by the Supreme Court in *Crawford*.²⁶⁰

In *Crawford*, the Court opined that statements are testimonial "when made under circumstances that would cause a reasonable witness to believe they could be used at trial."²⁶¹ Under *Crawford's* legal framework, the legal clerk's data entry, though made for the primary purpose of complying with Navy regulations, is nevertheless testimonial hearsay if she reasonably believes it could be used at a later trial.²⁶² Importantly, under *Crawford*, it is of no consequence that the legal clerk's data entry serves a separate and distinct primary purpose.²⁶³

C. Military Court's Treatment of Dual Purpose Documents

Prior to the Supreme Court's opinion in *Crawford v. Washington*,²⁶⁴ there was no doubt that entries in official records were sufficient to establish elements of crimes under the Uniform Code of Military Justice.²⁶⁵ As an

²⁵⁸ A NAVPERS 1070/606 is a service record which is used by the Navy to document periods of unauthorized absence in excess of 24 hours. U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1070-300 (2 Sept. 2004).

²⁵⁹ *See id.*

²⁶⁰ 541 U.S. at 52.

²⁶¹ *Id.*

²⁶² *See, e.g.,* United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042-43 (1998)) ("The proper inquiry . . . is whether the declarant intends to bear testimony against the accused. That intent, in turn may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused . . .").

²⁶³ I assume for the limited purpose of this hypothetical that the primary purpose of the data entries on a NAVPERS 1070/606 is nontestimonial in nature.

²⁶⁴ 541 U.S. at 36.

²⁶⁵ *See* United States v. Simone, 19 C.M.R. 272, 274-75 (C.M.A. 1955) (holding that an official entry declaring that a Soldier's absence was terminated by apprehension is legally sufficient to sustain such a finding); United States v. Bennett, 15 C.M.R. 309, 316 (C.M.A. 1954) (holding that an official entry which states that a Marine's absence was terminated by apprehension is legally sufficient to establish such a finding if the entry is made pursuant to official regulations); United States v. Coates, 10 C.M.R. 123, 126 (C.M.A. 1953) (holding that entries "made pursuant to a duty on the part of the official who made it" are admissible to prove the matter recited); United States v. Washington, 24 M.J. 527, 529 (A.F.C.M.R. 1987) (citing *Simone*, 19 C.M.R. at 274-75) ("Morning reports or official personnel accounting records, such as the AF Form 2098, may establish termination by apprehension.").

example, consider the case of *United States v. Simone*.²⁶⁶ The issue before the Court of Military Appeals (CMA)²⁶⁷ was whether “data, set out in a morning report, may suffice to sustain a finding of apprehension.”²⁶⁸ In *Simone*, a Soldier was apprehended by civilian authorities after a period of unauthorized absence.²⁶⁹ Upon the Soldier’s return to military control, an official entry was made in his service record indicating that his absence was terminated by apprehension.²⁷⁰ On appeal, the Soldier argued that this entry was not legally sufficient to sustain a finding that his absence was terminated by apprehension.²⁷¹ However, in affirming the Soldier’s conviction, the CMA noted that the data entry was made pursuant to an official duty imposed by Army regulations.²⁷² Thus, even though the data entry was arguably prepared

²⁶⁶ *Simone*, 19 C.M.R. at 272.

²⁶⁷ On Oct. 5, 1994, legislation changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (codified at 10 U.S.C. § 941 (2000)).

²⁶⁸ See *Simone*, 19 C.M.R. at 273.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 275.

²⁷² *Id.* Of interesting historical note, “[u]nder the Special Regulations governing Army personnel accounting in force prior to August 6, 1954, [there was] no requirement . . . that a morning report entry contain a statement of circumstances under which an absentee [S]oldier returned to military custody, and whether he was apprehended or had surrendered.” *Id.* However, as the CMA noted in *Simone*, “in August 1954—less than three months after the [CMA’s opinion in *United States v. Bennett*, 15 C.M.R. 309 (C.M.A. 1954)], the Army promulgated new Regulations relating to the preparation of morning reports.” *Id.* The new regulations required that “as to a returned absentee, an entry be made with respect to the ‘circumstances of return, whether surrendered or apprehended.’” *Id.* In *Bennett*, the CMA tacitly suggested that the Army and Air Force promulgate regulations that would require a morning report, in the case of an absentee Soldier or Airman, to include a statement regarding whether the member’s absence was terminated by apprehension. See *United States v. Bennett*, 15 C.M.R. 309, 316 (C.M.A. 1954). The specific language of the *Bennett* court is as follows:

[W]hile recognizing that a prima facie case of desertion terminated by apprehension is appreciably less difficult of establishment in a court-martial conducted under Navy auspices—or under those of the Marine Corps under current directives—than in one administered by the Army or Air Force, we are troubled little by this lack of uniformity. It is attributable solely to differing regulations amount the several Armed Forces—and these may be changed at will.

Id.

Based on this historical background, one can reasonably surmise that the primary purpose of the Army’s regulation requiring a data entry germane to the circumstances of an absentee Soldier’s return is for future use at trial. However, as one Soldier noted without elaboration, in today’s Army, “there might be a different reason for this required entry.” Interview with MAJ Nicholas Lancaster, Professor, Criminal Law Department, The Judge Advocate General’s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 3, 2007). Perhaps the primary purpose of the required entry could be to document the number of Soldiers that turned themselves in as compared to the number of Soldiers that were apprehended by civilian or military authorities.

for future use at trial,²⁷³ it was nevertheless admissible pursuant to the official records exception to the hearsay rule.²⁷⁴

An issue of great importance to military justice practitioners is whether *Crawford*²⁷⁵ requires the CAAF to declare that under certain scenarios, official record entries are testimonial statements. In January 2007, the CAAF addressed this issue in *United States v. Rankin*.²⁷⁶

In *Rankin*, the appellant was charged with a seven year period of unauthorized absence.²⁷⁷ At his trial, the government was allowed to admit service record entries for the purpose of proving that the appellant was absent from his unit without proper authorization.²⁷⁸ Based on these documents which were admitted in lieu of live testimony, the appellant was convicted of unauthorized absence.²⁷⁹ The issue on appeal was whether personnel records supporting an allegation of unauthorized absence are testimonial hearsay under *Crawford*.²⁸⁰

In opining that the service record entries at issue were nontestimonial, the *Rankin* court adopted a primary purpose test.²⁸¹ Specifically, the court stated:

Consistent with *Crawford* and *Davis*, . . . a number of questions emerge as relevant in distinguishing between testimonial and nontestimonial hearsay made under circumstances that would cause an objective witness to reasonably believe that the statement would be available for

²⁷³ See *supra* note 266 and accompanying text.

²⁷⁴ See *Simone*, 19 C.M.R. at 276.

²⁷⁵ 541 U.S. 36 (2004).

²⁷⁶ 64 M.J. 348 (2007). Of note, in 2005, the CAAF granted review in *United States v. Taylor* on the issue of whether, in light of *Crawford v. Washington*, personnel accountability documents constitute testimonial hearsay. See *United States v. Taylor*, 61 M.J. 157, 158 (2005). However, owing to numerous nonconstitutional errors that were properly objected to by a resplendent trial defense counsel, the CAAF did not reach the *Crawford* issue. In declining to address whether personnel accountability documents are testimonial, the CAAF stated: “In view of our resolution of this case on nonconstitutional grounds, we need not address the granted issue concerning constitutional questions under *Crawford v. Washington*.” *Id.* at 162.

²⁷⁷ *Rankin*, 64 M.J. at 350. The elements of an unauthorized absence offense are:

- (a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be; (b) That the absence was without authority from anyone competent to give him or her leave; and (c) That the absence was for a certain period of time.

UCMJ art. 86(b)(3) (2005). If the absence was terminated by apprehension, a fourth element is “[t]hat the absence was terminated by apprehension.” *Id.*

²⁷⁸ See *Rankin*, 64 M.J. at 350.

²⁷⁹ *Id.* at 349.

²⁸⁰ *Id.*

²⁸¹ See *id.* at 352.

use at a later trial. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the *primary purpose* for making, or eliciting the statements the production of evidence with an eye toward trial?²⁸²

In essence, the court’s holding creates an exception to the Confrontation Clause in place of that which was eliminated by the Supreme Court in *Crawford*.²⁸³ The *Rankin* court acknowledges that testimonial statements are those “that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.”²⁸⁴ Under this framework, the service record entries at issue in *Rankin*, documenting the appellant’s unauthorized absence are testimonial statements. In support of this assertion, consider the language of “the instruction governing the creation and maintenance”²⁸⁵ of the service record entries at issue. The Naval Military Personnel Manual states:

Service records are always required to adjust pay accounts and for evidence to sustain desertion/UA charges. Incorrect service record processing and documentation, including court-marital charge sheets, may result in unnecessary delays in bringing offenders to trial and

²⁸² *Id.* (emphasis added). The CAAF adopted this three prong test again in the case of a bank’s business records in *United States v. Foerster*. *Foerster*, 65 M.J. 120, 123 (2007), petition for cert. filed (U.S. Sep. 14, 2007) (No. 07-359). What is interesting about *Foerster* is the bank affidavit clearly mandates the victim cooperate with law enforcement and states on the affidavit that the affidavit will be turned over to law enforcement yet the primary purpose test caused the affidavit to become nontestimonial. *See id.* at 122-24. If a mother tells her five-year old daughter to tell the mother what the step father did because the mother wants to take the child to the doctors but also tells the child that this will be used to punish him, what will be the analysis after *Foerster* and *Rankin*? First, will the Court use the objectively reasonable standard of a five-year old child to determine if, in the mind of the objectively reasonable five-year old, this statement to mom was testimonial? Second, is this more than a routine cataloging of unambiguous factual matters? Third, what was the primary purpose? In this case with dual purposes, if the mother testifies that the primary reason for the question was the medical safety of the child, will the primary purpose test now cause the evidence to be admissible as nontestimonial? What if the mother says the primary purpose was to obtain testimony while the objective child would think it was for getting medical help? To expand the primary purpose test beyond the police interrogation into documents and other non-police interactions will only create mayhem for the military practitioner and judges. Phone Interview with LCDR Kevin Gerrity, Military Justice Department Head, Naval Justice School, Newport, RI (Sep. 28, 2007).

²⁸³ 541 U.S. 36 (2004). In overruling the *Ohio v. Roberts* adequate indicia of reliability test, the Supreme Court stated that “[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Id.*

²⁸⁴ *Rankin*, 64 M.J. at 351 (quoting *Crawford*, 541 U.S. at 51-52).

²⁸⁵ *See* Brief of Appellant at 11, *United States v. Rankin*, No. 06-0119 (CAAF July 5, 2006).

possibly losing a case at court-martial. Ensure complete, timely, and accurate submission of all documentation.²⁸⁶

Based on this instruction, every legal clerk making a service record entry germane to desertion/UA cases, should “reasonably believe . . . the [entry] w[ill] be available for future use at a later trial.”²⁸⁷ As such, if analyzed in the manner articulated by the Supreme Court in *Crawford*,²⁸⁸ the service record entries at issue in *Rankin* are testimonial. However, the *Rankin* court did not use this analytical paradigm. Instead, the court opined that a service record entry is nontestimonial if it serves a separate and distinct primary nontestimonial purpose.²⁸⁹ As explained in Part V.B, such an analytical framework impermissibly creates an exception to the Confrontation Clause. The fact that a testimonial statement serves a separate and distinct nontestimonial purpose does not make such statement nontestimonial. Instead, the more logical view is that the statement simply serves a concurrent nontestimonial purpose.

In sum, as one respected commentator has noted: “The bottom line is that if the declarant [makes] [a] statement in a situation warranting a reasonable anticipation of prosecutorial use, it is testimonial. . . . To hold that such a statement is not testimonial is merely to try to avoid *Crawford* because it makes prosecutions more difficult.”²⁹⁰

VI. CONCLUSION

The continuing fallout from *Crawford* and its progeny is an issue of great importance to military justice practitioners. Military courts, much like their civilian counterparts, are struggling to navigate their way to the true meaning of the Confrontation Clause. From the sands of Iraq to the beaches of Florida, *Crawford* issues abound. This article has identified three significant issues that are relevant to the multitude of cases being litigated in military courts across the globe each day: (1) whether post-*Whorton*, the CAAF should revisit its opinion in *Scheurer* and hold that nontestimonial hearsay in trials by courts-martial is no longer subject to Confrontation Clause scrutiny; (2) whether *Crawford* created a per se rule excluding testimonial hearsay contained within business and public records from Confrontation Clause scrutiny; and (3) whether *Davis*'s primary purpose test extends beyond the scope of police interrogations.

²⁸⁶ U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1600-060 (12 May 2006).

²⁸⁷ *Crawford*, 541 U.S. at 52.

²⁸⁸ *See id.*

²⁸⁹ *See Rankin*, 64 M.J. at 353 n.4.

²⁹⁰ Richard D. Friedman, *Grappling with the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241, 266 (2005).

Though the CAAF clearly held in *Scheurer* that nontestimonial hearsay in trials by courts-martial remains subject to Confrontation Clause scrutiny, the Supreme Court's opinion in *Whorton* suggests that the CAAF should revisit this opinion. When given an opportunity, the CAAF should hold that nontestimonial statements, though subject to the evidentiary rules of hearsay, are no longer subject to Confrontation Clause scrutiny.

Second, *Crawford* did not create a per se rule excluding testimonial hearsay contained within business and public records from Confrontation Clause scrutiny. A statement which is testimonial in nature does not magically become nontestimonial merely because it's cloaked within the contours of a business or public record. Though the CAAF made this point clear in *Magyari*, the NMCCA's opinion in *Harcrow* suggests that the CAAF must once again reiterate this edict.

Third, the determination of whether a statement is testimonial must be based on the circumstances in which the statement was made. That is, a statement is testimonial if "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial."²⁹¹ The fact that a testimonial statement serves a separate and distinct primary purpose does not make the statement nontestimonial.

²⁹¹ *Crawford*, 541 U.S. at 52.

BUILDING THE GLOBAL MARITIME SECURITY NETWORK: A MULTINATIONAL LEGAL STRUCTURE TO COMBAT TRANSNATIONAL THREATS

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INTRODUCTION

The post-9/11 world has been characterized by the emergence and re-emergence of threats to peace and security that transcend national boundaries. These “transnational” threats take many forms, and those responsible continually seek new methods and avenues for pursuing their activities. Nowhere is the proliferation of transnational threats more pronounced than throughout the maritime domain, both in the littorals close to shorelines and beyond the horizon where the ocean is “a realm that remains radically free.”¹

Effectively securing the maritime domain in the face of these transnational threats will require a shift from the traditional national view of maritime security to one with a global focus. Expanding the focus of security activities around the planet necessarily gives rise to the need for cooperative security arrangements, because of the inability of any one nation to secure the entire maritime domain through unilateral action. At the same time, just what such a global maritime security network would look like - and how it would address the myriad legal issues involved - is still open to considerable speculation.

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¹ WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS, AND CRIME* 3 (2004).

This thesis examines the need for establishing a global maritime security network, the various forms such a cooperative network might take, and the means by which it could be created and implemented. Ultimately, I will argue that a global maritime security network can best be constructed by utilizing a dual framework of international agreements; a series of memoranda of understanding with specialized semi-internationalized criminal tribunals exercising universal jurisdiction at the regional level, and an overarching “Statement of Principles” at the global level to link the regions together through a combination of information and resource sharing. Both initiatives rely on earlier models of cooperation on other topics.

Part I of this thesis examines the view of maritime security that existed until the end of the Cold War. It then presents an overview of several transnational threats to highlight the pervasive scope of the problem faced by nations everywhere. Part II continues with a detailed examination of perhaps the “most maritime” of the transnational threats - piracy - including an analysis of efforts by the international community to develop an effective legal framework to combat the problem. Part III considers the bases for establishing jurisdiction over transnational threats, again within the context of piracy. Part III specifically examines the territoriality principle, the nationality principle, the passive personality principle, the protective principle, the flag state principle, and finally the universality principle. Part III concludes with an analysis of two recent piracy prosecutions in asking whether the currently-applied jurisdictional schemes can successfully combat transnational threats. Part IV demonstrates how various regional agreements address several transnational problems, and examines whether a regional model could be utilized to combat waterborne security threats such as piracy. I then analyze several current examples of maritime multilateralism that run the spectrum from legally formalistic to ad hoc relationships with an eye toward identifying the most effective legal structure for building the security network and its components. Part V concludes with a brief discussion of compliance theory as applied to the framework of international agreements that aim to create a global maritime security network to combat transnational threats.

I. THE NEED FOR A GLOBAL MARITIME SECURITY NETWORK

*No nation can do everything, but all nations can do something. Maritime security starts with every nation's capacity to contribute and expands outward from there.*²

A. The Traditional Strategic Security Paradigm

Following World War II, through the Cold War, and even into the 1990s, we lived in a relatively straightforward world where the United States and the Soviet Union established well-defined geographic spheres of influence and adopted policies such as “containment” to keep this influence in check.³ Of course, knowing the enemy did little to reduce tensions between East and West; however, it did lend itself to a certain stability that comes from an international system in which there are two dominant nation-states. The maritime domain mirrored this relatively simple geopolitical reality, with American Fleets and NATO country navies coordinating activities closely to monitor and deter Soviet Fleet activity, while the Soviets and their Warsaw Pact allies responded in kind.⁴ In such a bi-polar world, the traditional paradigm of maritime security was primarily national in focus, and “the aim was to match capabilities and engagement with a potential foe, while crafting agreements (such as Incidents at Sea⁵) to reduce the prospect of false steps.”⁶

² Admiral Mike Mullen, Chief of Naval Operations, Remarks at Argentine Naval Staff Headquarters (Apr. 7, 2005).

³ WILSON D. MISCAMBLE, C.S.C, GEORGE F. KENNAN AND THE MAKING OF AMERICAN FOREIGN POLICY, 1947-1950 31-32, 93 (1992) (explaining the origins and early development of the United States’ “containment” doctrine, as well as suggesting an initial preference for political and economic measures rather than military action to implement it).

⁴ Carey Cavanaugh & Wayne Porter, *A New Approach to Multilateral Global Maritime Security 1* (Sept. 8, 2006) (unpublished article, on file with authors).

⁵ In the late 1960s, several threatening incidents between forces of the U.S. Navy and the Soviet Navy prompted talks aimed at preventing such incidents from escalating into hostilities between the two countries. The resulting Incidents at Sea Agreement was signed by Secretary of the Navy John Warner and Soviet Admiral Sergei Gorshkov in 1972 as a confidence-building measure designed “to enhance mutual knowledge and understanding of military activities; to reduce the possibility of conflict by accident, miscalculation, or the failure of communication; and to increase stability in times of both calm and crisis.” U.S. Department of State, <http://www.state.gov/t/ac/trt/4791.htm> (last visited Nov. 18, 2006).

⁶ Cavanaugh & Porter, *supra* note 4, at 1. Despite attempts to reduce the possibility of conflict between U.S. and communist-backed forces at sea, the *Mayaguez* incident in May 1975 highlights the tenuous nature of Cold War reality. On May 12, 1975, the Cambodian Navy under the direction of the Communist Party of Kampuchea (popularly known as the Khmer Rouge) seized an American merchant ship, *SS Mayaguez*, in international waters off the coast of Cambodia. On May 15, the U.S. Navy, Marine Corps, and Air Force engaged Khmer Rouge troops on the island of Kho Tang, where it was believed the captured crew was being held. The Khmer Rouge released the 39

Throughout most of the second half of the 20th century, with the United States on one side and the Soviet Union on the other, the maritime security challenge was preparing for and managing the direct threats posed by a major adversary.⁷ While maritime strategies during this time occasionally exhibited an offensive orientation, the focus was always on balancing one force against an equal force with the ultimate goal of preventing a breach of territorial waters.⁸ The collapse of the Soviet Union in 1990 ensured that the great clash of American and Soviet navies would never occur; however, it also ushered in a complex international reality that turned existing notions of security upside down - both ashore and at sea:

The Soviet Union had a defined location. Expected attack routes were well known, and we positioned our forces accordingly, in Europe and Asia. Geography dictated certain calculations, and factors such as the Fulda Gap and the Strait of Taiwan simply had to figure into wartime planning. . . . In the case of invasion, such as occurred in the two world wars, the choice was clear - either repel the invaders, or accept subjugation. During the Cold War, given that the potential threat was difficult to deny, nearly all the nations of Europe were forced to choose one side or the other. Even nations that were inclined to avoid having to take a side usually did so, and joined an alliance dedicated to ensuring their protection. . . . The Iron Curtain represented a clear line of demarcation between the free world and the world where communist ideology held sway.⁹

With the loss of predictability a world of uncertainty emerged, where national borders and the limits of territorial waters no longer defined the battlespace. In the United States, the Pentagon began re-evaluating the nation's military strategy, and the Navy adopted a "From the Sea" approach to security that sought to learn more about potential foes and conflict areas before the fight, through innovative intelligence gathering.¹⁰ Thus, by the end of the 20th century,

Mayaguez crewmembers, but 41 U.S. military personnel were killed in the operation. See John L. Frisbee, *The Mayaguez Incident*, VALOR, Sept. 1991, available at <http://www.afa.org/magazine/valor/0991valor.asp> (last visited Feb. 19, 2007).

⁷ In the 1980s, Secretary of the Navy John F. Lehman, Jr. was determined to counter the Soviet Fleet by building the "Six Hundred Ship Navy," a maritime security strategy first championed by Donald Rumsfeld while serving as secretary of defense in the Ford administration. GREGORY L. VISTICA, *FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY* 64 (1995).

⁸ *Id.* at 214-15.

⁹ Dr. Donald C. Winter, Secretary of the Navy Remarks at the Naval Surface Association Symposium, Arlington, Virginia (Jan. 12, 2006).

¹⁰ SHERRY SONTAG & CHRISTOPHER DREW, *BLIND MAN'S BLUFF* 374-377 (1998).

the United States was forced to recognize that maritime security could no longer be guaranteed by focusing on sea control or preparing for a classic battle to defeat a single enemy at sea.¹¹

The modern post-Cold War era has been marked by the rise of globalization and the emergence of transnational threats to the security, stability and economic prosperity of a multitude of nations.¹² These transnational threats from non-state actors and criminal elements span theaters from the Persian Gulf to the coast of South America to the Pacific Rim.¹³ Today, piracy, the drug trade, human trafficking, and international terrorism are major threats that can no longer be viewed as someone else's problem on the world stage. As articulated by the U.S. Chief of Naval Operations, Admiral Mike Mullen, "[T]oday's challenges, shared by all maritime nations, now flow almost seamlessly from the sea - over, around, and through our borders. The global maritime commons, as it is called, can now provide a venue through which both security and threats to that security pass freely and easily."¹⁴ Quite simply, in such an increasingly global era, the traditional strategic security paradigm no longer serves the needs and interests of the world community.

The reality today is that no single nation, acting alone, can muster and employ sufficient resources to effectively combat emergent transnational threats to peace and security.¹⁵ Accordingly, just as the U.S. maritime strategy of the 1980s clearly set forth how naval forces would be used to deter and, if necessary, defeat the Soviet Union, our new century demands a global maritime security strategy based on a vision of sea power that is larger and broader.¹⁶ As Singapore Defense Minister Tee Chee Hean stressed, "globalization requires that we adopt a new paradigm of national security - one that is founded on shared perspectives and common interests among countries."¹⁷ Individual nations will always maintain unique and distinct security interests vis-à-vis the global community of nations; however, transnational threats represent an area of commonality that lends itself to increased international cooperation. By combining the resources and capabilities of many nations, the rigidly-defined

¹¹ Admiral Mike Mullen, Chief of Naval Operations, Remarks at the Indonesian Command and Staff College (July 19, 2006).

¹² Cavanaugh & Porter, *supra* note 4, at 1-2.

¹³ Dr. Donald C. Winter, Secretary of the Navy, Remarks at the Navy Submarine League Annual Symposium, Alexandria, Virginia (June 8, 2006).

¹⁴ Chief of Naval Operations Admiral Mike Mullen, USN, *What I Believe: Eight Tenets that Guide My Vision for the 21st Century Navy*, U.S. NAVAL INSTITUTE PROCEEDINGS, Jan. 17, 2006, at 12, available at <http://www.military.com/forums/0,15240,85574,00.html> (last visited Nov. 18, 2006).

¹⁵ Cavanaugh & Porter, *supra* note 4, at 2.

¹⁶ Admiral Mike Mullen, USN, Chief of Naval Operations, Remarks at the World Affairs Council, Pittsburgh, Pennsylvania (May 19, 2006).

¹⁷ Cavanaugh & Porter, *supra* note 4, at 2.

and nationally-focused approach to security that triumphed in years past can be transformed into one that is flexible and cooperative.¹⁸

B. The United States National Security Strategy

A globalized maritime security strategy complements the *United States National Security Strategy* promulgated by President Bush approximately one year after the terrorist attacks of 11 September 2001.¹⁹ Although the *Security Strategy* portrays the United States as the lead actor in the Global War on Terrorism, President Bush's introduction stresses that "no nation can build a safer, better world alone."²⁰ In the years since the *Security Strategy* was first issued, a number of implementing documents have echoed and elaborated on its pronouncements and goals. For instance, the Secretary of Defense's *National Defense Strategy* declares that "[s]hared principles, a common view of threats, and commitment to cooperation provide far greater security than we could achieve on our own."²¹ Similarly, the Chairman of the Joint Chiefs of Staff's *National Military Strategy* stresses the importance of partnership within the international community.²² Finally, the *National Strategy for Maritime Security* emphasizes cooperation in the maritime domain: "Defeating this array of threats to maritime security . . . requires a common understanding and a joint effort for action on a global scale."²³ When considered as a whole, these *Strategies* indicate that any future United States national security initiatives will likely exhibit a multilateral and cooperative character founded on international partnerships with like-minded states.²⁴

¹⁸ *Id.*

¹⁹ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter SECURITY STRATEGY] (last visited Nov. 18, 2006).

²⁰ *Id.* at vi.

²¹ DEPARTMENT OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, at 4 (2005), http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm [hereinafter DEFENSE STRATEGY] (last visited Nov. 18, 2006).

²² CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA--A STRATEGY FOR TODAY; A VISION FOR TOMORROW (2004), <http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf> [hereinafter MILITARY STRATEGY] (last visited Nov. 18, 2006).

²³ THE NATIONAL STRATEGY FOR MARITIME SECURITY, at 2 (2005), <http://www.whitehouse.gov/homeland/4844-nsms.pdf> [hereinafter MARITIME STRATEGY; the DEFENSE STRATEGY, the MILITARY STRATEGY, the MARITIME STRATEGY, and the SECURITY STRATEGY are collectively referred to as the STRATEGIES] (last visited Nov. 18, 2006).

²⁴ See Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today, and Tomorrow*, 52 NAVAL L. REV. 60 (2005) (reflecting on some of the legal issues embedded in the *Security Strategy* to provide a comprehensive vision of post-9/11 national security).

C. Shifting the Legal Paradigm

Closer maritime cooperation between numerous countries will require a shift in the traditional legal paradigm. Historically, internationally accepted “blue water” legal rules were sufficient as navies operated sparingly within the territorial waters of other countries; however, a cooperative approach to maritime security will increasingly shift the focus of operations from the high seas to coastal regions and the shorelines of many countries in close proximity.²⁵ As forces transit from one territory to the next, the legal rules can change rapidly, and may be constantly evolving.²⁶ Additionally, cultural differences often manifest themselves through rules and regulations in ways largely unfamiliar to U.S. operating forces.²⁷

Extending engagement efforts to new areas of the world will increase the myriad legal gray areas that must be confronted. For instance, some regions, such as Somalia, have no recognized central government authority or any other feature associated with an established independent state.²⁸ In these un-governed or under-governed areas, “the law of the gun is often the only law that prevails.”²⁹ Because we are currently operating in an arena of accelerated legal challenges ripe for exploitation by transnational criminal actors, a serious re-evaluation of the legal approach to accomplishing the maritime security mission is essential.

D. The Global Economy and Security in the Maritime Domain

Policing and protecting the maritime commons is critically important because of its direct impact on the lives of a significant percentage of the world’s population. Worldwide, about 2.2 billion people live within 100

²⁵ Dr. Donald C. Winter, Secretary of the Navy, Remarks to the Office of the General Counsel Spring Conference, Alexandria, Virginia (Apr. 26, 2006).

²⁶ FAUSTINA PEREIRA, FRACTURED SCALES: THE SEARCH FOR A UNIFORM PERSONAL CODE 114 (2002) (Algeria, Egypt, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Sudan, Somalia, and Tunisia are examples of Muslim majority countries continually carrying out reform measures in an effort to develop legal systems that properly juxtapose Islamic ideals with modernist aspirations).

²⁷ Winter, *supra* note 25 (recounting a recent trip to Ghana in the Gulf of Guinea during which Ghana’s Minister of Defense, the Western Regional Deputy Minister, and the Minister of Fisheries all deferred to a local tribal chief from Sekondi).

²⁸ Somalia exists solely in a legal capacity; actual authority resides in the hands of the governments for the unrecognized entities of Somaliland, Puntland, the Supreme Islamic Courts Council and the United Nations-recognized interim transitional government in Baidoa. For a detailed introductory survey of Somalia, including the country’s recent political history, see THE EUROPA WORLD YEAR BOOK 3946-63 (Routledge ed. 2006).

²⁹ Winter, *supra* note 25.

kilometers of a coastline,³⁰ and more than half of all Americans now live on or near a coast.³¹ Over 90% of the world's trade is carried by approximately 50,000 merchant ships that transport nearly every kind of cargo.³² Final statistics are expected to show that world seaborne trade exceeded 7.11 billion tons of loaded goods in 2006,³³ with the United States importing a record \$1.87 trillion worth of goods and exporting \$1.02 trillion, also a record.³⁴ Each year over 2 billion tons of crude oil and petroleum products are shipped by maritime transportation, and North America is the largest importer of these products.³⁵ While these trade statistics highlight the crucial role played by the maritime commons in maintaining standards of living across the globe, it is also important to note that a record number of people are looking to the seas for rest and relaxation, with 8.6 million cruise ship passenger embarkations in 2005 at United States ports alone.³⁶

As evidenced by these maritime trade and passenger statistics, keeping the world's sea lanes, harbors, and ports safe and secure is critical to all nations' economic prosperity and well-being. Unfortunately, all of these areas - and particularly ports - are extremely vulnerable to attack or infiltration by individuals and groups seeking to inflict harm on a nation and its people. In the United States alone, 26,000 seagoing cargo containers are offloaded each day in 361 ports.³⁷ These containers account for 95% of the nation's non-North American trade by weight and 75% by value, and "the total volume of goods imported and exported through [U.S.] ports is expected to more than double in the next 20 years."³⁸ Additionally, most container ships offloading in the United

³⁰ Vice Admiral John G. Morgan, Jr. & Rear Admiral Charles W. Martoglio, USN, *The 1,000 Ship Navy: Global Maritime Network*, U.S. NAVAL INSTITUTE PROCEEDINGS, Nov. 30, 2005, at 14, available at <http://www.military.com/forums/0,15240,81652,00.html> (last visited Nov. 18, 2006).

³¹ Mullen, *supra* note 14.

³² Shipping and Worldwide Trade, <http://www.marisec.org/shippingfacts/worldtradeindex.htm> (last visited Nov. 18, 2006).

³³ Final world seaborne trade statistics for 2006 were unavailable at the time of this writing. For the most recent statistics projecting continued maritime trade growth in 2006, see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, REVIEW OF MARITIME TRANSPORT, at introduction (2006), available at http://www.unctad.org/en/docs/rmt2006_en.pdf [hereinafter REVIEW OF MARITIME TRANSPORT] (last visited Feb. 16, 2007).

³⁴ CIA's World Factbook, <https://www.cia.gov/cia/publications/factbook/geos/us.html#Econ> (last visited Feb. 16, 2007).

³⁵ See REVIEW OF MARITIME TRANSPORT, *supra* note 33, at 16.

³⁶ Updated statistics regarding total cruise ship passenger embarkations for 2006 were unavailable at the time of this writing. For the most recent statistics from 2005, see Business Research & Economic Advisors, *The Contribution of the North American Cruise Industry to the U.S. Economy in 2005*, at 1 (2006), available at http://www.iccl.org/resources/2005_economic_study.pdf (last visited Feb. 16, 2007).

³⁷ Joshua A. Lindenbaum, *Assuring the Flow: Maritime Security Challenges and Trade Between the U.S. and China*, 6 RICH. J. GLOBAL L. & BUS. 95, 98 (2006).

³⁸ Rachael B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MIL. L. REV. 1, 8 (2005).

States are owned and crewed by foreigners, with U.S.-flagged vessels actually accounting for less than 3% of the nation's overseas trade.³⁹

Given these statistics, it is easy to see that any disruption in the flow of cargo containers to and from United States ports could significantly impact the nation's economy; and yet, "the consequences of a breach in the security of a single container . . . would have a far greater impact upon both global trade and the global economy than did the 9/11 terrorist attacks."⁴⁰ While each cargo container could easily conceal a bomb or other terrorist threat, the U.S. Customs and Border Protection Service physically examines only about 7% of these containers.⁴¹ Unfortunately, even with the increased emphasis on port security after 9/11, it simply is not feasible to inspect a greater percentage of containers, and it is generally agreed that the best approach to countering the threat is a "layered" defense with coordinated security measures both overseas and nationally.⁴² Some of these measures include the Container Security Initiative⁴³ and Port State Control Programs, the latter of which will be discussed in greater detail in Part IV of this thesis. Clearly, the threat posed by cargo containers is a prime example of why international cooperation on maritime security issues is absolutely necessary in today's world.

E. Transnational Threats to Global Peace and Security

Given the impact of the maritime commons on trade, international commerce, and the movement of people, it is clear that the exploitation of these areas by criminal actors must be viewed as a significant threat to global prosperity.⁴⁴ Today, the world community is plagued by an array of

³⁹ *Id.* at 9.

⁴⁰ "Not only could a port security breach cause mass casualties, but it would necessitate closing U.S. maritime import and export systems, causing maritime trade gridlock, economic collapse of many businesses, and possibly leading to economic losses of \$1 trillion. By contrast, the attacks on 9/11 claimed more than 3,000 lives, and led to the loss of approximately \$100 billion." *Id.* at 2.

⁴¹ *Key Questions About the Dubai Port Deal*, CNN, Mar. 6, 2006, <http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html> (last visited Dec. 23, 2006).

⁴² Bralliar, *supra* note 38, at 3.

⁴³ "The Container Security Initiative [CSI] has four main facets: 1) the use of intelligence and technology to identify and evaluate risk of terrorism in individual shipments; 2) the pre-screening of cargo containers in their originating ports; 3) the use of technology to do this screening expediently; and 4) a move toward the use of cargo containers that are less-susceptible to tampering than those commonly in use at present. . . Thus far [in 2006], the U.S. has implemented the CSI in thirty-three ports in nineteen countries, including China-controlled Hong Kong and Shanghai, which rank as the first and second largest foreign ports, respectively, in terms of exports to the U.S." Lindenbaum, *supra* note 37, at 99. *See also* United States Customs and Border Protection, CSI in Brief, http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml (last visited Dec. 23, 2006).

⁴⁴ Morgan & Martoglio, *supra* note 30, at 2.

transnational threats which are not constrained by international borders.⁴⁵ Some of these threats to peace and security - such as piracy - have challenged seafaring people seemingly from time immemorial, while others - such as international terrorism - are products of our modern age. Furthermore, while traditional regional or global conflicts often find their roots in disputes between states over territorial boundaries, transnational threats and actors typically pursue certain criminal activities based upon calculations of economic profit, capital expenditure, and risk of punishment.⁴⁶ Regardless of the foundational causes, and regardless of which transnational threat poses the greatest risk to a particular country, there can be no doubt that cumulatively these threats significantly increase lawlessness in the maritime domain, thereby undermining peace and prosperity.⁴⁷ Some of the maritime-oriented threats that pose the greatest challenges include piracy, the drug trade, human trafficking, and international terrorism.

1. Piracy

A popular misconception exists - bolstered by romantic images in print and film - that pirates have been relegated to the pages of history. In reality, piracy is alive and well, and “[c]utlasses have been replaced by automatic rifles and in place of parrots, rocket-propelled grenade launchers rest on pirates’ shoulders.”⁴⁸ The International Maritime Bureau of the International Chamber of Commerce reported a total of 239 pirate attacks in 2006.⁴⁹ Despite the fact that the 239 attacks represent a slight decline overall compared to 2005, some areas - notably Bangladesh, Brazil, Indonesia, Nigeria, and Somalia - remain piracy hotspots.⁵⁰ In Bangladesh, the number of piracy attacks more than doubled to 47, and the port of Santos in Brazil experienced a wave of attacks

⁴⁵ The definition of the term “transnational” is “reaching beyond or transcending national boundaries.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1834 (4th ed. 2000).

⁴⁶ See Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 CARDOZO J.L. & GENDER 909 (2006) (advocating reconceptualization of the notion of human trafficking to focus on the conditions that give rise to the practice, rather than viewing its origins at the point of seizure of control over the victim).

⁴⁷ Morgan & Martoglio, *supra* note 30.

⁴⁸ Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT’L L. 17, 17 (2006).

⁴⁹ The International Maritime Bureau (IMB) was founded in 1981 in Kuala Lumpur, Malaysia. It is endorsed by the United Nations International Maritime Organization, publishes a weekly piracy report, and maintains a 24-hour piracy reporting center. The IMB also provides a live map for seafarers pinpointing the latest piracy incidents. The map can be accessed at, <http://www.icc-ccs.org> (last visited Feb. 16, 2007).

⁵⁰ *Optimism as Piracy Attacks Fall for Third Year in a Row*, ICC COMMERCIAL CRIME SERVICES, Jan. 22, 2007, <http://www.icc-ccs.org/main/news.php?newsid=80> (last visited Feb. 16, 2007).

against container ships at anchor.⁵¹ With 50 pirate attacks in 2006, Indonesian waters are the world's most dangerous;⁵² a fact that cannot be easily dismissed considering that 30% of the world's annual commerce and 50% of its oil pass through the Strait of Malacca.⁵³ While it is estimated that piracy costs the world economy as much as \$25 billion a year, pirate attacks are often underreported due to the high costs of investigation and the fact that losses are often insufficient to warrant filing insurance claims.⁵⁴

2. The Drug Trade

Illicit trafficking in narcotics is a worldwide activity with a pervasive reach into all communities, including cities, suburbs, and rural areas. Some of its common symptoms include the destabilization of governments and financial markets, the corruption of public officials, and the increase of societal health care costs.⁵⁵ According to the United Nations Office on Drugs and Crime, the number of drug users in the world is now estimated at 200 million people, equivalent to about 5% of the world population aged 15-64.⁵⁶ Based on the demand for drug treatment, some 25 million people worldwide are drug dependent, with the highest numbers of drug treatment per million inhabitants found in North America (5,200).⁵⁷ Additionally, the United Nations estimates that approximately \$322 billion a year is generated in the global drug trade at the retail level, which is higher than the Gross Domestic Product (GDP) of 88% of the countries in the world and equivalent to about three quarters of Sub-Saharan Africa's total GDP.⁵⁸ It is also impossible to overlook the close nexus between drugs and terrorism. About 90% of the world's heroin supply originates in Afghanistan,⁵⁹ and much of the proceeds generated through illicit trafficking of that drug are funneled to the Taliban regime, which finances terrorist activities

⁵¹ *Id.*

⁵² *Id.*

⁵³ Cavanaugh & Porter, *supra* note 4, at n.8.

⁵⁴ Dahlvang, *supra* note 48, at 18.

⁵⁵ Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 76 (2000).

⁵⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT, at 9 (2006), available at http://www.unodc.org/pdf/WDR_2006/wdr2006_volume1.pdf [hereinafter WORLD DRUG REPORT 2006] (last visited Nov. 18, 2006).

⁵⁷ *Id.* at 37.

⁵⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT (Executive Summary), at 17 (2005), available at http://www.unodc.org/pdf/WDR_2005/volume_1_ex_summary.pdf (last visited Nov. 18, 2006).

⁵⁹ WORLD DRUG REPORT 2006, *supra* note 56, at 11.

across the globe, and is largely responsible for the continuing instability and violence persisting within Afghanistan.⁶⁰

3. Human Trafficking⁶¹

Human trafficking is the practice of buying and selling human beings as commodities, and “is successful because it targets the most vulnerable and marginalized groups that are already struggling to survive on the lowest rungs of the socioeconomic hierarchy.”⁶² Empirical studies suggest that no country can claim immunity from the practice. Approximately 600,000 to 800,000 people - 80% of whom are women and girls and up to 50% of whom are minors - are trafficked across international borders every year for sexual and labor exploitation.⁶³ Primary destination countries are located throughout Asia, the Middle East, Western Europe, and North America, with between 14,500 and 17,500 people transported into the United States every year.⁶⁴ Human trafficking generates an estimated global income of \$7 billion to \$10 billion annually for organized criminal entities, and is the third largest international criminal enterprise behind the drug trade and arms smuggling.⁶⁵ In addition to fueling organized crime, human trafficking also generates social costs. According to the United States Department of State, human trafficking promotes social breakdown by tearing apart families, it negatively impacts labor markets by draining human resources, it erodes governmental authority by undermining law enforcement, and it creates adverse health conditions that lead to increased public health care costs.⁶⁶

⁶⁰ *Iraqi, Iranian Leaders Meet; A Look at the Afghan-Pakistan Border* (CNN television broadcast Sep. 12, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/060912/sitroom.03.html>) (last visited Nov. 18, 2006).

⁶¹ The Trafficking Victims Protection Act, 22 U.S.C. §§ 101-113 (2000), defines “severe forms of trafficking” as: a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

⁶² Ray, *supra* note 46, at 909.

⁶³ *Id.*

⁶⁴ *Developments in the Law - Jobs and Borders: The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180, 2187 (2005).

⁶⁵ *Id.* at 2186.

⁶⁶ UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, at 12-15 (2005), available at <http://www.state.gov/documents/organization/47255.pdf> (last visited Nov. 18, 2006).

4. International Terrorism⁶⁷

For most Americans, international terrorism first became an issue of concern on 11 September 2001. In its common usage, the term excludes the activities of state actors, and instead “is applied to small, ideologically motivated groups . . . whose strategies of terror-violence are designed to propagate a political message, destabilize a regime, inflict social harm as political vengeance, and elicit over-reactive state responses likely to create a political crisis.”⁶⁸ Contemporary terrorists seek dramatic and spectacular acts of violence to attract media and public attention, while increasingly relying on technology to coordinate and carry out operations across the globe.⁶⁹ The great fear today is that these transnational actors will utilize the global marketplace and the maritime domain to secure nuclear, biological, and chemical weapons of mass destruction (WMD).⁷⁰ Osama bin Laden himself reportedly seeks WMD as a “religious duty,”⁷¹ and it is believed that al Qaeda controls between a dozen and 50 cargo freighters that the organization uses for generating profit and potentially aiding terrorist attacks.⁷² In response to the possible exploitation of the maritime domain by terrorists seeking WMD, the United States and ten other nations instituted the Proliferation Security Initiative (PSI) in 2003.⁷³ The PSI is designed to intercept illicit and dangerous cargo through an expanded board, search, and seize scheme.⁷⁴ A more detailed discussion of the PSI follows in Part IV of this thesis.

F. **Moving Toward a Cooperative Security Paradigm**

As discussed above, transnational threats such as piracy, the drug trade, human trafficking, and international terrorism present daunting challenges of immense scope and importance to the world community. Serious consideration

⁶⁷ See 50 U.S.C.A. § 1801(c) (2005) for the definition of “international terrorism” under United States law.

⁶⁸ M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 86 (2002).

⁶⁹ Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT’L L. 297, 303-4 (2003).

⁷⁰ In February 2004, Pakistan’s leading nuclear scientist revealed his role in trafficking nuclear technologies and equipment among private actors, thus highlighting the ease with which non-state actors can gain access to WMD. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 137 (2005).

⁷¹ *Id.*

⁷² Colin Robinson, *Al Qaedas' 'Navy'--How Much of a Threat?*, Aug. 20, 2003, <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1644> (last visited Nov. 4, 2006).

⁷³ The original eleven participating states were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Becker, *supra* note 70, at 147 n.87.

⁷⁴ Although the PSI envisions interception of WMD on land and in the air, its primary focus has been at sea. *Id.* at 134.

of these issues reveals a compelling need to leverage the combined capabilities of nations, and taken together, illuminate several imperatives for maritime security:

First, it is clear that maritime security increasingly is an international problem that requires an international solution. Second, no single nation has the sovereignty, capacity, or control over the assets, resources, or venues from which transnational threats endanger global security. It requires close cooperation between like-minded nations to eliminate the root causes and persistent enablers of these transnational threats. Third, that level of cooperation can also pay dividends in other circumstances, as the tsunami relief efforts in the Indian Ocean area demonstrated, the success of which was driven in large part by the unity of purpose and the diverse multi-national capabilities of all of the participants.⁷⁵

Once it is accepted that nations sharing a common interest in maritime security ought to work together to safeguard the maritime domain, the question becomes how best to initiate and implement such an arrangement. Working with partner countries throughout the world, at various ends of the development spectrum, with sometimes competing self-interests will be complex, and establishing legal rules and structures to govern relationships will be critical to the success of any security initiative. Before looking to the future, however, it is first necessary to examine how the world community currently attempts to combat the aforementioned transnational threats through various legal instruments and arrangements. While a detailed discussion of piracy, the drug trade, human trafficking, and international terrorism is beyond the scope of this thesis, it is possible to analyze the current state of the law as it exists with respect to one of these global challenges. Accordingly, Part II of this thesis will focus on perhaps the “most maritime” of these threats - piracy.

II. PIRACY: A PERSISTING PROBLEM

While each of the transnational threats described in Part I occur regularly within the maritime domain, piracy is the only one that occurs exclusively within the maritime domain. Therefore, an in-depth analysis of piracy and its applicable law should provide a valuable starting point for determining how to best construct a global strategy designed to protect and ensure the freedom of the world’s waterways.

⁷⁵ Morgan & Martoglio, *supra* note 30.

*Yo Ho, Yo Ho, A Pirate's Life For Me*⁷⁶

A. Piracy Throughout the Ages

Piracy has been a persisting problem for thousands of years, and descriptions of the practice appear in Homer's *The Iliad* and *The Odyssey*.⁷⁷ In Greek mythology, piracy was treated as a creditable profession like hunting and fishing, and several writers on the subject have observed that "piracy may well be the world's third oldest profession, medicine being the second."⁷⁸ During the early 1st century BC, piracy was largely condoned throughout the Mediterranean because pirate forces supplied Rome with large numbers of slaves for its luxury markets.⁷⁹ Eventually, however, Vandal and Muslim pirates disrupted vital trade routes to Africa and the East, and coastal cities began forming alliances with pirate forces to avoid being plundered.⁸⁰ Finally, with 1,000 ships in service, the pirates virtually crippled trade, and the Romans could stand idly by no longer. In 67 BC, Roman commander Pompey was ordered to rid the Mediterranean of pirates, a task he completed in a mere three months time.⁸¹

Throughout the Middle Ages, pirate raids and plunders increased across the globe, from the North Sea to the Far East.⁸² During the 16th and 17th centuries, piracy experienced perhaps its greatest - and certainly most romanticized - era in the Caribbean. Rival European powers of the time, including the British Empire, Spanish Empire, Dutch Empire, and French Empire legalized pirate raids to acquire wealth and thereby aid colonial ambitions in the New World.⁸³ Privateers, as these "licensed" pirates were

⁷⁶ Theme song for the Pirates of the Caribbean attraction at Disney Theme Parks, written in 1967 by lyricist Xavier Atencio and composer George Bruns.

⁷⁷ George P. Smith, II, *From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT'L L. 277, 291 n.140 (1989).

⁷⁸ VIVIAN LOUIS FORBES, CONFLICT AND COOPERATION IN MANAGING MARITIME SPACE IN SEMI-ENCLOSED SEAS 102 (2001).

⁷⁹ Krzysztof Wilczyński, *Roman Piracy*, http://www.piratesinfo.com/detail/detail.php?article_id=42 (last visited Nov. 6, 2006).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² The most notorious of the Medieval pirates were Vikings, who explored abroad from about AD 800 to 1100. In the 13th century, Japan-based Wako made their debut in East Asia, initiating invasions that would persist for 300 years. Krzysztof Wilczyński, *Middle Age Piracy*, http://www.piratesinfo.com/detail/detail.php?article_id=43 (last visited Nov. 6, 2006).

⁸³ Legalization was accomplished through the issuance of a "letter of marque" on behalf of a national government that permitted the designated agent to search, seize, or destroy specified assets. The United States Constitution authorizes Congress to issue letters of marque. See U.S. CONST. art. I, § 8, cl. 6.

called, could attack and rob with impunity.⁸⁴ The major European maritime states finally abolished the practice of privateering with the Declaration of Paris in 1856,⁸⁵ and other countries, including the United States, repudiated it under the Hague Conventions of 1899 and 1907.⁸⁶

B. Modern Piracy

Piracy at sea continues into the present day, particularly in areas such as Southeast Asia, the South China Sea, parts of South America, the waters of the Indian Ocean, and south of the Red Sea.⁸⁷ Modern pirates often target commercial shipping because cargo ships make prime targets as they slow to allow for navigation and control through narrow bodies of water such as the Suez Canal, the Panama Canal, and the Strait of Malacca.⁸⁸ While a large number of pirate gangs can be characterized merely as petty opportunists, many pirates are well organized, sophisticated, and controlled by organized criminal enterprises.⁸⁹ Whereas knives and dugout canoes may be utilized by small-time pirates off the coast of West Africa to steal ship's stores or the cash and valuables of crews onboard, gangs of pirates in the South China Sea and the Indian Ocean communicate by satellite and cell phone, carry heavy weapons, and seek to hijack entire ships and kill or maroon the crews.⁹⁰ In the most elaborate schemes, hijacked vessels are repainted, given a new identity through false papers, and simply disappear.⁹¹

C. Recent Piracy Incidents

A number of recent high-visibility incidents involving the United States Navy have raised the level of awareness of maritime nations everywhere to the dangers of modern piracy and highlighted the need for a cooperative framework to address the threat.

⁸⁴ The famous Barbary pirates of the Mediterranean were privateers who operated from the North African coast until the French finally conquered Algiers in 1830. Krzysztof Wilczyński, *Golden Age of Piracy*, http://www.piratesinfo.com/detail/detail.php?article_id=44 (last visited Nov. 6, 2006).

⁸⁵ The 1856 Declaration of Paris, *available at* <http://www.yale.edu/lawweb/avalon/lawofwar/decparis.htm> (last visited Nov. 18, 2006).

⁸⁶ Although there is no mention of pirates in the Hague Conventions, they permit the capturing state to charge those acting beyond state commission under their criminal laws; therefore, the crime of piracy could be charged if contained in municipal law. ALFRED P. RUBIN, *THE LAW OF PIRACY* 199 n.255, 294 (1988).

⁸⁷ *Optimism as Piracy Attacks Fall for Third Year in a Row*, *supra* note 50.

⁸⁸ It would seem that the confines of land and the “finite” waters in these areas would make them easiest to patrol for pirates. Paradoxically, even with additional sea and air patrols and “expanded authority” to perform intercepts at sea, order has not been imposed - particularly in the Strait of Malacca. LANGEWIESCHE, *supra* note 1, at 46.

⁸⁹ *Id.* at 44-45.

⁹⁰ *Id.* at 45.

⁹¹ *Id.*

1. *The Seabourne Spirit*

In November 2005, the luxury Bahamian-registered cruise ship *Seabourne Spirit* was attacked by pirates in two boats with machine guns and rocket-propelled grenade (RPG) launchers. While the 440-foot long ship was hit by an RPG, it eventually managed to outrun the pirates after employing new technology, a non-lethal weapon - a Long Range Acoustic Device - that emitted a focused beam of ear-splitting sound to successfully prevent the attempt to board her.⁹² Two days after the attack, members of a United States Navy explosives ordnance disposal team cleared unexploded ordnance from the ship.⁹³

The *Seabourne Spirit* attack is noteworthy for two reasons. First, it highlights the fact that modern pirates have become so emboldened that a band of eight to ten pirates sought to commandeer a cruise ship carrying 302 passengers and crew. Second, this was not a case of coastal violence; the attempted boarding occurred almost 100 miles off the coast of Somalia. The U.S. Chief of Naval Operations, Admiral Mike Mullen, declared the location of the attack to be a “tipping point” in the fight against lawlessness in the maritime domain because it demonstrated that modern pirates have “the capability and the will to disrupt maritime trade routes far beyond the shoreline.”⁹⁴

2. *The Safina Al Bisaarat*

On 16 January 2006, ten Somali pirates attacked an Indian-based ship, the *Safina Al Bisaarat*. According to crewmember accounts, the pirates approached rapidly in speedboats and swarmed onboard brandishing AK-47 assault rifles and shouldered RPG launchers. The pirates quickly subdued the crew with blows from the butts of the AK-47s and pistols, and then ordered the crewmembers to take the ship out to sea where additional attacks could be launched.⁹⁵ Four days later, on 20 January 2006, the motor vessel *Delta Ranger* reported an attempted pirate boarding with shots fired. The United States Navy, with ships in the area, received notice of the attack and began pursuit of the alleged assailants. The following day, 54 nautical miles off the coast of Somalia, the *USS WINSTON S. CHURCHILL*, a guided missile destroyer

⁹² Cavanaugh & Porter, *supra* note 4, at n.7.

⁹³ U.S. Navy Boards Ship After Pirate Attack, CNN, Nov. 7, 2005, <http://www.cnn.com/2005/WORLD/africa/11/07/somalia.pirates/index.html> (last visited Nov. 18, 2006).

⁹⁴ Vice Admiral John G. Morgan, Jr., USN, *A Navy of Navies*, 9 RUSI DEFENSE SYSTEMS 66, 67 (July 2006).

⁹⁵ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 4 (2007).

attached to the *NASSAU* Strike Group, captured the pirates.⁹⁶ The incident marked the first apprehension of pirates by a United States Navy warship in generations.⁹⁷ Eight days later, the pirates were flown to Mombasa, Kenya where their trial for piracy subsequently began.⁹⁸ Details regarding this trial, and its implications for the global maritime security network, will be discussed in Part III of this thesis.

D. The Law of Piracy

As discussed above, piracy is a practice with ancient origins. Laws against piracy have ancient origins as well.⁹⁹ In the beginning, these laws were designed to deter the practices of land-based Mediterranean communities that maintained their economies by violent tax collections at sea or with booty seized from their neighbors.¹⁰⁰ Eventually, by the 16th century, laws against piracy referred to the non-land-based marauding at sea that characterizes piracy today.¹⁰¹ By the mid-19th century, with European trade flourishing and privateering no longer an accepted practice, nations began the modern movement toward formalizing piracy's status in international conventions.¹⁰² Following the Declaration of Paris in 1856 and the Hague Conventions in 1899 and 1907, the Assembly of the League of Nations attempted to codify the international law of piracy in 1924; however, the effort failed based on a perception that the issue was no longer pressing for the international community.¹⁰³ Finally, in 1954, the International Law Commission, at the request of the United Nations General Assembly, completed a review of the law of the sea and published a text containing six articles dealing directly with

⁹⁶ *U.S. Navy Seizes Pirate Ship Off Somalia*, Jan. 23, 2006, <http://www.military.com/NewsContent/0,13319,86072,00.html> (last visited Nov. 18, 2006).

⁹⁷ Bahar, *supra* note 95, at 4.

⁹⁸ *Id.*

⁹⁹ Wilczyński, *supra* note 82 (describing an inscription found at Delphi in 100 BC establishing that Roman citizens should be free to conduct whatever business they desire, without peril; a copy of the law was to be sent to the kings of Cyprus, Alexandria, Egypt, Cyrene, and Syria informing them that no pirate is to "use the kingdom, land, or territory of any Roman ally as a base of operation," and those who harbor pirates will be considered collaborators).

¹⁰⁰ RUBIN, *supra* note 86, at 12.

¹⁰¹ *Id.* at 19-20.

¹⁰² Prior to the modern era, the Hanseatic League united German cities in a 13th century attempt to establish a multilateral effort against piracy in the Baltic, North Sea, and elsewhere. Samuel P. Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 132 (1990).

¹⁰³ In the words of the Polish Representative (M. Zaleski) approved by the League Council on 13 June 1927: "It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its conclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every state, or one the treatment of which can be regarded as in any way urgent, and the replies of certain governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement." RUBIN, *supra* note 86, at 308.

piracy.¹⁰⁴ While it was clear that codification of these articles would require political compromise because the term “piracy” had conflicting meanings among nations, the issue was deemed of sufficient importance to find an acceptable solution.¹⁰⁵ Eventually, after four years of negotiations, eight articles dealing directly with piracy were adopted in Geneva in 1958 and included in the Convention on the High Seas.¹⁰⁶ These articles were subsequently inserted with minor changes into the United Nations Convention on the Law of the Sea, concluded in 1982.¹⁰⁷

1. The United Nations Convention on the Law of the Sea of 1982 (UNCLOS)¹⁰⁸

UNCLOS is the comprehensive centerpiece treaty applicable to the non-land area of the world, with 153 parties as of February 2007.¹⁰⁹ Although some states have not ratified the treaty, including the United States,¹¹⁰ the large consensus suggests that the UNCLOS is the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.¹¹¹

¹⁰⁴ *Id.* at 319.

¹⁰⁵ *Id.* at 320.

¹⁰⁶ See Geneva Convention on the High Seas, U.N. Doc. A/CONF. 131/53 (1958), Apr. 29, 1958, reprinted in 13 U.S.T. 2312, 450 U.N.T.S. 82 (1962), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf [hereinafter High Seas Convention] (last visited Nov. 11, 2006).

¹⁰⁷ RUBIN, *supra* note 86, at 337.

¹⁰⁸ United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992); 21 I.L.M. 1261, U.N. Doc., reprinted in United Nations, the Law of the Sea: United Nations Convention on the Law of the Sea, A/Conf. 62/122 (1982), U.N. Sales No. E.83.V.5 (1983), available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter UNCLOS] (last visited Nov. 18, 2006).

¹⁰⁹ For a complete list of ratifications, accessions, and successions to the UNCLOS, see UN Oceans and Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited Feb. 16, 2007).

¹¹⁰ The United States has not ratified the UNCLOS, although it is pending before Congress at the time of this writing. See Marjorie Ann Browne, *The Law of the Sea Convention and U.S. Policy* (May 12, 2006) (discussing recent developments concerning the treaty and United States ratification), <http://www.ncseonline.org/NLE/CRSreports/06Apr/IB95010.pdf> (last visited Nov. 11, 2006). (On May 15, 2007, President Bush announced that he had urged the Senate to ratify the UNCLOS. On October 31, 2007, the Senate Foreign Relations Committee voted 17-4 to send the treaty to the full U.S. Senate for a ratification vote.)

¹¹¹ Louis B. Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U. L. REV. 271, 278 (1985) (“Once a consensus is reached at an international conference, a rule of customary international law can emerge without having to wait for the signature of the convention.”). See also THE RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § V (1987), “[B]y express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.” [hereinafter RESTATEMENT].

Therefore, the UNCLOS definition of piracy must be the starting point for any legal discussion of what acts constitute the practice.¹¹² According to Article 15 of the Geneva Convention on the High Seas (High Seas Convention)¹¹³ and Article 101 of the UNCLOS, piracy consists of any of the following acts:

1. Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.
2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
3. Any act of incitement or of intentional facilitation of an act described in Subparagraph 1 or subparagraph 2 of this article.¹¹⁴

While the inclusion of a definition in the High Seas Convention and UNCLOS proved a significant step forward in the international effort to suppress piracy, the definition is extremely narrow in scope. For instance, the definition only includes those acts which have been committed illegally for “private ends” on the high seas or outside the jurisdiction of any state. The “private ends” restriction has led to a commonly held view that acts of violence committed on religious or ethnic grounds or for political reasons - typical motivations for modern terrorism - cannot be treated as piracy.¹¹⁵ Meanwhile, the geographical limitation excludes acts of piracy committed in a state’s coastal

¹¹² See Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L. J. 293, 295-296 (1996) (noting Professor Albert Rubin’s observation that there may be at least six different meanings of the word “piracy” in literature, treaty articles, and national statutes).

¹¹³ High Seas Convention, *supra* note 106, art. 15.

¹¹⁴ UNCLOS, *supra* note 108, art. 101.

¹¹⁵ See Rudiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law* 3, Apr. 28, 2006, <http://www.itlos.org/news/statements/Wolfrum/Terrorism%20at%20Sea.28.04.06.pdf> (last visited Dec. 23, 2006). *But see* Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 265 (2002) (presenting the argument for a broad interpretation of “private interests” that would include political motive for private gain, thereby extending piracy to include acts of terrorism at sea).

waters. Additionally, the meaning of the word “illegal” in the UNCLOS Article 101 definition of piracy is unclear and the legislative history is not enlightening.¹¹⁶ Ultimately, therefore, “it is for the courts of the prosecuting states to decide whether the act of violence under consideration was illegal under international law or the law of the prosecuting states.”¹¹⁷

2. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988 (SUA Convention)¹¹⁸

The International Maritime Organization (IMO) drafted the SUA Convention following the *Achille Lauro* affair¹¹⁹ to fill gaps in the UNCLOS and ensure that states will either prosecute or extradite those responsible for committing terrorist acts at sea.¹²⁰ Under the SUA Convention, state parties bind themselves to consider as offenses those acts which are “unlawfully and intentionally” committed by a person who:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668, *available at* http://www.unodc.org/unodc/terrorism_convention_maritime_navigation.html [hereinafter SUA Convention] (last visited Nov. 18, 2006).

¹¹⁹ “On October 7, 1985, a group of Palestinians from the Popular Liberation Front seized the *Achille Lauro*, an Italian registered cruise ship, in Egypt's territorial waters, and demanded the release of Palestinian prisoners from Israeli jails. Israel refused, and the terrorists murdered an elderly Jewish U.S. citizen, Leon Klinghoffer. Egypt negotiated the release of the hostages and took the terrorists into custody, but did not actually arrest them. Subsequently, the hijackers boarded an Egypt Air flight to Tunisia. Under U.S. pressure, Tunisia did not allow the aircraft to land. U.S. Navy fighters eventually forced the aircraft down at a NATO airfield in Italy where a standoff occurred between U.S. and Italian authorities over which government had jurisdiction. The Italian government denied the U.S. requests for extradition and tried the hijackers in Italy. The leader of the operation, Abu Abbas, was eventually allowed to leave Italy through Yugoslavia.” Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 344 n.9 (2002).

¹²⁰ *Id.* at 344.

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows that is false, thereby endangering the safe navigation of the ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).¹²¹

By detailing the definition of an illegal act at sea, the SUA Convention broadens the rules relating to piracy and, unlike the UNCLOS, it also applies to politically motivated terrorist acts. The SUA Convention also “applies to all ships navigating through waters beyond the outer limit of the territorial sea of a single state, the lateral limits of its territorial sea with adjacent states, or when the alleged offender is found in the territory of [another] state.”¹²² Therefore, it covers a significantly larger geographical territory than the UNCLOS, which is limited to pirate attacks on the high seas or outside the jurisdiction of any state.¹²³

In response to acts of terrorism in recent years, the marine transportation industry sought to further strengthen the SUA Convention

¹²¹ SUA Convention, *supra* note 118, art. 3.1.

¹²² Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT’L & COMP. L. REV. 493, 520 (2003).

¹²³ UNCLOS, *supra* note 108, at art. 100, 101. The UNCLOS provisions are ambiguous and controversial with respect to jurisdiction over piracy outside the territorial waters of a coastal state, particularly with respect to the exclusive economic zone (EEZ). UNCLOS Article 86, which describes general provisions applicable to the high seas, reads: “The provisions of this part [including the articles on piracy] apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial seas or in the internal waters of a State. . . .” Nevertheless, it has been argued that UNCLOS piracy provisions should apply to the EEZ “because they are not incompatible with the rights of coastal states: Since enforcement against a pirate, in normal circumstances, could not be viewed as impinging upon any rights reserved to the coastal State, the law of piracy in the EEZ must be viewed as identical to that applying beyond.” Zoe Keywan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 111 (2000); *see also* Dahlvang, *supra* note 48, at 24 (stating that the EEZ is usually considered “high seas” for piracy purposes).

through a series of amendments specifically addressing the use of WMD for the purpose of intimidating a population or seeking to compel action by a government or international organization.¹²⁴ These amendments, now known as the 2005 Protocols, were adopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties.¹²⁵ The requisite number of states have yet to ratify the 2005 Protocols;¹²⁶ however, upon entering into force, these amendments will make it an offense:

[T]o unlawfully and intentionally transport, discharge, or use against or on a ship: explosives; radioactive materials; biological, chemical or nuclear (BCN) weapons; or hazardous or noxious substances and materials. The offense also extends to the transport of materials, software or related technologies significantly contributing to the design, manufacture or delivery of a BCN weapon.¹²⁷

E. Deficiencies in the Law of Piracy

The SUA Convention greatly improved the international law applied to piracy by clarifying issues surrounding offenses and jurisdiction; nevertheless, significant gaps in the law of piracy remain. These gaps can be grouped and summarized as follows:

1. Reactive as Opposed to Preventive Approach

The UNCLOS merely imposes a general obligation for states to cooperate in the repression of piracy.¹²⁸ Similarly, while the preamble to the SUA Convention calls on the IMO to develop measures “to prevent unlawful acts which threaten the safety of ships,”¹²⁹ it offers little guidance on how to do so, and in the years since the SUA Convention came into force, “there has been no significant action relating to ship security; rather, the IMO has focused more

¹²⁴ 2005 Protocols to the SUA Convention, art. 3bis, <http://www.imo.org> [hereinafter 2005 Protocols] (last visited Nov. 18, 2006).

¹²⁵ Jane Andrewartha, *English Maritime Law Update: 2005*, 37 J. MAR. L. & COM. 359, 360 (2006).

¹²⁶ The amended Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has not yet entered force. It will enter into force ninety days after the date on which twelve states have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession with the Secretary-General. The amended Protocol requires ratification from three states which are also party to the SUA Convention but it cannot come into force unless the 2005 SUA Convention is already in force. See IMO, <http://www.imo.org> (last visited Feb. 16, 2007).

¹²⁷ Andrewartha, *supra* note 125, at 360.

¹²⁸ UNCLOS, *supra* note 108, at art. 100.

¹²⁹ SUA Convention, *supra* note 118, at preamble.

on its traditional role of promoting safety at sea and preventing maritime pollution.”¹³⁰ Additionally, the SUA Convention does not impose any “real obligation” to submit offenders to criminal jurisdiction for prosecution and punishment.¹³¹ A state party does have the obligation to establish jurisdiction where possible¹³² and, if it does not extradite, to “submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that state” and to “take their decision in the same manner as in the case of any other offence of a grave nature under the law of that state;”¹³³ however, this obligation only imposes the requirement to hold a preliminary hearing, and not to actually prosecute the alleged offender before an independent court of criminal justice.¹³⁴

2. Restricted Access to Preventive Information

Aside from the general obligation to cooperate in the repression of piracy, the UNCLOS does not address the sharing of information between states to prevent pirate attacks, and the SUA Convention provisions on this subject are “vague and highly permissive.”¹³⁵ Article 13 of the SUA Convention only requires states to cooperate in the prevention of illegal acts at sea by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;

¹³⁰ Mellor, *supra* note 119, at 384.

¹³¹ Bahar, *supra* note 95, at 40.

¹³² SUA Convention, *supra* note 118, at art. 6.4 (“Each state Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the state parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.”).

¹³³ *Id.* at art. 10.1 (“The state Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that state. Those authorities shall take their decision in the same manner as in the case of any other offence of grave nature under the law of that state.”). Similar language requiring a State to extradite or prosecute is common in international treaties. For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that “[e]ach State Party shall likewise take measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 24 I.L.M. 535, art. 5(2), available at <http://www1.umn.edu/humanrts/instreet/h2catoc.htm> [hereinafter Convention Against Torture] (last visited Feb. 19, 2007).

¹³⁴ Bahar, *supra* note 95, at 40.

¹³⁵ Mellor, *supra* note 119, at 384.

(b) exchanging information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.¹³⁶

The only clarification of these information requirements is then set forth in Article 14 of the SUA Convention, which states that a party that has:

reason to believe that an offense set forth in article 3 will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those states which it believes would be the states having established jurisdiction in accordance with article 6.¹³⁷

Together, these information-sharing provisions are less than desirable because: 1) they restrict the flow of information to only those states that may exert jurisdiction over possible attacks; 2) the “national law” compliance requirement could prevent the release of relevant information in a timely manner; and 3) the sharing of information is only required when it is believed an attack will be committed.¹³⁸

3. Limitations to the SUA Convention

With its expansion of the definition of illegal acts at sea, the SUA Convention does create a broader jurisdictional grant over pirate attacks than the UNCLOS; however, a vessel still must be in international transit coming from foreign territory or the high seas or passing through or heading for such areas at the time of the illegal act.¹³⁹ Accordingly, there is still a gap in the law if a vessel only transits the territorial waters of one state, although that gap could be filled by the state’s national laws. Additionally, while ratification of the SUA Convention gives state parties the ability to assert jurisdiction over alleged offenders found in another country’s territory, “there is no right-of-entry into such territorial waters for nations capable of actual suppression.”¹⁴⁰

While the UNCLOS is customary international law binding on all nations,¹⁴¹ the SUA Convention is only applicable to state signatories.¹⁴² As of

¹³⁶ SUA Convention, *supra* note 118, at art. 13.1.

¹³⁷ *Id.* at art. 14.

¹³⁸ Mellor, *supra* note 119, at 385-86.

¹³⁹ SUA Convention, *supra* note 118, at art. 4.

¹⁴⁰ Bahar, *supra* note 95, at 40.

¹⁴¹ RESTATEMENT, *supra* note 111, at § V IN NT.

31 December 2006, the SUA Convention had been ratified by 142 countries, representing 88.02 percent of worldwide shipping by tonnage.¹⁴³ Notably, however, it is inapplicable to some of the areas most prone to pirate attacks. Somalia has not ratified the SUA Convention, and of the three littoral states surrounding the “piracy hotbed” of the Strait of Malacca - Indonesia, Malaysia, and Singapore - only Singapore has ratified it.¹⁴⁴ Indonesian waters alone accounted for more pirate attacks than any other country’s waters in 2006.¹⁴⁵ Finally, even though state parties to the SUA Convention are obligated to act, the absence of any sanction provisions within the Convention might result in a lack of compliance.¹⁴⁶

As can be seen through this examination of the law of piracy, the international community can develop a legal framework to address transnational threats; however, this examination also demonstrates that the need for compromise across the wide spectrum of nations often results in gaps that might limit the law’s effectiveness in practice. Even something as seemingly simple as defining a transnational threat can be extremely difficult to accomplish and have far-reaching implications for states with hopes of successfully combating that threat. Therefore, a global maritime security network must not only clearly define the type of activities it seeks to prevent, it must also provide cooperating nations with a mechanism to apply the law prohibiting such activities. Accordingly, Part III of this thesis will examine the possible bases on which states can assert jurisdiction over transnational threats, with an emphasis being placed once again on the threat of piracy.

III. JURISDICTION TO COMBAT TRANSNATIONAL THREATS

When considering the question of jurisdiction under international law, it is necessary to distinguish between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. Jurisdiction to prescribe refers to a state’s power to pass legislation governing a particular activity or conduct. Jurisdiction to adjudicate refers to a state’s ability to subject persons or things to its judicial processes. Lastly, jurisdiction to enforce refers to a state’s power to

¹⁴² Tammy M. Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL’Y 743, 760 (2005).

¹⁴³ IMO, *supra* note 126.

¹⁴⁴ Jackson Sawatan, *Vital for Littoral States to Ratify Conventions, Says Report*, Malaysian National News Agency, May 23, 2006, <http://www.bernama.com.my/bernama/v3/news.php?id=199190> (last visited Nov. 18, 2006). *See also* IMO, *supra* note 126.

¹⁴⁵ *Optimism as Piracy Attacks Fall for Third Year in a Row*, *supra* note 50.

¹⁴⁶ Bahar, *supra* note 95, at 41.

induce or compel compliance with its law through its courts.¹⁴⁷ International law regards these forms of jurisdiction as a prerogative of sovereign states and, because control over territory is the hallmark of sovereignty, the traditional limits of jurisdiction mirror territorial boundaries.¹⁴⁸

While international law has long prohibited the agents of one state from enforcing its criminal laws within the territory of another state without consent, international law does permit a state to apply its domestic laws to acts committed elsewhere that have effect in its territory.¹⁴⁹ This objective reach of domestic legislation was first recognized in the *Lotus Case*¹⁵⁰ in the early 20th century, and has been expanding ever since. Thus, it is appropriate to begin the jurisdiction discussion with an examination of the various territorial and extraterritorial bases a state might invoke to justify the application of its domestic laws to combat transnational threats. These bases include: 1) the principle of territoriality; 2) the principle of nationality of the offender; 3) the principle of nationality of the victim (or passive personality principle); 4) the principle of protection; 5) the principle of the flag; and 6) the principle of universality.¹⁵¹

A. The Territoriality Principle

A fundamental tenet of international law is that a state may apply its laws to activities occurring within its territory. As Chief Justice Marshall once said, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”¹⁵² The territoriality principle includes not only a state’s land territory, but also its internal waters, territorial waters, and archipelagic waters.¹⁵³

¹⁴⁷ JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 355-56 (2d ed. 2006).

¹⁴⁸ See Eugene Kontrovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L. J. 183, 188 (2004).

¹⁴⁹ FORBES, *supra* note 78, at 108.

¹⁵⁰ In 1926, a collision on the high seas between a French naval ship and a Turkish freighter resulted in the sinking of the freighter and the deaths of eight Turkish nationals. When the French ship reached port in Turkey, the French watch officer was arrested and charged with homicide. He was subsequently convicted and sentenced. France objected to the actions of Turkish authorities, and the issue of what state could apply its criminal law was submitted to the Permanent Court of International Justice (the precursor to the International Court of Justice). The Court determined that both states could apply their laws under the circumstances, and thus the case was one of concurrent jurisdiction. *Id.* See also DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 356-58.

¹⁵¹ LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES, 21-2 (2003).

¹⁵² *Schooner Exchange v. McFaddon*, 7 U.S. 116, 136 (1812).

¹⁵³ FORBES, *supra* note 78, at 108. See also UNCLOS, *supra* note 108, at Part II for a discussion of the territorial sea, and Part IV for a discussion of archipelagic states. The U.S. claims a 12 nautical

Because territorial waters are subject to territorial sovereignty, the coastal state enjoys the right and responsibility to apply its domestic laws throughout its waterways, just as it can with respect to its land mass subject to innocent passage.¹⁵⁴ Outside the territorial waters, a coastal state retains some jurisdiction and limited enforcement abilities in an area known as the contiguous zone. Within the contiguous zone, which extends for 12 nautical miles beyond the territorial waters, a coastal state has jurisdiction over immigration, sanitation, customs, and fiscal matters; however, it does not retain plenary jurisdiction over criminal matters.¹⁵⁵ Within a larger exclusive economic zone (EEZ), which includes the contiguous zone, the coastal state retains jurisdiction over the management of natural resources and the protection of the marine environment.¹⁵⁶

As applied to a transnational threat such as piracy, the territoriality principle of jurisdiction works well if the coastal state possesses the robust resources and domestic law necessary to pursue and prosecute the unlawful activity within its territorial waters. On the other hand, if the coastal state is unable to address the threat, the territoriality principle is extremely limiting because, absent permission, “the naval vessels or marine police from one state may not enter the internal waters, territorial waters or archipelagic waters of another state to patrol for pirates or to arrest persons for acts of piracy, regardless of where such acts took place.”¹⁵⁷ Thus, the effectiveness of the territoriality principle as a basis for combating maritime transnational threats depends completely on the coastal state’s ability to meet the challenges posed by these threats or its willingness to allow other states to do the job close to its own shores.¹⁵⁸

mile territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles. See President Ronald Reagan, U.S. Ocean Policy Statement, 19 WEEKLY COMP. PRES. DOC. 383-385 (Mar. 10, 1983) (“[T]he United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.”), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Statement.pdf (last visited Nov. 18, 2006).

¹⁵⁴ UNCLOS, *supra* note 108, at Part II art. 2, 17.

¹⁵⁵ *Id.* at Part II art. 33.

¹⁵⁶ The EEZ extends not more than 200 miles from the baselines from which the territorial sea is measured. *Id.* at Part V art. 56, 57.

¹⁵⁷ FORBES, *supra* note 78, at 108-9. See also UNCLOS, *supra* note 108, at Part II art. 19 (The right of innocent passage through territorial seas and archipelagic waters does not include the right to exercise police powers).

¹⁵⁸ See REYDAMS, *supra* note 151, at 26-7 (positing that globalization undermines the territoriality principle: “Technological advances, the more sophisticated structure of commercial organizations, and the growth of enterprises with transnational links erode the concept of territoriality. As a result, it becomes increasingly difficult to determine when and where offences of any complexity take

B. Extraterritorial Bases for Jurisdiction

While the territorial principle remains a fundamental basis for exercising jurisdiction, that principle has undergone considerable evolution over the last century. The “engine” driving this evolution was the “increasing internationalization of commerce and industry” in the early 20th century that witnessed the emergence of business relationships - and disputes - between partners from different corners of the globe.¹⁵⁹ As a result, courts in the United States and elsewhere began the process of expanding the concept of jurisdiction to enable one nation to “invade” the territorial sovereignty of another state for the purpose of applying its domestic law.¹⁶⁰ Understandably, one nation’s attempt to exercise jurisdiction over activities within a second nation’s territory could damage relationships between states and undermine international stability. Accordingly, “a nation can exercise extraterritorial jurisdiction over an offense only when it has a clear nexus with the offense that gives it jurisdictional priority over other nations.”¹⁶¹ For purposes of the current discussion concerning a global maritime security network, the bases for asserting extraterritorial jurisdiction are critical because the activities of transnational actors frequently occur within the territory of multiple nations and competing jurisdictional claims are likely to arise.

1. The Nationality Principle

The nationality principle permits a state to apply its laws to its own citizens when they are located outside its territory.¹⁶² By invoking this principle, a state can “reach” acts of piracy committed within the territorial waters of another state if its citizens are the offenders.¹⁶³ While this basis for exercising jurisdiction would appear straightforward and simple to apply, it has significant shortcomings in the modern world. For instance, nationality is not always clear: “the basis for ascribing human nationality may be birthplace, genealogical descent, prior oath-taking, or current profession of allegiance.”¹⁶⁴ Additionally, the concept of nationality has been eroded by the phenomenon of globalization,

place. The progressive erosion of . . . territoriality poses immense challenges to ‘ordinary’ law enforcement and compels us to rethink the traditional concept of jurisdiction.”).

¹⁵⁹ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 364.

¹⁶⁰ *See, e.g., United States v. Aluminum Co. of America*, F.2d 416 (2d Cir. 1945) (applying the effects doctrine to determine the extraterritorial reach of the Sherman Act).

¹⁶¹ Kontrovich, *supra* note 148, at 189.

¹⁶² *See e.g., Blackmer v. United States*, 284 U.S. 421 (1932) (ruling that U.S. laws applied to a U.S. citizen resident in France).

¹⁶³ FORBES, *supra* note 78, at 108.

¹⁶⁴ Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 239 (1990).

which is characterized by highly-mobile transient populations with significant connections to more than one state.¹⁶⁵ Ultimately, the nationality principle could serve as a valuable tool for combating transnational threats; however, its effectiveness would depend wholly on: 1) accurately identifying the nationality of an offender, and 2) the ability of that offender's state to take subsequent action.

2. The Passive Personality Principle

Under the passive personality principle, a state may apply its law to an act committed outside its territory when its national is a victim of the act.¹⁶⁶ Although historically disfavored, this form of jurisdiction has gained new relevance in treaties and domestic legislation, largely in response to increased terrorist activity.¹⁶⁷ Despite this new relevance; however, the passive personality principle is subject to the same limitations as the nationality principle discussed above. Additionally, its potential application raises questions about nationality and motive, as well as the definition of the term "victim."¹⁶⁸ Accordingly, the passive personality principle would appear to have some utility as applied to transnational threats, but its shortcomings may be even greater than the nationality principle upon which it is based.

3. The Protective Principle

The protective principle is a limited concept whereby "states recognize the right to regulate conduct outside their territory by non-nationals that is directed against their security or a limited number of other important state interests."¹⁶⁹ Although the protective principle would seem to provide states with a valuable jurisdictional instrument to combat transnational threats, it is rarely invoked for a number of reasons. First, if a state's citizens are harmed

¹⁶⁵ REYDAMS, *supra* note 151, at 26.

¹⁶⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 379.

¹⁶⁷ See e.g., United Nations Convention Against Transnational Organized Crime, Dec. 12, 2000, 40 I.L.M. 335 (2001); UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf (last visited Nov. 19, 2006)(authorizing states to enact passive personality statutes in respect of transnational crimes covered by the treaty); *United States v. Bin Laden*, 92 F.Supp. 2d 189 (S.D.N.Y. 2000) (stating that the passive personality principle is "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality").

¹⁶⁸ REYDAMS, *supra* note 151, at 23 n.60.

¹⁶⁹ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 378. The protective principle is usually used for official documents. See, e.g., *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968) (upholding the exercise of jurisdiction based upon the protective principle, stating that the government has a "legitimate interest" in information regarding persons seeking entry into the United States and that false statements in visa applications "constitute[] an affront to the very sovereignty of the United States.").

abroad, the passive personality principle can provide jurisdiction.¹⁷⁰ Second, if the harm involves the general interests of a nation, an attempt by one state to invoke the protective principle and its broad grant of jurisdiction could generate claims of excessive application by a second state and create international tensions.¹⁷¹ Finally, while international law has accepted the right of a state to exercise jurisdiction to protect “national security” or certain “interests of state,” there are no internationally accepted definitions of those terms.¹⁷²

C. The Flag State Principle: Territoriality or Nationality

According to the flag state principle, a state has the right to apply its laws to acts aboard vessels registered in that state. Flag state control of its ships is premised on the theory that a ship is a national of a state or an extension of its territory; essentially, a floating island.¹⁷³ Because no state has authority over the high seas itself, the flag state principle “serves a need for the preservation of order on the high seas.”¹⁷⁴ Despite the fact that the flag state principle greatly contributes to maintaining the openness of the high seas, there are significant problems with its practical application. The primary pitfall with the flag state principle is the legal fiction of flags of convenience, whereby shipowners shop globally and choose the nationality of their vessels.¹⁷⁵ While this free enterprise arrangement has created some market efficiencies within the shipping industry, “it constitutes an exact reversal of sovereignty’s intent and a perfect mockery of national conceits.”¹⁷⁶ Among the problems it has created or facilitated include dangerous ships, pollution, the implicit disposability of crews, stateless terrorism, and modern piracy.¹⁷⁷ Given the fact that many flag states now have little linkage to their ships beyond the initial registration, it is not surprising that many states fail in their obligations under international law. Thus, the ultimate

¹⁷⁰ Kontrovich, *supra* note 148, at 189-90.

¹⁷¹ *Id.*

¹⁷² REYDAMS, *supra* note 151, at 23.

¹⁷³ Emeka Duruigbo, *Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry*, 7 ANN. SURV. INT’L & COMP. L. 101, 106 (2001). See also UNCLOS, *supra* note 108, at Part VII art. 92 (providing that ships shall be subject to the exclusive jurisdiction of the flag state on the high seas, unless in exceptional cases provided in international treaties or the UNCLOS itself), and UNCLOS Part VII art. 105 (providing a general exception to the rule for piracy: “On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 112 (defining the expression “flags of convenience” as “the flag of any country allowing the registration of foreign owned and foreign controlled vessels under conditions which for whatever the reasons, are convenient and opportune for the persons who are registering the vessels”).

¹⁷⁶ LANGEWIESCHE, *supra* note 1, at 6.

¹⁷⁷ *Id.* at 7.

issue with the flag state principle is not the validity of its legal underpinnings, but rather, ensuring flag state enforcement over violations.¹⁷⁸

D. The Universality Principle

Each of the aforementioned extraterritorial forms of jurisdiction are based on a clear nexus between a state and the prohibited activity. By contrast, the universality principle of jurisdiction does not require any link to the forum state;¹⁷⁹ rather, any state may unilaterally launch an investigation when “the prohibited acts are of an international character and are of serious concern to the international community as a whole.”¹⁸⁰ The theory of universal jurisdiction transcends national sovereignty with the twofold assumption that the international community holds certain shared interests, and that expanded jurisdiction over transgressions of these interests will enhance world order.¹⁸¹ While the concept of universal jurisdiction is widely accepted today, it is also extremely controversial; the issue is defining the principle’s scope.¹⁸² Whereas universal jurisdiction was initially limited to the offenses of piracy and the slave trade, states have increasingly applied the principle in recent years to some human rights offenses.¹⁸³ Current debate centers on whether to expand the scope of universal jurisdiction even further to encompass “certain acts of terrorism, assaults on diplomatic personnel, or kidnapping.”¹⁸⁴

On its face, the universality principle appears as a potent and promising weapon against the types of transnational threats discussed above in Part I of this thesis. In fact, given that piracy is the oldest offense to which universal jurisdiction has been applied,¹⁸⁵ a detailed discussion of the principle’s

¹⁷⁸ Duruigbo, *supra* note 173, at 108-9.

¹⁷⁹ See REYDAMS, *supra* note 151, at 28-42 (identifying three doctrinal versions of the universality principle: 1) the co-operative general universality principle that applies to all serious offenses committed abroad when extradition of the foreign offender is not possible; 2) the co-operative limited universality principle that only applies to international offenses; and 3) the limited universality principle that does not require any link to the forum state and relies solely on the international legal character of the offense).

¹⁸⁰ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 380.

¹⁸¹ M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 42 (Stephen Macedo ed., 2004) [hereinafter UNIVERSAL JURISDICTION].

¹⁸² REYDAMS, *supra* note 151, at 28.

¹⁸³ See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785 (1988); see also Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION, *supra* note 181, at 77 (discussing Israel’s “responsible exercise of universal jurisdiction” to try Adolf Eichmann for his role in the extermination of Jews during World War II).

¹⁸⁴ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 380.

¹⁸⁵ Randall, *supra* note 183, at 791.

relationship to piracy should provide insights into how, if at all, it can contribute to the creation of a global maritime security network. An appropriate starting point for this discussion is with a brief overview of the two principal sources of international law that govern the exercise of universal jurisdiction: customary law and international agreement.

1. Customary Law as a Source of Universal Jurisdiction

Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁸⁶ Over time, a majority of nations have recognized that the prosecution of certain international crimes contributes so greatly to their common interests that it is necessary to allow all states the opportunity to exercise jurisdiction. Typically, these crimes possess a particularly grave nature and, in some cases, it is not entirely clear which state can exercise jurisdiction.¹⁸⁷ Although, as noted above, the expanding scope of universal jurisdiction is subject to much current debate, it is well established as a matter of customary international law that universal jurisdiction can be exercised over piracy, slave trading, war crimes, genocide, and torture.¹⁸⁸

2. International Agreements as a Provider of Universal Jurisdiction

The second principal source of international law governing the exercise of universal jurisdiction is international agreement. Unlike customary international law, which is binding on all nations, an international agreement only binds the parties to the agreement.¹⁸⁹ Today, countries have established universal jurisdiction by treaty over such offenses as hijacking, terrorism, torture and apartheid.¹⁹⁰ Such treaties create a form of universal jurisdiction by

¹⁸⁶ RESTATEMENT, *supra* note 111, at § 102(2).

¹⁸⁷ MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 50-52 (2005); *see also* Randall, *supra* note 183 (emphasizing only the fundamental nature of the crime as a rationale for the exercise of universal jurisdiction).

¹⁸⁸ *See* Bassiouni, *supra* note 181, at 47-52 (describing the evolution of these international crimes over centuries through declarative prescriptions and later in enforcement prescriptions). *See also* RESTATEMENT, *supra* note 111, at § 404.

¹⁸⁹ RESTATEMENT, *supra* note 111, at § 102, cmt. f (“An international agreement creates obligations binding between the parties under international law.”).

¹⁹⁰ Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for all Nations Against International Crime*, 9 MSU-DCL J. INT’L L. 7 (2000). *See also* International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1456, art. 8(1), *available at* http://www.unodc.org/unodc/terrorism_convention_hostages.html (last visited Nov. 19, 2006); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, art. 7, *available at* http://www.unodc.org/unodc/terrorism_convention_civil_aviation.html (last visited Nov. 19, 2006);

requiring state parties to enact legislation giving themselves jurisdiction in any case where the state chooses not to extradite an offender.¹⁹¹ While treaty-created universal jurisdiction only extends to state parties, it can become binding on all states as customary international law if the treaty becomes widely accepted and implemented in state practice.¹⁹²

3. Universal Jurisdiction and Piracy

The crime of piracy has been subject to universal jurisdiction for centuries, first as a matter of customary international law, and more recently pursuant to international conventions.¹⁹³ Initially, there were two reasons why universal jurisdiction was applied to piracy. First, pirates were considered “hostis humani generis” - or enemies of all mankind - because of the gravity of the crime in which they engaged.¹⁹⁴ Second, ever since Hugo Grotius developed the concept of *mare liberum* in the early 17th century and established the doctrine of freedom of the seas, no state possessed the territorial jurisdiction to punish acts of piracy on the high seas, and flag states were largely unable to prosecute effectively.¹⁹⁵ Today, universal jurisdiction can also be applied to acts

Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, art. 7, available at <http://138.25.65.50/au/other/dfat/treaties/1972/16.html> (last visited Nov. 19, 2006); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, art. 7, available at http://www.unodc.org/unodc/terrorism_convention_protected_persons.html (last visited Nov. 19, 2006); International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249, art. 8(1), available at http://www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html (last visited Nov. 19, 2006); Convention Against Torture, *supra* note 133, at art. 7(1); Convention on the Suppression and Punishment of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, art. 5, available at <http://www.unhcr.ch/html/menu3/b/11.htm> (last visited Nov. 19, 2006).

¹⁹¹ Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems*, 16 FLA. J. INT'L L. 371, 380 (2004).

¹⁹² *Id.* at 380-81.

¹⁹³ INAZUMI, *supra* note 187, at 49-50 (indicating that universal jurisdiction over piracy derives from the treatment of brigands and dates back to at least the sixteenth century).

¹⁹⁴ Randall, *supra* note 183, at 791, 794; *see also* United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (quoting Justice Story that “A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.”); *but cf.* Kontrovich, *supra* note 148 (challenging the generally accepted view that piracy was universally cognizable because of its heinousness).

¹⁹⁵ Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 988 (2006); *see also* INAZUMI, *supra* note 187, at 50.

of piracy pursuant to treaty law. Article 19 of the High Seas Convention and Article 105 of the UNCLOS provide:

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith.¹⁹⁶

Thus, states may assert universal jurisdiction over piracy by invoking either customary international law or the UNCLOS.¹⁹⁷ Indeed, under the current international law regime, “it is hard to find any authority challenging the universal principle as applied to piracy.”¹⁹⁸

Given the fact that the legitimacy of universal jurisdiction over piracy has been re-affirmed time and time again, it is fair to ask whether this principle has been invoked and applied successfully to prosecute piratical acts. At the outset, it is important to note that just because universal jurisdiction over piracy is permitted as a matter of customary international law and treaty law, prosecution on this basis still must be authorized by a state’s national legal system or by an implementing statute for internationally established adjudicating bodies.¹⁹⁹ Until recently, national legislation permitting the exercise of universal jurisdiction was rare, and “no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.”²⁰⁰ Additionally, on the international plane, none of the investigating commissions or criminal tribunals established by the international community since World War I has been based on the theory of universal jurisdiction, and the statute of the International Criminal Court only has a universal scope as to

¹⁹⁶ High Seas Convention, *supra* note 106, at art. 19; and UNCLOS, *supra* note 108, at art. 105.

¹⁹⁷ See RESTATEMENT, *supra* note 111, § § 404, 423 (permitting the United States to define and adjudicate the offense of piracy pursuant to the universality principle).

¹⁹⁸ Kontrovich, *supra* note 148, at 190.

¹⁹⁹ Bassiouni, *supra* note 181, at 46.

²⁰⁰ *Id.* See also REYDAMS, *supra* note 151, at 83-219 (presenting detailed accounts of universal jurisdiction legislative and judicial practice at the municipal level in 14 countries - Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, the Netherlands, Senegal, Spain, Switzerland, United Kingdom (England and Wales), and the United States; none of these countries has exercised universal jurisdiction in the absence of national legislation establishing such jurisdiction).

the limited international crimes within its jurisdiction.²⁰¹ Nevertheless, despite the seeming reluctance to actually apply universal jurisdiction on the national and international levels, the occasional piracy prosecution on this basis has taken place.²⁰² Two noteworthy cases bear further examination.

a. *The Alondra Rainbow*

On October 22, 1999, the Japanese-owned tanker *Alondra Rainbow*, with a crew of 15 Filipinos under the command of two Japanese officers, sailed from the port of Kuala Tanjung in Indonesia, bound for Miike in Japan. Shortly after it left Kuala Tanjung, the ship was attacked and forcibly boarded by a band of ten men armed with pistols and swords. The *Alondra Rainbow* was carrying a full load of nearly 7,000 metric tons of aluminum ingots worth approximately \$10 million, which happened to be the value of the ship as well.²⁰³ The crew was dumped into a small inflatable raft and drifted for 11 days before being rescued by a Thai fishing vessel.²⁰⁴ After the hijacking, the pirates sailed the ship - repainted while underway - through the Singapore Strait to Malaysia and then to the Philippines, where the cargo was quickly sold. At that point, investigators suspect the ship steamed generally westward where it gained access to the Indian Ocean and vanished.²⁰⁵

A few weeks after the *Alondra Rainbow* disappeared, the Piracy Reporting Center, Kuala Lumpur, received a plausible reported sighting of a vessel of similar description to the ship sailing in international waters off India's southwest coast.²⁰⁶ The Indian Navy responded to the report and pursued the pirates for 35 hours and nearly 575 miles, until finally apprehending them on November 16 off the west coast of India near Goa. The Indian Navy towed the

²⁰¹ *Id.* See Rome Statute of the International Criminal Court, Part 2, July 17, 1998, U.N. Doc. A/Conf. 183/9, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter THE ROME STATUTE] (last visited Nov. 19, 2006) (the international crimes currently within the ICC's jurisdiction are genocide, crimes against humanity, and war crimes).

²⁰² Several early nineteenth century U.S. Supreme Court cases described the basis for asserting universal jurisdiction over piracy. See, e.g., *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 147-48 (1820) ("A pirate, being *hostis humani generis*, is of no nation or State . . . All the States of the world are engaged in a tacit alliance against them. An offence committed by them against any individual nation, is an offence against all. It is punishable in the Courts of all. So, in the present case, the offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish."), and *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820) ("[P]irates being *hostis humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all.").

²⁰³ LANGEWIESCHE, *supra* note 1, at 48-52.

²⁰⁴ *Id.* at 57-59.

²⁰⁵ *Id.* at 59-60.

²⁰⁶ *Id.* at 71.

Alondra Rainbow to Mumbai, where the vessel and the arrested personnel were handed over to local police.²⁰⁷

The *Alondra Rainbow* prosecution turned out to be a landmark case because it marked the first time universal jurisdiction was invoked to try an act of piracy with no connection to the prosecuting country.²⁰⁸

The Indians could have sat back and done nothing. The *Alondra Rainbow* was a Panamanian ship owned by the Japanese, crewed by Filipinos, and attacked off the shores of Indonesia by pirates of uncertain nationalities. Its disappearance had no connection to India at all, and there was certainly no domestic constituency expressing outrage and demanding action.²⁰⁹

Nevertheless, India is a party to the UNCLOS, and it took seriously its obligation to cooperate in the repression of piracy.²¹⁰ The prosecution moved exceedingly slowly in Mumbai, and the first depositions in the case were not taken until 2001. Ironically, though India had the ability to prosecute the act of piracy based on universal jurisdiction, the Indian Penal Code contained no penalties for piracy. Fortunately, however, relevant sections of old Admiralty provisions pertaining to piracy from the days of British colonial rule were still applicable.²¹¹ In February 2003, the Mumbai Sessions Court convicted the pirates and sentenced them to jail for up to seven years each.²¹²

b. *The Safina Al Bisaarat*

Details of the *Safina Al Bisaarat* pursuit and capture are described above in Part II of this thesis. On 29 January 2006, the ten Somali pirates were flown to Mombasa, Kenya to stand trial for piracy. As with the *Alondra Rainbow* case, the prosecuting country had no connection to the attacked ship or the alleged offenders; however, Kenya - like India - is also a party to the

²⁰⁷ *Id.* at 73-74.

²⁰⁸ *Id.* at 76.

²⁰⁹ *Id.* at 71.

²¹⁰ See UNCLOS, *supra* note 108, at art. 100. For a complete list of ratifications, accessions, and successions to the UNCLOS, see UN Oceans and Law of the Sea, *supra* note 109.

²¹¹ LANGEWIESCHE, *supra* note 1, at 71,76 (The Indian government did charge the pirates with other crimes under Indian law, including armed robbery, attempted murder, assault, theft, forgery, fraud, and entering India without valid passports - although they had done so involuntarily in shackles and under guard).

²¹² Adrian Leonard, *Modern Pirates of the Ancient Seas*, LEADER'S EDGE, Apr. 2006, http://www.ciab.com/TemplateMagazine.cfm?Section=Editorial&MagazineTimeFrame_ICID=129&MagazineYear_ICID=168 (last visited Nov. 19, 2006).

UNCLOS and invoked universal jurisdiction to pursue the case.²¹³ On 26 October 2006, the pirates were convicted of hijacking the *Safina Al Bisaarat*. According to news reports, the men claimed during the trial to be stranded fishermen, and none showed any emotion as they were found guilty.²¹⁴ Prosecutors initially sought the death penalty; however, on 1 November 2006, the pirates were each sentenced to seven years in prison.²¹⁵

4. The Limitations of Universal Jurisdiction

Despite the successes of the *Alondra Rainbow* and the *Safina Al Bisaarat* prosecutions and the categorical expansion of the universality principle, it is not widely understood and states do not tend to apply it.²¹⁶ Some of the limitations associated with the principle include:

1) Difficulties associated with obtaining physical custody of offenders. A common dilemma arises with a war criminal at large and no reasonable prospect for extradition. In such a situation, a particularly aggrieved state may be faced with having to pursue custody through questionable means such as abduction, or foregoing prosecution altogether.²¹⁷

2) Overriding political and foreign policy concerns. The value of punishing one criminal, even for a particularly egregious crime, may not

²¹³ See UN Oceans and Law of the Sea, *supra* note 109. Unlike India, Kenya has a piracy statute that cites the law of nations: “Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.” Penal Code of Kenya, Chapter VIII, Section 69(1), 24 of 1967, s. 6.

²¹⁴ *Somali Pirates Face Death Penalty in Kenya*, CNN, Oct. 26, 2006, <http://www.cnn.com/2006/WORLD/africa/10/26/somali.kenya.pirates.ap/index.html> (last visited Nov. 19, 2006) (The pirates’ defense lawyer has indicated that he will appeal the verdict to Kenya’s high court in Nairobi on grounds that Kenya had no jurisdiction over the case).

²¹⁵ *Somali Pirates Captured by U.S. Navy Get 7 Years Each*, CNN, Nov. 1, 2006, <http://www.cnn.com/2006/WORLD/africa/11/01/somali.pirates.ap/index.html> (last visited Nov. 19, 2006).

²¹⁶ Bassiouni, *supra* note 181, at 62 (explaining that great confusion has resulted from the fact the universality principle has at least five meanings: 1) universality of condemnation for certain crimes; 2) universal reach of national jurisdiction; 3) extraterritorial reach of national jurisdiction; 4) universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and 5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused).

²¹⁷ Randall, *supra* note 183, at 840. See also INAZUMI, *supra* note 187, at 26-27 (According to the Princeton Principles on Universal Jurisdiction (hereinafter Princeton Principles), principle 1(2), absence of a suspect is only permitted in pre-trial proceedings; actual exercise of universal jurisdiction to adjudicate can only take place after the suspect is in custody), and Bass, *supra* note 183 (contrasting the advantages of abduction - namely that sometimes the abductees simply deserve to be on trial - with the disadvantages of abduction - primarily that the act infringes upon national sovereignty and is threatening to the international order).

outweigh charges of political bias or jurisdictional challenges by other states.²¹⁸ Additionally, it is not unforeseeable that the exercise of jurisdiction by one state without linkage to an offender could infringe on the individual rights of the accused and give rise to allegations of abusive or disruptive prosecutions on the international plane.²¹⁹

3) Possible application by nonconformist nations. China, for example, has openly hindered anti-piracy efforts, and could assert universal jurisdiction to “shield” its nationals or undermine efforts of the international community to combat the threat.²²⁰

4) Dependency on domestic laws. Even if a state exercises universal jurisdiction to prosecute criminal acts for all the “right” reasons, the outcome is still dependent on the sufficiency of that state’s domestic laws. For instance, with respect to piracy, a wide range of domestic laws are currently “on the books.” At the extremes, some penal laws simply incorporate the law of nations,²²¹ while others fail to mention piracy at all. Recall that the *Alondra Rainbow* prosecution was almost undermined by the absence of any penalties against piracy in the Indian Penal Code.

5) Lack of willingness. Finally, it must be acknowledged that states may simply lack the will to exercise universal jurisdiction unless they are obligated to do so. This lack of interest may be grounded in a number of factors, from the absence of a nexus to the crime to a shortage of the necessary security and law enforcement authorities.²²² Indeed, even though the *Alondra Rainbow* case must be viewed as one of the great successes of universal jurisdiction as applied to piracy, the Indian authorities exhibited an initial reluctance to prosecute. The Mumbai police operate in a city of eighteen million people, and the *Alondra Rainbow* represented an unwanted headache. One official summarized the problem as follows:

²¹⁸ Randall, *supra* note 183, at 840.

²¹⁹ *Id.* See also UNIVERSAL JURISDICTION, *supra* note 181, at 7 (citing the Princeton Principles’ assertion that states should refuse to extradite accused persons who are liable to be subject to sham proceedings; torture; cruel, degrading or inhuman punishment; or the death penalty).

²²⁰ “The Japanese bulk carrier *Tenyu* disappeared in September 1998 while sailing from Indonesia to South Korea with a cargo of aluminum ingots. The ship reappeared in Southern China a few months later repainted, renamed and reflagged as a Honduran vessel. The Japanese owners were able to reclaim it only by using the serial number of the engine. The cargo was gone, as were the former crew, presumed dead. The 16 hijackers, all Indonesians, were released without charge.” Dahlvang, *supra* note 48, at 24.

²²¹ United States law makes criminal those acts defined as piracy by the law of nations. 18 U.S.C. §1651 (2006).

²²² INAZUMI, *supra* note 187, at 211-12.

[T]he common practice if such a ship comes, you shoo her away. Otherwise you don't know what to do with her. The question of jurisdiction comes up everywhere. [Pirates] are the scum of the earth. What would happen if India convicted and imprisoned them, but after their release Indonesia refused to recognize or accept them? They would become stateless people. Then the problem for India would be where to send them.²²³

Ultimately, of course, the Indian authorities did prosecute the *Alondra Rainbow* pirates, largely because of the high-profile nature of the Indian Navy's involvement in the apprehension.²²⁴ Notably, the lack of willingness to pursue a piracy prosecution was also present following the *Safina Al Bisaarat* incident. The *Safina Al Bisaarat* was an Indian-based ship and therefore, India could have exercised jurisdiction to prosecute if desired. The reasons for India's declining prosecution are not known to this author; however, it was only India's inability - or refusal - to pursue the case that made Kenya's universal jurisdiction prosecution possible.

E. Lessons for the Global Maritime Security Network

The detailed examinations in Parts II and III of this thesis reveal several lessons that can be applied to any international effort designed to combat transnational threats. Based on the international community's experience with piracy, it is recommended that a global maritime security network be developed with the following goals in mind:

- 1) States must consider the network to impose serious (if not binding) obligations.
- 2) Security threats must be clearly defined.
- 3) States must enact domestic legislation to address identified threats.
- 4) Preventive information must be shared openly among states.
- 5) The network must make allowances for competing jurisdictional claims.
- 6) States must be open to outside enforcement if unable to suppress threats.
- 7) States must proactively pursue - or allow - prosecution of offenders.
- 8) Offenders' individual rights must be protected.

In my opinion, any cooperative security arrangement that achieves these goals stands a very strong chance of successfully combating transnational threats. Part

²²³ LANGEWIESCHE, *supra* note 1, at 75.

²²⁴ *Id.*

IV of this thesis will examine various types of existing cooperative state arrangements and their legal underpinnings to determine which one - or combination of components - best achieves the above goals.

IV. BUILDING A GLOBAL MARITIME SECURITY NETWORK

Think Globally, Act Locally²²⁵

If cooperation between nations is the key to securing the maritime domain against transnational threats, the question then becomes how to create an environment conducive to international cooperation while motivating individual states to take action for the collective good. The first step toward cooperation on any level is the recognition of common interests.

A. International Cooperation: Development of the Transit Passage Regime

Once nations realize that they share a common significant vulnerability, constructive cooperation is possible even among sworn enemies. A prime example of such cooperation between enemies in the international law arena was the creation of the “transit passage” regime at the United Nations Law of the Sea Convention (LOSC) in 1982. In 1960, most states recognized the three-mile breadth of the territorial sea first proposed by Galiani in 1782.²²⁶ By the closing stages of the LOSC, however, the great majority of states had abandoned this position in favor of territorial seas of 12 miles or more.²²⁷ This gradual expansion of the breadth of territorial seas posed serious consequences for international navigation. If the 12-mile territorial sea replaced the three-mile territorial sea as customary international law, as many as 116 straits previously open to international navigation would become territorial waters and therefore

²²⁵ The phrase “Think Globally, Act Locally” was reportedly coined by Rene Dubos as an advisor to the United Nations Conference on the Human Environment in 1972, and refers to the argument that global environmental problems can turn into action only by considering ecological, economic, and cultural differences of our local surroundings. The slogan applies equally well to developing a stable security environment that enables global prosperity by focusing regionally and nationally. *See Morgan & Martoglio, supra* note 30, at 2.

²²⁶ The United States adopted the three-mile territorial sea limit in 1793, and it gained widespread acceptance as customary international law during the 19th century. Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT’L L.J. 405, 412 (2006).

²²⁷ *Id.* *See also* John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT’L L. 77, 86 (1980) (as of November 2, 1979, 23 states, including the United States, recognized a three-mile maximum breadth for the territorial sea; seven states recognized limits beyond three but less than 12 miles; 76 states claimed or accepted 12 miles, including the Soviet Union; and 25 states recognized limits beyond 12 miles, ranging from 15 to 200).

could be lawfully regulated by the coastal state under the regime of “innocent passage.”²²⁸

Prior to the LOSC, the regime of innocent passage was applied in international straits, subject only to the proviso that innocent passage shall not be suspended within these straits.²²⁹ Notably, as long as the major maritime powers insisted on a three-mile territorial sea, a belt of international waters between some of the more strategically critical straits was maintained, and transiting vessels avoided the restrictions imposed by the regime of innocent passage.²³⁰ With the expansion of the territorial seas, however, the major naval powers, particularly the United States and the Soviet Union, found the innocent passage rule too restrictive for their national security interests.²³¹

In response to the encroachment of territorial seas upon international straits, the United States and the Soviet Union used the LOSC to push for the development of a more liberal transit regime as applied to international straits passage.²³² Two major issues were at stake in the negotiation of a new straits regime: 1) the rights of submerged passage by submarines and overflight by airplanes; and 2) the discretionary competence of coastal states to exclude passage on the ground that it was not innocent.²³³ The United States and the Soviet Union perceived these two issues to be of vital strategic importance, and both made it clear that a new law of the sea treaty would depend on a satisfactory resolution to the question of straits passage.²³⁴ Ultimately, these two major maritime powers forged a compromise and introduced the less restrictive concept of transit passage²³⁵ for straits connecting two parts of the high seas or exclusive economic zones; for other straits the right of innocent passage was maintained.²³⁶

²²⁸ See Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 14-17, 516 U.N.T.S. 205, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf (last visited Dec. 18, 2006).

²²⁹ *Id.* at Art. 16(4); see also Moore, *supra* note 227, at 85.

²³⁰ W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 59 (1980).

²³¹ Thomas Carothers, *Recueil des Cours de l'Academie de Droit International de La Haye*, 1987, 85 AM. J. INT'L L. 390, 392 (1991) (book review).

²³² *Id.*

²³³ Mohamed El Baradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AM. J. INT'L L. 532, 547 n.81 (1982).

²³⁴ *Id.*

²³⁵ UNCLOS, *supra* note 108, art. 37-44 (defining the parameters of transit passage).

²³⁶ Carothers, *supra* note 231, at 392.

Despite these negotiations, neither the United States nor the Soviet Union signed the UNCLOS,²³⁷ although their transit passage compromise survived and has become recognized - along with the UNCLOS itself - as customary international law.²³⁸ Regardless, for purposes of this thesis, the critical point is that during the height of the Cold War, the United States and the Soviet Union found common ground and were able to cooperate and compromise on a significant matter of international law. Granted, both nations were motivated solely by their respective self-interests; however, this experience demonstrates that when self-interests coincide on a high-priority issue, constructive cooperation for the benefit of all nations is possible.

B. The Case for Regionalism: Regional Solutions to Transnational Problems

If mortal enemy nations with thousands of nuclear weapons pointed at each other can find common ground on which to cooperate and compromise, then it seems reasonable to assume that states facing serious transnational threats should also be able to work together - should *want* to work together - to eliminate or at least significantly reduce the problem. Indeed, myriad examples exist today in the international arena where states have banded together to forge effective cooperative relationships. For purposes of building a global maritime security network, however, it is necessary to examine what characteristics create the best partnerships. For instance, is geographic proximity among states or to a particular threat the most important consideration? Should available resources or a state's world view factor into the equation? Additionally, is there an optimal number of state participants, or could a network of 100 nations function just as effectively as a partnership of just two?

Following World War II, the principal allied powers, the United States, the Soviet Union, Great Britain, China, and France, entrusted the maintenance of international peace and security to the United Nations and its Security Council.²³⁹ Over the ensuing 60 years, this attempt to guarantee global security demonstrated how difficult it is to achieve consensus for collective action among nations on a global scale.²⁴⁰ In fact, during the Cold War, the competing

²³⁷ The Russian Federation became a party to the UNCLOS on 12 March 1997. *See* UN Oceans and Law of the Sea, *supra* note 109.

²³⁸ Lee, *supra* note 226, at 409 (positing that the UNCLOS constituted an innovation in the development of customary international law by: 1) codifying and modifying antecedent customary international law; 2) crystallizing emerging customary international law; and 3) initiating a progressive development of customary international law).

²³⁹ Erik Suy, *Is the United Nations Security Council Still Relevant? And Was It Ever?*, 12 TUL. J. INT'L & COMP. L. 7, 9-10 (2004).

²⁴⁰ Compare Charles Krauthammer, . . . *But Not At The U.N.*, TIME, Oct. 16, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1546346,00.html> (last visited Dec. 19, 2006)

ideologies of the United States and Soviet Union virtually paralyzed the United Nations Security Council, and ensured that global agreement on collective action would not occur.²⁴¹ Since the end of the Cold War, the Security Council has been able to greatly increase its number of binding resolutions and peacekeeping missions,²⁴² however, ironically, the demise of superpower regional struggles has simultaneously created a “trend towards the regionalization of security politics [and] the realization that . . . cooperation on a regional basis would therefore be a favorable alternative to ineffective national attempts at security.”²⁴³

The case for a regional solution to collective security threats is strengthened by the predominance of regional efforts to address other transnational concerns involving environmental, intellectual property, and human rights issues.

1. Migratory Fish Stocks

The UNCLOS recognized the coastal states’ exclusive fishing jurisdiction in a multifunctional zone called the exclusive economic zone (EEZ) extending 200 miles from the baselines of the country’s territorial sea.²⁴⁴ Beyond the 200-mile limit, the use of the high seas is open to all, and conservation of resources must be accomplished through the creation of regional

(arguing that the United Nations is a hopeless idea because collective security is an illusion and nations will always act first and foremost for their own interests and the pursuit of power), *with id.* at 9 (arguing that the United Nations’ introduction of Peacekeeping Operations as a substitute for “action” under Chapter VII has enabled it to provide workable and adequate solutions to international security problems).

²⁴¹ The Security Council did establish a military force under the command of the United States in response to North Korea’s aggression against South Korea in 1950; however, the Soviet Union was absent from the deliberations of the Security Council at the time this action was authorized. Suy, *supra* note 239, at 12-13.

²⁴² “During the time span of 40 years, between October 1945, when the United Nations Charter entered into force, and the Security Council became operative, and August 1990, the Security Council adopted 660 resolutions. Only a few of these original resolutions were binding resolutions taken under chapter VII of the Charter which deals with ‘action’ concerning a threat to the peace, a breach of the peace and acts of aggression. Consider, however, that from 1990 until the end of 2003, in a span of only 13 years, the Security Council adopted nearly nine hundred resolutions dealing with questions of peace and security. The number of these resolutions in which the Council has stated that it is ‘acting under Chapter VII of the Charter’ is nearly uncountable, and certainly in marked contrast with similar resolutions adopted from 1945 to 1990. From 1948 until 1978, the Security Council established 13 peacekeeping operations. Then followed a period of ten years without peacekeeping operations. From 1988 until 2004, the Council established 44 peacekeeping operations, 20 of which are in Africa.” *Id.* at 9.

²⁴³ David D. Jividen, *It Takes a Region: A Proposal for an Alternative Regional Approach to UN Collective Force Humanitarian Intervention*, 10 USAFA J. LEG. STUD. 109, 124 (2000).

²⁴⁴ UNCLOS, *supra* note 108, at art. 57.

agreements with other states or international organizations.²⁴⁵ One significant issue left unresolved by UNCLOS was agreement on a regime for migratory fish stocks that “straddle” the coastal states’ EEZ and the high seas.²⁴⁶ In 1995, to fill this gap in the law, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks adopted the Agreement Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks (Migratory Fish Stocks Agreement).²⁴⁷ This Agreement requires coastal states and states fishing on the high seas to adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks, promote the objective of their optimum utilization, and ensure that the stocks are maintained or restored at levels capable of producing maximum sustainable yield.²⁴⁸ Importantly, it also departs from the traditional principle of flag state enforcement by permitting members of regional fisheries organizations to board fishing vessels flying the flag of another state to inspect for conservation and management violations.²⁴⁹

In response to the Migratory Fish Stocks Agreement and its imposition of a duty to cooperate, coastal states and states fishing on the high seas began crafting regional agreements such as the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central

²⁴⁵ A. Anna Zumwalt, *Straddling Stock Spawn Fish War on the High Seas*, 3 U.C. DAVIS J. INT’L L. & POL’Y 35, 41 (1997).

²⁴⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 729.

²⁴⁷ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stock and Highly Migratory Fish Stock, Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/Conf. 164/37 (Aug. 4, 1995), 34 I.L.M. 1542 (1995), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement> [hereinafter Migratory Fish Stocks Agreement] (last visited Dec. 19, 2006).

²⁴⁸ The Migratory Fish Stocks Agreement requires states to apply the “precautionary principle” that conservation and management measures should be implemented even in the absence of adequate scientific information regarding environmental harm. *Id.* at art. 5-6. See also Southern Bluefin Tuna Cases, 117 I.L.R. 148 (1999) (International Tribunal for the Law of the Sea decision recognizing and applying the precautionary principle to prohibit Australia, Japan, and New Zealand from conducting an experimental fishing program).

²⁴⁹ “Plainly, the Migratory Fish Stocks Agreement is a significant improvement to the present regime for the protection of straddling and highly migratory fish stocks. In addition to strengthening existing compliance and enforcement measures in regional fisheries agreements, the Migratory Fish Stocks Agreement provides a strong incentive for non-members to join regional fishery organizations.” David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT’L L. 497, 541-42 (1998); see also Jamison E. Colburn, *Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement*, 6 J. TRANSNAT’L L. & POLY. 323, 363 (1997) (providing examples of management/conservation violations, including the use of prohibited gear, the taking of juvenile fish, and the taking of prohibited quantities of fish).

Pacific Ocean (Honolulu Convention).²⁵⁰ The Honolulu Convention was one of the first agreements responsive to both the UNCLOS and the Migratory Fish Stocks Agreement, and was the first multilateral fisheries convention in the central and western Pacific region open to both Pacific Island nations and distant water fishing nations (DWFNs).²⁵¹ The Honolulu Convention builds on the member-state enforcement mechanisms recognized in the Migratory Fish Stocks Agreement, requires all vessels in the region to use a vessel monitoring system for tracking purposes, and provides a unique decision-making process that urges consensus and creates a balance between Pacific Island nations and DWFNs so neither group can dominate terms of any agreement.²⁵² The Honolulu Convention has been described as “breathtakingly innovative” and provides some general lessons concerning regional cooperation, including: 1) a strong and coordinated cooperative body encourages the sharing of resources among nations; and 2) a functional regional organization allows small nations to speak with a more uniform voice when talking to larger powers.²⁵³

2. Trademark Law

As discussed in Part I of this thesis, the modern post-Cold War era has been marked by a rapid globalization of the economic marketplace. This trend has inspired a proliferation of international intellectual property lawmaking initiatives, particularly with respect to trademark law.²⁵⁴ With the emergence of a global consumer society, “[t]he role of the trademark is becoming more important as goods increasingly travel to distant markets where brand recognition may be the consumer’s only assurance of quality and origin.”²⁵⁵ The first international effort to standardize the protection of intellectual property rights, including trademarks, was the Paris Convention for the Protection of

²⁵⁰ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Ocean, Sept. 5, 2000, <http://swr.nmfs.noaa.gov/news/mhlc7.pdf> [hereinafter Honolulu Convention] (last visited Dec. 20, 2006). The United States signed the Honolulu Convention on Sept. 5, 2000. On May 16, 2005, President Bush forwarded the Convention to the Senate urging ratification based upon the United States’ direct interest as a coastal nation and a major distant water fishing nation (with the fourth-largest catch in the region); however, as of the date of this thesis, it has not been ratified. See Message to the United States Senate Regarding WCPF Convention, May 16, 2005, <http://www.whitehouse.gov/news/releases/2005/05/20050516-7.html> (last visited Dec. 21, 2006).

²⁵¹ Emily E. Larocque, *The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Can Tuna Promote Development of Pacific Island Nations?*, 4 ASIAN-PACIFIC L. & POL’Y J. 82, 84 (2003).

²⁵² *Id.* at 102-4.

²⁵³ Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT’L L.J. 143, 159, 177-78 (2004).

²⁵⁴ See Timothy W. Blakely, *Beyond the International Harmonization of Trademark Law: The Community Trademark as a Model of Unitary Transnational Trademark Protection*, 149 U. PA. L. REV. 309 (2000).

²⁵⁵ *Id.* at 310.

Industrial Property (Paris Convention), concluded in 1883.²⁵⁶ The Paris Convention, which remains the principal international treaty governing intellectual property rights, “is primarily concerned with harmonization²⁵⁷ of substantive trademark law and is premised on the fundamental principle that member states are not allowed to discriminate between their nationals and nationals of other member states.”²⁵⁸ Despite its preeminence, the Paris Convention’s inherent weakness, and the primary weakness of harmonization, is its failure to overcome the principle of territoriality, and its inability to create trademark rights separate and apart from those of its member states.²⁵⁹

In the years since the initial passage of the Paris Convention, the vision of a worldwide trademark registration system has not been realized; however, there have been successful regional efforts at harmonizing trademark law, most notably the Community Trade Mark (CTM) System developed in the European Union (EU).²⁶⁰ Under the CTM System, trademark owners can file a single registration for protection in all countries of the EU.²⁶¹ In addition to the fact that one application covers 25 countries, the System’s advantages include: 1) use of a CTM registration in one country constitutes “good use” in all EU countries; 2) one enforcement action will be applicable throughout the EU; and 3) the process of multinational registration is much less expensive.²⁶² For

²⁵⁶ Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, *as amended*, July 14, 1967, 21 U.S.T. 1630, 828 U.N.T.S. 305, *available at* http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html [hereinafter Paris Convention] (last visited Dec. 22, 2006). Originally enacted in 1883, the Paris Convention has been revised six times: Brussels (1900); Washington (1911); The Hague (1925); London (1934); Lisbon (1958); and Stockholm (1967). Marshall A. Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, 9 n.24 (1998).

²⁵⁷ “Harmonization is the process by which the varying laws of different sovereign entities are changed to more closely reflect a common set of legal principles agreed to by those sovereign entities. . . . Harmonization should not be confused, however, with international lawmaking, as it does not lead to a uniform set of agreed rules, but rather merely directs a change of rules, standards or processes in order to avoid conflicts and bring about equivalence. Therefore, the end product of harmonization is not a truly unitary body of law that governs a particular subject matter over a number of distinct jurisdictions. Instead, even after harmonization, the governing law in each jurisdiction is not the target set of legal principles, but the revised national law of each local jurisdiction.” Blakely, *supra* note 254, at 312.

²⁵⁸ Leaffer, *supra* note 256, at 9-10.

²⁵⁹ Blakely, *supra* note 254, at 315.

²⁶⁰ The European Union’s community system of trademark protection was implemented by the Trade Mark Regulation, which came into force on March 15, 1994. The CTM itself was launched on January 1, 1996. *Id.* at 338; *see also* Council Regulation (EC) 40/94 of 20 December 1993 on the Community Trade Mark, 1994 O.J. (L 11) 1.

²⁶¹ Karol A. Kepchar, *Protecting Trademarks: Common Law, Statutes and Treaties*, SL082 ALI-ABA 39, 46 (2006).

²⁶² Paul W. Reidl, *Understanding Basic Trademark Law: A Primer On Global Trademark Protection*, 870 PLI/Pat 141, 168 (2006). “The CTM system has been embraced by the global trademark community, and the number of applications received by the [Office for Harmonization in the Internal Market] OHIM has vastly exceeded all projections. In 1996, OHIM received 43,135

purposes of studying regional cooperation and its possible implications for a security network, the CTM System provides a valuable model because: 1) the EU is composed of many countries; 2) it encompasses both common law and civil law systems; 3) it is multilingual; and 4) it joins countries that have a history of political and economic strife.²⁶³ In short, these characteristics highlight once again that despite significant obstacles, regional cooperation is possible and might be the best and most feasible alternative when consensus cannot be reached on a global level.

3. Human Rights

Human rights first began to emerge as a principal focus of international law in the aftermath of World War II.²⁶⁴ Initially, global efforts to protect human rights were driven by the United Nations, most notably with the Universal Declaration on Human Rights.²⁶⁵ During the ensuing 60 years, the United Nations continued its promotion of human rights; however, “many of the most developed human rights regimes seem to be at the regional level. . . . Even if we long for the simplicity and regularity of a single global human rights regime, regionalism is a fact of international life.”²⁶⁶ At the regional level, the Organization of American States created the American Declaration of the Rights and Duties of Man,²⁶⁷ which today is “deemed to be the normative instrument that embodies the authoritative interpretation of the fundamental rights of the individual.”²⁶⁸ Additionally, the Organization of African Unity (OAU) adopted the African Charter on Human and Peoples’ Rights, which notably requires member states to adopt legislative or other measures to give effect to the human

applications. In 2005, it received 58,651 applications. A high percentage (20%) of applications have been opposed. This has caused significant delays. As of January 1, 2006, approximately 470,000 applications were pending at OHIM.” *Id.* at 169.

²⁶³ Blakely, *supra* note 254, at 347.

²⁶⁴ “The atrocities of World War II forced a reassessment of the position of individuals under international law. Reliance on the doctrine of state responsibility was clearly insufficient to deal with abuses committed by a state against its own nationals, since no state could be expected to bring an action against itself. Recognizing this, the Allied Powers during World War II - the United States, the United Kingdom, France, and the Soviet Union - pledged to prosecute individuals responsible for atrocities committed during the course of the war. This decision, and the Nuremberg and related trials that followed the war, marked a turning point in attitudes toward the individual’s status in international law.” DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 442-43.

²⁶⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (Dec. 10, 1948), available at <http://www.unhcr.ch/udhr/index.htm> (last visited Dec. 22, 2006).

²⁶⁶ John King Gamble, et al., *Human Rights Treaties: A Suggested Typology, An Historical Perspective*, 7 BUFF. HUM. RTS. L. REV. 33, 39 (2001).

²⁶⁷ American Declaration of the Rights and Duties of Man, May 2, 1948, reprinted in 43 AM. J. INT’L L. 133 (Supp. 1949), available at <http://www.cidh.org/Basicos/basic2.htm> [hereinafter American Declaration] (last visited on Dec. 22, 2006).

²⁶⁸ Gamble, et al., *supra* note 266, at 40.

rights, duties, and freedoms spelled out in the Charter.²⁶⁹ Finally, from a regional perspective, Europe has the most fully developed human rights law with the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁷⁰ and the treaty establishing the EU, which prominently features human rights.²⁷¹

With such a proliferation of instruments as evidence, there can be no doubt that human rights is viewed as a high priority by a significant portion of the world community. Why then is the trend toward developing regional instead of global agreements to protect these rights? First, there is no consensus as to a definition of human rights, and “[h]uman rights may . . . differ[] according to the particular economic, social, and cultural society in which they are being defined.”²⁷² Second, there is considerable confusion concerning the nature of these “rights” from a jurisprudential perspective, because “some rights . . . are intended as immediately enforceable binding commitments, others merely as specifying a possible future pattern of behavior.”²⁷³ For purposes of building a security network, these limitations are important because they highlight that cooperation on any level must be grounded in a common understanding of the “interest” to be pursued. Without agreement on this fundamental issue, any effort to bring nations together will necessarily fail.

In conclusion, these examples from various areas of the law seem to support the view that any attempt to create a global maritime security network stands the greatest chance of success if that effort seeks regional agreement rather than global consensus on how to address transnational security threats.

²⁶⁹ Banjul Charter on Human and Peoples Rights, June 27, 1981, art. 1, 21 I.L.M. 58, *available at* <http://www.hrcr.org/docs/Banjul/afhr.html> [hereinafter African Charter] (last visited Dec. 22, 2006); *see also id.* at 41 (contrasting the African Charter’s requirement to legislate to promote human rights with the American Declaration’s approach that simply urges members to take appropriate measures to direct judicial action to ensure compliance).

²⁷⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://www.unhcr.md/article/conv.htm> (last visited Dec. 22, 2006).

²⁷¹ “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.” Treaty of Amsterdam, Oct. 2, 1997, sec. 5, 32 I.L.M. 56, *available at* <http://www.eurotreaties.com/amsterdamtext.html> (last visited Dec. 22, 2006).

²⁷² Gamble, et al., *supra* note 266, at 34 (quoting Professor Rebecca M. M. Wallace); *see e.g.*, Bilihari Kausikan, *Asia’s Different Standard*, 92 FOR. POL’Y 24 (1993) (challenging the universality ideal by emphasizing the differences between Asian and Western cultures), *but cf.* Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) (arguing that basic human rights are fundamentally universal, subject only to a recognition that limited cultural variation might be necessary).

²⁷³ Gamble, et al., *supra* note 266, at 35 (quoting Professor Malcolm Shaw).

Interestingly, these examples indicate that a “region” can be defined quite broadly, and should not be limited solely by geography or the resources of participating nations (the Honolulu Convention covers an area 24.8 million square kilometers in size with signatories from around the globe);²⁷⁴ or type of legal system (the CTM System is applied in common law and civil law countries);²⁷⁵ or by sheer number or size of countries involved (the African Charter on Human and Peoples’ Rights has ratifications or accessions from all 53 OAU member states).²⁷⁶ On the other hand, all of these examples seem to indicate that regional cooperation is only possible between nations with a similar understanding of the nature of a particular issue and the political will to make that issue a national priority. With this in mind, the true value of a regional approach to building a global maritime security network becomes apparent - by emphasizing different threats across the globe, like-minded nations will band together where self-interests coincide to create a “patchwork” of “regions” that will address all transnational threats, and disagreements concerning the nature and priority of these threats will not doom the total effort to failure.

C. Regional Security Arrangements: The Evolution of NATO

Of course, the concept of regional security arrangements is not new, and recent history provides many examples of such partnerships. For instance, the Cold War spawned both the North Atlantic Treaty Organization (NATO)²⁷⁷ and the Southeast Asia Treaty Organization (SEATO).²⁷⁸ These regional alliances, and the treaties which created them, were formed as a defensive check on Soviet expansionism - first in Western Europe and then in Southeast Asia.²⁷⁹

²⁷⁴ See Larocque, *supra* note 251, at 82-3.

²⁷⁵ See Blakely, *supra* note 254, at 347.

²⁷⁶ See Gamble, et al., *supra* note 266, at 41.

²⁷⁷ NATO is an international organization for collective security established in 1949, in support of the North Atlantic Treaty signed in Washington, DC, on April 4, 1949. Its founding members included Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, and the United States. See North Atlantic Treaty, Apr. 4, 1949, 34 U.N.T.S. 243, available at <http://www.nato.int> (last visited Dec. 29, 2006).

²⁷⁸ SEATO was an international organization for defensive collaboration established September 8, 1954 pursuant to the Southeast Asia Collective Defense Treaty. Its founding members included Australia, France, New Zealand, Pakistan, Philippines, Thailand, United Kingdom, and the United States. See H. R. MCMASTER, DERELICTION OF DUTY 255 (1997), and Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, available at <http://www.yale.edu/lawweb/avalon/intdip/usmulti/usmu003.htm> (last visited Dec. 29, 2006).

²⁷⁹ The North Atlantic Treaty marked the first time since 1800 that the United States government bound itself by a treaty of alliance during peacetime. The initial stimulus for the North Atlantic Treaty came not from an American, but from British Foreign Secretary Ernest Bevin, who argued in 1948 that “we shall be hard put to stem the further encroachment of the Soviet tide. . . . It is not enough to reinforce physical barriers which still guard our western civilization. We must organize and consolidate the ethical and spiritual forces inherent in this western civilization of which we are the chief protagonists. This in my view can only be done by creating some form of union in Western Europe, whether of a formal or informal character, backed by the Americas and the Dominions.”

Initially, neither alliance was envisioned to create military obligations; however, both led to the militarization of the containment policy and ultimately to United States involvement in South Vietnam.²⁸⁰ It can be argued, therefore, that regional alliances formed at the outset of the Cold War contributed to the bipolarization of the international environment.²⁸¹ Such division would be counterproductive to a global maritime security network, and it begs the question as to whether regional alliances for security purposes can be created and used as the basis for unifying nations on a global scale.

While SEATO was dissolved in 1977, NATO continues to exist and evolve. With the end of the Cold War and dissolution of the Warsaw Pact in 1991, NATO's main adversary ceased to exist, forcing a strategic re-evaluation of the organization's purpose, nature, and tasks.²⁸² Since 1991, NATO gradually expanded into Eastern Europe, saw its first broad-scale military engagement in the Kosovo War, and for the first time invoked its Charter's collective security provision following the terrorist attacks of 11 September 2001.²⁸³ Today,

MISCAMBLE, *supra* note 3, at 113, 115 (quoting *The First Aim of British Policy*, Jan. 4, 1948, C.P. (48) 6, CAB 129/23). In the spring of 1954, President Eisenhower rejected direct American intervention in Indochina, but he did not wish to leave Southeast Asia to its own devices. On April 7, 1954, he articulated the "falling domino" principle which held that the loss of Indochina to the Communists would be followed by the probable loss of Japan, Formosa, the Philippines, Australia, and New Zealand. To prevent such a loss, President Eisenhower urged creation of a regional "concert of nations" in Southeast Asia on the NATO model to institute a policy of containment. STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 360-62 (1990).

²⁸⁰ In December 1947, Ernest Bevin first broached the subject of a defensive system in Western Europe to Secretary of State George Marshall. Bevin vaguely proposed "not a formal alliance, but an understanding backed by power, money and resolute action" which would prevent the Soviets from filling the power void in Europe. MISCAMBLE, *supra* note 3, at 114. SEATO bound its member nations only to "meet common danger" in accordance with their own "constitutional processes" and to "consult" with one another; however, in 1963, Secretary of Defense Robert McNamara and Secretary of State Dean Rusk believed that a failure to intervene in South Vietnam pursuant to SEATO would weaken U.S. status in NATO. ROBERT S. MCNAMARA, *IN RETROSPECT* 62-3 (1996).

²⁸¹ "[George] Kennan lamented the militarization of containment that NATO initiated and the rigidity it brought to the European situation. He had hoped to see a more politically unified and economically integrated Western Europe develop which would dilute the bipolar quality of the international environment. Although such a strategy might have been viable, it was not to be." MISCAMBLE, *supra* note 3, at 140.

²⁸² The Warsaw Pact, an organization of Central and Eastern European communist states, was established in 1955 in Warsaw, Poland to counter the perceived threat from the NATO alliance. Its members included the Soviet Union, East Germany, Czechoslovakia, Bulgaria, Hungary, Poland, Romania, and Albania (until 1968). The Warsaw Pact was officially dissolved at a meeting in Prague on 1 July 1991. *THE NEW ENCYCLOPEDIA BRITANNICA*, Vol. 12, 503 (15th ed. 2007). For the text of the Warsaw Pact, see The Avalon Project website, <http://www.yale.edu/lawweb/avalon/intdip/soviet/warsaw.htm> (last visited Dec. 30, 2006).

²⁸³ On 12 March 1999, the former Warsaw Pact members and successor states Czech Republic, Hungary, and Poland joined NATO. See Press Release, NATO, The Accession of the Czech Republic, Hungary, and Poland (Apr. 1999), <http://www.otan.nato.int/docu/comm/1999/9904-wsh/pres-eng/03acce.pdf> (last visited Feb. 17, 2007). Bulgaria, Estonia, Latvia, Lithuania, Romania,

NATO is an alliance of 26 countries, and the NATO of the Cold War is gone.²⁸⁴ During the Cold War, NATO was focused entirely on defending the territory of its allies; in today's world, NATO is taking a more proactive approach to security in other areas, and is doing so through both military and political engagement.²⁸⁵ In 2005 alone, for example, NATO was involved in such diverse missions as peacekeeping operations in Bosnia and Kosovo, naval counter-terrorism operations in the Mediterranean, support to African Union operations in Darfur, training Iraqi military forces inside Iraq, and delivering humanitarian relief supplies to Pakistan and Louisiana.²⁸⁶ Additionally, NATO has attempted to engage in fruitful dialogue and create partnerships with countries outside the alliance that share its values and can contribute to security.²⁸⁷

In many ways, therefore, NATO in its current form is a fledgling global security network with the capability to pursue and achieve some of the goals outlined at the close of Part III of this thesis - namely the imposition of obligations, the definition of security threats, and the sharing of information among alliance members. Strictly from a maritime perspective, which is the focus of this thesis, the fact that navies of NATO member countries have worked together closely for many years establishes that interoperability at sea is

Slovakia, and Slovenia followed suit in March 2004. See George W. Bush, President of the United States, Remarks by the President on the Enlargement of NATO (Mar. 29, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040329-4.html> (last visited Feb. 17, 2007). See also DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 568-573 (detailing NATO's "extensive bombing campaign against the Federal Republic of Yugoslavia (FRY) during the spring of 1999 in an effort to force the FRY to confer autonomy on the province of Kosovo and to terminate human rights abuses directed against Kosovar Albanians."), and *id.* at 989-90 (detailing NATO's formal invocation of Article 5 of the Washington Treaty on 12 September 2001).

²⁸⁴ As of 9 February 2007, NATO membership included the following nations: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, United States, Greece, Turkey, Germany, Spain, Czech Republic, Hungary, Poland, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia. See NATO website, *supra* note 277.

²⁸⁵ See Kurt Volker, Principal Deputy Assistant Secretary for European and Eurasian Affairs, *Transatlantic Security: The Importance of NATO Today*, Remarks at Howard University's Model NATO Conference, Washington, DC (Feb. 23, 2006), <http://www.state.gov/p/eur/rls/rm/2006/62073.htm> (last visited Jan. 12, 2007).

²⁸⁶ *Id.*

²⁸⁷ These partnerships include the Partnership for Peace, with European and Asian countries to build a common sense of the role of the military in a democratic society, and secure cooperation on peacekeeping operations in Bosnia and Kosovo. At the same time NATO created the Partnership for Peace, it created the Mediterranean Dialogue which has seven countries from North Africa as participants. During the last few years, the Mediterranean Dialogue has proven more and more practical with the increase in operational activities in the broader Middle East. Finally, in 2004, NATO created the Istanbul Cooperation Initiative which reaches out to countries in the Persian Gulf. It is anticipated that future cooperation will be sought with countries such as Australia, New Zealand, South Korea, and Japan that share NATO's values and are capable of contributing to security. *Id.*

possible.²⁸⁸ Nevertheless, while the building blocks for naval cooperation exist, a truly effective global maritime security network designed to combat transnational threats must also involve the miscellaneous law enforcement agencies implemented to address these threats. Unfortunately, interoperability between these agencies has been less successful:

Not only is international cooperation in these matters patchy, but even at a national level, coordination can be frustrated by bureaucracy, judicial issues and political in-fighting. Moreover, the thorny issue of national sovereignty, whether it be applied to exclusive economic zones or territorial seas, can lead to a defensive mindset that regards any offer of outside help as a threat.²⁸⁹

Therefore, rather than viewing NATO or a NATO-like alliance as the sole means by which a global maritime security network can be created, it is best to view it as a piece of the puzzle and a foundation upon which the network can be built. NATO's expansion and transformation since the end of the Cold War proves that a wide group of like-minded nations will join each other to confront exterior security threats; the next step is figuring out how to assemble an even broader coalition throughout the maritime domain.

D. Introducing the 1,000 Ship Navy

In 2005, in recognition of the emergence of transnational challenges, the U.S. Chief of Naval Operations, Admiral Mike Mullen, proposed the unorthodox vision of a "navy of navies" drawn from around the world to protect the maritime domain:

I'm after that proverbial 1,000 ship Navy - a fleet-in-being, if you will - comprised of all freedom-loving nations, standing watch over the seas, standing watch over each other. Because I believe, with every fiber of my being, that we are all united by more than just fear.²⁹⁰

The United States Navy currently has 278 deployable battle force ships and submarines;²⁹¹ however, with the NATO precedent for naval cooperation, and

²⁸⁸ See Stephen Saunders, *Executive Overview: Jane's Fighting Ships*, JANE'S, June 12, 2006, http://www.janes.com/defence/naval_forces/news/jfs/jfs060612_1_n.shtml.

²⁸⁹ *Id.*

²⁹⁰ Admiral Mike Mullen, Chief of Naval Operations, Remarks at the 17th International Seapower Symposium, Newport, Rhode Island (Sept. 21, 2005).

²⁹¹ Status of the Navy as of Dec. 28, 2006. See U.S. Navy website, http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146 (last visited Dec. 29, 2006). To put this

the fact that over 6,000 warships exist worldwide, coordinated action on the scale proposed by Admiral Mullen should be possible.²⁹² Importantly, however, the concept of the 1,000 ship Navy is not limited to warships; it also includes coast guards, maritime forces, port operators, commercial shippers and local law enforcement - all working together.²⁹³ In the year since it was announced, Admiral Mullen's vision has been generally well received; however, some commentators have suggested that the concept's myriad obstacles make it easy to dismiss as impractical.²⁹⁴ While there is currently no agreement on how to build the 1,000 ship Navy, one of the underlying principles articulated by Admiral Mullen is a reliance on regional maritime networks.²⁹⁵ Given the fact that this thesis also advocates building a global maritime security network on regional foundations, I will incorporate the 1,000 ship Navy into my analysis, and I will apply the lessons learned and objectives articulated in earlier portions of this thesis to that concept.

1. Objectives

The overarching theme of this thesis is that a global maritime security network is necessary to combat the scourge of transnational threats such as piracy. The stated goal of the 1,000 ship Navy is more general in nature, although it encompasses the transnational challenges posed by both nation states and non-state actors. At base, the idea of the 1,000 ship Navy is founded on the notion that in this era of globalization, the lifeblood of that globalization - trade - must flow freely and unencumbered.²⁹⁶ For that reason, the fundamental goal of the 1,000 ship Navy "is to increase the security of the maritime domain so that the maritime commons may be safely used by all nations."²⁹⁷ Within this broad maritime security goal are two objectives:

- 1) Increasing maritime domain awareness (the knowledge of anything at sea that affects a nation's security, safety, economics, or its environment); and

number in perspective, the U.S. Navy possessed a fleet of 574 deployable ships and submarines in 1990. See *Budgeting for Naval Forces: Structuring Tomorrow's Navy at Today's Funding Level*, Congressional Budget Office study prepared for the Subcommittee on Sea Power of the Senate Committee on Armed Services, Chap. 1, Oct. 2000, <http://www.cbo.gov/showdoc.cfm?index=2603&sequence=0&from=0> (last visited Dec. 29, 2006).

²⁹² Cavanaugh & Porter, *supra* note 4, at 6 n.14.

²⁹³ Mullen, *supra* note 16.

²⁹⁴ See e.g., Saunders, *supra* note 288.

²⁹⁵ Morgan, *supra* note 94, at 68.

²⁹⁶ *Id.* at 66.

²⁹⁷ Morgan & Martoglio, *supra* note 30, at 4.

- 2) Posturing assets to rapidly respond to crises or emergencies that occur at sea or in the littorals.²⁹⁸

According to senior U.S. Navy leadership, the key to attaining these objectives is close international cooperation, and a recognition that “plugging into a regional or global maritime network will not be a one-size-fits-all proposition.”²⁹⁹ Therefore, the challenge for individual nations is to determine where their national interests intersect with common interests, and to contribute capabilities and assets as they are able.³⁰⁰ When nations cooperate and contribute in this manner, as India and Kenya did to apprehend and prosecute the *Safina Al Bisaarat* pirates as detailed in Part III of this thesis, the objectives of the 1,000 ship Navy are satisfied.

2. Underlying Principles

In order to meet the objectives of the 1,000 ship Navy, Admiral Mullen introduced the following principles - in addition to the aforementioned reliance on regionalism - that could guide the establishment of a global maritime security network:

- 1) National sovereignty first. Sovereignty must always be respected, with no compromise.
- 2) Participate where common interests exist. A global network can assist in solving most of the common challenges we face day in and day out.
- 3) Focus is security in the maritime domain. While nations face many challenges beyond maritime, they are outside the scope of this endeavor.
- 4) Foundation is individual nations’ capabilities. As the fundamental building block, each nation contributes within its own capacity; each has something to give.
- 5) More than just navies and coast guards . . . shipping companies. The world needs more than just navies, but a thousand-ship network of various international forces and resources.

²⁹⁸ *Id.* See also Morgan, *supra* note 94, at 68. “Littoral” refers to a coastal region or shore; the “Littoral Zone” is the region or zone between the limits of high and low tides. American Heritage Dictionary of the English Language 1023 (4th ed. 2000).

²⁹⁹ Morgan & Martoglio, *supra* note 30, at 3.

³⁰⁰ *Id.*

6) Nations that can assist others . . . help where/when possible. Those who can will assist others, especially with security in ungoverned and under-governed regions, leveraging special relationships with less capable nations.

7) Nations that need assistance . . . ask for it. While it requires special political will to ask for help, this is an essential step to ensure that sovereignty is respected. Concurrently, nations with more robust capabilities can help ease this burden by reaching out to lend a hand.

8) Share information widely. To be effective and efficient, the global network must share vital unclassified information such as commercial ship characteristics and data.³⁰¹

On the whole, these principles are much more general than the goals for a cooperative security arrangement articulated in Part III of this thesis. That does not mean, however, that they are incompatible. On the contrary, all of the goals listed in Part III fit squarely within one or more of Admiral Mullen's underlying principles. The conclusion, therefore, is that the 1,000 ship Navy, if implemented, stands a very strong chance of successfully combating transnational threats. The crucial question from a legal perspective thus becomes how best to forge the ties that will bind this global fleet while simultaneously upholding its founding principles and accomplishing its goals and objectives.

E. The Ties That Bind: International Agreements and Maritime Cooperation

States enter into international agreements all the time, and these agreements vary widely along a spectrum from formal treaties to informal "gentleman's agreements." The decision to employ one type of agreement versus another can be based on several factors, and often reflects the strength of states' commitment to one another and the underlying purpose for cooperation. Often, the final form of an agreement also reflects the inherent tension between a desire to create a binding and credible agreement while simultaneously seeking to minimize the "cost" of sanctions for a breach.³⁰² Thus far, this thesis

³⁰¹ Morgan, *supra* note 94, at 67-8.

³⁰² On the international plane, sanctions for violating an international agreement include not only direct punishment, but also a loss of reputation among other states. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005) (explaining why rational states

has established that any cooperative security arrangement on the international plane must be flexible enough to accommodate a wide variety of interests, but specific enough to impose seriously-held obligations. Is such an agreement possible to create the 1,000 ship Navy? If a single agreement is not possible or desirable, can various types of agreements or elements of multiple agreements work together to bring about the desired result? Ultimately, is an ad hoc relationship the best way to proceed vice any type of formal arrangement? In order to answer these questions for the 1,000 ship Navy, it seems logical to begin by examining examples of multilateral cooperation in a maritime environment that run the spectrum from very formal to very informal.

1. Treaties: Revisiting the Honolulu Convention

Treaties remain the primary means by which states enter into agreements on the international plane, and are preferred among actors seeking legally binding commitments to assist their pursuit of self-interests.³⁰³ Of course, there is no international police force to ensure that states comply with their treaty obligations, and international courts have limited jurisdiction,³⁰⁴ nevertheless, many believe that treaties create “credible” commitments “that underscore the durability and significance of underlying promises. . . . [and] raise the political costs of noncompliance.”³⁰⁵ While the formality of treaty arrangements does create predictability, states conversely lose the flexibility to adapt commitments to their particular situations, as well as the ability to implement an agreement quickly without formal ratification pursuant to domestic practices.³⁰⁶

As discussed previously, the Honolulu Convention is a regional treaty implemented to regulate the taking of migratory fish stocks in the Western and Central Pacific Ocean, and it highlights the important role that formal agreements can play when a significant disparity in bargaining power exists between parties. The economies of small and isolated Pacific Island nations

sometimes prefer to draft their agreements in such a way as to make them less credible and, therefore, more easily violated).

³⁰³ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 36, 40-43.

³⁰⁴ See e.g., Statute of the International Court of Justice (ICJ), art. 36, para. 2 (stating instances when the ICJ would have compulsory jurisdiction to decide a case on its merits), and *id.* art 36, para. 6 (in the event of a jurisdictional dispute, the ICJ has the ability to determine whether it has jurisdiction), available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm> (last visited Jan. 2, 2007).

³⁰⁵ See, e.g., Charles Lipson, *Why Are Some International Agreements Informal*, 45 INT’L ORG. 495, 508-512 (1991); but see DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 41 (pointing out that political scientists who adhere to realist theories of international relations largely discount treaties as exerting little influence over state behavior, and contend that the outcomes of state interactions are determined by the relative power of the states involved).

³⁰⁶ Guzman, *supra* note 302, at 591-592.

depend heavily on tuna fishing, but these nations lack the capacity to fully develop this industry and maximize revenue; as a result, revenue is generated from the sale of access rights and a percentage of profits generated from the take of larger DWFNs.³⁰⁷ Given the Pacific Island nations' reliance on DWFNs for economic support, it was vitally important for the smaller nations to secure commitments that would guarantee the continued health of tuna stocks for development of the region.³⁰⁸ A formal treaty arrangement enabled these smaller nations to speak firmly with one voice and protect their interests by attempting to define - to the extent possible - the behaviors of much more powerful players on the international scene.³⁰⁹ Of course, many would argue that these commitments are only as good as the larger nations' willingness to abide by them,³¹⁰ but an agreement by a larger nation to be bound in such a formal manner when not necessary can send a signal to the rest of the world that the object and purpose of the agreement is one that deserves attention.³¹¹ In this way, a large nation can establish and develop a reputation as a leader on the world stage with respect to any number of issues, such as the Honolulu Convention's concern for the environment.

While treaties do have the advantages outlined above, the formality of the agreement necessarily requires much negotiation which can significantly delay consensus or even render it unattainable. For instance, in the case of the Honolulu Convention, two major DWFNs - Japan and Korea - have refused to

³⁰⁷ See Larocque *supra* note 251, at 87. "When the [UNCLOS] created the EEZ, giving sovereign rights to coastal nations over natural resources within 200 nautical miles of the coast, Pacific Island nations with miniscule land areas and little political power suddenly retained authority over the largest tuna fishery in the world. Two-thirds of the tuna caught worldwide, valued at \$1.5 to \$2 billion, are harvested in these EEZs." *Id.* at 83.

³⁰⁸ "Economically, Pacific Island nations are among the least developed in the world. Most have a gross domestic product per capita less than U.S. \$2,000 per year. Many rely on foreign aid from countries like the United States, New Zealand, and Australia. Many islanders survive on subsistence agriculture and fishing. What little industry exists generally involves tourism, agriculture, fishing, or licensing of DWFNs to fish." *Id.* at 85-6.

³⁰⁹ *Id.* at 99 (recounting how economic disparity has created reluctance by Pacific Island negotiators to terminate bilateral discussions with larger nations, thus allowing DWFNs to whittle away at unfavorable terms and establish arrangements with terms inferior in all aspects to multilateral agreements).

³¹⁰ See e.g., Byard Q. Clemmons, *Might Makes Right?*, 46 FED. LAW. 40 (1999) (presenting the argument that national self-interest is the primary motivation for compliance with treaties and not dutiful obedience to the raw authority of law).

³¹¹ See e.g., Norman Dorsen, *Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context*, 3 U.C. DAVIS J. INT'L L. & POL'Y 143 (1997) (arguing that to preserve its reputation as an international leader in securing respect for human rights and the rule of law, the United States should take specific steps to ensure compliance with the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and the International Convention for the Elimination of All Forms of Racial Discrimination).

accept it; a fact that could significantly limit the treaty's effectiveness.³¹² Accordingly, using the Honolulu Convention as an example of maritime regional cooperation by treaty, it would seem logical to argue in favor of a treaty as the legal instrument of choice when an executive seeks to more effectively bind another state actor or actors on a matter of great significance on which there is general consensus between relatively few parties and little need to try to accommodate divergent national circumstances.³¹³

2. Memoranda of Understanding: Port State Control Agreements

A memorandum of understanding (MOU) is a legal document that expresses a common agreement between parties, but does not legally obligate states and lacks the binding power of a treaty.³¹⁴ On the international plane, MOUs are typically easier to adopt and modify than treaties which may require lengthy negotiating processes, and MOUs can also be put into effect in many countries without formal ratification.³¹⁵ Although multilateral MOUs would likely be more difficult to negotiate than bilateral MOUs - simply because of the presence of more countries and more competing interests - there are several noteworthy examples of multiple countries working in concert on issues of

³¹² See Larocque *supra* note 251, at 109.

³¹³ *Id.* at 96-97 (positing whether the Honolulu Convention will ultimately advance the interests of Pacific Island nations because these interests often diverge from those of DWFNs, primarily with respect to access fees).

³¹⁴ See Alexandre Kiss, *Commentary and Conclusions, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 226-27 (Dinah L. Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE]. But see Clare Shine, *Selected Agreements Concluded Pursuant to the Convention on the Conservation of Migratory Species of Wild Animals, in* COMMITMENT AND COMPLIANCE, *id.*, at 205 (discussing a debate within environmental circles as to whether a memorandum of understanding constitutes: 1) a legally binding obligation; or 2) an implementing agreement without legal consequences). The United Nations defines a memorandum of understanding as "an international instrument of a less formal kind. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. It is typically in the form of a single instrument and does not require ratification. They are entered into either by States or International Organizations." See United Nations Treaty Collection website, available at <http://untreaty.un.org/English/guide.asp#memoranda> (last visited Feb. 19, 2007). For an example of a memorandum of understanding, see e.g., Memorandum of Understanding Relating to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems on May 26, 1972, signed on Sept. 26, 1997 by U.S. President Bill Clinton and the U.S.S.R. Successor States updating the Anti-Ballistic Missile Treaty, available at http://www.dod.mil/acq/acic/treaties/abm/ad_mou.htm (last visited Jan. 7, 2006).

³¹⁵ See Dinah Shelton, *Centennial Essay: In Honor of the 100th Anniversary of the AJIL and the ASIL: Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319-322 (2006) (discussing "[t]he increasing use of nonbinding normative instruments in several fields of international law.").

significance pursuant to this form of agreement, including the effort to construct the international space station.³¹⁶

In the maritime context, port state control programs are an example of regional cooperation through memoranda of agreement. As a result of environmental disasters such as the *Exxon Valdez* grounding in Alaska, ports have faced increasing pressure to impose strict environmental and safety standards for visiting vessels.³¹⁷ From a business perspective, however, such stricter standards could increase the costs of transportation and make a port less competitive.³¹⁸ In response, regional arrangements for port state control emerged:

The wide-scale adoption of port state control is an attempt to develop an exception to the competitive relationship of ports within the same region. Port state control has as its foundation and operational ethic cooperation amongst regional ports. That cooperation has as its goals safer ships and cleaner seas, and is built upon the view that the goals can only be accomplished if all the regional ports apply and enforce the same rules in a similar manner to visiting vessels. Where the ports cooperate by agreeing to apply the same rules in a similar manner, then no single port seeks or acquires competitive advantage by offering to overlook sub-standard vessels.³¹⁹

The first regional arrangement for port states was created in Europe through the 1982 Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment (Paris MOU).³²⁰ Since 1982, the IMO has encouraged the establishment of regional port state organizations, and MOUs have been signed covering all of the world's oceans: Europe and the north Atlantic (Paris MOU); Asia and the Pacific (Tokyo MOU); Latin America (Acuerdo de Viña del Mar); Caribbean (Caribbean MOU); West and Central Africa (Abuja MOU); the Black Sea

³¹⁶ See Rochus Moenter, *The International Space Station: Legal Framework and Current Status*, 64 J. AIR L. & COM. 1033 (1999) (discussing the foundational agreements between countries and space agencies that led to the development and construction of the international space station).

³¹⁷ Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207, 208 (2000).

³¹⁸ *Id.* at 207.

³¹⁹ *Id.* at 209.

³²⁰ Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Jan. 26, 1982, 21 I.L.M. 1, available at <http://www.parismou.org/ParisMOU/Organisation/Memorandum+of+Understanding/default.aspx> [hereinafter Paris MOU] (last visited Jan. 7, 2006).

region (Black Sea MOU); the Mediterranean (Mediterranean MOU); the Indian Ocean (Indian Ocean MOU); and the Arab States of the Gulf (Riyadh MOU).³²¹ These agreements recognize that a port state is permitted to apply its national laws to visiting vessels; however, cooperating nations instead agree to apply a common set of environmental laws and safety standards created by various international treaties.³²²

The evidence suggests that regional port control agreements have been successful in reducing marine environmental pollution and the number of sub-standard vessels plying the seas.³²³ These MOUs also demonstrate that regional cooperation can be achieved through means that enable states to retain a certain degree of national autonomy. For instance, “all the regional port state control MOUs are aware of the need to strike a balance between exercising the authority international law cedes to a port state with the responsibilities of flag states and, more importantly, economic realities.”³²⁴ Admittedly, such an arrangement can

³²¹ See IMO website, *supra* note 126. See also *id.*; Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Dec. 5, 1993, <http://www.tokyo-mou.org/> (last visited Jan. 7, 2007); Latin American Agreement on Port State Control of Vessels, Nov. 5, 1992, http://200.45.69.62/index_i.htm (last visited Jan. 7, 2007); Memorandum of Understanding on Port State Control in the Caribbean Region, Feb. 9, 1996, 36 I.L.M. 231; West and Central Africa Memorandum of Understanding on Port State Control, Oct. 22, 1999, <http://www.marineafri.com/work1/mou/agreement.htm> No further cite—hereinafter not necessary (last visited Jan. 7, 2007); Memorandum of Understanding on Port State Control in the Black Sea Region, Apr. 7, 2000, <http://www.pma.ru/en/default.htm> (last visited Jan. 7, 2007); Mediterranean Memorandum of Understanding on Port State Control, July 11, 1997, http://www.medmou.org/Med_MoU_Text.html (last visited Jan. 7, 2007); Indian Ocean Memorandum of Understanding on Port State Control, June 5, 1998, <http://www.iomou.org/moumain.htm> (last visited Jan. 7, 2007); The Arab States of the Gulf Memorandum of Understanding on Port State Control, 2004.

³²² For instance, port state control inspectors in the Paris and Tokyo memoranda currently verify the compliance of vessels with the following seven major international conventions. The first six, developed within the IMO, address safety and pollution issues. The seventh, developed within the International Labour Organization, deals with the health and occupational safety of seafarers. The conventions are: 1) The International Convention for the Safety of Life at Sea (SOLAS), 1974; 2) The International Convention for the Prevention of Pollution from Ships (MARPOL), 1973; 3) The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978; 4) The International Convention on Load Lines, 1966; 5) The Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972; 6) The International Tonnage Convention, 1969; and 7) The International Labour Organization Convention No. 147 Merchant Shipping (Minimum Standards), 1976 (ILO 147).

³²³ See McDorman, *supra* note 317, at 224 n.93 (citing the conclusion of Dr. Edgar Gold that “ship-source marine pollution has been reduced to the lowest-ever level through a combination of stricter coastal and port state controls, better shipboard technology and operations and overall value of the product”); see also *id.* at 224 (recounting the conclusion of Ronald B. Mitchell that tanker owner compliance with international vessel standards is a result of port state control arrangements), *but cf.* John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GA. J. INT’L & COMP. L. 571, 590-92 (1997) (observing that the port state control regime has not reduced vessel losses as expected).

³²⁴ McDorman, *supra* note 317, at 212.

lead to inefficiencies depending on a state's available resources, as well as "port shopping" by shipping companies;³²⁵ however, port state control agreements can nevertheless serve as a model for regional cooperation and an alternative to formal treaties when a general collective will exists between many nations that are either unwilling or unable to enter into binding legal agreements.³²⁶

3. Informal Cooperative Frameworks: The Proliferation Security Initiative

Next on the spectrum from very formal to very informal cooperative frameworks is a "more flexible approach to collective action that eschews both ad hoc unilateralism and institutionalized multilateralism."³²⁷ In practice, this approach is embodied by the Proliferation Security Initiative (PSI). The PSI was born out of the post-9/11 awakening to the vulnerability of terrorist targets to WMD attacks, along with a skepticism that the existing non-proliferation architecture based on multilateral treaties could prevent such weapons from falling into the hands of hostile or unstable states or terrorist organizations.³²⁸ These concerns were highlighted by the *So San* incident in December 2002, during which Spanish naval forces patrolling the Arabian Sea intercepted and boarded a flagless vessel suspected of carrying suspicious cargo en route from North Korea.³²⁹ Spanish authorities discovered fifteen Scud missiles hidden onboard the ship; however, the following day, the vessel was released with its

³²⁵ *Id.* at 224-225.

³²⁶ See Shelton, *supra* note 315, at 320 (explaining that "the memorandum of understanding has become a common form of undertaking, perhaps motivated by the need to circumvent the political constraints, economic costs, and legal rigidities that often are associated with formal and legally binding treaties").

³²⁷ Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 543 (2004).

³²⁸ Becker, *supra* note 70, at 136-38. "Nuclear weapons and related technology are ostensibly controlled through the Nuclear Non-Proliferation Treaty (NPT), the Comprehensive Nuclear Test Ban Treaty (CNTBT), and the oversight provided by the International Atomic Energy Agency (IAEA). Export controls of the NPT are supplemented by oversight from the Zangger Committee and the Nuclear Suppliers Group (NSG). Biological weapons are banned by the Biological and Toxin Weapons Convention (BTWC), and chemical weapons by the Chemical Weapons Convention (CWC), with compliance overseen by the Organization for the Prohibition of Chemical Weapons (OPCW). The Australia Group facilitates the harmonization of export controls for both the biological and chemical regimes. Finally, the Missile Technology Control Regime (MTCR) and the Hague Code of Conduct provide export guidelines for equipment and technology related to end-products including cruise missiles and unmanned air vehicles, while the Wassenaar Arrangement maintains control lists of items such as semiconductor lasers and navigation equipment. Export control groups tend to operate informally on a consensual basis and do not necessarily impose binding legal obligations on their members. As a result, their records of success are mixed." *Id.* at 137-38.

³²⁹ *Id.* at 152.

cargo since the sale of these missiles between North Korea and Yemen (the alleged destination) was not prohibited by any international agreement.³³⁰

On 31 May 2003, U.S. President George W. Bush formally announced creation of the PSI, and described it as “an effort to seize illegal weapons, missile technology, and other agents of terrorism.”³³¹ A few months later, eleven nations signed a broad Statement of Interdiction Principles, which is not a formal agreement and carries no binding legal responsibilities.³³² Instead, participating nations agree to support the guiding principle of the PSI, which is:

to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council.³³³

The PSI lacks a central office, an international secretariat, an operational handbook, rules of engagement, and congressional authorization; and yet, since its inception, it has gained widespread support from more than seventy countries and former U.N. Secretary General Kofi Annan.³³⁴ Although not limited to the maritime domain, the focus of the PSI has been the interception of illicit cargo at sea through a pooling of participating nations’ intelligence and physical resources.³³⁵ According to the Statement of Interdiction Principles, states can pursue this overall objective in four ways:

1) by undertaking effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD or related materials;

³³⁰ *Id.* at 153. See also U.S. Lets Scud Ship Sail to Yemen, CNN, Dec. 12, 2002, <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/us.missile.ship/index.html> (last visited Jan. 8, 2007).

³³¹ Bush: “No U.S.-Europe Conflict,” CNN, May 31, 2003, available at <http://www.cnn.com/2003/WORLD/europe/05/31/bush.europe1100/index.html> (last visited Jan. 8, 2007). See also George W. Bush, President of the United States, Remarks by the President to the People of Poland (May 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html> (last visited Jan. 8, 2007).

³³² Becker, *supra* note 70, at 149. The original eleven participating states were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. *Id.* at 147 n.87.

³³³ U.S. Dep’t of State, The Proliferation Security Initiative, Statement of Interdiction Principles (Sept. 4, 2003), <http://usinfo.state.gov/products/pubs/proliferation/#statement> [hereinafter Statement of Interdiction Principles] (last visited Jan. 8, 2007).

³³⁴ Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT’L L. 771, 775-76 (2006).

³³⁵ Becker, *supra* note 70, at 134.

- 2) by adopting streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity;
- 3) by reviewing and working to strengthen relevant national and international legal authorities where necessary to accomplish these objectives; and
- 4) by taking specific actions in support of interdiction efforts regarding cargoes of WMD or related-materials.³³⁶

Additionally, Statement signatories are encouraged to consent to the boarding of their flagged vessels, and the U.S. has acquired such consent under certain circumstances through bilateral agreements.³³⁷

After several years in place, the PSI is simultaneously hailed by some as one of the most important recent positive developments in the area of international peace and security, and criticized by others as undermining the legitimacy of interdiction due to a lack of institutional organization.³³⁸ Regardless of these divergent views, the fact that the PSI has garnered broad support among a large number of states around the world to counter a global WMD threat make its flexible design and informal organization a framework worth considering for the 1,000 ship Navy.³³⁹ In addition to generating widespread support, the PSI has had its successes in terms of cargo seizures, which strengthens its legitimacy and furthers the case for expanding its scope to encompass more than just the transnational threat of international terrorism.³⁴⁰

³³⁶ See Statement of Interdiction Principles, *supra* note 333.

³³⁷ Shulman, *supra* note 334, at 775. Such consent is significant because of the basic principle of international law that a ship flying the flag of one state on the high seas is generally immune from interference by forces of another state. *Id.* at 803.

³³⁸ See, e.g., *id.* at 776 (arguing that the PSI “may fundamentally alter the transnational legal framework for the use of force by states.”); *but cf.* Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SECURITY L. 125, 125 (2005) (arguing that only “institutional process . . . can provide the necessary capacity for intelligence sharing, mutual critique and maximization of political consensus” required to counter the WMD threat).

³³⁹ While the PSI has garnered broad support for non-proliferation goals, it has not achieved consensus on many sensitive issues. For instance, “[s]ome European states may be less willing to promote aggressive PSI methods out of reluctance to weaken the international commitment to continued development of the multilateral treaty regimes already in place.” Becker, *supra* note 70, at 163.

³⁴⁰ See Byers, *supra* note 327, at 529 (describing how, just months after its inception, the PSI was responsible for a successful cooperative effort between the U.S., British, German, and Italian governments to seize Libya-bound parts for gas centrifuges of a kind that can be used to enrich

Unfortunately for purposes of this thesis, aspects of the PSI's structure remain shrouded in mystery, and little information is available concerning levels of support and participation.³⁴¹ Nevertheless, enough is known to show that as a model for a global maritime security network, the PSI has several advantages, including: 1) its decentralized operating structure actually coordinates and facilitates the unilateral actions of participating states;³⁴² 2) control is not based on widespread subscription and compliance as it is with multilateral treaty regimes;³⁴³ 3) it incorporates "coalitions that will vary in size and composition based upon the issue at hand";³⁴⁴ 4) it largely avoids problems of institutional blockage;³⁴⁵ and 5) it "enables the United States to focus its persuasive efforts on those most able and willing to assist with respect to any given matter."³⁴⁶

4. Ad Hoc Responses: Tsunami Relief

To complete the picture of international cooperation, it is necessary to point out that sometimes such cooperation occurs in the *absence* of any formal or informal agreement. One very recent example of this ad hoc cooperation was the immediate international response to the devastating 2004 Indian Ocean earthquake and its resulting tsunamis. On 26 December 2004, an undersea earthquake of a magnitude greater than 9.0 triggered a series of tsunamis that spread throughout the Indian Ocean, killing nearly 230,000 people and displacing 1.7 million more.³⁴⁷ Total economic cost of the damage and losses across the region have been estimated at \$9.9 billion.³⁴⁸ Immediately following the event, media coverage was enormous and the response swift and multi-layered, including "components from the affected population, provincial and

uranium); *see also* Becker, *supra* note 70, at 156 (noting that reports indicate that ships headed to North Korea with equipment for uranium enrichment have been intercepted, but details are scarce).

³⁴¹ *See* Shulman, *supra* note 334, at 826.

³⁴² Becker, *supra* note 70, at 151.

³⁴³ *Id.* at 138.

³⁴⁴ *See* Byers, *supra* note 327, at 543.

³⁴⁵ *Id.* at 544.

³⁴⁶ *Id.*

³⁴⁷ The most current information available lists the total number of people lost (killed or missing) in the disaster at 227,898. The tsunamis killed people in 14 countries around the Indian Ocean, and by the end of January 2005, 52 more countries reported that their citizens were among the dead or feared dead. TSUNAMI EVALUATION COALITION, JOINT EVALUATION OF THE INTERNATIONAL RESPONSE TO THE INDIAN OCEAN TSUNAMI: SYNTHESIS REPORT, 16, 33 (2006), *available at*

<http://www.bmz.de/en/service/infothek/evaluation/MultiGeberEvaluierungen/EvalBericht013/Tsunami.pdf> [hereinafter TSUNAMI REPORT 2006] (last visited Jan 11, 2007). The earthquake itself was the largest earthquake recorded in 40 years, and is estimated to have released the energy of 23,000 Hiroshima-type atomic bombs. The Deadliest Tsunami in History?, NATIONAL GEOGRAPHIC NEWS, Jan. 7, 2005, http://news.nationalgeographic.com/news/2004/12/1227_041226_tsunami.html (last visited Jan. 11, 2007).

³⁴⁸ TSUNAMI REPORT 2006, *supra* note 347, at 17.

national authorities and the national militar[ies], [and] international agencies and international militaries.”³⁴⁹ On the international plane, a core group including Australia, Canada, India, Japan, the Netherlands, the United Nations, and the United States coordinated the first stages of a response and ensured no duplication of efforts by participating nations.³⁵⁰ Eventually, the United Nations assumed the central role in mobilizing and coordinating relief efforts.³⁵¹

The initial international cooperation referenced above is noteworthy because it was created truly on an ad hoc basis. In testimony before the U.S. House of Representatives International Relations Committee and the Appropriations Committee on Foreign Operations, Alan Larson, Under Secretary for Economic, Business and Agricultural Affairs, stated:

It is an indication of the strength of our partnership with these countries, that we were able to rapidly pull together this group, which never had a physical meeting and established no bureaucracy in addressing these critical issues. The experience of this group sets an example of how to deal cooperatively and effectively with international partners in a crisis situation of this scale. Such cooperation can only occur because of our well-established relationships with like-minded democracies.³⁵²

From a maritime perspective, the U.S. Navy was a critical component of the overall United States commitment to the Indian Ocean region, its largest operation in that part of the world since the Vietnam War.³⁵³ The “free form” multilateral effort in which the U.S. participated was largely self-organizing, involved no agreements or encumbrances, had no designated leader, and

³⁴⁹ *Id.* at 36, 43.

³⁵⁰ See Alan Larson, Under Secretary for Economic, Business and Agricultural Affairs, *Tsunami Tragedy: On the U.S. Government's Relief-to-Reconstruction Strategy*, Testimony before the International Relations Committee and the Appropriations Committee on Foreign Operations, U.S. House of Representatives (Jan. 26, 2005), <http://www.state.gov/e/rls/rm/2005/41312.htm> (last visited Jan. 11, 2007).

³⁵¹ *Id.* See also United Nations Coordinates International Response to Tsunami, May 9, 2005, <http://www.unfoundation.org/files/pdf/2005/UNroleintsunamirelief.pdf> (last visited Jan. 11, 2007), and UN Office of the Special Envoy for Tsunami Recovery website, <http://www.tsunamispecialenvoy.org/> [hereinafter UN Special Envoy website] (last visited Jan. 11, 2007).

³⁵² Larson, *supra* note 350.

³⁵³ “The commitment of the U.S. administration to the relief effort could be seen in the sending of one of its first-line Carrier Strike Forces to the region, and the diversion of a Marine expeditionary force bound for the Persian Gulf. . . . [T]here were a significant number of joint military-civilian endeavors including the assessment missions flown from the *USS Abraham Lincoln*, the manning of the *USS (sic) Mercy* with civilian volunteers, and the transport of 60 NGO personnel from Singapore aboard a helicopter landing ship.” TSUNAMI REPORT 2006, *supra* note 347, at 60.

developed no “strategy” beyond providing relief to as many people as possible as quickly as possible.³⁵⁴ It was also short lived - the main U.S. military effort wound down one month after the tsunamis, and the remaining foreign military forces departed within three months.³⁵⁵

While the ad hoc “free form” force created immediately following the 2004 Indian Ocean earthquake made possible the delivery of life-saving food, supplies, and other aid by military first responders, the lack of formal coordination was not welcomed by the private sector and non-profit communities more concerned with a long-term presence and commitment to the region.³⁵⁶ In a defense of the lack of formal coordination efforts, Alan Larson testified that “it is important to remember the sheer scale of the disaster and the immensity of the international response, and that in the early stages of response, speed can be more important than coordination.”³⁵⁷ Ultimately, this simple statement highlights why international cooperation without any previous agreement will work initially in a crisis situation, but not as the basis for building a sustained global maritime security network. A natural disaster such as the Indian Ocean earthquake and tsunamis is a one-time - or at least extremely infrequent - event of massive proportions.³⁵⁸ When such a tragic and horrific event occurs, the attention of the world is focused initially toward a singular purpose; however, within a short time, competing interests emerge that require structured coordination to function together.³⁵⁹ A security network

³⁵⁴ See Cavanaugh & Porter, *supra* note 4, at 4-5.

³⁵⁵ The Indonesian Defence Minister set a deadline of March 26, 2005 for all foreign military forces to leave Aceh. The one exception to this deadline was the Malaysians, who were told the deadline did not apply to fellow Association of Southeast Asian Nations; however, the Malaysians were subsequently asked to leave in April 2005. TSUNAMI REPORT 2006, *supra* note 347, at 60 n.52.

³⁵⁶ During the initial phase of the response, when coordination was largely absent, NGO-military relations bordered on hostile. NGOs viewed U.S. involvement in Indonesia as merely an opportunistic attempt to assuage Muslims, and they accused Australia of intervening merely to rebuild relations with Indonesia following the secession of East Timor. For their part, the international military saw NGOs as ineffective and self-promoting. *Id.* at 60.

³⁵⁷ Larson, *supra* note 350.

³⁵⁸ Several natural disasters of significant visibility and proportion have occurred in the past three years. In December 2003, the city of Bam, Iran was destroyed by a magnitude 6.6 earthquake, killing more than 26,000 and injuring an additional 30,000 people. In August 2005, Hurricane Katrina killed nearly 2,000 people along the Gulf Coast of the United States and caused \$81.2 billion of damage, making it the costliest natural disaster in the country’s history. In October 2005, the Kashmir earthquake killed nearly 75,000 and injured more than 106,000 people in Pakistan, India, and Afghanistan.

³⁵⁹ Following the initial tsunami response, the United Nations assumed coordination responsibilities to “look[] candidly at how well UN agencies, donors and NGOs are working together, and are assisting affected countries in managing the aid flows.” Larson, *supra* note 350. Following Hurricane Katrina in August 2005, offers of international aid came pouring into the United States; however, the State Department imposed a “tedious process of matching offers with specific needs” to avoid a repeat of problems with aid sent to tsunami victims. See World Aid Offers Pour In, CNN,

designed to combat regularly-occurring and often low-visibility transnational threats must continually balance competing interests and establish a long-standing presence.³⁶⁰ In such an environment, coordination is necessary, and coordination requires prior agreement. Accordingly, while the ad hoc international cooperation that emerges following a natural disaster or other crisis can be highly effective initially, it should be recognized as limited to the purpose for which it was created, and not as a model for the 1,000 ship Navy.

F. Preserving Individual Accountability

Before bringing the pieces together using one or more of the legal structures discussed immediately above, it is necessary to address a critical lesson gleaned from the examination of piracy that is not typically raised by regional security arrangements such as NATO or concepts such as the 1,000 ship Navy - that is the idea of individual accountability. As discussed in Part III of this thesis, successfully combating transnational threats ultimately requires prosecuting individuals for their transgressions while simultaneously protecting offenders' rights. Understandably, however, regional security arrangements such as NATO have been most commonly concerned with the behaviors of states at the "macro" level rather than the accountability of individuals at the "micro" level.³⁶¹

While there are significant geopolitical interests and ramifications involved when it comes to combating transnational threats, the effort must ultimately target behaviors and views at a much smaller level. As previously discussed, transnational activities such as piracy are most often carried out by individuals and small groups. In order for the activities of actors at this level to be curtailed, a global security network must provide the promise of accountability and justice for transgressions.³⁶² Similarly, in order for a state to

Sept. 6, 2005, available at <http://www.cnn.com/2005/US/09/06/international.aid.flows/index.html> (last visited Jan. 11, 2007).

³⁶⁰ Mullen, *supra* note 14, at 3 (stating that the U.S. Navy will remain rotational, forward deployed, and surge capable to react quickly in times of humanitarian crisis and "deter and dissuade potential adversaries in peacetime through persistent forward presence").

³⁶¹ See generally Volker, *supra* note 285 (discussing the geopolitical importance of NATO today); see also Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT'L L. 335, 350 (2002) (discussing how the international community, and particularly NATO, has been criticized for not cooperating with the Hague Tribunal constituted to try war criminals in the former Yugoslavia, "with the result that that the relative level of war criminal on the dock at The Hague is, on the whole, very low, compared with those on the dock in the IMT trial at Nuremberg").

³⁶² See e.g., Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 46-47 (2006) (arguing that within the human rights context, an "increased focus on individual accountability should improve deterrence by creating significant personal disincentives for individual perpetrators of abuse. . . [and] an important first step in preventing violations is eliminating the perception of individual impunity generated by current conditions").

identify dealing with transnational threats as a national priority, its citizens must believe that committing the state's resources - including its military and law enforcement resources - will ultimately make a difference and alleviate the problem. For instance, recall from Part III of this thesis that prosecutions following the *Alondra Rainbow* and *Safina Al Bisaarat* piracy incidents were not a foregone conclusion, and such action was taken by India and Kenya respectively only when the political will was deemed to exist.³⁶³ Without a common belief at the individual level that devoting state resources will actually reduce the threats posed by transnational actors, the political will to participate in an alliance to combat these actors will not exist.³⁶⁴ One way to strengthen such a belief among the populace is with "results" from successful prosecution of offenders.³⁶⁵ Therefore, to be truly effective, a global maritime security network must include a justice system that provides the requisite deterrence and incentive at the lowest levels.

If the global maritime security network in the form of a 1,000 ship Navy is to be built on regional foundations as discussed earlier, then it only makes sense to consider how a regional justice system with criminal courts could be constructed. What follows is a brief examination of several structural options available, as initially proposed by William W. Burke-White.³⁶⁶

1. Specialized Regional Criminal Courts

A truly regional criminal court could be formed by agreement between several countries within a given geographic region, with territorial jurisdiction limited to the particular region, and judges drawn from the same area.³⁶⁷ The international agreement establishing such a court would have to be very formal -

³⁶³ LANGEWIESCHE, *supra* note 1, at 75. See also Donoho *supra* note 362, at 47 (discussing the dependence of individual accountability remedies on the political will of the host forum, which must authorize such remedies).

³⁶⁴ See Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 407 (2006) (contending that the principle of individual accountability was accepted at the Nuremberg trials because the political will necessary for such acceptance existed, and that a similar political will likely exists "amongst people of developing countries who have suffered diminution of their political and economic independence at the hands of intergovernmental institutions and transnational corporations.").

³⁶⁵ See e.g., Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 358 (2005) (positing that "establishing individual accountability by way of criminal trials is not only essential to . . . achieve some degree of justice, but is also an effective way . . . [to replace] the 'culture of impunity' that permitted heinous abuses to be committed in the first place . . . [and] may provide some victims with a 'sense of justice and catharsis,' a sense that, by having addressed their grievances, their suffering can at last, more easily, come to an end.").

³⁶⁶ William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729 (2003).

³⁶⁷ *Id.* at 749.

such as a treaty - because of the need to set forth precise duties, responsibilities, and limitations on authority; however, negotiating such an instrument would stand a high degree of success if the number of member states was relatively small and the consensus for action between them strong.³⁶⁸ It is even possible that an entirely new regional criminal court system with jurisdiction over individuals for international crimes could be established by modifying an existing regional judicial mechanism.³⁶⁹ Of course, creating such a system in regions without a pre-existing judicial mechanism would require significant effort and depend upon a strong desire for individual accountability coupled with a willingness to delegate sovereignty over certain criminal justice matters.³⁷⁰

2. International Criminal Court (ICC) Sitting Regionally

The idea of a permanent international criminal court to try individuals for war crimes surfaced after World War II with the Nuremberg and Tokyo trials; however, despite an initial mandate by the General Assembly, the issue lay dormant within the United Nations for most of the remaining twentieth century.³⁷¹ In 1989, the General Assembly passed the issue to the International Law Commission (ILC) for study following a request by Trinidad and Tobago to consider such a tribunal for drug trafficking.³⁷² The ILC offered a draft statute in 1994, and treaty negotiations took place throughout 1996 and 1997.³⁷³ Finally, in July 1998 at Rome, the 128-article Statute of the International Criminal Court (the Rome Statute) was signed by 120 nations.³⁷⁴ The Rome

³⁶⁸ *Id.*

³⁶⁹ *Id.* See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last visited Jan. 12, 2007).

³⁷⁰ Examples of such areas would include Sub-Saharan Africa and Asia. See Burke-White, *supra* note 366, at 749.

³⁷¹ Dinah L. Shelton, INTRODUCTION, IN INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, xii-xiii (Dinah L. Shelton ed., Transnational Publishers 2000) [hereinafter THE ROLE OF THE ICC].

³⁷² *Id.* at xiii.

³⁷³ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 658.

³⁷⁴ See THE ROME STATUTE, *supra* note 201. Seven states voted against The Rome Statute, including the United States. The vote was not recorded, so it is not known what states other than the U.S. voted no. Although the U.S. was an active participant in the Rome negotiations, it ultimately voted against The Rome Statute based on the possibility that U.S. nationals could be prosecuted without U.S. consent. On 31 December 2000, the U.S. signed The Rome Statute, but announced it would seek to amend the treaty rather than submitting it to the Senate for advice and consent. On 6 May 2002, the U.S. informed the Secretary-General of the United Nations that it does not intend to become a party to The Rome Statute. DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 662. See also William K. Lietzau, *The United States and the International Criminal Court: International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119 (2001) (discussing The Rome Statute's bases for automatic jurisdiction over the three

Statute entered into force on 1 July 2002 after receiving its sixtieth ratification, and as of January 2007, it had 104 state parties.³⁷⁵

While the ICC sits in the Hague and is typically far removed from the cases it is likely to hear, the Rome Statute provides for the Court sitting elsewhere, including regionally, “whenever it considers it desirable.”³⁷⁶ Although the Rome Statute provides little guidance as to when the Court could sit regionally, basic considerations would likely be “the practicality of such arrangements and whether it is in the interests of justice to do so.”³⁷⁷ Presumably, a determination of “in the interests of justice” would largely entail considerations of political independence - the need to reduce the likelihood of political manipulation of the justice system by particular factions within the national government - and the need for the “extra” legitimacy that the ICC sitting regionally would bring.³⁷⁸ Ultimately, therefore, assuming the Court could negotiate a logistical agreement with a state in the region giving it the facilities to conduct a trial and access to evidence, there appears to be no legal impediment to the ICC sitting in a regional context.³⁷⁹ Of course, because the international crimes currently within the ICC’s jurisdiction are limited to genocide, crimes against humanity, and war crimes, the Rome Statute would have to be amended to permit the Court jurisdiction to try the types of transnational crimes discussed in this thesis.³⁸⁰

3. Regional Courts Exercising Universal Jurisdiction

Part III of this thesis contains a detailed discussion of the universality principle of jurisdiction, and concludes that it could serve as a potent and promising weapon against the types of transnational threats discussed above in Part I of this thesis. Part III of this thesis also points out, however, that the practical application of universal jurisdiction has been hampered by several factors, including: 1) difficulties associated with obtaining physical custody of offenders; 2) overriding political and foreign policy concerns; 3) possible application by nonconformist nations; 4) dependency on domestic laws; and 5)

categories of offenses for all state parties), and *Comparison of the Clinton and Bush Administration Positions on the International Criminal Court*, United Nations Association of the United States of America website, October 2003, available at <http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=345925> (last visited Jan. 12, 2007).

³⁷⁵ See DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 661. See also International Criminal Court Assembly of State Parties website, <http://www.icc-cpi.int/statesparties.html> (last visited Jan. 12, 2007) (for a complete and up to date listing of the state parties to The Rome Statute).

³⁷⁶ Burke-White, *supra* note 366, at 750. See also THE ROME STATUTE, *supra* note 201, at art. 3.

³⁷⁷ Burke-White, *supra* note 366, at 750-51.

³⁷⁸ *Id.* at 736-37, 741-42.

³⁷⁹ *Id.* at 751.

³⁸⁰ See THE ROME STATUTE, *supra* note 201, at art. 5.

lack of willingness. Given these factors, is it reasonable to believe that universal jurisdiction could be effectively applied in a regional context?

The easy answer to this question is yes, because it's been done before. Following World War II, the Allied powers established the International Military Tribunal (Nuremberg tribunal) to try German war criminals³⁸¹ and the International Military Tribunal for the Far East (Tokyo tribunal) to try Japanese leaders.³⁸² Both tribunals were regional constructs composed of judges from Allied and other states.³⁸³ Although some debate persists on whether these post-war tribunals actually applied universal jurisdiction, their proceedings were clearly based on the principle of universality.³⁸⁴ Additionally, the regional "International Criminal Tribunal for the former Yugoslavia and the International Tribunal for Rwanda have legitimized their jurisdictional regime on the basis of universal jurisdiction."³⁸⁵

Practically speaking, the regional exercise of universal jurisdiction to prosecute transnational crimes should be relatively easy to achieve. For instance, "regionalization [could] be achieved by granting a jurisdictional

³⁸¹ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited Jan. 13, 2007).

³⁸² Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No. 1), as amended, General Orders No. 20, Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20, available at <http://www.yale.edu/lawweb/avalon/imtfech.htm> (last visited Jan. 13, 2007).

³⁸³ DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 609.

³⁸⁴ Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 41 (2000). Compare Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 464 (1994) (citing *In re List* as an example of the Allied application of universal jurisdiction during which a U.S. zonal tribunal tried German officers for executing hundreds of thousands of civilians in the Balkan region during the war, despite the fact that the U.S. had no territorial connection with the crime, nor were any of the other traditional nexuses present to assert extraterritorial jurisdiction), with Madeline Morris, *The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROB. 13, 37 (2001) (arguing that neither the Nuremberg nor the Tokyo tribunal based its competence on the collective exercise of universal jurisdiction, but rather the consent of the state of nationality of the defendants).

³⁸⁵ Johan D. van der Vyver, *International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 814 (2001); see also Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 407 (2000) (citing the ad hoc tribunals for the former Yugoslavia and Rwanda as precedent for the establishment of "a theory of universal international jurisdiction which would permit the international community as a whole, in certain limited circumstances, to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in their thrust and unbounded in their geographical scope"); but cf. Morris, *supra* note 384, at 36 (arguing that the former Yugoslavia and Rwanda tribunals' jurisdiction "is more properly viewed as arising from the powers of the Security Council to take such steps as are required to restore or maintain international peace and security").

preference to states within the region in which the crime occurred.”³⁸⁶ These states would need the requisite domestic legislation to exercise universal jurisdiction; however, more than 120 countries already have such legislation and, therefore, “wherever international crimes occur, there are states within the region capable of prosecution under the universality principle.”³⁸⁷ It is necessary to note, however, that the scope of this legislation is generally limited to the prosecution of war crimes or crimes against humanity and, therefore, as with the Rome Statute, the domestic legislation would have to be amended to allow for the prosecution of other transnational crimes pursuant to the universality principle.³⁸⁸

Regional courts exercising universal jurisdiction would favorably address the concerns mentioned above and in Part III of this thesis. For instance, a regional agreement establishing such a judicial mechanism could require party states to adopt the requisite domestic legislation; the involvement of many nations would likely make it harder for an accused to escape detention and turnover to the criminal tribunal; and the agreement could also set forth guidelines to resolve jurisdictional conflicts, thereby defusing political tensions or overcoming the lack of political will to prosecute. There are no generally observed rules for resolving jurisdictional conflicts over the exercise of universal jurisdiction; however, a hierarchy of jurisdiction could be established based on The Princeton Principles of Universal Jurisdiction, which recommend balancing the following criteria:³⁸⁹

- a) multilateral or bilateral treaty obligations;
- b) the place of commission of the crime;
- c) the nationality connection of the alleged perpetrator to the requesting state;
- d) the nationality connection of the victim to the requesting state;
- e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;

³⁸⁶ Burke-White, *supra* note 366, at 752.

³⁸⁷ *Id.*

³⁸⁸ For a complete chart of domestic implementing legislation for the exercise of universal jurisdiction, see Amnesty International, IOR 53/018/2001, ch. 15, available at <http://web.amnesty.org/library/index/engior530182001?OpenDocument> (last visited Jan. 13, 2007).

³⁸⁹ Burke-White, *supra* note 366, at 752.

- f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- g) the fairness and impartiality of the proceedings in the requesting state;
- h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- i) the interests of justice.³⁹⁰

It would also be possible to create a hierarchy of jurisdiction based upon the relative interest a particular state might have in prosecuting a certain type of transnational crime, or based upon the level of resources a particular state could devote to pursue certain crimes. Regardless, just as the universality principle itself must be recognized as a potentially valuable weapon against transnational crime, so the regional application of the principle must be recognized as a preferable means of implementing it.

4. Semi-Internationalized Courts

Post-conflict environments are frequently characterized by a very strong desire for individual accountability, and yet, despite the political will, “the domestic judiciary [may be] unable to deal with the complexity and number of outstanding cases.”³⁹¹ It might also be the case, however, that standing up a fully internationalized tribunal is unacceptable or impractical.³⁹² In several such situations, a middle ground has emerged where international criminal law has been applied by “mixed tribunals” consisting of international and local judges within the overall structure of the domestic courts.³⁹³ To regionalize domestic

³⁹⁰ Lloyd Axworthy, et al., Princeton Project on Universal Jurisdiction, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 32 (2001), *available at* http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf [hereinafter PRINCETON PRINCIPLES] (last visited Jan. 13, 2007).

³⁹¹ Burke-White, *supra* note 366, at 753.

³⁹² A fully internationalized tribunal might be unacceptable or impractical for several reasons in a post-conflict environment, including quite simply the lack of available infrastructure and logistical resources to stand-up and operate such a judicial system.

³⁹³ Burke-White, *supra* note 366, at 754. Examples of these mixed tribunals have been found in East Timor and Sierra Leone. See On the Organization of Courts in East Timor, United Nations Transnational Administration in East Timor (UNTAET) Reg. 2000/11, U.N. Doc. UNTAET/REG/2000/11, (Mar. 6, 2000), *as amended* by UNTAET Reg. 2000/14, U.N. Doc. UNTAET/REG/2000/14, (May 10, 2000), *available at* <http://www.un.org/peace/etimor/untaetR/Reg0014E.pdf> (last visited Jan. 14, 2007), and Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246, appended to Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security

courts using this mixed tribunal model, the participating international judges could simply be selected from within the region where the court sits and the crimes occurred.³⁹⁴

Which of these regional models could best promote individual accountability and preserve offenders' rights within the context of a global security network designed to combat transnational threats? In my opinion, the best solution would be a regional justice system that draws upon elements from these structures, rather than the wholesale adoption of one of the models. Of all the court structures presented above, the ICC sitting regionally is probably the least realistic or desirable solution, simply because of the volume and nature of crimes sought to be addressed by the global maritime security network. The ICC is designed to prosecute "only those heinous crimes of genocide, crimes of war, crimes against humanity, and eventually crimes of aggression, that escape the jurisdiction of domestic tribunals."³⁹⁵ Therefore, it is not surprising that by 2006, the ICC's prosecutor had initiated formal investigations into only three situations.³⁹⁶ Given this context, it is doubtful that consensus would ever exist to amend the Rome Statute to include jurisdiction for the prosecution of such "lesser" crimes as piracy and drug trafficking.³⁹⁷ Additionally, if the security network is effective in apprehending large numbers of these criminals, the sheer volume of cases would likely overwhelm a single judicial body. Accordingly, the ideal regional justice system should encompass many courts with broad jurisdiction.

Several of the regional examples provided above contemplate the use of existing domestic courts as regional courts. Incorporating existing court resources and structures would provide the global maritime security network with the capability to process the large number of cases necessary to truly impact the public order:

Council, app. II (2002), available at <http://www.sierra-leone.org/specialcourtgreement.html> [hereinafter Sierra Leone Agreement] (last visited Jan. 14, 2007).

³⁹⁴ Burke-White, *supra* note 366, at 754.

³⁹⁵ Gustavo Gallon, *The International Criminal Court and the Challenge of Deterrence*, in THE ROLE OF THE ICC, *supra* note 371, at 100.

³⁹⁶ "[T]he human rights situation in the Ituri province in the Democratic Republic of the Congo; the activities in Uganda of the Lord's Resistance Army, a separatist group known for committing horrendous abuses, particularly against children; and the Sudanese region of Darfur, following a formal referral of that situation to the Prosecutor by the Security Council in March 2005." DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 661-62.

³⁹⁷ Indeed, the idea of a permanent international criminal court was resurrected upon a request by Trinidad and Tobago to consider such a tribunal for drug trafficking offenses; however, drug trafficking was not ultimately included in the Rome Statute as an offense over which the ICC would have jurisdiction.

Unfortunately, no legal system can totally eliminate crime. In fact, the existence of a criminal justice system in each society is not related to the expectation that crime will end, but to the assumption that crimes will continue to take place. No legal system has ever deterred every person from committing crimes. . . . If a deterrent effect - even limited or partial - is desired, the efforts at holding perpetrators accountable must be significant and serious. In fact, deterrence is directly proportional to accountability. That means that the more the violators are stopped and held accountable, the higher the deterrence effect. If many violators escape control by [a] court, there may be no deterrence effect at all.³⁹⁸

If domestic courts are to be employed in this effort, it will be absolutely necessary to ensure political independence and legitimacy. A relatively simple method of achieving these goals is to utilize the “mixed tribunal” model of semi-internationalized courts. For instance, an agreement between the United Nations and the Government of Sierra Leone provides for a special court with three judges - one appointed by the Government of Sierra Leone, and two appointed by the Secretary General upon recommendations from regional states.³⁹⁹ Similar mixed tribunals could be established throughout any given region, with composition and selection criteria determined by agreement between participating states.

To be most effective, I propose that each of these semi-internationalized tribunals should be vested with the universal jurisdiction to try limited types of cases. In other words, each tribunal could not try every offense; rather, each tribunal would have a “specialty” much akin to the ICC’s authority to exercise universal jurisdiction over limited types of offenses. For instance, if such a specialized court system was established within the Strait of Malacca region, a semi-institutionalized court in Indonesia could be granted jurisdiction to hear all piracy cases within the region; a Singapore court could hear all drug trafficking cases; and a Malaysian court could hear all human trafficking cases. Initial determinations concerning what courts would handle what crimes could be made on the basis of a particular state’s overriding interest in prosecuting certain crimes or on the prevalence of a given problem and the available judicial resources that a state could bring to bear. Additionally, even if a state does not possess the requisite domestic court structure to support trying large numbers of transnational crimes, its judges could still participate on the mixed tribunals in other countries. In this way, every state within a region could contribute to the administration of justice and ensure that its interests were being represented

³⁹⁸ Gallon, *supra* note 395, at 97.

³⁹⁹ Burke-White, *supra* note 366, at 754. *See also* Sierra Leone Agreement, *supra* note 393, at art. 2.

without concern that one or two states could dominate the agenda or outcomes in all cases. Ultimately, whether a state's contributions to the judicial system are large or small, every state within a region would have a stake in the outcome.

What legal instrument could best create this court structure? Certainly, any such agreement would have to fall along the more formal end of the spectrum, although I do not believe a treaty would be necessary. Rather, states could look to the example of Port State Control MOUs. In a nutshell, and as discussed earlier in Part IV, Port State Control MOUs establish the framework whereby a port state can "institute proceedings in its own courts in respect of a vessel voluntarily within one of its ports . . . [to] enforce its laws against the vessel concerned if such vessel has committed a breach of applicable international rules and standards."⁴⁰⁰ At base, this is a regional arrangement that empowers a judicial mechanism similar to the proposed system of numerous specialized semi-internationalized courts operating throughout a region to try commonly recognized transnational crimes. In the case of Port Control MOUs, the agreements themselves set forth what international standards will apply within a given region, and an MOU establishing a specialized semi-internationalized court system could similarly incorporate international conventions to precisely define crimes and guarantee offenders' rights.⁴⁰¹ It is also important to note that while MOUs do not legally oblige states, there is a general view that "they should be seen as politically binding, creating a moral obligation on signatory states to carry out undertakings."⁴⁰² Accordingly, such agreements are not easily disregarded, and Port State Control MOUs provide clear evidence that states will make non-legally binding instruments the basis of agreement for actions of considerable importance.⁴⁰³

G. Bringing the Pieces Together: A Dual Framework

Ultimately, how do you create strong regional alliances with effective justice systems and tie these alliances together on a global scale? Proposals concerning the 1,000 ship Navy have largely advocated an ad hoc structure described as follows:

Membership in this [1,000 ship Navy] would not be proscriptive and - in contrast to formal military alliances - would entail no legal or encumbering ties. Rather, it would be

⁴⁰⁰ Z. OYA OZCAYIR, PORT STATE CONTROL 81 (2001).

⁴⁰¹ By way of example, and for a list of conventions incorporated into the Paris and Tokyo Port State Control MOUs, *see supra* note 322.

⁴⁰² Shine, *supra* note 314, at 205.

⁴⁰³ *See Kiss, supra* note 314, at 226.

an informal, voluntary, free form force of maritime partners. Specific challenges would yield unique partnerships. These partnerships would have no designated leader and no permanent secretariat, but would be largely self-organizing.⁴⁰⁴

Described in this way, the 1,000 ship Navy sounds like the emergency response coalition assembled following the 2004 Indian Ocean earthquake and tsunamis. According to this view, state participation would be based on a shared commitment to maritime security, and the fleet would be “bound” at all levels by “three elements: 1) common command, control, and communication (C3) protocols; 2) shared global maritime awareness; and 3) the means to synchronize resources to achieve agreed objectives.”⁴⁰⁵

While I wholeheartedly agree with the proposition that C3 protocols, shared maritime awareness, and synchronization of resources is critical to the success of a global maritime security network, I do not believe such a force could be established entirely on an ad hoc or “free form” basis.⁴⁰⁶ As discussed earlier in Part IV, I believe the need for a continual balancing of state interests and long-standing presence - not to mention the establishment of regional judicial systems - requires coordination and agreement that is formalized in such a way to encourage commitment and inspire reliance. That is not to say, however, that rigid governance is required. I do believe that a common interest in security and a strong desire to combat the types of transnational threats outlined in Part I of this thesis will drive the necessary spirit of cooperation between nations. Accordingly, I hereby advocate a two-tiered approach to building the 1,000 ship Navy; one that relies on a dual framework of more formal legal agreements at the regional level, tied together by an informal arrangement at the global level.

1. The Regional Level

In an ideal world, nations across the globe could agree not only on the need to establish a global maritime security network, but also on all aspects of its structure and administration. Information would flow freely between partner states, and individual suspicions would fall away as the 1,000 ship Navy was

⁴⁰⁴ Cavanaugh & Porter, *supra* note 4, at 5.

⁴⁰⁵ *Id.* at 7.

⁴⁰⁶ NATO already has an internationally recognized method for mariners to communicate that could be adopted as a model for 1,000 ship Navy communications. *Id.* at 8. Examples of information sharing in a maritime environment also include the Virtual Regional Maritime Traffic Center (V-RMTC) in the Mediterranean that “provides a forum for 27 nations, NATO, EUROMARFOR and the IMO to share unclassified shipping information utilizing the Automatic Identification System (AIS) and the World Wide Web, . . . [and] the internationally supported CTF-150 operations from the Red Sea around the Straits of Hormuz.” Morgan, *supra* note 94, at 68.

quickly implemented to counter the scourge of numerous and varied transnational threats. In such an environment, the 1,000 ship Navy could be created by a global treaty, and enjoy the predictability and adherence to obligations that treaties are intended to achieve.⁴⁰⁷ Unfortunately, we do not live in such an ideal world, and true global agreement on any issue is extremely difficult - if not impossible - to achieve, even with today's increased globalization.⁴⁰⁸ Additionally, given that treaty-making usually involves a slow and costly process, a negotiated consensus, ratification, and enforcement mechanisms for non-compliance, trying to build a 1,000 ship Navy with a single global treaty is difficult to conceive of indeed.⁴⁰⁹

That is not to say, however, that predictability and reliance and commitment should be abandoned "as human societies strive to maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources."⁴¹⁰ Nevertheless, the reality is that states are often unwilling to accept formally binding legal texts because legal obligations carry consequences.⁴¹¹ It is also true that states' willingness to be bound together in a formal manner generally increases as their common interests increase, and such consensus increases as the pool of participating states decreases.⁴¹² It would

⁴⁰⁷ See, e.g., Richard B. Bilder, *Recent Books on International Law: Review Essay: International Law Is, As International Law Theory Does?*, 100 AM. J. INT'L L. 248, 255 (2006) (book reviews) ("Governments create . . . international agreements such as the Nuclear Non-proliferation Treaty, the 1982 UN Convention on the Law of the Sea, and the two International Covenants on human rights, in order to make international relations more transparent and predictable."); see also Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Jan. 16, 2007).

⁴⁰⁸ See Wolfgang H. Reinicke and Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE, *supra* note 314, at 88 ("[G]lobalization fundamentally alters the prospects and possibilities of [treaty] compliance, potentially leading to a higher incidence of defection from international agreements. . . . In some issue-areas nation-states cannot fulfill treaty obligations because the objects of regulation are highly mobile and act transnationally.").

⁴⁰⁹ *Id.* Additionally, "[t]reaty law usually does not offer the required 'process openness' many global policy issues need to achieve acceptance and compliance by all participants." *Id.* at 89. See also John F. Duffy, *Symposium: Patent System Reform: Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 692 (2002) (describing worldwide consensus as a "significant political barrier to legal experimentation" within the context of establishing a single, integrated global patent system by multilateral treaty).

⁴¹⁰ Dinah L. Shelton, *Introduction*, in COMMITMENT AND COMPLIANCE, *supra* note 314, at 7.

⁴¹¹ *Id.* at 10.

⁴¹² See e.g., Andrew A. Faye, *APEC and the New Regionalism: GATT Compliance and Prescriptions for the WTO*, 28 LAW & POL'Y INT'L BUS. 175, 206 (1996) ("It is much easier to achieve consensus . . . when there are only eighteen negotiating parties rather than 117 [i.e., in the WTO]."), and Timothy H. Goodman, *"Leaving the Corsair's Name to Other Times: How To Enforce the Law Of Sea Piracy In the 21st Century Through Regional International Agreements"*, 31 CASE W. RES. J. INT'L L. 139, 161 (1999) (arguing that a regional convention, "negotiated by a smaller number of

only make sense, therefore, to try to develop as strong and binding an international agreement as possible, at the “highest” level possible; in other words, the level at which the greatest number of states are willing to be so bound. I believe this level to be the regional level as discussed throughout Part IV of this thesis.

I do not believe a formal treaty is required at the regional level to promote the type of coordination and cooperation necessary to lay the foundations for the 1,000 ship Navy. In fact, I would argue that the goals of such a maritime security network as set forth throughout this thesis would be better served by adopting a “soft law” alternative at the regional level for three main reasons: 1) the need to induce a greater number of states to participate; 2) it allows for more active participation of various agencies and non-state actors; and 3) it can generally be adopted more rapidly and amended or quickly replaced if it fails to meet current challenges.⁴¹³ Again, one need look no further than Port State Control MOUs for an effective precedent on these counts. The concept of port state control is not simply aimed at serving the interests of individual nations; rather, the “[i]nspections, investigations and criminal proceedings against violators also further the interests of all States in the region and the international community as a whole.”⁴¹⁴ Despite the recognized need for numerous states and agencies to work together to further the collective good, the participants to the 1982 Paris MOU “had no wish to create legal rights and obligations for themselves.”⁴¹⁵ As a result, they coordinated their activities using a soft law instrument that served as a model for every subsequent Port State Control MOU, and “has led to gradual improvements in the fields of safety at sea and the protection of the marine environment in the interest of the

nation-states, could avoid a key pitfall in large multilateral negotiations: that the final product reflects, not the best possible solution, but the ‘lowest common denominator’ among a multiplicity of negotiators.”)

⁴¹³ Shelton, *supra* note 410, at 12-13. “Soft law may be loosely defined as declared norms of conduct understood as legally non-binding by those accepting the norms. Soft law instruments assume innumerable forms, ranging from declarations of international organizations, to industry codes of conduct, to experts’ reports. Soft law instruments, though not enforceable by legal sanction, are often framed in legal language and in many respects may exhibit an authority comparable to that of treaties or custom.” DUNOFF, RATNER & WIPPMAN, *supra* note 147, at 36. See, e.g., Conference on Security and Co-operation in Europe: Final Act (The Helsinki Final Act of 1975), Aug. 1, 1975, 14 I.L.M. 1292, available at <http://www.hri.org/docs/Helsinki75.html> (last visited Jan. 18, 2007).

⁴¹⁴ Doris Konig, *Port State Control: An Assessment of European Practice*, in MARINE ISSUES: FROM A SCIENTIFIC, POLITICAL, AND LEGAL PERSPECTIVE 38 (Peter Ehlers, et al. eds., Springer 2002).

⁴¹⁵ *Id.* at 40. See also Duruigbo, *supra* note 173, at 129 n.180 (noting that the Paris MOU format was adopted ostensibly as a reflection of the intention of states involved to avoid binding obligations; an intention accentuated by the fact that the MOU was concluded among maritime authorities and not state governments).

international community as a whole.”⁴¹⁶ Accordingly, I propose that the foundations of the 1,000 ship Navy be constructed on regional foundations with regional justice systems between states bound together by Port State Control-like MOUs.

2. The Global Level

If the foundations of the global maritime security network are constructed using regional Port State Control-like MOUs, the next question becomes how to tie the “patchwork” of regions together to create the global 1,000 ship Navy? Of course, the underlying assumption here is that the regions *need* to be tied together somehow. I think it safe to say that without worldwide linkage, the threat posed by transnational actors could not be abated. If regions were isolated, criminal actors at sea could slip through one security environment with confidence that subsequent officials would have to begin searching anew; that is not to say the actors would be guaranteed safety, but crossing from region to region could certainly buy time, and creative actors would also undoubtedly find ways to exploit “holes” in the network. For instance, it is reasonable to assume that some regions would focus on certain security threats over others, and some regions would simply have more resources to devote to certain threats than others. The result could be the kind of forum-shopping sometimes exhibited by shipping companies as a way of avoiding states with more effective port controls.⁴¹⁷ Ultimately, it is only through the regional sharing of resources - and primarily the resource of information - that a maritime security network will be able to meet its goals and objectives on a global level.

Information sharing in its many forms will “plug” the holes between regions by effectively “importing [maritime security] into regions where it is lacking and exporting it from regions that have the capability and desire to do so.”⁴¹⁸ Again, as with the creation of regional alliances, I would contend that a formal treaty is not necessary to promote and ensure the cooperation necessary to share information on a global level. For instance, it is one thing to seek global agreement on a law of the sea regime, but quite a less daunting task to establish a framework for the sharing of maritime information. That is not to say the creation of such a framework would be easy, but the model is certainly closer to the informal PSI than the formal UNCLOS.⁴¹⁹ In fact, I believe an

⁴¹⁶ *Id.* at 54. *But see* König, *supra* note 414, at 41 (noting that the European Community believed it necessary to enact the EC Directive on Port State Control in 1995, a legally binding directive to ensure compliance with commitments under the Paris MOU).

⁴¹⁷ *See* McDorman, *supra* note 317, at 224-25.

⁴¹⁸ Morgan & Martoglio, *supra* note 30, at 5.

⁴¹⁹ The point must be made that the UNCLOS is remarkable as an example of a successful global treaty. While proving that such consensus is possible in rare circumstances, it does also reinforce the fact that attaining such agreement is a long and arduous process. Attempts to codify the peacetime

“expanded” version of the PSI is the ideal method of creating the linkage between regions necessary to make the 1,000 ship Navy a reality.

As discussed earlier in Part IV of this thesis, the PSI is an extremely informal and flexible arrangement between nations that has successfully promoted information and resource sharing to confront the WMD threat. As explained, the PSI is not without its critics, and yet, it cannot be denied that the program has garnered widespread support; in my opinion largely because it does not dictate how countries must act in order to participate in the initiative. Beyond agreeing to support the guiding principle of the PSI, participating nations are only “encouraged” to pursue the objective in a number of ways.⁴²⁰ It is not hard to imagine that a similarly broad “Statement of Principles” could be drafted to encompass numerous transnational threats instead of simply WMD. Regions could agree to abide by the Principles on a global level while retaining the autonomy to simultaneously pursue their particular interests - as outlined in MOUs - at the regional level. Furthermore, the PSI establishes that, as long as a general common interest exists, a central governing body is not necessary to facilitate information sharing and communication between a large number of parties on a global level.

Obviously, the PSI is also attractive as a global model because it could be incorporated in a very short period of time. Additionally, regions could be added to the mix easily, and goals and objectives could be updated as various transnational threats increased or decreased in prevalence and relative importance to the world community. It is also necessary to see, however, that the PSI offers other unique advantages that make it a valuable part of the dual framework for creating the 1,000 ship Navy. First, because the idea of a 1,000 ship Navy is being championed by the U.S. Chief of Naval Operations, it is entirely likely that, “despite the best of intentions, [a global maritime security network] will be seen as a U.S. initiative to bend international maritime forces to an American agenda.”⁴²¹ It is hard to escape the practical fact that, as the world’s largest naval power, the United States will have to steer the 1,000 ship Navy to a certain degree; however, it is vitally important to the global engagement effort that U.S. involvement be seen as largely “supporting” vice “driving” the effort.⁴²² The PSI model will enable the U.S. to strike this delicate balance on the international stage - without a central governing body, the U.S. will be unable to overtly dictate policy, but as the greatest potential provider of

rules of the international law of the sea were initiated in 1924 by the League of Nations, and the UNCLOS finally went into effect in 1994 - a span of 70 years. See R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 13-22 (3d ed. 1999).

⁴²⁰ See Statement of Interdiction Principles, *supra* note 333.

⁴²¹ Saunders, *supra* note 288, at 1.

⁴²² Cavanaugh & Porter, *supra* note 4, at 12.

information and resources, its involvement will naturally be sought out by regions across the globe. Second, the informal PSI model is conducive to the unique nature of the maritime environment. As mentioned earlier in Part IV, the PSI was not initially limited to the maritime domain, and yet, its successes have come almost exclusively in that environment.⁴²³ Why? Despite the legal order represented by UNCLOS, “[t]he oceans are marked by a blurry line between freedoms guaranteed by the presence of law and a more radical freedom - that is, a kind of anarchy - that flourishes in spite of prescribed legal norms.”⁴²⁴ The freedom of the maritime domain is both appealing and threatening. It is appealing in the sense that it provides even small countries the ability to assert autonomy across the globe; when a ship sets sail from its homeport, it *is* that country and all it represents. At the same time, the vastness of the oceans is isolating and highlights just how little control any one country can really impose to prevent its exploitation. In my opinion, the PSI works in the maritime environment because it allows for the desired autonomy while providing the sought after interdependence necessary to overcome the uncertainty associated with our planet’s oceans. A 1,000 ship Navy built partially upon the familiar PSI model should have the same effect.

V. CONCLUSION

This thesis is about the nature of international cooperation within the context of a particular challenge - combating transnational threats to peace and security that transcend national boundaries and are particularly prevalent in the maritime domain. The position advocated in this thesis is that a global maritime security network - or 1,000 ship Navy - can best be constructed by utilizing a dual framework of international agreements; a series of memoranda of understanding with specialized semi-internationalized criminal tribunals exercising universal jurisdiction at the regional level, and an overarching “Statement of Principles” at the global level to link the regions together through a combination of information and resource sharing. As with all international agreements or arrangements, however, the ultimate question is: will it work? The answer to that question depends largely on the extent to which this combination of agreements can shape behavior in the desired way; in other words, will state participants comply with these agreements?

The dual framework proposed in this thesis is composed of “soft law” or non-legally binding instruments,⁴²⁵ and the reasons for utilizing these various

⁴²³ Becker, *supra* note 70, at 134.

⁴²⁴ *Id.* at 135.

⁴²⁵ See Edith Brown Weiss, *Conclusions: Understanding Compliance with Soft Law, in* COMMITMENT AND COMPLIANCE, *supra* note 314, at 535 (distinguishing “between four

types of informal agreements are set forth throughout Part IV. The issue of compliance “refers to whether countries in fact adhere to the provisions of [an] accord and to the implementing measures that they have instituted.”⁴²⁶ In the case of soft law, compliance is a function of many factors, and “it is unlikely that a specific formula can be discovered . . . to optimize compliance.”⁴²⁷ Nevertheless, studies have shown that several factors are likely to increase the rate of compliance in a variety of non-binding situations. Several of these factors are or will likely be present in the proposed global maritime security network, including:

- a) a continuing long-term relationship among the participants in which they must interact;
- b) consensus among the participants on the need for particular behavior;
- c) linkage of multiple soft law instruments;
- d) linkage to domestic legal systems; and
- e) equitable and relatively simple obligations.⁴²⁸

Of course, despite these factors, compliance ultimately depends upon a country’s intent and capacity to comply.⁴²⁹ Not only is such intent and capacity difficult to ascertain, it is also susceptible to change over time.⁴³⁰ Accordingly, it is impossible to say with certainty whether the proposed dual framework of soft law instruments will ultimately achieve the stated goals of the global maritime security network. Nevertheless, the fact that these instruments are already being used with success on the international plane is cause for optimism. Additionally, and perhaps ominously, the best guarantor of success stems from the nature of the transnational threats themselves. More and more nations now recognize that these transnational actors threaten the very fabric of our global security, and as Admiral Mullen has stated, “[o]ur adversaries will not rest, [and] our global neighbors will not wait.”⁴³¹ Now is the time to “confront the forces of lawlessness and instability . . . [by] stand[ing] watch together over the global maritime domain.”⁴³²

categories of instruments based on whether the form was binding or non-binding and whether the content was binding or non-binding.”); *see also* Shelton, *supra* note 410, at 3-5.

⁴²⁶ Shelton, *supra* note 410, at 5.

⁴²⁷ Jonathan L. Charney, *Compliance With International Soft Law*, in COMMITMENT AND COMPLIANCE, *supra* note 314, at 117.

⁴²⁸ *Id.* *See also* Weiss, *supra* note 425, at 539-42, 547-48. It is also necessary to note that the proposed global maritime security network does not include other factors that some commentators believe are crucial for compliance with soft law obligations, including the presence of institutional mechanisms for monitoring and supervising compliance. *See id.* at 538.

⁴²⁹ Weiss, *supra* note 425, at 550-53.

⁴³⁰ *Id.*

⁴³¹ Mullen, *supra* note 14, at 5.

⁴³² Morgan, *supra* note 94, at 68.

INTERDICTION ON THE HIGH SEAS: THE ROLE AND AUTHORITY OF A MASTER IN THE BOARDING AND SEARCHING OF HIS SHIP BY FOREIGN WARSHIPS

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I. INTRODUCTION

On September 11, 2001, several individuals belonging to the terrorist organization al-Qaeda¹ hijacked four passenger planes of which two crashed into the World Trade Center Towers in New York City, one into the Pentagon—the Department of Defense headquarters, and the fourth, destined for either the United States Capitol or the White House, crashed in Pennsylvania after passengers confronted and fought the hijackers.² As a result, over 3000 men, women, and children from over 80 different countries died or remain missing

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¹ Al-Qaeda, Arabic for "the base," is an international terrorist network founded in 1989 and led by Osama bin Laden, a Saudi Arabian. It seeks to rid Muslim countries of what they consider profane influence of the West and replace their governments with fundamentalist Islamic regimes. Al-Qaeda is an offshoot of the 1980s Afghanistan resistant Palestinian Moslem Brotherhood. The Palestinian Moslem Brotherhood was formed by Osama bin Laden and Abdullah Azzam in response to the 1979 Soviet invasion of Afghanistan. See JEFFERY F. ADDICOTT, WINNING THE WAR ON TERROR 18-20 (2003). See also AHMED RASHID, TALIBAN, MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 132 (2000).

² *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4 (2004) (hereinafter *9/11 Commission Report*).

following the attacks.¹ What commenced thereafter was the United States' Global War on Terrorism.²

Just as multiple aircrafts facilitated the terrorist attacks on innocent civilians on September 11, 2001, terrorists are using ships to carry out their operations.³ Reports indicate that commercial ships of varying sizes and types are being used, some knowingly and others unwittingly, in carrying out terrorist attacks, in the transportation of terrorists and terrorists' instrumentalities,⁴ and weapons of mass destruction.⁵ There is a widely held belief that Osama bin Laden covertly owns a fleet of commercial vessels ranging from as few as fifteen to as many as fifty, flying under various flags of convenience and that these vessels are potentially floating bombs targeted at United States' interests.⁶

¹ *9/11 Commission Report*, *supra* note 2, at 4.

² The term used by the United States to describe its worldwide military, law enforcement, and diplomatic campaign against al-Qaeda, prompted by the latter's involvement in the September 11, 2001 terrorist attack. In a speech on October 11, 2001, President George W. Bush, explained the goal of the global war on terrorism. He stated: "The attack took place on American soil, but it was an attack on the heart and soul of the civilized world. And the world has come together to fight a new and different war, the first, and we hope the only one, of the 21st century. A war against all those who seek to export terror and a war against those governments that support or shelter them." President George W. Bush, White House News Conference (Oct. 11, 2001), *available at* <http://www2.indystar.com/library/factfiles/crime/national/2001/sept11/transcripts/1011bush.html> (last visited Oct. 20, 2007).

³ *See e.g.*, John S. Burnett, *The Next 9/11 Could Happen at Sea*, N.Y. TIMES, Feb. 22, 2005, at A17.

⁴ "Reports in January 2002 indicated that the search of a freighter by a US Navy vessel revealed that a group of Al Qaeda terrorists had been hiding inside a shipping container. The group escaped from the container a short time before the ship was searched." Vijay Sakhuja, *Maritime Terrorism: India Must be Prepared*, 12 FAULTLINES: WRITING ON CONFLICT & RESOLUTION (May 29, 2002) *available at* <http://satp.org/satporgtp/publication/faultlines/volume12/Article4.htm>. *See also* Paul Redfern, *Terrorism: World Shippers Need to 'Wake Up,'* THE EAST AFRICAN (Nov. 19, 2001) *available at* <http://www.nationaudio.com/News/EastAfrican/26112001/Maritime/Maritime12.html> (in the article, a British merchant security advisor raised grave concerns about the terrorism threats to merchant vessels).

⁵ U.S. Dep't of State, International Information Programs, The Proliferation Security Initiative (June 2004), *available at* <http://usinfo.state.gov/products/pubs/proliferation> (The Proliferation Security Initiative (PSI), announced by President Bush on May 31, 2003, is a global initiative aimed at interdicting shipments of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide).

⁶ *See* Sakhuja, *supra* note 6. *See e.g.*, John Mintz, *15 Freighters Believed to be Linked to Al Qaeda, U.S. Fears Terrorists at Sea, Tracking Ships is Difficult*, WASH. POST, Dec. 31, 2002, at A1. *See also* Colin Robinson, *Al Qaeda's 'Navy' – How Much of a Threat?* Center for Defense Information (CDI) (Aug. 20, 2003), *available at* http://www.cdi.org/program/document.cfm?DocumentID=1644&from_page=. /index.cfm (Aug. 20, 2003) *Brassed Off: Flags of Convenience*, THE ECONOMIST, May 18, 2002, at 85 (reporting that the intelligence community believes that Osama Bin Ladin has a fleet of over 20 ships flying under flags of convenience, which has caused the United States to submit a proposal the International Maritime Organizing (IMO) to make ship ownership more transparent).

With over ninety percent of the world's cargo transported by sea, the global economy depends on maritime shipping.⁷ The United States has recognized the threat to both maritime shipping and the nation from maritime-based terrorist activities. The United States National Strategy for Maritime Security states:

Terrorists can also develop effective attack capabilities relatively quickly using a variety of platforms, including explosives-laden suicide boats . . . ; merchant and cruise ships as kinetic weapons to ram another vessel, warship, port facility, or offshore platform; commercial vessels as launch platforms for missile attacks Terrorists can also take advantage of a vessel's legitimate cargo, such as chemicals, petroleum, or liquefied natural gas, as the explosive component of an attack. Vessels can be used to transport powerful conventional explosives or WMD for detonation in a port or alongside an offshore facility.⁸

In response to the real and present danger from the sea, and in support of the Global War on Terrorism,⁹ the United States and its coalition partners are engaged in "maritime interception operations" in the Gulf of Oman and North Arabian Sea.¹⁰ This boarding and searching of foreign flagged commercial vessels on the high seas allows the United States and its coalition partners to interdict suspected terrorist vessels before the terrorists have the opportunity to attack unsuspecting innocent civilians at sea and on land.¹¹ Thus, maritime interdiction operations are critical to the disruption of terrorist activities and maritime security.

⁷ UNITED STATES NATIONAL STRATEGY FOR MARITIME SECURITY 2 (2005) *available at* <http://www.whitehouse.gov/homeland/4844-nsms.pdf> (last visited on 20 January 2007) (According to the strategy, "[s]hipping is the heart of the global economy, but it is vulnerable to attack in two key areas. Spread across Asia, North America, and Europe are 30 megaports/cities that constitute the world's primary, interdependent trading web. Through a handful of international straits and canals pass 75 percent of the world's maritime trade and half its daily oil consumption. International commerce is at risk in the major trading hubs as well as at a handful of strategic chokepoints.").

⁸ *Id.* at 4.

⁹ Peter Grier and Faye Bowers, *How Al Qaeda Might Strike the US by Sea*, CHRISTIAN SCI. MON., May 15, 2003, at 2 (discussing U.S. government concerns that Al-Qaeda may mount terrorist attacks from the sea or with the use of maritime assets).

¹⁰ *U.S. and Coalition Forces Bring Global War on Terrorism to the Enemy at Sea*, NAVY NEWS STAND, at http://www.news.navy.mil/search/display.asp?story_id=9263 (Aug. 29, 2003) ("Maritime Interception Operations (MIO) has become an important mission for U.S. and coalition forces. Since more than 95 percent of the world's commerce moves by sea, it is likely that terrorists use merchant shipping venues to move cargo and passengers for their purposes, including escaping prosecution or even carrying out terrorist attacks.").

¹¹ *Id.* See also Robinson, *supra* note 8.

One of the tactics available to the United States in the Global War on Terrorism is requesting consent from the master to board and search a foreign flagged merchant ship.¹² The United States Navy and Coast Guard rely on section 3.11.2.5.2 of *The Commander's Handbook on the Law of Naval Operations* in seeking master's consent.¹³ The ability to communicate directly with the master to gain entry to his ship permits the United States naval forces to quickly verify the legitimacy of a ship's cargo, crew, and records without undue delay to the boarded ship.¹⁴

The United Kingdom, a close ally of the United States and a participant¹⁵ in the maritime interdiction operations, does not share the United States' position on a master's authority to consent to the boarding and searching of his ship by non-flag state personnel.¹⁶ British Naval regulations require the consent of the flag state, not the master or person in charge of the ship, in order to board and search a foreign non-military vessel on the high seas.¹⁷ The United Kingdom's policy creates undue delay and unnecessarily hinders the ability to conduct maritime interception operations on the high seas.

This article postulates that a master of a vessel has the authority under international law to consent to searches of his ship, including all individuals on his vessel, if requested by non-flag state warships. Part II starts with a discussion of the historical origin of maritime law and concludes with the current maritime legal regime on the high seas as it relates to searches. Part III examines the flags of convenience phenomenon and its impact on master's consent. Part IV discusses the customary and codified rules applicable to peacetime interdiction of ships on the high seas. Finally, Part V argues that customary international law, legal commentators, courts, and legislatures have recognized the historical authority a master has over all activities onboard his ship, including the authority to consent to boardings on the high seas.

¹² See Sandra L. Hodgkinson et al., *Limitations on Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 Am. U. Int'l L. Rev. 583, 589-593 (2007).

¹³ U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS, July 2007, para. 3.11.2.5.2. (The Commander's Handbook as it is commonly referred to by the sea services is a joint publication applicable to Navy, Marine Corps, and Coast Guard. It is designed to provide naval and coast guard personnel with an overview of the rules of law governing United States naval operations in peacetime and during armed conflict).

¹⁴ *Id.*

¹⁵ See *supra* note 12.

¹⁶ U.K. MINISTRY OF DEFENCE, BR3012, HANDBOOK ON THE LAW OF MARITIME OPERATIONS, § 4-15, February 2003 (The Handbook provides legal guidance to United Kingdom's naval personnel).

¹⁷ *Id.*

II. HISTORY OF MARITIME LAW

The authority of a master to consent to the boarding and searching of his ship is steeped in the annals of maritime law. Therefore, in order to analyze both the United States' and United Kingdom's positions on the issue of master's consent, it is first necessary to trace the evolution of the rules applicable to the conduct of maritime commerce and the conduct of sovereign states vis-à-vis the granting of nationality to ships.

A. Maritime Law — The Early Years

The body of law commonly called the law of the sea for centuries was embodied in customary international law before becoming largely codified in the four 1958 Geneva Conventions¹⁸ and the 1982 Convention on the Law of the Seas.¹⁹ The customary international law²⁰ rules originated during the period of the Roman Empire.²¹ In the second century, the Roman jurist, Marcianus, “declared that the sea and the fish in the sea were *communis omnium naturali jure* (common or open to all men by the operation of natural law).”²² In time, Marcianus' declaration became part of the Roman Empire civil code and was the accepted doctrine on the sea.²³ Although the Romans proclaimed free access of the sea to all, in practice and reality, it exercised complete control because of its navy's dominance over the Mediterranean.²⁴

The Roman Empire may have formulated the early legal framework on the use of the sea, but the Empire's disintegration left a vacuum. After the fall of the Roman Empire, disputes over the rights to freely sail the seas in the pursuit of maritime commerce led to several wars in Europe.²⁵ Pursuant to a

¹⁸ Geneva Convention on the High Seas, Sept. 30, 1962 450 U.N.T.S. 82 [hereinafter Convention on the High Seas]; Geneva Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 516 U.N.T.S. 205; Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Mar. 20, 1966, 559 U.N.T.S. 285; and Geneva Convention on the Continental Shelf, Jun. 10, 1964, 499 U.N.T.S. 311.

¹⁹ The 1982 United Nations Convention on the Law of the Sea, Nov. 16, 1994, 1833 U.N.T.S. 3 [hereinafter UNCLOS III or LOSC].

²⁰ Article 38 of the statute of the International Court of Justice recognizes customary international law as a source of international law. *See* Statute of the International Court of Justice, June 26, 1945, art. 38, 39 Stat. 1031, 1060. Customary international law has traditionally be defined as a “general and consistent practice of states followed by them from a sense of legal obligation.” THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter Restatement (Third)].

²¹ THOMAS A. CLINGAN, THE LAW OF THE SEA: OCEAN LAW AND POLICY 10 (1994).

²² *Id.*

²³ *Id.* at 10-11. (The rules regarding the sea were ultimately codified in the Code of Justinian in 529 A.D. The Romans never claimed a maritime jurisdiction boundary, not even a three-mile limit).

²⁴ *Id.*

Papal bull in 1493²⁶ granting sovereignty of various parts of the sea, particularly off the African and Indian coasts (East Indies), maritime states such as the United Kingdom²⁷ and the Netherlands were excluded from participating in the lucrative East Indies trade.²⁸ Consequently, the Netherlands challenged Portugal's legal authority to claim dominance over the high seas based on the Papal bull.²⁹

As a result of the conflicts between the Dutch and Portuguese over maritime commerce in the East Indies, Hugo Grotius was hired by the Dutch East Indies Company to provide a legal opinion justifying the company's--the Dutch--right to freely sail the Indian and Atlantic Oceans and engage in maritime commerce on the seas without the interference from other States.³⁰ Grotius, a Dutch lawyer and legal scholar, wrote and published *Mare Liberum* (*The Freedom of the Sea*)³¹ and is widely considered the father of international law.³² *Mare Liberum* was not written as a text or book, but rather as a legal brief meant to argue the Dutch case for equal and uninhibited access to the seas.³³ Hugo Grotius' *Mare Liberum* established the doctrine that no nation had the right to prevent another nation from exercising freedom of navigation on the

²⁵ GARY KNIGHT AND HUNGDAH CHIU, *THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS AND READINGS* 12-13 (1991). See also Ram P. Anand, *Freedom of the Seas: Past, Present, and Future*, in *THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW: THE LAW OF THE SEA* 216 (Hugo Caminos ed., 2000) (The Marcianus doctrine of the seas being open to all men was dormant for centuries until revived by Hugo Grotius).

²⁶ The document (papal decree) used by Pope Alexander VI in 1493 to divide the Atlantic Ocean between Spain and Portugal. See United Nations Office for Ocean Affairs and Law of the Seas, *Legislative History on Part VII, Section I* (Articles 87, 89, 90-94, 96-98) of the United Nations Convention on the Law of the Sea 8 (1989).

²⁷ The British in the last 16th century started to take steps to dispute the Spanish and Portuguese claim of ownership over a large portion of the Atlantic and Indian oceans. In 1580, the Spanish Ambassador vigorously complained to Queen Elizabeth I that Sir Francis Drake's trip, that included going from the Atlantic Ocean to the Pacific Ocean, violated Spain sovereign waters. In her reply to the Spanish Ambassador, Queen Elizabeth I stated that the oceans were common to all and no nation can claim ownership. See GERARD J. MANGONE, *LAW OF THE WORLD OCEAN* 13-14 (1981). See also 4 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 501 (1965).

²⁸ See Anand, *supra* note 27 at 43-43 (Anand gives an in depth history of the conflicts that led to the writing of *Mare Liberum*). See also Clingan, *supra* note 23, at 22-24.

²⁹ FUTURE OF LAW OF THE SEA 21 (L. J. BOUCHEZ & L. KAIJEN EDS., 1975); HUGO GROTIUS, *MARE LIBERUM* (THE FREE SEA) vii (Ralph Van Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916). See also Anand, *supra* note 27 at 76-78.

³⁰ R. R. CHURCHILL AND A. V. LOWE, *THE LAW OF THE SEA* 4-5 (3rd ed. 1999); Ian Patrick Barry, Note, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 307-308 (2004); for a detailed analysis on the early history of Maritime law see Arvid Pardo, *The Law of the Sea: Its Past and Its Future*, 63 OR. L. REV. 7 (1984).

³¹ R. P. ANAND, *ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA* 2 (1983).

³² See Clingan, *supra* note 23, at 10.

³³ See Grotius, *supra* note 31, at v (Scott's Introductory Note) (*Mare Liberum* was subsequently published anonymously in 1608).

high seas--the sea was open for all states to engage in such things as maritime commerce.³⁴ This was a sound rejection of the idea that national dominion could extend to the high seas and prevent access and use by other sovereign States.³⁵ As discussed *infra*, Grotius' *Mare Liberum* is now permanently weaved into the fabric of the law of the sea as reflected in LOSC Article 87.³⁶

B. Maritime Law – Mare Liberum to 1982 Law of the Sea Convention

Grotius' concept of freedom of navigation on the high seas remained largely in place until the early twentieth century, when the "traditional uses of navigation and fishing became more problematic" because of increased trade and the advance of technology, such as steam powered vessels.³⁷ Much as the East Indies trade led to conflicts between the Dutch and the Portuguese in the sixteenth century; the steam powered ships and the corresponding increase in demands for goods in the aftermath of World War II led to conflicts among other sea-going states.³⁸ Consequently, the need to codify the rules that had evolved into customary international law and the need for more precise rules to keep the peace became apparent.³⁹

The world's nations have made four attempts to codify the laws associated with freedom on the seas.⁴⁰ The first attempt was under the auspices of the League of Nations.⁴¹ The conference convened at the Hague in 1930, but the parties failed to reach an agreement on the limits of the territorial seas.⁴²

The second attempt occurred under the sponsorship of the United Nations, the successor organization to the defunct League of Nations.⁴³ This led to the adoption of four conventions in 1958 commonly referred to as "UNCLOS

³⁴ *Id.*

³⁵ Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 169-170 (2005) (The British scholar John Seldon was the proponent of the doctrine of exclusive control by nation states (*Mare Clausum*)--the opposite view of Marcianus and Grotius).

³⁶ LOSC, *supra* note 21, art. 87. (Article 87 states that the high seas are open to all States, among other things, for freedom of navigation, whether coastal or land-locked. LOSC Article 87 will be discussed in greater detail in part IV of the thesis).

³⁷ Clingan, *supra* note 23, at II.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See L. Dolliver M. Nelson, *Reflections of the 1982 Convention on the Law of the Sea*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 28 (David Freestone, Richard Barnes & David Ong eds., 2006).

⁴¹ *Id.*

⁴² See Churchill and Lowe, *supra* note 32, at 14.

⁴³ *Id.*

17:⁴⁴ (1) Convention on the Territorial Sea and the Contiguous Zone; (2) the Convention on the High Seas; (3) the Convention on the Continental Shelf; and (4) the Convention on Fishing and Conservation of the Living Resources on the High Seas. The United States and the majority of states only ratified the first three conventions.⁴⁵

Because of problems not satisfactorily resolved in the UNCLOS I, a subsequent conference was convened in 1960--“UNCLOS II,” but it failed to produce an agreement.⁴⁶ Like the 1930 Hague Conference, the impasse had to do with defining the limits of the territorial seas and a fishing zone boundary.⁴⁷

The fourth attempt was convened in 1973⁴⁸--“UNCLOS III”--and resulted in the United Nations Convention on the Law of the Sea, which was opened for signature on December 10, 1982 in Montego Bay, Jamaica⁴⁹ and went into force on November 16, 1994.⁵⁰ The United States and several states of the developed world, such as the Federal Republic of Germany and the United Kingdom, did not initially sign or ratify the treaty, although Germany and the United Kingdom have since become members.⁵¹

On March 10, 1983, President Ronald Reagan announced that the United States would not sign the Law of the Sea Convention because of concerns with the deep seabed mining provisions.⁵² However, the President stated that the United States accepted the remaining substantive provisions as

⁴⁴ See *supra* note 20.

⁴⁵ D. W. BOWETT, *THE LAW OF THE SEA* 4 (1967). See also SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 339 (2006) (Professor Murphy articulates the position of most legal scholars that customary international law was the authoritative source for rules governing navigation on the seas prior to UNCLOS I). The United States is still a member of the 1958 Convention on the High Seas. See discussion, *infra* notes 53-61 and accompanying text.

⁴⁶ See ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 24 (1993). See also Bowett, *supra* note 47, at 5-19 (The author provides a detailed account of the 1960 UNCLOS II Conference).

⁴⁷ See Mangone, *supra* note 29, at 33 (A joint Canada-United States proposed agreement for a 6 nautical mile territorial sea and a 6 nautical mile fishery zone failed by one vote). See also Leo J. Bouchez, *The Freedom of the High Seas*, in *FUTURE OF THE LAW OF THE SEA* 24 (L.J. Bouchez & L. Kaijen eds., 1973); Friedheim, *supra* note 48, at 2.

⁴⁸ According to then Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs, John D. Negroponete (currently the Deputy Secretary of State), the LOSC was convened in part due to United States' and the former Soviet Union's concerns over the freedom of the seas. John D. Negroponete, *An Address 20th Annual Conference of the Law of the Sea Institute* (1996) in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 128 (Thomas A. Clingan, Jr. ed., 1988).

⁴⁹ LOSC, *supra* note 21.

⁵⁰ *Id.*

⁵¹ See Status of the United Nations Convention on the Law of the Sea, available at http://www.un.org/Depts/los/reference_files/status2007.pdf.

⁵² 22 I.L.M. 461 (1983) (contains the full text of President Reagan's March 10, 1983 Ocean Policy Statement).

reflecting customary international law.⁵³ On October 7, 1994, President William Jefferson Clinton forwarded the Law of the Sea Convention, along with newly negotiated provisions on deep seabed mining to the Senate for its consent to United States accession.⁵⁴ The Senate Foreign Relations Committee has held hearings⁵⁵ and voted in favor of consent but the full Senate has not yet voted as of May 2007.⁵⁶ In his transmittal to the Senate, President Clinton restated the United States' policy to act in accordance with the traditional use of the seas that had passed into customary international law.⁵⁷ The net effect is that although the United States has not yet acceded to the LOSC, it accepts and is adhering to the provisions that reflect customary international law.

C. LOSC Rules Applicable to Merchant Vessels on the High Seas

The rights of merchant ships from any country to freely sail the high seas is now widely accepted as a tenet of international law⁵⁸--a clear victor of *mare liberum* over *mare clausum*.⁵⁹ Under both customary international law⁶⁰

⁵³ Louis B. Sohn, Professor of International Law, The Law of the Sea: Customary International Law Developments, Address at the American University Washington College of Law Edwin A. Mooers Lecture (Oct. 11, 1984), 34 AM. U. L. REV. 271, 279 (1985) ("An agreement between the signatories to the Convention and the United States that most of the provisions of the Convention have become customary international law."). See Churchill and Lowe, *supra* note 32, at 24 (opining that many of LOSC provisions reflects customary international law).

⁵⁴ 34 I.L.M. 1393 (1995).

⁵⁵ On October 31, 2007, the Senate Foreign Relations Committee voted 17-4 in favor of sending the treaty, for the second time in three years, to the full Senate for accession. See, Viola Gienger, *Senate panel backs sea treaty*, SEATTLE TIMES, Nov. 1, 2007, at A11. See also, S. Exec. Rpt. 108-10 (2004) (The Senate Foreign Relations Committee held hearings on October 2003 and voted unanimously on February 25, 2004 in favor of the treaty, but a vote never made it to the floor); and MARJORIE ANN BROWNE, THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003, CONGRESSIONAL RESEARCH SERVICES REPORT RS21890 (Aug. 19, 2004).

⁵⁶ There is still a very active debate in the United States against the ratification of Law of the Sea Convention citing its defects and costs. See, Doug Bandow, *Sink the Law of the Sea Treaty: Still Crazy After All These Years*, THE WEEKLY STANDARD, Mar. 15, 2004) available at http://www.cato.org/pub_display.php?pub_id=2567. But see *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Art XI of the Law of the Sea Convention: Hearing Before the S. Comm. On Foreign Relations*, 108th Cong. 10 (2004) (statement of Admiral Michael G. Mullen, Vice Chief of U.S. Naval Operations (supporting ratification). See also *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending art XI of the Law of the Sea Convention: Hearing Before the S. Comm. On Foreign Relations*, 108th Cong. 10 (2004) (statement of Rear Admiral William L. Schachte, U.S. Navy, Retired) (citing his support for ratification because of the security benefits to the United States).

⁵⁷ *Supra* note 56, at 1396.

⁵⁸ Stefan A. Riesenfeld, *High Seas and Navigational Rights: What Are They and Who May Assert Them in U.S. Courts?* in THE LAW OF THE SEA: WHAT LIES AHEAD? 42 (Thomas A. Clingan, Jr. ed. (1988).

and the Law of the Sea Convention,⁶¹ a merchant ship on the high seas is subjected to the jurisdiction of the state whose flag it flies.⁶² LOSC Article 92 states, “[s]hips shall sail under the flag of one State only, and save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”⁶³ Consequently, a merchant ship sailing on the high seas falls under the jurisdiction and authority of its flagged state.⁶⁴ As succinctly put by one legal commentator, “[i]n common parlance, a ship is regarded as a country’s ambassador and normally none other than a sovereign independent State is entitled to establish diplomatic relations by exchange of ambassadors with other countries.”⁶⁵

The legal result under international law is that a merchant vessel on the high seas is immune from the jurisdiction of another state, unless otherwise

⁵⁹ ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOLUME 11, LAW OF THE SEA AND SPACE, 136 (1989). See also, LOSC Part VII Legislative History, *supra* note 28, at 8.

⁶⁰ See Sohn, *supra* note 57, at 279; see also 80 CJS Shipping § 1 (2006); United States v. Flores, 289 U.S. 137, 154 (1933) (Justice Stone cites to an 1882 British appeals court decision, which held that the United Kingdom’s jurisdiction extended not only to its territorial waters, but also to its ships on the high seas and British ships in a foreign state’s territorial waters.); Delany v. Moraitis, 136 F.2d 129, 133 (4th Cir. 1943) (“Vessels are deemed in law a part of the territory of the country whose flag they fly, and as such are subject to the jurisdiction and laws of that country.”); Fisher v. Fisher, 165 N.E. 460, 462 (N.Y. 1929) (“A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries.”).

⁶¹ LOSC, *supra* note 21, Art. 92.

⁶² *Id.* See also David Anderson, *Freedom of the High Seas in the Modern Law of the Sea*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 333 (David Freestone, Richard Barnes, and David Ong eds., 2006) (Some nations viewed ships as literally pieces of floating territory, thereby possessing authority of the state wherever the ship sailed).

⁶³ Full text of Article 92 read:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

LOSC, *supra* note 21, Art. 92.

⁶⁴ H. A. SMITH, *THE LAW AND CUSTOM OF THE SEA* 46 (2nd rev. ed. 1950) (“The first and perhaps the most important of the customary rules, is that every state has exclusive jurisdiction over all the ships which fly its flag.”).

⁶⁵ NAGENBRA SINGH, *MARITIME FLAG & INTERNATIONAL LAW* 24 (1978).

provided in the Law of the Sea Convention or under customary international law.⁶⁶

LOSC Article 92 is a codification of the now well-established principle delineated in 1927 by the Permanent Court of International Justice in the *S.S. Lotus* (France v. Turkey) case.⁶⁷ In the *S.S. Lotus*, the Court held that “[v]essels on the high seas are subjected to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.”⁶⁸ In commenting on the rights of ships on the high seas to be free from interference by foreign states, Professor Gilbert Gidel explains that:

The essential idea underlying the principle of freedom of the high seas is the concept of the prohibition of interference in the peacetime by ships flying one national flag with ships flying the flags of other nationalities. The prohibition of interference is based on the idea of the flag, that is to say, the symbol of the attachment of the ship to a given State and not on the idea of the nationality of the individuals concerned in the maritime relations in question.⁶⁹

Notwithstanding the Court’s holding and Professor Gidel’s comments, a flag state’s exclusive jurisdiction on the high seas is not absolute—even in peacetime. Over the centuries, several exceptions to the flag state’s exclusive jurisdiction have developed.⁷⁰ These exceptions are firmly grounded in both

⁶⁶ *Id.* See e.g., H. MEYERS, *THE NATIONALITY OF SHIPS* 31 (1967) (suggesting that customary international law is applicable to ships regardless of state of registry). This should be distinguished from situations under LOSC Articles 21 and 27 where a coastal state is permitted to board a ship without the consent of the flagged vessel within the territorial waters of that state to exercise criminal jurisdiction if the laws of the coastal state were violated or to enforce customs laws and regulations.

⁶⁷ Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT’L L. & POL’Y 253, 267 (2005) (“The exclusive enforcement relationship between a flag state and its vessels on the high seas has long been recognized by international law. As early as 1927, the Permanent Court of International Justice (PCIJ) held in the *Lotus* Case that vessels on the high seas are subject to no authority except that of the State whose flag they fly. The Convention codifies this principle in Article 92, which reserves to the flag state jurisdiction over ships flying its flags on the high seas.”) (internal quotes omitted).

⁶⁸ *P.C.I.J.* Ser. A, No. 10, at 25 (1927). See MYERS S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 1072 (1962) (articulating the premise that ships on the high seas are not subject to regulations of other states).

⁶⁹ McDougal & Burke, *supra* note 70, at 1072 (citing to Gidel’s 1950 Memorandum on the Regime of the High Seas 3-4, U.N. Doc. No. A/CN.4/32 (1955)). Professor Gidel is the author of the classical legal treatise on the sea: *DROIT INTERNATIONAL PUBLIC DE LA MER* (1932).

⁷⁰ See LOSC, *supra* note 21, Art. 110; Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT’L L. 771, 803 (2006).

customary norms and treaty laws.⁷¹ Those exceptions will be discussed *infra* in part IV, but first, it is necessary to examine the rules governing the registration--flagging--of ships.

D. Flagging of Merchant Ships

The flying of a state's flag identifies the ship's nationality--place of registration--and provides a clear statement to the world of the state's legal jurisdiction and authority over that ship.⁷² The rule governing the flagging⁷³ of merchant vessels is set forth in Article 91 of LOSC.⁷⁴ Under LOSC Article 91, each state formulates its own rules for determining the registration criteria for granting its nationality to ships.⁷⁵ The only caveat placed on the state is the so-called requirement for a "genuine link" between the registering state and the ship.⁷⁶ Article 91 is the formal relationship between the registering state and the ship flying its flag.⁷⁷ Article 91 is virtually identical to Article 5⁷⁸ of the 1958

⁷¹ See Shulman, *supra* note 72, at 803.

⁷² *Id.*

⁷³ The word "flagging" as used in this article refers to the granting of a state's nationality to a ship.

⁷⁴ Full text of Article 91 (Nationality of ships) reads :

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

LOSC, *supra* note 21, Art. 91.

⁷⁵ *Id.* See also Restatement (Third), *supra* note 22, § 501, cmt. b.

⁷⁶ LOSC, *supra* note 21, Art. 91. The issue of genuine link will be discussed in Part III B of this article.

⁷⁷ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY 104 (3 Satya N. Nandan & Shabtai Rosene eds., 1995).

⁷⁸ Article 91 deleted the portion in Article 5(1) that begins with the subjective clause, "in particular . . ." The deleted portion in Article 5 was an attempted to explain the phrase "genuine link." Full text of Article 5 (Convention on the High Seas) reads:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; *in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag* (emphasis added).
2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Convention on the High Seas. Because the United States remains a party to the High Seas Convention, Article 5 is still the governing norm for the United States.⁷⁹ In addition to the two cited treaties, the flagging of a merchant vessel is also ensconced in customary international law⁸⁰ as well as in United States jurisprudence.⁸¹

In the *Muscat Dhows* case (1905), the Permanent Court of Arbitration upheld the right of France to allow subjects of the Sultan of Muscat to fly the French flag.⁸² In so doing, the Court was of the opinion that “[g]enerally speaking it belongs to every sovereign to decide to who he will accord the right to fly his flag and to prescribe the rules covering such grant.”⁸³ Thus, even before the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention, the right of a state to prescribe conditions for lending its nationality to ships was recognized by the international community.⁸⁴ It is noteworthy to mention that the *Muscat Dhows* case made no reference of a genuine link requirement. Professor D. P. O’Connell, suggests that the *Muscat Dhows case* stands for the proposition “that there is no unique connection between the national identity of a ship for jurisdiction purposes and the flying of a flag.”⁸⁵

Id.

⁷⁹ Pursuant to Article 311, the Law of the Sea Convention supersedes the 1958 Conventions, but only for parties who have ratified the newer convention. Since the United States has not yet ratified the Law of the Sea Convention, the 1958 Convention on the High Seas and customary international law governs the United States’ conduct on the high seas. See LOSC, *supra* notes 54–59 and accompanying text.

⁸⁰ Edwin Anderson, III, *The Nationality of Ships and Flags Of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 145-146 (1996) (opining that the principle enunciated in the *Muscat Dhows* case that each state set the conditions for granting nationality to ships is evidence of customary international law).

⁸¹ See, David Matlin, Note, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT’L L. 1018, 1030-1031 (1991).

⁸² *Decision of the Permanent Court of Arbitration in the matter of Muscat Dhows*, 2 AM. J. INT’L L. 923, 927 (1909). It is believed that the Sultan wanted to use the cover of the French flag to engage in the slave trade which limited his exposure. See 2 D.P. O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 753 (I. A. Shearer ed. 1984).

⁸³ McDougal & Burke, *supra* note 70, at 1059. See also *Muscat Dhows*, 2 AM. J. INT’L L. at 927. It has been suggested that Article 5 of the 1958 Convention on the High Seas was the codification of the *Muscat Dhows case*. See, e.g., Anderson III, *supra* note 82, at 146 (argues that both the *Muscat Dhows* and *Lauritzen v. Larsen*, 345 U.S. 571 (1953) stands for the proposition that any state--coastal or landlocked--may prescribe rules for granting its nationality to ships).

⁸⁴ See Anderson III, *supra* note 82, at 145.

⁸⁵ See 2 O’Connell, *supra* note 84, at 753. The United States appears to have followed this premise when it flagged Kuwaiti oil tankers in the mid-nineteen eighties in order to protect them during the Iraq-Iran War. In essence, the United States was flagging the vessels out of convenience. See generally Harvey Rishikof, *Symposium: Reflections on the ICJ’s Oil Platform Decision: When Naked Came the Doctrine of “Self-Defense”: What Is the Proper Role of the International Court of Justice in Use of Force Cases?*, 29 YALE J. INT’L L. 331, 335(2004).

The right of a state to grant nationality to ships has been formally part of the United States jurisprudence landscape since 1953.⁸⁶ In *Lauritzen v. Larsen*, a Danish sailor sued his Danish employer--the owner of a Danish ship in which he was employed--in United States federal court based on United States law for negligent injuries suffered while the ship was in port Cuba.⁸⁷ The Supreme Court dismissed the case on jurisdictional grounds because as the flag state, Danish law governed the liability of the Danish ship owner for injuries sustained by a Danish sailor in foreign waters.⁸⁸ In so holding, the Supreme Court recognized that “[e]ach state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.”⁸⁹

As the above analysis demonstrates, a ship’s nationality, although not identical, is akin to the nationality of an individual. Like an individual’s nationality, a ship’s nationality identifies which state under international law exercises jurisdiction over the ship and crew and which state exercises diplomatic protection over the same.⁹⁰

III. IMPACT OF FLAGS OF CONVENIENCE ON MASTER’S CONSENT AUTHORITY

It is of paramount importance to the international community that the customary international law-based doctrine of master’s consent remain a viable option in preventing and suppressing international terrorism on the high seas.⁹¹ Although the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was drafted to assist in the prevention of terrorism at sea, its enforcement is conditioned upon flag state consent.⁹² As will be established *infra*, the widespread use of flag of

⁸⁶ See *Lauritzen v. Larsen*, *supra* note 85.

⁸⁷ *Id.* at 573.

⁸⁸ *Id.*

⁸⁹ *Id.* at 584.

⁹⁰ See e.g., Meyers, *supra* note 68, at 24-30. Professor Meyers uses the term “allocation” to describe the rights and duties a state has in regards to ships registered under its laws. *Id.* at 30. It is under this construct of nationality that the United Kingdom claims a master is without the authority to consent to the boarding and searching of his ship by foreign warships on the high seas. This view will be further discussed in Part V.

⁹¹ United Nations’ Security Council Resolution 1373 calls upon all states to take measures to prevent and suppress terrorist acts. It also calls for states to fully implement the relevant international anti-terrorism conventions. S.C. Res. 1373, U.N. Doc.S./RES 1373 (Sept. 28, 2001).

⁹² The 2005 SUA Protocol, subject to flag consent, would allow member states the power to visit, board, and search and seize a ship suspected of trafficking of WMDs, delivery systems and related materials on the high seas. See Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (2005). See Angelos

convenience⁹³ states to register much of the world's merchant vessels can have deleterious effects on the ability of states to obtain flag state consent during exigent situations.⁹⁴

As part of the Proliferation Security Initiative (PSI),⁹⁵ several flag of convenience states such as Belize, Cyprus, Liberia, the Marshall Islands, and Panama, have all entered into ship boarding agreements with the United States. However, these agreements are vulnerable to political upheavals or governing instability.⁹⁶ For example, Liberia, the second largest flag of convenience state, was embroiled in domestic political chaos for over a decade.⁹⁷ There was barely a functioning government until 2006. The ability to request consent from the flag state is critically impeded in these situations.

Syrigos, *Interdiction of Vessels on the High Seas*, in UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA 198-199 (Anastasia Straati, Maria Gavouneli & Nikolaos Skourtos eds. 2006). The hijacking of the Italian cruise ship *Achille Lauro* by Palestinian terrorists in 1985 galvanize the international community around the dangers of terrorism on the high seas. The *Achille Lauro* incident ultimately led to the adoption of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and the 2005 Protocol to the SUA Convention. See Brad J. Kieserman, *Preventing and Defeating Terrorism at Sea: Practical Considerations for Implementation of the Draft Protocol for the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*, in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 426 (Myron H. Nordquist, John Norton Moore, and Kuen-chen Fu, eds., 2005); Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. INT'L U. L. REV. 341, 344 (2002).

⁹³ The term "flag of convenience" will be defined in section A below.

⁹⁴ Gone are the days when there were genuine links between a flag state and ships under its registry. Today, so-called open registry states allow for the large-scale registration of ships that have no genuine contacts with the flag state. One author has called for the fixing the serious gap in maritime law caused by the failure of flags of convenience in fulfilling their international duties as flag states. See Catlin A. Harrington, Comment, *Heightened Security: The Need to Incorporate Articles 31BIS(1)(A) and 8BIS(5)(E) of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of the Sea*, 16 PAC. RIM. L. & POL'Y J. 107, 109 (2007). See *infra* notes 379-384 and accompanying text.

⁹⁵ The Proliferation Security Initiative was launched by the Bush administration on May 31, 2003 in Krakow, Poland. Its purpose is to prevent the proliferation of weapons of mass destruction (WMD) by air, land, and sea. The initial PSI eleven members are: Australia, France, Germany, Italy, Japan, The Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. A number of states have entered into bilateral ship boarding agreements with the United States and other PSI partners to facilitate the interdiction of WMD at sea. See Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 509-510 (2005) (providing an in-depth analysis of the PSI program). See also Shulman, *supra*, note 72, at 774-777; United States Department of State, United States Initiatives to Prevent Proliferation (2005), available at <http://www.state.gov/documents/organization/47000.pdf> (last visited on Sep. 28, 2007).

⁹⁶ U.S. Dep't of State, Bureau of Nonproliferation, Proliferation Security Initiative Ship Boarding Agreements, available at <http://www.state.gov/t/np/c12386.htm> (last visited on Mar. 6, 2007).

⁹⁷ The CIA World Fact Book 2007, available at <https://www.cia.gov/cia/publications/factbook/geos/li.html> (last visited on Mar. 14, 2007).

This section will demonstrate that because of the absence of a genuine link between flag of convenience states and their ships, the master's role has evolved to compensate for the failure of flag of convenience states to fulfill their international duties as flag states.⁹⁸ It will also be shown that this lack of control by flag of convenience states is further indicia of the master's inherent authority over the operation of the ship, which includes giving consent for others to board and search his ship, absent specific instructions to the contrary from the flag state.⁹⁹

A. Flags of Convenience

It is well-established in both customary international law and treaty law that states are vested with the authority to prescribe the conditions for granting nationality to merchant ships.¹⁰⁰ During the early twentieth century, the ability of each state to set the criteria for formulating the rules for nationality was not seen as a problem because the merchant vessel's nationality, for the most part, corresponded with its homeported state.¹⁰¹ In fact, ships were traditionally registered at the site where the owners kept their main business operation.¹⁰²

This however started to slowly change during World War II¹⁰³ and significantly after the post-World War II economic boom.¹⁰⁴ Ship owners no

⁹⁸ In March 2006, the United Nations General Assembly in Resolution 60/30 recognized the need to address the role of a genuine link and its relationship to the duty of flag states. *See* G.A. Res. 60/30, U.N. Doc. A/RES/60/30 (Mar. 8, 2006). Paragraph 49 of the resolution reads that the General Assembly:

[l]ooks forward to the results of the ongoing work of the International Maritime Organization in cooperation with other competent international organizations, following the invitation extended to it in resolution 58/240 and resolution 58/14 of 24 November 2003, to examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels, and the potential consequences of non-compliance with duties and obligations of flag States described in relevant international instruments.

⁹⁹ *See generally* Karen C. Hildebrandt, *Chartering Cruise Ships for Special Occasions*, 29 J. MAR. J. & COM. 205, 211 (1998) (noting that the master is ultimately in charge and that he has veto power over anything that jeopardizes the safety of the ship).

¹⁰⁰ *See* Ademuni Odeke, *Port State Control and UK Law*, 28 J. MAR. J. & COM. 657, 658 (1997). *See also* LOSC, *supra* note 21, Art. 92; *S.S. Lotus*, *supra* note 70.

¹⁰¹ Nandan, et al., *supra* note 79, at 107 ("Under general maritime law and the shipping laws of the different law of the different countries, every vessel has a home port or port of registry which constitutes the legal residence of the ship regardless of its physical location at any given moment.").

¹⁰² G. P. PAMBORIDES, *INTERNATIONAL SHIPPING LAW: LEGISLATION AND ENFORCEMENT* 9 (1999).

¹⁰³ *See*, Moria L. McConnell, *Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link*, 16 J. MAR. L. & COM. 366, 367 (1985) (Some commentators believe that flags of convenience was borne out of the necessity of World War II, because many ship

longer registered their ships out of loyalty to their country of nationality or main place of business, but rather on where they could operate at the lowest cost.¹⁰⁵

Commentators divided national shipping registry systems into three generalized categories: “closed register” or “national”, “open register,” and a hybrid category between closed and open sometimes called “second register.”¹⁰⁶ Generally, a closed register system refers to a system that only allows registration of ships that are owned by individuals or entities located in the flag state (i.e. there is a genuine link between the flag state and the ship).¹⁰⁷ The hybrid, or second register, is more akin to the closed register, but has some features of an open register.¹⁰⁸ Typically in a hybrid ship registry system, a majority of the owners and crew are nationals of the flag state.¹⁰⁹

Many in the maritime shipping industry use the term “flags of convenience” or “open registry” in reference to ships registered (i.e. flagged) in a state in which both the ships and their owners have little or no contact, but for the registration itself.¹¹⁰ Yet another definition defines a flag of convenience “as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”¹¹¹ In 1970, the Rochdale Commission, a body commissioned by the British Government to study the flags of convenience phenomenon, identified six factors unique to flags of convenience states:

owners, including some in the United States, re-registered with neutral nations to avoid becoming targets for German submarines).

¹⁰⁴ Becker, *supra* note 37, at 142.

¹⁰⁵ *Id.* See Pamborides, *supra* note 104; Julie A. Perkins, *Ship Registers: An International Update*, 22 TUL. MAR. L.J. 197 (1997) (By registering their ships in a flag state of convenience, ship owners increase their profit bottom line, while open registry states earns a considerable amount of income).

¹⁰⁶ Becker, *supra* note 37, at 142. See also, Simon w. Tache, *The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link*, 16 INT’L L. 301 303-303 (1983); Perkins, *supra* note 107, at 197.

¹⁰⁷ Becker, *supra* note 37, at 142 (The United States is an example of a closed register).

¹⁰⁸ *Id.* (Canada is an example of the hybrid register).

¹⁰⁹ Pamborides, *supra* note 104, at 11.

¹¹⁰ The International Transport Workers’ Federation, *available at* <http://www.itfglobal.org/flags-convenience/sub-page.cfm> (last visited February 2, 2007). The International Transport Workers’ Federation (ITF) is an international trade union federation of transport workers’ unions, including those in the maritime industry. It has launched a worldwide campaign against the use by ship owners of flags of convenience to escape from national laws and national unions. See also Pamborides, *supra* note 104, at 13 (As one commentator has put it, the International Transport Workers’ Federation “has openly declared war on the system of [flags of convenience] and vouched to fight it by every means available.”).

¹¹¹ BOLESŁAW ADAM BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY 2* (1962) (Although published in 1962, the author’s historical account and analysis of the flags of convenience remains valid today).

- (1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens.
- (2) Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted.
- (3) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given.
- (4) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments.
- (5) Manning of ships by non-nationals is freely permitted.
- (6) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.¹¹²

The criteria laid out in the Rochdale Report points to the developing world countries as the ideal location for flags of convenience.¹¹³ It should not come as a surprise then that the most popular flag of convenience states include: Panama¹¹⁴ (6,302 ships registered), Liberia¹¹⁵ (1,553 ships registered), Bahamas

¹¹² The Report of the Committee of Inquiry into Shipping (1970), London, H.M.S.O. 197 Cmnd 4337. See also Pamborides, *supra* note 104, at 10.

¹¹³ See Anderson III, *supra* note 82, at 158; Perkins, *supra* note 107, at 197 (as of June 1996, Panama was the leading flag of convenience state).

¹¹⁴ See Robert Rienow, *Test of the Nationality of a Merchant Vessel* 25 (1937) (Scholars trace the modern period of the use of flags of convenience to the United States prohibition period of the 1920, when several United States flagged ships were registered in Panama to avoid the law against selling alcohol on United States flagged ships). Since 1977, the Panamanian Registry has been operating from New York. See Panamanian Consulate Houston, Texas web site available at http://www.conpahouston.com/maritime_registry.html (last visited February 12, 2007).

¹¹⁵ The Liberian Registry has offices in Vienna, Virginia, New York City, Piraeus, Greece, Hong Kong, London, Monrovia, Zurich and Tokyo. Its headquarters are in New York City. See Liberian International Ship & Corporate Registry (LISCR) Vessel Registration web site at <http://www.liscr.com/> (last viewed on February 12, 2007.)

(1,297 ships registered), St. Vincent & the Grenadines (1,219 ships registered), Honduras (1,143 ships registered), and Belize (1,040 ships registered).¹¹⁶

Critics of open registry argue that ship owners migrate toward flag of convenience states because of lower or no taxes, low labor cost, lax labor standards, and loose environmental and safety regulations.¹¹⁷ Political considerations as well as a desire to mask criminal activity are also suggested as possible motives for using flags of convenience.¹¹⁸ Unscrupulous individuals have taken advantage of flags of convenience's loose regulations to smuggle narcotics.¹¹⁹ There is a fear that al-Qaeda will use flags of convenience ships to commit terrorist acts at sea against United States' interests.¹²⁰

Flag of convenience states also have their supporters. Proponents argue that consumers are the beneficiaries, because lower shipping costs translate into lower prices for consumer goods.¹²¹ Additionally, proponents suggest there is a symbiotic relationship between flag of convenience states and ship owners.¹²² The flag of convenience states earn income and international prestige, while ship owners and their corporate clients earned more profits, which benefit both parties.¹²³

B. Genuine Link

The International Transport Workers' Federation, probably the most vocal opponent of flags of convenience, argues that because there is no "genuine link" between the merchant ship's actual owner and the ship's nationality, (i.e. flag state) open registry states fail to enforce labor standards and adhere to

¹¹⁶ International Transport Workers' Federation, *Campaign Against Flags of Convenience and Substandard Shipping Annual Report 8* (2004) available at <http://www.itfglobal.org/files/seealsodocs/1324/FOCREPORT.pdf> (The web site has an exhaustive list of all the states considered flags of convenience by the International Transport Workers' Federation). See also, Anderson III, *supra* note 82, at 155 (putting the amount of ships registered under the Panamanian flag at 1800 ships. It should be noted however, that Anderson's figures are at least ten years old).

¹¹⁷ See Becker, *supra* note 37, at 143; See also Syrigos, *supra*, note 94, at 152.

¹¹⁸ See Jeremy Firestone and James Corbett, *Maritime Transportation: A Third Way For Port And Environmental Security*, 9 WIDENER L. SYMP. J. 419, 420 (2003). See also Becker, *supra* note 37, at 142-143; Matlin, *supra* note 83, at 1049 (Ships flying under flags of convenience have been implicated in the drug traffic trade).

¹¹⁹ See Matlin, *supra* note 83 at, 1049-1050.

¹²⁰ See Robinson, *supra* note 8.

¹²¹ See Matlin, *supra* note 83, at 1044.

¹²² See Anderson III, *supra* note 82, at 159.

¹²³ *Id.*

international standards.¹²⁴ Both the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention require a *genuine link* between the flagging state and a ship that flies its flag.¹²⁵ But, what exactly is meant by a “genuine link” and how does it work? To answer that question, one must first examine the origin of the principle. The genuine link principle was first articulated in 1955 by the International Court of Justice in the *Nottebohm Case* (Liechtenstein v. Guatemala).¹²⁶

1. The *Nottebohm Case*

In the *Nottebohm* case, the Court had to decide whether Liechtenstein, which had granted citizenship to Mr. Frederic Nottebohm, a German citizen who resided and operated a business in Guatemala for thirty-four years, could make a claim on behalf of Mr. Nottebohm against Guatemala for seizing his property without just compensation.¹²⁷ Mr. Nottebohm resided permanently in Guatemala from 1905 until March 1939 before applying for and being granted citizenship by the Principality of Liechtenstein in October 1939.¹²⁸ Upon leaving Guatemala in March or April 1939, Mr. Nottebohm executed a power of attorney for the continued operation of his business.¹²⁹ Mr. Nottebohm submitted his naturalization application to Liechtenstein authorities just over a month after the start of World War II.¹³⁰

In possession of his Liechtenstein passport, Mr. Nottebohm returned to Guatemala in early 1940 and resumed his prior business activities.¹³¹ Sometime in 1943, Guatemala enacted a war measure that resulted in the deportation of Mr. Nottebohm and seizure of his property.¹³² In response to the seizure, Liechtenstein made a claim against Guatemala for the seizure of the property of a Liechtenstein citizen contrary to international law.¹³³ Guatemala countered that Liechtenstein’s granting of citizenship to Mr. Nottebohm was contrary to the generally recognized principle of nationality under international law.¹³⁴

¹²⁴ See International Transport Workers' Federation, *supra* note 118.

¹²⁵ See Convention on the High Seas, *supra* note 20, Art. 5; LOSC, *supra* note 21, Art. 91.

¹²⁶ See McConnell, *supra* note 105, at 369; Liechtenstein v. Guatemala, 1955 I.C.J. 4.

¹²⁷ Liechtenstein v. Guatemala, *supra*, note 128, at 4. See also Pamborides, *supra* note 104, at 2.

¹²⁸ Liechtenstein v. Guatemala, *supra*, note 128 at 8.

¹²⁹ *Id.* (Mr. Nottebohm spent most of his time in Guatemala during the 34 year period (1905-1939), leaving only for business and vacation trips).

¹³⁰ *Id.*

¹³¹ *Id.* at 16.

¹³² *Id.* at 18 (Guatemala had passed a law to confiscate property from individuals who were believed to be Nazi sympathizers).

¹³³ *Id.* at 6-7.

¹³⁴ *Id.* at 11.

In establishing the “genuine link” principle, at least when applied to individuals, the International Court of Justice went on to hold that “[n]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹³⁵ The International Court of Justice by a vote of eleven to three dismissed Liechtenstein’s claim ruling that the connection (i.e. link) between Mr. Nottebohm and Guatemala was strong, as evidenced by his thirty-four years of residence and business activity, while his link with Liechtenstein was extremely tenuous.¹³⁶ Therefore, Guatemala was not required under international law to recognize Liechtenstein’s naturalization of Mr. Nottebohm.¹³⁷ From the *Nottebohm* decision, the rule developed that a state is not required to recognize the nationality of an individual if there is no genuine link between the individual and the granting state.¹³⁸ It is because of the *Nottebohm* decision that the “genuine link” concept found its way into both the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention.¹³⁹

2. Historical Background on 1958 Convention on the High Seas and the Effects of the *Nottebohm* Case

At the London Conference in 1956, where members of the International Law Commission (Commission) had gathered at its Eighth Session to prepare its report and recommendations on the proposed Convention on the High Seas, delegates from the Netherlands, representing the interests of seamen unions and ship owners, were the leading opponents of flags of convenience.¹⁴⁰ In representing those interests, the Netherlands proposed to the Commission that it adopt the genuine link principle from the *Nottebohm* case.¹⁴¹ This was not the first time, however, that the Netherlands brought up the idea of tying the genuine link to the granting of nationality to ships.

In its 1955 official comments to the Special Rapporteur on the Regime of the High Seas, the Netherlands Government proposed replacing the draft Article 5 with two new provisions, Article 5a and 5b.¹⁴² The Netherlands’ proposed Article 5a read: “Each State may fix the conditions for the registration of ships in its territory and the right to fly its flags. Nevertheless, for purposes

¹³⁵ *Id.* at 23.

¹³⁶ *Id.* at 24; Pamborides, *supra* note 104, at 2.

¹³⁷ See Liechtenstein v. Guatemala, *supra*, note 128, at 26; Pamborides, *supra* note 104, at 2.

¹³⁸ See Boczek, *supra* note 113, at 116.

¹³⁹ See McConnell, *supra* note 105, at 369; Pamborides, *supra* note 104, at 3.

¹⁴⁰ See Boczek, *supra* note 113, at 72.

¹⁴¹ *Id.* at 119.

¹⁴² *Id.* at 20.

of recognition of the national character of the ship by other States, there *must exist a genuine connexion between the State and the ship.*¹⁴³

In justifying its proposal, the Netherlands government acknowledged that it would be too difficult to prescribe a detailed set of rules on the granting of nationality to ships, thus the article should “merely state the principle that there must be a genuine connexion between the ship and the State.”¹⁴⁴

Although the United Kingdom did not reference the genuine link principle in its comment to the Special Rapporteur’s report, like the Netherlands position, it called for effective jurisdiction and control by the flag state.¹⁴⁵ In his report, the Special Rapporteur recommended that the International Law Commission evaluate the Netherlands and United Kingdom view.¹⁴⁶

At the Eighth Session, the International Law Commission’s draft of Article 5, which was renumbered Article 29, contained a Netherlands’ backed reference to a genuine link.¹⁴⁷ With a few minor edits, the Commission incorporated the Netherlands’ genuine link language *in toto*.¹⁴⁸ Opponents such as France and Guatemala were of the opinion that the genuine link principle from the *Nottebohm* case was inapplicable to ships.¹⁴⁹ The International Law Commission shared the Netherlands and other states’ concerns with the problems of flags of convenience, but could not get enough support for the proposed genuine link language and was forced to compromise, weakening the language, rather than not having any criteria at all.¹⁵⁰ The Commission justified its position by noting in its commentary that:

“While leaving States a wide latitude in [determining the nature of the genuine link], the Commission wished to make it clear that the grant of

¹⁴³ *Id.* (The proposed Article 5b is not relevant to this discussion.) (emphasis added).

¹⁴⁴ *Id.* at 21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Although the Special Rapporteur recommended the International Law Commission evaluate the Netherlands and United Kingdom viewpoints, he reserved judgment on Article 5. *Id.* at 22.

¹⁴⁷ *Id.* at 28.

¹⁴⁸ *Id.*

¹⁴⁹ See Boczek, *supra* note 113, at 120-123. (arguing against the application by analogy of *Nottebohm* to ships because that decision was based on attributes of individual, which are not easily transferred over to inanimate object, such as ships).

¹⁵⁰ H. GARY KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS (1976-1977) 396-398 (1976) (The Commission abandoned its original position on Article 5 because it could not achieve the criteria it had set for itself--namely a regulation that would solve the flags of convenience problem. It also did not try to define “genuine link” because the laws of the traditional maritime states were too divergent to create an internationally accepted definition). See also Law of the Sea Commentary, *supra* note 79, at 104-105.

its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link with its new State. The jurisdiction of the State over ships, and the control it should exercise . . . , can only be effective where there exists in fact a relationship between the State and the ship other than mere registration or the mere grant of a certificate of registry.”¹⁵¹

In the final version of Article 5 the requirement for a genuine link between the state and the ship was kept, but the reference to the phrase “national character of the ship” was dropped and replaced with “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”¹⁵² The inclusion for a genuine link requirement in the 1958 Convention of the High Seas, at least on paper, appears to repudiate, or at a minimum weaken, the unfettered discretion of states to prescribe liberal rules for the granting of its nationality to ships as espoused in the *Muscat Dhows* and *Lauritzen* cases.¹⁵³ Conversely, the genuine link principle has been severely criticized as anti-business, pro-union, ambiguous, thereby lacking precision.¹⁵⁴

3. The Genuine Link: ICJ Advisory Opinion

The failure of the 1958 Convention of the High Seas to produce an authoritative genuine link definition did not deter flags of convenience opponents from using other legal maneuvers to tie ships nationality to the *Nottebohm* genuine link test.¹⁵⁵ The Inter-Governmental Maritime Consultative Organization (IMCO), the predecessor to the IMO,¹⁵⁶ asked the International Court of Justice for an advisory opinion on the meaning of Article 28(a) of

¹⁵¹ Law of the Sea Commentary, *supra* note 79 at 104-105 (citing Report of the International Law Commission covering the work of its Eighth Session (A/3159), Article 29 Commentary, para. (3) at 2790). *See also* Knight, *supra* note 152, at 396.

¹⁵² Law of the Sea Commentary, *supra* note 79 at 104-105. *See supra* note 82 for the full text of the approved Article 5 of the 1958 Convention on the High Seas. *See also* Knight, *supra* note 152 at 402. (30 states voted against, including the United States, 15 states voted in favor, and 17 states abstained, against the provision which would have given states the authority to withhold recognizing a ship’s nationality if they believed that there was no genuine link between the purported flag state and the ship).

¹⁵³ *See* Bowett, *supra* note 47, at 56; Matlin, *supra* note 83 at 1033; Pamborides, *supra* note 104, at 3-4.

¹⁵⁴ *See* Bowett, *supra* note 47, at 56-58. *See also* Knight, *supra* note 152, at 400.

¹⁵⁵ *See* McConnell, *supra* note 105, at 377; Pamborides, *supra* note 104, at 5-6.

¹⁵⁶ The IMO, established in 1948 and based in Great Britain, is a specialized agency of the United Nations with 167 Member States and three Associate Members. Its primary mission is to develop and maintain a comprehensive regulatory framework for shipping, including safety, environmental concerns, legal matters, technical cooperation, maritime security and the efficiency of shipping. *See also* International Maritime Organization, <http://www.imo.org>.

IMCO charter.¹⁵⁷ The IMCO sought to have two flag of convenience states, Liberia and Panama, excluded from gaining seats on the influential Maritime Safety Committee, which was open to the eight largest ship owning States.¹⁵⁸ France, Norway, the Netherlands and the United Kingdom asked the Court to apply the *Nottebohm* genuine link test to determine if Liberia and Panama are legitimate ship owning states.¹⁵⁹

In its 1960 advisory opinion, the Court refused to apply the *Nottebohm* genuine link test and instead held that the determination of the largest ship owning states only depends upon the tonnage registered in the flag state.¹⁶⁰ In arriving at its decision, the Court resorted to traditional treaty interpretation and did not conduct an analysis on whether the ships registered by Liberia and Panama met the requirements of Article 5 of the 1958 Convention on the High Seas.¹⁶¹

In judging the effects of the Advisory Opinion, some commentators suggest that the genuine link test is either dead or existing only on life support.¹⁶² Others believe that the opinion has limited applicability, because it was based on a straightforward treaty interpretation.¹⁶³ One legal commentator believes it would be a mistake to apply any juridical effect to the Court's advisory opinion, although the advisory opinion may have some effect on the psyche of the opponents of flags of convenience. As will be discussed in detail, every attempt to give teeth to the genuine link provision has met with frustration and disappointment.

4. The Genuine Link Test under the 1982 Law of the Sea Convention

The campaign to remove the ambiguity from the genuine link test did not fare much better under the Law of the Sea Convention.¹⁶⁴ In fact, arguably the Law of the Sea Convention only weakened the genuine link test by leaving it to the sole discretion of the flag state to determine the amount of control it will exercise.

¹⁵⁷ Constitution of the Maritime Safety Committee of the International Maritime Consultative Organization (Adv. Op.) 1960 I.C.J. 150 (June 8).

¹⁵⁸ *Id.* (Article 28(a) provides the criteria for the selection of states to the Maritime Safety Committee).

¹⁵⁹ *Id.*; see McConnell, *supra* note 105, at 377; Pamborides, *supra* note 104, at 5-6.

¹⁶⁰ 1960 I.C.J., *supra* note 161, at 171.

¹⁶¹ Pamborides, *supra* note 104, at 6.

¹⁶² See Pamborides, *supra* note 104, at 6; Boczek, *supra* note 113, at 100.

¹⁶³ L. F. E. Goldie, *Recognition and Dual Nationality-A Problem of Flags of Convenience*, 31 Y. B. INT'L L. 220, 271 (1963); McConnell, *supra* note 105, at 378.

¹⁶⁴ See McConnell, *supra* note 105, at 378-380; Pamborides, *supra* note 104, at 5-6; Matlin, *supra* note 83, at 1035.

Like its predecessor, the Law of the Sea Convention failed to reach a consensus on the meaning of the term “genuine link.”¹⁶⁵ Article 91, “Nationality of Ships” of the Law of the Sea Convention is an identical replica of Article 5 of the 1958 Convention on the High Seas, with one modification.¹⁶⁶ A portion of the third sentence in Article 5, which reads “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag,” was deleted from the LOSC Article 91 version.¹⁶⁷ The deleted language was subsequently inserted in LOSC Article 94 in the section, which outlines the flag state’s duties.¹⁶⁸ Some in the legal community have argued that the decoupling of the genuine link language and the phrase “in particular . . .” preserved the ambiguity that existed in Article 5 of the Convention on the High Seas.¹⁶⁹ If so, perhaps the genuine link provision is devoid of any meaning.

In the 1999 *M/V Saiga* case,¹⁷⁰ the International Tribunal for the Law of the Sea addressed for the first time the legal significance of the term “genuine link” as it is used in LOSC Article 91.¹⁷¹ The *Saiga* was registered in St. Vincent and the Grenadines (flag state), owned by a Cyprus company, managed by a Scottish company, and chartered to a Swiss company.¹⁷² The master and crew were nationals of the Ukraine.¹⁷³ On October 27, 1997, *M/V Saiga*, an oil tanker serving as a refueling vessel off the coast of West Africa, supplied gas oil to three fishing vessels operating in the Guinean exclusive economic zone (EEZ).¹⁷⁴ The refueling occurred within Guinea’s EEZ about 22 miles off the Guinea’s island of Alcatraz.¹⁷⁵ The next day, October 28, Guinean patrol boats

¹⁶⁵ See McConnell, *supra* note 105, at 382; Pamborides, *supra* note 104, at 5-6.

¹⁶⁶ See McConnell, *supra* note 105, at 380-381.

¹⁶⁷ *Id.* See Nandan ET AL., *supra* note 79, at 105-107 (indicating that the Article 5 language was included verbatim in the working papers at the second session in 1974 but was modified at the third session in 1975).

¹⁶⁸ See McConnell, *supra* note 105, at 380-381.

¹⁶⁹ See *Id.* (arguing that although Article 94 list the duties of flag states, it does not have an enforcement mechanism for violations, and that despite the new increased flag state obligations, Article 94 does nothing to help define the genuine link requirement). See also Pamborides, *supra* note 104, at 7.

¹⁷⁰ *M/V Saiga* (No. 2) (St. Vincent v. Guinea) 120 I.L.R. 144 (Int’l Trib. L. of the Sea, 1999).

¹⁷¹ LOSC, *supra* note 21, Art. 91; Anne Bardin, *Coastal State’s Jurisdiction over Foreign Vessels*, 14 PACE INT’L L. REV. 27, 71-75 (2002). See generally Tullio Treves, *Flag of Convenience Before the Law of the Sea Tribunal*, 6 SAN DIEGO INT’L L.J. 179 (2004).

¹⁷² *M/V Saiga* (No. 2), *supra* note 172, at para. 31 (The facts are summarized in paragraphs 31-39 of the Judgment).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at para. 32.

¹⁷⁵ *Id.*

fired on, boarded, and seized the *M/V Saiga* off the coast of Sierra Leone, beyond the southern limit of Guinea's EEZ.¹⁷⁶

St. Vincent and the Grenadines filed an action against Guinea with the International Tribunal for the Law of the Sea (ITLOS), alleging among other things, that Guinea wrongfully interfered with the freedom of navigation of one of its flagged ships while in international waters.¹⁷⁷ Guinea countered that there was no “genuine link” between the *Saiga* and St. Vincent and the Grenadines and therefore, it was not required to recognize the Vincentian nationality of *M/V Saiga*.¹⁷⁸

In rejecting Guinea’s argument, the Tribunal held that the requirement for a “genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.”¹⁷⁹

The Tribunal’s decision appears to vindicate Professor Boczek, who articulated in his pioneering treatise on flags of convenience that the *Nottebohm* genuine link test was limited to individuals and not to the relationship between a flag state and its ships.¹⁸⁰ Under *Nottebohm*, states do not have to respect the grant of nationality to an individual if there is no genuine connection between the granting state and the individual; however, under *M/V Saiga (No. 2)*, states are not supposed to rely on the apparent lack of a genuine link to challenge the validity of a ship’s registration.¹⁸¹

5. United Nations Convention on Conditions for Registration of Ships

The most recent attempt to define “genuine link” is the 1986 United Nations Convention on Conditions for Registration of Ships.¹⁸² The convention, opened for signature in May 1986, currently has fourteen parties, twenty-six shy of the number necessary for it to come into force.¹⁸³ None of the fourteen

¹⁷⁶ *Id.* at para. 33-34. (Two crew members were injured from gunshot wounds. The ship was brought to Guinea, where the ship and crew were detained, the cargo of gas oil was removed, and the master was prosecuted for customs violations).

¹⁷⁷ *Id.* at para. 29.

¹⁷⁸ *Id.* at para. 75.

¹⁷⁹ *Id.* at para. 83.

¹⁸⁰ See Boczek, *supra* note 113, at 122-123 (indicating that the Harvard Law School drafters of the draft convention on international responsibility had difficulties extending the *Nottebohm* genuine link test to corporations).

¹⁸¹ *Id.* at 116-117. See also *M/V Saiga (No. 2)*, *supra* note 172, at para. 83.

¹⁸² U.N. Doc. TD/RS/CONF/19/Add.1 (Jul. 30 1986).

¹⁸³ *Id.*

parties includes any of the flag of convenience states.¹⁸⁴ The convention purported to define for the first time, the requisite elements necessary to satisfy the genuine link requirement.¹⁸⁵

Articles 8, 9, and 10 are the heart and soul of the convention, because they establish the economic link between the flag state and the ships.¹⁸⁶ Under the language of the 1986 Convention, a genuine link will exist if: (1) flag state nationals are included in the ship ownership; (2) the ship is manned by flag state nationals; or (3) flag state nationals are involved in the management of the ship.¹⁸⁷ Because of the low number of parties, it is unlikely that the convention will have any impact on the registration of ships with flags of convenience. The failure to give teeth to the genuine link provision returns things to the status quo. Ships continue to be flagged by states in which there are little to no genuine link.

C. Analysis

Contrary to the intent of LOSC Article 91, not all flag states are equal. Flag of convenience states are more concerned with the number and tonnage of ships registered, which has a corresponding economic benefit to the state than they are concerned with the well-being of the masters and the condition of the ships.¹⁸⁸

The lack of a genuine link between the flag state and the ship, as Professor Captain Gold aptly stated, leaves the master to fend for himself if he gets into trouble.¹⁸⁹ Professor Captain Gold cites two cases involving *M/V Erika* and *M/V Prestige*, in which the masters were imprisoned by coastal states for oil pollution that occurred while the ships were in international waters.¹⁹⁰ In both cases, the ships were registered to flag of convenience states, Malta and the Bahamas, respectively.¹⁹¹ In both cases, the flag states failed to come to the

¹⁸⁴ *Id.*

¹⁸⁵ See McConnell, *supra* note 105, at 389; Pamborides, *supra* note 104, at 16. See also Tache, *supra* note 108, at 306-307.

¹⁸⁶ U.N. Conference on Trade and Development Information Unit, U.N. Doc. No. TAD/INF/1770, (Feb. 7, 1996). See also Pamborides, *supra* note 104, at 18.

¹⁸⁷ Convention on Conditions for Registration of Ships available at <http://www.admiraltylawguide.com/conven/registration1986.html>. See also Matlin, *supra* note 83, at 1036.

¹⁸⁸ Edgar Gold, *Command: Privilege or Peril? The Shipmaster's Legal Rights and Responsibilities*, Background Paper presented at 12th International Command Seminar, London, May 21-23, 2003, available at <http://www.ifsma.org/fairtreatment/documents/commandGold.pdf> (last visited Mar. 6, 2007).

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Id.* at 4-7.

¹⁹¹ *Id.*

assistance of the masters or exercise any flag state jurisdiction.¹⁹² Such abdication of flag state protections exposes the master to criminal liability if the ship is involved in any unlawful activity or if he allows any illegal activity onboard the ship. This lack of control by flag of convenience states is further indicia of the master's inherent authority over the operation of the ship, which includes giving consent for others to board and search the ship.

The lack of a genuine link between the flag of convenience states and the ships that fly under their flags provide very little incentive for these states to cooperate with interdicting states, such as the United States.¹⁹³ The fact that some states are currently cooperating is not dispositive.¹⁹⁴ A review of the Proliferation Security Initiative (PSI) boarding agreements with flag of convenience states reveals that the agreements are not necessarily such good deals for the United States. For example, some of the PSI boarding agreements do not allow for unilateral boardings.¹⁹⁵ Instead, the United States is required to seek permission on individual cases upon a showing of good cause.¹⁹⁶ On the other hand, a boarding premised upon master's consent is less complicated. The master either consents or not; a showing of good cause is not required.¹⁹⁷

This paper does not argue or suggest that a master's consent is superior to that of the flag state. To the contrary, it argues that in the absence of specific directions from the flag state, the master has the inherent authority to consent to the boarding and searching of his ship.¹⁹⁸ It also does not challenge the universally accepted and recognized principle of the exclusive authority of the flag state.¹⁹⁹

¹⁹² *Id.*

¹⁹³ Harrington, *supra* note 96, at 136 (suggesting that flags of convenience states have little incentive to ensure compliance with international rules and regulation).

¹⁹⁴ *See supra* note 98 and accompanying text.

¹⁹⁵ Becker, *supra* note 37, at 162. The boarding agreements can be lumped into two groups. In the first group, represented by Croatia and Cyprus, there is no implied state consent to board if the flag state has not responded within a certain time limit. In the second group represented by Belize, Liberia, the Marshall Islands, and Panama, if there is no response from the flag state within a certain time period (two to four hours) consent to board is presumed. *See Syrigos, supra*, note 94, at 191-192. *See also* Murphy, *supra* note 47, at 351.

¹⁹⁶ Becker, *supra* note 37, at 162 (arguing that PSI boarding agreements lacks the formal authorization process, including a uniform definition of 'good cause' which can cause potential problems).

¹⁹⁷ *See* Commander's Handbook on the Law of Naval Operations, *supra* note 15, § 3.11.2.5.2.

¹⁹⁸ *See infra* notes 360-371 and accompanying text (discussing the relationship between the flag state and the master).

¹⁹⁹ Meyers, *supra* note 68, at 52 (noting that exclusive jurisdiction of flag states was widely accepted by the states present at the 1958 Conference on the Law of the Sea). The provision on exclusive flag state jurisdiction (Article 6) received the unanimous votes of all 51 members of the Second Committee and 61 votes in favor, zero against, and two abstentions in the Plenary Meeting. *Id.* In commenting on the jurisdiction of a flag state, McDougal and Burke state that "[i]t is of course unquestioned practice that the state which is responsible for a ship's conformity with international

The recognition and continued existence of master's consent is crucial as a valid alternative where flag state consent is not possible or practical. For example, the lack of a genuine link between flag of convenience states and ships under their registry may cause such states to turn a blind eye not only to safety issues, but also to evidence of illegal activities by ship owners.²⁰⁰ It is therefore, the masters, under these conditions, who are in the best position to ensure their ships are not being used for illegal activities.²⁰¹ Of course, if the masters are complicit in the illegal activity on board the ship, one would expect them to refuse to acquiesce to the search of their ship by a foreign warship. However, there are three possible reasons why a complicit master would consent to the boarding and searching of his ship.

First, the master may fear that his refusal will lead to reasonable suspicion that he is engaged in criminal behavior, which would lead to his detention while flag consent is being requested.²⁰² For instance, criminal suspects in the United States, who have contrabands in their automobiles, routinely consent to the search of their automobiles by the police when pulled over for traffic infractions.²⁰³ Second, by consenting the master may later use the fact of the consent as proof that he was unaware of the criminal conduct.²⁰⁴ Third, a complicit master may consent in the hope that the search will not find the hidden contraband and the master will be credited as cooperating in the fight against international terrorism.²⁰⁵

law has a competence equal to its responsibility and may control the movement and activities of its ships as its interpretation of community obligations and its national policies requires." See McDougal & Burke, *supra* note 70, at 1066. The PSI partners practice this precise scenario in the PSI exercise, Sea Saber, that took place in the Arabian Sea in January 2004. See Syrigos, *supra* note 94, at 190. As part of the scenario, the targeted ship master refused to give consent to board his ship. The PSI partners then sought and received consent from the flag state and boarded the ship notwithstanding the master's refusal. *Id.*

²⁰⁰ See Syrigos, *supra* note 94, at 152-153; Pamborides, *supra* note 104, at 9; McConnell, *supra* note 105, at 367.

²⁰¹ This of course assumes that the flag state has not given instructions to the contrary. See *supra* notes 201-203 and accompanying text.

²⁰² See Andrew W. Anderson, *In the Wake of the DAUNTELESS: The Background and Development of Maritime Interdiction Operations*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 31-32 (Thomas A. Clingan, Jr. ed., 1986).

²⁰³ I recognize there is a difference between a police traffic stop and an interdiction on the high seas, but the analogy is nevertheless relevant to explain why a ship master may consent to the searching of his ship. See generally *United States v. Rodriguez*, 60 M.J. 239, 248 (C.A.A.F. 2004) (After being stopped on an interstate highway for a common traffic infraction, the defendant gave a Maryland State trooper a written consent to search of his car); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (recognized the validity of consent searches); *Katz v. United States*, 389 U.S. 347 (1967).

²⁰⁴ Anderson, *supra* note 204, at 31-32.

²⁰⁵ See e.g., Logan, *supra* note 69, at 253 (In the M/V *So San* interdiction, discussed *infra* notes 247-249 and accompanying text, missiles were hidden underneath 40,000 stacks of cement).

IV. BOARDING OF SHIPS ON THE HIGH SEAS

It is well settled in international law that no state may claim sovereignty over the high seas.²⁰⁶ This principle is firmly rooted in both customary international²⁰⁷ and treaty laws as reflected in LOSC Articles 89²⁰⁸ and 87.²⁰⁹ The general rule concerning the conduct of ships on the high seas is governed by LOSC Article 92.²¹⁰ Paragraph 1 of Article 92 provides in part: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”²¹¹

The effect of LOSC Article 92 is that other states and, more specifically, foreign warships are prohibited from interfering with the ships navigating on the high seas.²¹² Interference with ships on the high seas violates the sovereign rights of the flag state unless such interference is authorized by the

²⁰⁶ Friedheim, *supra* note 48, at 284-285 (The 1982 Law of the Sea Convention was an affirmation of the Grotian principle of high seas freedom).

²⁰⁷ *Id.* at 24-26. The historical basis that gave rise to customary international law is discussed at length in Part V.

²⁰⁸ LOSC, *supra* note 21, Article 89 (“No State may validly purport to subject any part of the high seas to its sovereignty.”).

²⁰⁹ Full text of Article 87 (Freedom of the High Seas) reads:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

LOSC, *supra* note 21, Article 87. See also Stuart Kaye, *Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS* 350 (David Freestone, Richard Barnes & David Ong eds., 2006) (Article 87 is a reflection of the freedom of navigation principle espoused by the International Court of Justice in the 1949 *Corfu Channel case*).

²¹⁰ LOSC, *supra* note 21, Art. 92.

²¹¹ *Id.*

²¹² Syrigos, *supra* note 94, at 152.

flag state or is otherwise permitted by international law.²¹³ Like most rules, inevitably, there are exceptions, and LOSC Article 92 “flag state exclusive jurisdiction” is not absolute.²¹⁴ These exceptions are based on customary practices and treaties developed over the centuries.²¹⁵

A. Peacetime and Wartime High Seas Boarding²¹⁶

The exceptions to the flag state exclusivity are grouped into two categories: the “right of visit and search” and the “right of approach and visit,” also known as the “right of visit.”²¹⁷ These two concepts are separate and distinct.²¹⁸

1. The Right of Visit and Search

The concept of “visit and search” dates back to the 14th century and is widely accepted as a customary norm of international law.²¹⁹ The famous

²¹³ Exceptions to the exclusive jurisdiction of a flag state are based on both customary international and treaty law. See Robert C. F. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1167-1168 (1989); 2 HALLECK, *INTERNATIONAL LAW* 239 (S. Baker 3d ed., 1993) (Halleck wrote over 100 years ago that “to justify [interference] it must be shown that the particular case comes clearly within the exceptions to this rule [of exclusivity of flag state jurisdiction], which have been established by the positive law of nations, or by treaty stipulations between the parties.”); see also LOSC, *supra* note 21, Art. 97, 92, and 110.

²¹⁴ LOSC, *supra* note 21, Art. 110.

²¹⁵ See Shulman, *supra* note 72, at 803 (explaining the importance of the exceptions to highlight the fact that throughout the history of maritime commerce, boarding of foreign ship without legal authority could be considered an act of war and did in fact lead to a few skirmishes).

²¹⁶ These provisions do not apply where the foreign flag vessel is a warship or other government vessel. A warship or other ship owned or operated by a country and used only for government non-commercial purposes enjoys complete immunity from interference from other nations. LOSC, *supra* note 21, Art. 32 and Art. 110. See also, Restatement (Third), *supra* note 22, § 522.

²¹⁷ See e.g., Syrigos, *supra* note 94, at 154; Anna Van Zwanenberg, *Interference with Ships on the High Seas*, 10 INT'L & COMP. L.Q. 785, 786-793 (1961). Article 110 uses the term “right of visit”, LOSC, *supra* note 21, Art. 110.

²¹⁸ See Joseph Lohengrin Frasca, VISIT, SEARCH, AND SEIZURE ON THE HIGH SEAS 22-23 (1938). See also A. Shearer, *Problems of Jurisdiction and Law Enforcement against Delinquent Vessels*, in THE LAW OF THE SEA 320 (Hugo Caminos ed., 2001) (In the nineteenth century the only recognized peacetime restrictions to freedom of the seas were jurisdiction over pirates, jurisdiction over a flag state’s own ships, and the right of approach and visit for the purpose of verifying a ship’s flag).

²¹⁹ Frasca, *supra* note 220, at 51 (finding the legal status of the right of “visit and search” has not faced any serious challenges over the centuries nor denied by any state). In a March 28, 1855 letter to the Spanish Foreign Minister complaining about the boarding of an American ship, the *El Dorado*, on the high seas by a Spanish cruiser, Secretary of State William Marcey conveyed that the right of visit and search was not a unique American doctrine and that “it has the sanction of the soundest expositors of international law.” See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 890-891 (1906) (The Secretary of the Navy subsequently gave the order for the Navy to protect United States flagged ships from visit and searches on the high seas).

nineteenth century English jurist Lord Stowell is credited with the judicial recognition of the concept in the *Le Louis* case.²²⁰ The right of “visit and search” is strictly a wartime tool.²²¹ It allows a belligerent warship to stop and search a merchant ship on the high seas to determine whether it is engaged in the war efforts for the other side.²²²

2. The Right of Approach and Visit

Customary international law has long recognized the right of “approach and visit.”²²³ The doctrine became part of the American jurisprudence in the nineteenth century prize case, *The Marianna Floria*.²²⁴ In that case, Justice Story writing for the United States Supreme Court stated:

“Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of

²²⁰ See 2 Moore, *supra* note 221, at 886 (“In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. No nation can exercise a right of visitation and search upon the common and unappropriate parts of the sea, save only on the belligerent claim.”), citing *Le Louis*, 2 Dodson 210, 245 (1858); McDougal & Burke, *supra* note 70, at 798. See also 4 Whiteman, *supra* note 29, at 670; Zwanenberg, *supra* note 219, at 786-792.

²²¹ See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA §118 (Louise Doswald-Beck ed., 1995). See also Frasca, *supra* note 220, at 49; 4 Whiteman, *supra* note 29, at 670.

²²² See Frasca, *supra* note 220 at 49. See also Zwanenberg, *supra* note 219, at 791-793; Commander’s Handbook, *supra* note 15, § 7.6; Reuland, *supra* note 215, at 1171.

²²³ See 2 C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, 311 (6th rev. ed. 1967) (The right of approach and visit (“*enquête du verification du pavillon* or reconnaissance is a right conferred on war ships of all nations by international maritime usage.”). See also Commander’s Handbook, *supra* note 15, at 3-4. The British use the term “Right of Approach” vice “Right of Visit,” however, there is no legal significance between the two terms. The doctrine was recognized by the United Kingdom in an 1858 statement by Lord Lyndhurst in reference to the *Fur Seal Arbitration*. See Zwanenberg, *supra* note 219, at 792. In doing so, the British Government discarded its practice of conducting visit and search during peacetime. *Id.*

²²⁴ *The Marianna Floria* 24 U.S. 1 (1826). See also 2 O’Connell, *supra* note 84 at 802-803 (Although the right of approach and visit has been recognized in international law text for a long time, the traditional rule was that if a warship approaches a foreign merchant ship, it did so at its own peril. In fact, the United States Naval ship, the *Alligator*, was fired upon by the *Marianna Floria* during an approach and visit). See McDougal & Burke, *supra* note 70, at 887-893.

ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority”²²⁵

Under this customary rule, foreign warships may approach a ship on the high seas in order to verify the ship’s identity and nationality.²²⁶ LOSC Article 110 is the treaty version of the customary right of “approach and visit.”²²⁷ Unlike the concept of “visit and search,” the right of “approach and visit” is a peacetime tool.²²⁸

B. Peacetime High Seas Boarding Exceptions

Consistent with the customary international norm of the right of “approach and visit” and LOSC Article 110, a foreign warship, in peacetime, may not only exercise the right to “approach and visit” foreign merchant ships on the high seas, but may also board and possibly seize these vessels without flag state consent in the following five situations.²²⁹

1. Piracy Exception

The first exception to the exclusiveness of flag state jurisdiction is the right of foreign warships to stop and board a foreign flagged ship provided there are reasonable grounds for suspecting that the ship is engaged in piracy.²³⁰ The crime of piracy occurs when the crew or passengers of a private ship commit any illegal act of violence, detention or raid for private ends on the high seas against another ship or person or property on board.²³¹ The consent of the flagged state is not required because piracy is considered a universal crime, thus

²²⁵ *Marianna Floria*, 24 U.S. at 20. See also Zwanenberg, *supra* note 219, at 792.

²²⁶ *Frascona*, *supra* note 220, at 23 (“[t]he right of visit is the right solely to inspect the papers and credentials of the visited vessel to determine the nationality, character, contents, nature, and respective destinations of the vessel and cargo.”). See also I. BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 247 (3d ed., 1979); Zwanenberg, *supra* note 219, at 792; Reuland, *supra* note 215, at 1170.

²²⁷ See *United States v. Williams*, 617 F.2d 1063, 1076 (5th Cir. 1980) (The right of approach and visit in Article 22 of the 1958 Convention on the High Seas [predecessor to Article 110 of LOSC] is a codification of the international maritime common law.); Zwanenberg, *supra* note 219, at 792 (Article 22 of the 1958 Convention of the High Seas was an adaptation general accepted principle of international law). See also Anderson, *supra* note 204, at 341.

²²⁸ 4 Whiteman, *supra* note 29, at 670; see also, Commander’s Handbook, *supra* note 15, at 3-4.

²²⁹ See Shearer, *supra* note 220, at 443-444; 2 O’Connell, *supra* note 84, at 801-802; LOSC, *supra* note 21, Art. 110.

²³⁰ LOSC, *supra* note 21, Art. 110. These provisions do not apply where the foreign flag vessel is a warship or other government vessel.

²³¹ See LOSC, *supra* note 21, Art. 101. A pirate has also been described as one without legal authority that attacks a ship on the high seas with the intention to steal its contents. See 2 Moore, *supra* note 221, at 953. See also 1 L. OPPENHEIM, *INTERNATIONAL LAW* 608-609 (Hersch Lauterpacht ed., 8th ed., 1955).

subject to the jurisdiction of all states.²³² A ship found to be engaged in piracy may be seized and the suspects arrested and brought to justice in any state.²³³ The suppression of piracy on the high seas under LOSC Article 105 is a codification of a customary international norm.²³⁴

2. Transportation of Slavery Exception

The second exception applies to the suppression of slavery.²³⁵ Similar to piracy, the slave trade is a universal crime, and all states have a legal obligation under both customary and treaty laws to prevent and punish the transportation of slaves on the high seas.²³⁶ However, unlike piracy, once a foreign warship boards and finds evidence of slavery, it does not have the legal authority to seize the ship or arrest its crew.²³⁷ Its only option is to notify the flag state, which has the sole authority to affect a seizure and arrest.²³⁸

3. Unauthorized Broadcasting Exception

Thirdly, a foreign warship may stop and board a ship where there are reasonable grounds to suspect that the ship is engaged in unauthorized broadcasting.²³⁹ This may be seen as a peculiar exception, but the prevalence of the practice in the 1960s of ships positioning themselves just outside the legal reach of coastal states, particularly in Europe, and broadcasting for profit without a license led to its inclusion into the 1982 Law of the Sea Convention.²⁴⁰ Under this exception, both the flag state and the states subject to the unauthorized broadcasting can arrest and prosecute the violators.²⁴¹

²³² See 2 Colombos, *supra* note 225, at 444; 2 O'Connell, *supra* note 84, at 967; Smith, *supra* note 66, at 50 ("By the ancient custom of the sea, all honest men are entitled to treat the pirate as an outlaw, an Ishmaelite, and a general enemy of mankind."). See also Reuland, *supra* note 215, at 1177, (citing 1 W. WYNNE, THE LIFE OF SIR LEOLINE JENKINS, 86 (1724)).

²³³ LOSC, *supra* note 21, Art. 105. See also 2 Moore, *supra* note 221, at 952 ("Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessel of any particular state, and brought within its territorial jurisdiction, for trial in its tribunals."); Churchill and Lowe, *supra* note 32, at 209-211.

²³⁴ See 4 Whiteman, *supra* note 29, at 648-649.

²³⁵ LOSC, *supra* note 21, Art. 110.

²³⁶ LOSC, *supra* note 21, Art. 99. See also Churchill and Lowe, *supra* note 32, at 212.

²³⁷ See 2 Moore, *supra* note 221, at 952 (explaining that during the early 1800s, the international community was unsuccessful in its attempts to make the slave trade an international crime like piracy, where each state would be authority to seize the slave ship and prosecute its crew). See also McDougal & Burke, *supra* note 70, at 1086-1087.

²³⁸ See Syrigos, *supra* note 94, at 157.

²³⁹ LOSC, *supra* note 21, Art. 110.

²⁴⁰ See, e.g., 2 O'Connell, *supra* note 84, at 815. See also Churchill and Lowe, *supra* note 32, at 211-212; Reuland, *supra* note 215, at 1224.

²⁴¹ LOSC, *supra* note 21, Art. 109. (Article 109(3) lists other potential prosecution jurisdictions including: the state of registry of the installation, the state of which the person is a national, any

4. Stateless Ship Exception

The fourth exception of a flagged state's exclusive jurisdiction applies when the ship is not authorized by any state to fly its flag. Under this condition, the ship is without nationality²⁴² and commonly referred to as the "stateless ship."²⁴³ Ships become stateless for a number of reasons, including having its registration revoked or using multiple state flags, thereby causing confusion and deception.²⁴⁴ As the name suggests, a stateless ship is a ship without nationality and the concomitant protection of a flagged state is absent, thus it may be boarded.²⁴⁵ The most recent and widely reported incident of the approach of visit of a stateless vessel occurred in December 2002, when Spanish Naval forces boarded the *So San*, 600 miles off the Yemeni coast in the Indian Ocean.²⁴⁶ Spanish forces boarded the merchant ship because there were no visible sign of nationality: the ship was not flying a flag; the markings on the ship's hull were obscured by paint; the ship refused to respond to repeated hails

state where the transmissions can be received, or any state where authorized radio communication is suffering interference). In 1962, Denmark seized the *Lucky Star* which was broadcasting just outside of Danish territorial waters. The crew was arrested and successfully prosecuted under Danish Law. See 2 O'Connell, *supra* note 84, at 815.

²⁴² LOSC, *supra* note 21, Art. 110.

²⁴³ McDougal & Burke, *supra* note 70, at 1084.

²⁴⁴ LOSC, *supra* note 21, Art. 92. See also Churchill and Lowe, *supra* note 32, at 213-2141. The following is a non-exhaustive list of factors to be used in determining whether a ship qualifies as stateless: no claim of nationality; multiple claims of nationality (e.g., sailing under two or more flags); contradictory claims or inconsistent indicators of nationality (e.g., master's claim differs from vessel's papers and/or homeport does not match nationality of flag); changing flags during a voyage; removable signboards showing different vessel names and/or homeports; absence of anyone admitting to be the master and/or displaying no name, flag or other identifying characteristics; and refusal to claim nationality. See J. ASHLEY ROACH & ROBERT W. SMITH, INTERNATIONAL LAW STUDIES, EXCESSIVE MARITIME CLAIMS 485 (2nd ed. 1994); Commander's Handbook, *supra* note 15, at 3-25.

²⁴⁵ See McDougal & Burke, *supra* note 70, at 1084 (It is commonly accepted that stateless ships are without protection of any flag state and are thus subjected to interference on the high seas). See also A. W. Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law*, 13 MAR. L. & COM. 323, 335 (1982); Syrigos, *supra* note 94, at 157-158 (Stateless vessels do not have the same protection of flagged merchant ships on the high seas). Cf Churchill and Lowe, *supra* note 32, at 214 (suggesting that although a ship is without nationality, that in itself does not give states the right to assert and exercise jurisdiction over the ship and crew).

²⁴⁶ Thom Shanker, *Threats and Responses: Arms Smuggling*, N.Y. TIMES, Dec. 11, 2002, at A1 (reporting on scud missiles found on North Korean ship). See also, Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Dec. 12, 2002, available at <http://www.asil.org/insights/insigh94.htm>.

by various means; the ship increased speed while being hailed; and the ship was making evasive maneuvers.²⁴⁷

5. Ships of Visiting State Nationality Exception

The fifth exception applies to ships of the visiting state's nationality.²⁴⁸ Ships that although flying another state's flag, or refusing to respond to hails or signals, are in fact of the same nationality as the warship.²⁴⁹ Accordingly, such ships will be subjected to the jurisdiction of the warship.²⁵⁰

C. **U.N. Security Council Resolution Exception**

Although not specifically mentioned in LOSC Article 110, merchant vessels may also be stopped and boarded on the high seas, if authorized by a resolution of the United Nations Security Council.²⁵¹ Members of the United Nations are required to comply and enforce the decisions of the Security Council.²⁵² Recent examples of states stopping and searching ships pursuant to Security Council Resolutions include Iraq²⁵³, Haiti,²⁵⁴ and Serbia.²⁵⁵

²⁴⁷ Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction*, 29 MELB. U.L. REV. 733, 735-736 (2005). See Barry, *supra* note 32, at 300; Becker, *supra* note 37, at 152.

²⁴⁸ LOSC, *supra* note 21, Art. 110. See also Shearer, *supra* note 220, at 443-444.

²⁴⁹ See 1 RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 420-421 (1991); Nandan, et al., *supra* note 79, at 244. See also Shearer, *supra* note 220, at 443-444.

²⁵⁰ See LOSC, *supra* note 21, Art. 110.

²⁵¹ See U. N. Charter art. 25. See also Daniel H. Joyner, *The PSI and International Law*, THE MONITOR, Spring 2004, at 9. Odeke, *supra* note 102, at 659 (citing Security Council resolutions in 1966 (Rhodesia--now Zimbabwe) and 1993 (Yugoslavia) which required the stopping of merchant vessels bound for certain ports).

²⁵² See U. N. Charter art. 25. It is in the interest of the boarding state to ensure the boarding and inspection is carried out with the minimum amount of interference with the merchant ship's operation schedule, because it is liable for any loss or damage that may result due to the boarding. See LOSC, *supra* note 21, Article 110. See generally Certain Expenses of the United Nations ("Certain Expenses case"), 1962 I.C.J. 151 (1951).

²⁵³ See S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990) (authorized member states to conduct maritime interdiction operation in order to halt all inward and outward maritime shipping to Iraq).

²⁵⁴ See S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993) (authorized member states to conduct interdiction operation to prevent embargoed items from reaching Haiti).

²⁵⁵ See S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992) (authorized member states to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the embargo placed on Serbia).

V. ANALYSIS OF A SHIP MASTER'S AUTHORITY TO CONSENT TO BOARDINGS AND SEARCHES OF HIS VESSEL ON THE HIGH SEAS

Boarding based on the consent of a ship's master can be a very effective and efficient interdiction tool, since it allows for expeditious verification of a ship's papers, cargo and navigation documents.²⁵⁶ An interdiction conducted pursuant to a master's consent often results in minimal interference with a ship's mission because the ship generally need only deviate from its base course and speed for brief intervals to permit the boarding process.²⁵⁷ Consensual boarding has the advantage of avoiding the frequent lengthy delays associated with conducting boarding pursuant to specific consent from the flag state.²⁵⁸

The United States' justification that a ship's master is empowered to consent to the boarding and searching of his merchant ship is articulated in section 3.11.2.5.2 of the Commander's Handbook on the Law of Naval Operations.²⁵⁹ The section entitled "Consensual Boarding," provides: "[a] consensual boarding is conducted at the invitation of the master . . . of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. *The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and*

²⁵⁶ Commander's Handbook, *supra* note 15, at para 3.11.2.5.2.

²⁵⁷ *Id.* Master's consent is crucial in situations where, for any number of reasons, flag state consent is difficult to obtain. See Becker, *supra* note 37, at 177 (acknowledging that a master's consensual boarding is presumptively suspect without reference to another source of clear legal authority).

²⁵⁸ See e.g., United States v. Juda, 46 F.3d 961 (9th Cir. 1995) (holding that it is legally permissible for Coast Guard to detain a foreign ship on the high seas while awaiting flag consent). See Becker *supra* note 37, at 178:

("Even if the flag state can be contacted directly, this can be a time-consuming and administrative difficult procedure. . . . [T]he failure to receive timely response can be critical; the requesting ship's authority to pursue and intercept the suspect vessel evaporates if the vessel reaches the territorial waters of a third state before interception can occur.")

²⁵⁹ Commander's Handbook notes:

Although a master may consent to the boarding and searching of his ship, that consent does not allow the assertion of law enforcement authority--such as arrest or seizure. A consensual boarding is not an exercise of maritime law enforcement jurisdiction. It is undisputed that criminal jurisdiction on the high seas remains the sole prerogative of the flag state, subject to a few minor exceptions contained in LOSC Article 92, 97, and 110.

Commander's Handbook, *supra* note 15, at para. 3.11.2.5.2; see also Meyers, *supra* note 68, at 50-52.

includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.”²⁶⁰

This section examines the United States’ rationale to determine if this practice can withstand international legal scrutiny.

A. Master’s Consent Based upon Historical Responsibility and Authority

The historical origins and role of a ship’s master supports the legal premise that a master is vested with the authority to consent to the boarding and searching of a ship under his command. Legal commentators, courts, and legislatures have recognized the historical authority masters have in the operation and command of their ships. This authority extends to a master’s ability to consent to the boarding and searching of a ship under his command on the high seas.

1. Origins of a Ship’s Master

The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages.²⁶¹

The historical role of a master has evolved over time to one where it is widely accepted that the master has the ultimate responsible for the safety of the crew, passengers, cargo and the safe operation of the ship.²⁶² In this capacity, he has the prerogative to invite guests, including foreign law enforcement and military personnel, to come aboard the ship on the high seas.²⁶³

²⁶⁰ *Id.* (emphasis added).

²⁶¹ *The China*, 74 U.S. 53, 68 19 L.Ed. 67 (1868). The position of master originated from the maritime commerce during the middle ages. *Id.* at 68. See also *United States Coast Guard v. Merchant Mariner’s Document No. Z 217 56 7381 (Cordish)*, Decision of the Commandant, No. 2098 (Mar. 18, 1977) available at <http://www.uscg.mil/hq/g-cj/appeals/cg2098.pdf> (last visited on Mar. 6, 2007).

²⁶² See *Commander’s Handbook*, supra note 15, at para. 3.11.2.5.2; U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD INSTRUCTION MANUAL 16247.1D, UNITED STATES COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, para C.2,(Apr. 15, 2005). The International Federation of Shipmasters’ Associations (IFSMA) Policy Document (2005), available at <http://www.ifsma.org/> (last visited on Mar. 6, 2007) (supporting idea that it is a well-settled and known fact that a master has the ultimate responsibility for the safe operation of his the ship).

²⁶³ See *infra* Part V (D).

Initially, the master and ship owner was often the same person.²⁶⁴ However, sometime during the fifteenth century, the wealthy maritime merchants in such city states as Genoa, Pisa, Florence, and Venice became more interested in politics and the social benefits of living ashore rather than on the ships, as was the general practice of the times.²⁶⁵ Consequently, the title and position of master was created to carry on the everyday operation of the ship.²⁶⁶ The delegation of shipboard duties and responsibilities from the wealthy maritime merchants to the master became the universal practice, which out of necessity led to a significant increase in power and responsibility of the master over time and continues to the present.²⁶⁷

2. Legal Commentary on a Master's Inherent Authority

The historical basis of a master's inherent authority over the operation of the ship is widely accepted and well documented by legal scholars in the maritime shipping industry. The teaching and practice of legal scholars are appropriate secondary sources when interpreting international law.²⁶⁸ As aptly put by one British legal scholar, Professor Robert Grime, "[a] ship has been likened to a floating state. It is a closed community which must, of necessity, have its own government and rules. . . . The ship's master is the person with the final responsibility of running the vessel."²⁶⁹ Professor Grime further elaborates that despite the codification of the British Shipping laws, the master's common law powers and authority have not been abolished.²⁷⁰

Another British distinguished legal commentator and recognized expert in maritime law, Professor Christopher Hill of the London School of Economics and Political Science, commented on the master's inherent authority over the ship in modern times. He argues that a master is still viewed as the ship's

²⁶⁴ D. J. WILSON & J. H. S. COOKE, *BRITISH SHIPPING LAWS: THE LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES 5-6* (11th ed. 1990).

²⁶⁵ *Id.* See also HUGO TIBERG, *SHIP MASTER* 11 (1991) (At the end of the fifteenth century ship owners amassed great wealth and increased their ship inventory, which necessitate them moving ashore to manage their affairs. The master took over such roles as hiring the crew and managing all aspects of the ship in the absence of the owner).

²⁶⁶ Wilson & Cooke, *supra* note 266, at 6.

²⁶⁷ *Id.* But see Gold, *supra* note 190, at 7 (arguing that although technology has allowed the master to be in frequent communication with the ship owner or agent, the master still possesses legal authority and responsibility for all acts associated with the sailing of the ship and delivery of the cargo).

²⁶⁸ See International Court of Justice Statute, *supra* note 22, art. 38(1)(b).

²⁶⁹ ROBERT P. GRIME, *SHIPPING LAW* 56 (1978).

²⁷⁰ *Id.* (The British Merchant Shipping Act (MSA) was first enacted in 1894. The current applicable version is the MSA of 1995, available at http://www.opsi.gov.uk/ACTS/acts1995/ukpga_19950021_en_1.htm).

commander and holds a position of special trust and is responsible for the safe operation of the ship.²⁷¹

Professor Captain Edgar Gold, an Australian maritime legal scholar, noted in 2003 that the master's authority and responsibility is entrenched in customary law and has not changed, except where such authority has been clearly stated.²⁷² In fact, under the state marriage laws of many of the United States' states and territories, a ship captain may perform legal and valid marriage ceremonies. He also points out that the global community has accepted the historical role and authority of a master.²⁷³

Other commentators such as Professor H. Holman, provide similar justification for the inherent authority of master.²⁷⁴ In a 1964 publication Professor H. Holman observed:

The Master is charged with the safety of the ship and cargo; in his hands are the lives of passengers and crew. His position demands the exercise of all reasonable care and skill in navigation, of a least ordinary care and ability in the transaction of business connected with the ship and the constant use of patience and consideration in his dealings with those under his command or entrusted to his care.²⁷⁵

Professor Holman's 1964 statement is consistent with the views of the scholars discussed *supra*.²⁷⁶ Thus, despite the technological advances in communications, legal commentators still recognize the master's historical

²⁷¹ CHRISTOPHER HILL, MARITIME LAW 362 (3rd ed. 1989).

²⁷² Gold, *supra* note 190, at 7.

²⁷³ Gold writes:

The master's legal authority and responsibility . . . has been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master's authority and responsibility is something that is accepted in terms of customary law on a global basis. Nevertheless, it must be emphasized that these customary rules were not only developed in the sailing ship era, when communications were rudimentary, but also that they were principally created in order to assist shipping as a commercial enterprise.

Id. at 7–8.

²⁷⁴ H. HOLMAN, A HANDY BOOK FOR SHIPOWNERS AND MASTERS (16th ed. 1964).

²⁷⁵ *Id.* at 5. See also Meyers, *supra* note 68, at 110 (suggesting that when the master is performing ship functions as registering births, concluding marriages, issuing death certificates, etc., he is acting in his capacity as an official his flag state to whom he is directly responsible. But in matters such as navigator, he is not acting as an agent of the flag state).

²⁷⁶ See *supra* notes 270-273 and accompanying text.

responsibility and authority over his ship. Likewise, judicial decisions have solidified the inherent authority of the master over his ship.

3. Judicial Decisions Recognizing a Master's Inherent Authority

The Styria, a 1902 United States Supreme Court decision, gives a window view into the magnitude and scope of the master's inherent authority over his ship.²⁷⁷ *The Styria* involved the civil suit of a master for failure to deliver part of his cargo to its intended destination at the appointed due date.²⁷⁸ *The Styria* was required to load a shipment of sulphur in Sicily and deliver it to New York City.²⁷⁹ However, shortly after the sulphur was loaded onboard the ship, the master learned that the United States and Spain were at war and the Spanish considered sulphur contraband.²⁸⁰ Because his transit from Sicily to New York City would take him by the Spanish coast, the master off-loaded the shipment of sulphur and set sail for New York.²⁸¹ Unbeknownst to the master, shortly before he set sail for New York, the Spanish Government had exempted sulphur from its contraband list.²⁸²

Justice Shiras, writing for the Court, acknowledged the now entrenched maritime doctrine that a master has plenary authority over the ship by stating: "[t]he master of a ship is the person who is [entrusted] with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention."²⁸³ In arriving at the conclusion that the master's decision regarding the operation of the ship is entitled to great discretion, the Supreme Court evaluated two British cases from 1872 and 1896, both of which upheld decisions in favor of the master regarding his navigation of the ship.²⁸⁴ The courts' recognition of a master's inherent authority over the operation of his or her ship has been further spelled out by states in the form of statutory schemes.

²⁷⁷ *The Styria*, 186 U.S. 1, 22 S.Ct. 731, 46 L.Ed. 1027 (1902).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 3.

²⁸¹ *Id.*

²⁸² *Id.* at 5.

²⁸³ *Id.* at 9.

²⁸⁴ *Id.* at 17. (In the 1872 case, *Geipel v. Smith*, 7 Q. B. 404 (1872) the House of Lords held that the master was justified in not transporting his passengers from a port in England to Hamburg, Germany, because of a French blockage of the Hamburg port. Likewise, in *Noble's Explosives Co v. Jenkins*, 2 Q. B. 326 (1896), the House of Lords upheld the master's decision not to sail from Hong Kong because of the danger that the ship and cargo would be seized due to a declared war between Japan and China).

4. Statutory Schemes Recognizing a Master's Inherent Authority

The recognition of a master's authority over the ship was not limited to unwritten customs, judicial decision, and commentaries. Some of the maritime states in Europe developed written text on the duties, authorities and responsibilities of a master.²⁸⁵ For example, section 496 of the 1889 Code of Commerce of the Kingdom of Portugal states that the master "is the person entrusted with the command and conduct of the ship."²⁸⁶ The 1886 Code of Commerce of the Kingdom of Spain lists several functions that are inherent in the position of a master: to command the crew and sail with instruction from the ship owners, to keep the ship seaworthy in all respects, punish those who fail to fulfill his orders.²⁸⁷ As the above excerpts illustrate, the early maritime legislations recognized the historical authority masters have in the operation and command of their ships.

5. Analysis

The master initially inherited the duties and responsibilities of the wealthy ship owners and, over time, his responsibilities and authorities have grown exponentially to where there is universal acceptance that he bears the ultimate authority for navigation and safety of the ship and all within.²⁸⁸ Notwithstanding advances in communications technology, which arguably makes the master more accountable to the ship owner and agents, the master maintains his plenary authority over all activities concerning the operation of the ship on the high seas, including the authority to consent to the boarding of the ship by foreign military or law enforcement personnel.²⁸⁹

B. Has Master's Consent Crystallized into a Customary Norm of International Law?

Customary international law, or the "laws of nation" as it was called in the nineteenth century, is not an American creation,²⁹⁰ but it has been part of the American legal landscape since Chief Justice Marshall's landmark opinion in

²⁸⁵ See e.g., THE MARITIME CODES OF SPAIN AND PORTUGAL (F. W. Raikes trans., Aberdeen University Press 1896).

²⁸⁶ *Id.* at 138.

²⁸⁷ *Id.* at 14–15.

²⁸⁸ See *supra*, notes 217-257 and accompanying text (discussing the exceptions to flag state exclusive jurisdiction).

²⁸⁹ *Id.* The International Federation of Shipmasters' Associations (IFSMA) defines a master as the person in charge and having ultimate responsibility for the command of the vessel. The IFSMA is non-profit making organization that represents the interest of Shipmaster. Available at <http://www.ifsma.org/tempannounce/captain.html> (last visited Mar. 6, 2007).

²⁹⁰ See Jack Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. INT'L L. 639, 640 (2000).

The Paquete Habana.²⁹¹ In order for state practice to qualify as a norm of customary international law, two elements must be satisfied.²⁹² First, the norm must result from a general and consistent practice by states (state practice).²⁹³ In order to qualify as a general practice, the number of states is not controlling.²⁹⁴ Second, there must be evidence of opinio juris.²⁹⁵ Opinio juris occurs when there is proof that states comply with the customary norm out of a sense of legal obligation.²⁹⁶ As described by Judge Tanaka in the *North Sea Continental Shelf case*:

[t]o decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances.²⁹⁷

1. State Practice

Evidence of state practice can be derived from various sources to include public statements of government officials, military manuals, and actions by military commanders.²⁹⁸ In the case of the United States, the practice of

²⁹¹ *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.”).

²⁹² See *North Sea Continental Shelf (Federal Republic of Germany / Denmark / Netherlands)*, 1969 I.C.J. 3, 175 (1969) (Tanaka, J., dissenting). See also Churchill and Lowe, *supra* note 32, at 7.

²⁹³ See Restatement (Third), *supra* note 22, 102(2); Michelle M. Kundmueller, *The Application of Customary International Law in U.S. Courts: Custom, Convention, Or Pseudo-Legislation?* 28 J. LEGIS. 359, 361 (2002). See also, International Court of Justice Statute, *supra* note 22, art. 38 (stating that customary International Law is a source of international law).

²⁹⁴ KAROL WOLFKE, *CUSTOM PRESENT IN INTERNATIONAL LAW* 53 (3d rev. ed. 1993) (“An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.”). But see Kundmueller, *supra* note 295, at 362 (opining that in order to qualify as general practice, it must be general, although it does not need to be universal practice).

²⁹⁵ See Churchill and Lowe, *supra* note 32, at 7.

²⁹⁶ See Goldsmith & Posner, *supra* note 292, at 641.

²⁹⁷ See *supra* note 297 at 175-176 (citing *North Sea Continental Shelf Case (Germany v. The Netherlands/Denmark)* 1969 I.C.J. 175-176 (Tanaka, J., dissenting)).

²⁹⁸ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 176, 486 (indicating that military manuals are evidence of state practice); JEFFERY L. DUNOFF, ET AL., *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 79 (providing a non-exhaustive list of possible

requesting master's consent is clearly delineated in section 3.11.2.5.2 of the Commander's Handbook.²⁹⁹ The Commander's Handbook is an authoritative military publication that applies to naval operations of the United States Navy, United States Marine Corps and the United States Coast Guard.³⁰⁰ The Commander's Handbook is widely accepted in the international military community as a leading reference in naval operations.³⁰¹ Furthermore, additional guidance for seeking master's consent can be found in the United States Coast Guard Maritime Law Enforcement Manual (MLEM), another authoritative military/law enforcement source.³⁰²

The United States Department of State also affirms the Navy and Coast Guard's position on master's consent.³⁰³ In a September 15, 1990 telegram, the State Department stated:

Master's Consensual Boarding: Consent by the master of a foreign vessel to boarding by law enforcement officials of another state in international waters, for the purpose of gathering information. The master determines the scope, conduct and duration of the boarding. Flag state authorities are not contacted before the boarding. No enforcement jurisdiction, such as arrest or seizure, may be exercised during a consensual boarding of a foreign flag vessel without the permission of the flag state (whether or not the master consents), even if evidence of illegal activity is discovered.³⁰⁴

The State Department telegram is further evidence of the United States' view that consensual boarding is a general and consistent state practice. As discussed below, masters routinely give their consent, thereby providing additional support

sources of state practice: diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals, and actions by military commanders, treaties and executive agreements, decisions of international and national courts, declarations, and resolutions of international organizations).

²⁹⁹ See Commander's Handbook, *supra* note 15, at 3-12 - 3-13.

³⁰⁰ *Id.* (The Commander's Handbook sets out the fundamental principles of international and domestic law that govern U.S. Naval operations at sea. It applies to U.S. naval operations (Navy and Marine Corps) during time of peace and Part I complements the more definitive guidance on maritime law enforcement promulgated by the U.S. Coast Guard).

³⁰¹ See Guilfoyle, *supra* note 249, at 742 (indicating that 25 nations use the Commander's Handbook as their principal reference guide).

³⁰² Maritime Law Enforcement Manual, *supra* note 264, at para C.2.

³⁰³ See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1989-1990 449 (Margaret S. Pickering et al. eds., 2003) (containing documents produced and prepared under the auspices of the Office of Legal Adviser, Department of State).

³⁰⁴ *Id.*

for acceptance of the practice of master consent in the international maritime community.³⁰⁵

The practice of master's consent is not solely an American innovation. The right of a master to consent to the boarding of his ship on the high seas is recognized by at least nineteen states.³⁰⁶ Currently, nineteen states have entered into bilateral maritime counter-drugs and proliferation security initiative agreements with the United States in which each state has expressly recognized the right of a master to consent to boardings on the high seas.³⁰⁷ These nineteen states are: Antigua and Barbuda,³⁰⁸ Barbados,³⁰⁹ Belgium,³¹⁰ Belize,³¹¹ Costa Rica,³¹² Croatia,³¹³ Dominica,³¹⁴ Dominican Republic,³¹⁵ Grenada,³¹⁶ Guatemala,³¹⁷ Guyana,³¹⁸ Honduras,³¹⁹ Malta,³²⁰ Nicaragua,³²¹ Panama,³²² St. Kitts & Nevis,³²³ St. Lucia,³²⁴ St. Vincent and the Grenadines,³²⁵ Suriname,³²⁶ and Trinidad & Tobago.³²⁷ Six of these nineteen states, Panama, Malta, St. Vincent and the Grenadines, Antigua and Barbuda, Belize, and Honduras, as flag states collectively account for over fifty percent of world shipping fleet.³²⁸ Thus, although only nineteen of the one hundred and ninety-two United Nations

³⁰⁵ See *infra* notes 344–352 and accompanying text (discussing a United States Coast Guard master's consent operation).

³⁰⁶ U.S. Dep't of State, Office of the Legal Advisor, List of Treaties and Other International Agreements of the United States in Force on January 1, 2005 <http://www.state.gov/documents/organization/53678.pdf> (last visited on Mar. 4, 2007).

³⁰⁷ *Id.*

³⁰⁸ Agreement concerning maritime counter-drug operations, U.S.-Ant., Jun. 3, 1996.

³⁰⁹ Agreement concerning maritime counter-drug operations, U.S.-Bar., Jun. 25, 1997.

³¹⁰ Maritime Counter-Drug Operations LEDET MOU signed March 1, 2001.

³¹¹ Agreement concerning maritime counter-drug operations, U.S.-Bel., Dec. 23, 1992. See also T.I.A.S. No. 11914, 1992 WL 589726.

³¹² Agreement concerning maritime counter-drug operations, U.S.-C.R., Nov. 19, 1999.

³¹³ Agreement concerning maritime counter-drug operations, U.S.-Cro., Jun. 1, 2005.

³¹⁴ Agreement concerning maritime counter-drug operations, U.S.-Dom., Apr. 19, 1995.

³¹⁵ Agreement concerning maritime counter-drug operations, U.S.-D.R., Mar. 23, 1995. See also T.I.A.S. No. 12630, 1995 WL 1130042.

³¹⁶ Agreement concerning maritime counter-drug operations, U.S.-Gre., May 16, 1995.

³¹⁷ Agreement concerning maritime counter-drug operations, U.S.-Gua., Jun. 19, 2003.

³¹⁸ Agreement concerning maritime counter-drug operations, U.S.-Guy., Apr. 10, 2001.

³¹⁹ Agreement concerning maritime counter-drug operations, U.S.-Hon., Jan. 30, 2001.

³²⁰ Agreement concerning maritime counter-drug operations, U.S.-Mal., Jun. 1, 2001.

³²¹ Agreement concerning maritime counter-drug operations, U.S.-Nic., Nov. 15, 2001.

³²² Agreement concerning maritime counter-drug operations, U.S.-Pan., Feb. 5, 2002.

³²³ Agreement concerning maritime counter-drug operations, U.S.-St. K., Apr. 13, 1995.

³²⁴ Agreement concerning maritime counter-drug operations, U.S.-St. L., Apr. 20, 1995.

³²⁵ Agreement concerning maritime counter-drug operations, U.S.-St. V., Jun. 4, 1995. See also T.I.A.S. No. 12676, 1995 WL 1565281.

³²⁶ Agreement concerning maritime counter-drug operations, U.S.-Sur., Aug. 26, 1999.

³²⁷ Agreement concerning maritime counter-drug operations, U.S.-Trin., Mar. 4, 1996.

³²⁸ See Liberian International Ship & Corporate Registry (LISCR) Vessel Registration web site, *supra* note 120 (referring to the amount by gross tonnage).

member states recognize the right of a master to consent to boardings on the high, these nineteen states (twenty including the United States), as flag states, are home to the majority of the world shipping fleet.³²⁹

Paragraph 9 in the bilateral agreement between the United States and Belize is replicated in the other eighteen agreements. It provides:

Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels conducted by either party seaward of any nation's territorial sea, whether based on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, *the consent of the vessel master, or an authorization from the flag state to take law enforcement action.*³³⁰

Paragraph 9 explicitly states that the agreement does not apply to a boarding based upon the consent of a master. This should be distinguished from a prospective flag state consent, such as the PSI boarding agreements, where consent is presumed if there is no response from the flag state within a certain time period.³³¹ The reference to master's consent in the nineteen bilateral agreements merely preserves the parties' position on that issue.³³² The agreements make it clear that boardings premised upon master's consent are outside the four corners of the document. To hold otherwise would be inconsistent with positions of the State Department,³³³ the Navy, the Coast Guard, and the nineteen bilateral agreements.³³⁴ It is reasonable to conclude that the nineteen bilateral agreements would not have mentioned the master's consent principle if the states that entered into them did not believe the principle existed. It is highly unlikely that states would arbitrarily enter into international agreements without fully understanding the implications of their decision.³³⁵

The German Navy's position is additional evidence of the general practice of master's consent.³³⁶ During a speech at the Fifth Regional Sea power Symposium in Venice, Italy in October 2004, Vice Admiral Lutz Feldt,

³²⁹ *Id.* Because most of the nineteen states can be characterized as developing states (with the exception of Belgium and Malta), critics may argue that the agreements merely reflect a hegemonic relationship, and that the United States is using its economic and military strength to imposed a desired outcome. See generally JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 199-200 (2006).

³³⁰ See *supra* note 313 (emphasis added).

³³¹ See, e.g., Becker, *supra* note 37, at 162.

³³² See *supra* notes 305-306 and accompanying text.

³³³ *Id.*

³³⁴ See *supra* notes 260-261 and accompanying text.

³³⁵ See Murphy, *supra* note 47, at 154; See also Alvarez, *supra* note 331, at 588.

³³⁶ Lutz Feldt, *Proliferation Security Initiative (PSI): Instrument For The Evolution of International Law Of The Sea*, NAVAL FORCES, Jan. 1, 2005, at 1-4, available at 2005 WLNR 6584881.

then, the German Navy Chief of Staff indicated that although the issue of master's express consent is not well-settled in international law, in order to board a non-German merchant ship on the high seas, a German warship requires the consent of the ship owners, shipping authorities or the master.³³⁷ He, however, left open the question whether master's consent to boarding would encroach on the rights of the flag state.³³⁸ For this reason, he recommended entering into bilateral agreements with the main shipping states to facilitate interdiction on the high seas.³³⁹ The fact that Vice Admiral Feldt recommends the use of bi-lateral boarding agreements does not defeat the fact that the German Navy believes a master has the authority to give consent.³⁴⁰

While the above discussion provides credible evidence of a general practice of master's consent by states with the most registered ships, it falls short of meeting the uniform and consistent practice threshold necessary to become a customary norm of international law.³⁴¹ However, for the nineteen states mentioned, there is ample evidence to support the notion that master's consent has matured into a general and consistent practice among those states.

2. The Doctrine of Opinio Juris

As described below, the United States, through the Coast Guard, routinely requests and receives master's consent to board foreign flag vessels.³⁴² In July 1966, at the Twentieth Annual Meeting of the Law of the Sea Institute held at the University of Miami Law School, a distinguished panel of law of the sea experts gathered to discuss interdiction at sea.³⁴³ At that conference, Commander Andrew W. Anderson, an active duty United States Coast Guard

³³⁷ *Id.* (While showing the picture of a dhow off the Horn of Africa, VADM Lutz stated, "[t]o be able to stop and inspect this Dhow, German Combat Support Ship FGS Frankfurt am Main would need the consent of the ship owners, shipping authorities or the [master] of this suspected vessel because it is obviously not flying a German Flag.") (internal quotes omitted).

³³⁸ *Id.* at 4.

³³⁹ *Id.* at 6.

³⁴⁰ *Id.* at 4.

³⁴¹ See also Goldsmith & Posner, *supra* note 292, at 641 (In order to satisfy the customary international law first prong, the practice must be a widespread and uniform practice among states).

³⁴² See, e.g., *United States v. Greene*, 671 F.2d 46, 49 (1st Cir 1982) (The Coast Guard was tracking a British flag vessel in international waters under suspicion of drug smuggling. It was only after the Coast Guard commander requested permission to board and the master refused, did the Coast Guard request and obtain permission from the British government).

³⁴³ The Panel included Professor Louis Sohn, Professor, Irwin Stotzy, Professor, Stefan Riesenfeld, Professor Jonathan Charney, and Professor Thomas A. Clingan. See *THE LAW OF THE SEA: WHAT LIES AHEAD?* 3–10 (Thomas A. Clingan, Jr. ed., 1986).

officer and former commanding officer of a Coast Guard cutter, gave a presentation on maritime interdiction operations.³⁴⁴

In describing a typical interdiction operation on the high seas he explained that if the target ship is not a United States flagged ship the first step is to seek the master's consent for a voluntary boarding.³⁴⁵ He added that "[i]t is the position of the Coast Guard that [a master's] consent boarding is not violative of international law since the master may voluntarily waive his right to proceed without interference and allow the Coast Guard to come aboard."³⁴⁶ The Coast Guard's basis for master's consent is grounded in the United States' recognition that as a matter of customary international law, a master has complete authority over all activities onboard his ship, which includes the discretion to invite anyone to come aboard.³⁴⁷ Commander Anderson further explains that the scope of the boarding and inspection is limited by terms laid out by the master.³⁴⁸ In other words, the master determines the scope, conduct and duration of the boarding.³⁴⁹ In fact, Commander Anderson relates that "[i]n practice, the vast majority of masters readily consent to such boardings, sometimes placing conditions on the boarding such as continuing to proceed on their voyage while the boarding is in progress."³⁵⁰

Legal commentators in the international law field also recognize the principle of master's consent.³⁵¹ According to Professor Louis Henkin, the Chief Reporter of the Restatement (Third) of the Foreign Relations Law of the United States, a master has the right to invite anyone to come aboard the ship as his guest, including foreign law enforcement personnel.³⁵² Another legal commentator, Mark R. Shulman, has likewise opined that in addition to the flag state, the master as well as the ship's owner has the authority to consent to board by foreign warships on the high seas.³⁵³

³⁴⁴ See Anderson, *supra* note 204, at 11. (Commander Anderson was the commanding officer of the USCG cutter *DAUNTELESS* and was heavily involved in interdiction operations in the Caribbean Sea).

³⁴⁵ *Id.* at 32.

³⁴⁶ *Id.*

³⁴⁷ See Maritime Law Enforcement Manual, *supra* note 306, at para. C.2.

³⁴⁸ *Id.*

³⁴⁹ See, e.g., Commander's Handbook, *supra* note 15, at para. 3.11.2.5.2 ("The scope and duration of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion.").

³⁵⁰ See Anderson, *supra* note 204, at 11.

³⁵¹ The teachings of experts in the legal field are secondary sources in the interpretation of international law. See International Court of Justice Statute, *supra* note 22, art. 38.

³⁵² See Restatement (Third), *supra* note 22, § 522, cmt. e, rn. 4 (Modern practice accepts the right of master to consent to foreign flag boarding in drug trafficking cases).

³⁵³ See Shulman, *supra* note 72, at 809 ("There are notable exceptions to the general rule of freedom of navigation. First of all, the [master] or the owner of a ship can waive it. There may be instances

The above analysis demonstrates that the United States' actions in seeking master's consent satisfy the *opinio juris* prong.³⁵⁴ However, the difficulty lies in establishing whether other states also act in conformity with the master consent principle.³⁵⁵ As argued above in Part V(B)(1), the nineteen states that acknowledge the right of master's consent in the bilateral agreements with the United States arguably have demonstrated a willingness to be bound by the terms, thus demonstrating *opinio juris*. The counter argument is that nineteen states (twenty when including the United States) only represent ten percent of the member states of the United Nations and are insufficient to bind the other ninety percent.³⁵⁶

Notwithstanding these hurdles, the practice of requesting and receiving master's consent is a general and consistent practice by a significant amount of interested states. The practice of obtaining master's consent is also sufficiently ripe to justify at least a presumption that a master's consent has been accepted by other interested states as an expression of law.³⁵⁷

C. Master's Consent - LOSC Article 110

Consensual boarding on the high seas is a ratification of the long-recognized authority under international law of a master to invite anyone to visit the ship, subject to conditions he may impose. As discussed in Part IV *supra*, LOSC Article 110³⁵⁸ lists the codified grounds for visit and approach.³⁵⁹ While

when that permission could be secured; for instances, when the boarding party notifies the owner or [master] that the ship is suspected of carrying contraband.”)

³⁵⁴ See Goldsmith & Posner, *supra* note 292, at 641.

³⁵⁵ See *id.*

³⁵⁶ But see Wolfke, *supra* note 296, at 53 (asserting that to qualify as a general practice, the number of states is not controlling).

³⁵⁷ See *id.*; Kundmueller, *supra* note 295, at 216.

³⁵⁸ Article 110 (Right of visit)

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
 - (a) the ship is engaged in piracy;
 - (b) the ship is engaged in the slave trade;
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
 - (d) the ship is without nationality; or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

it is a correct statement that LOSC Article 110 does not list a master's consent as a justification for boarding a foreign flagged merchant ship, it is also equally accurate to state that neither LOSC Article 110 nor any positive international law expressly prohibits military warships or law enforcement officials from relying solely on a master's consent when conducting a search.³⁶⁰

While there is no clear positive rule under international law that prohibits master's consent, the general consensus among legal scholars is that the flag state, exercising its authority under LOSC Article 92, may prohibit the master from giving such consent.³⁶¹ Professor H. A. Smith writes that the breadth of the flag state's exclusive jurisdiction governs all acts on board the ship.³⁶² McDougal and Burke do not go as far as Professor Smith, but suggest it is unquestioned that the state is responsible for a ship's conformity with international law and may control its movement and activities pursuant to community obligations and national policies.³⁶³

An example of this principle is illustrated by the 1917 British case of *Furness, Withy & Co. v. Rederiaktiebolaget Banco*.³⁶⁴ In *Rederiaktiebolaget Banco*, the steamship *Zamora*, registered in Sweden and flying a Swedish flag, was chartered by a British entity to transport goods between the United Kingdom and several ports outside of the Kingdom of Sweden.³⁶⁵ While the *Zamora* was in Cardiff, United Kingdom, Sweden passed an emergency legislation preventing its flagged ships from transporting goods and cargo

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

LOSC, *supra* note 21, Article 110.

³⁵⁹ See *supra* notes 208-230 and accompanying text.

³⁶⁰ LOSC, *supra* note 21, Art. 110.

³⁶¹ See Smith, *supra* note 66, at 46; 2 Colombos, *supra* note 225, at 297.

³⁶² See Smith, *supra* note 66, at 46.

³⁶³ McDougal & Burke, *supra* note 70, at 1066.

³⁶⁴ *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, 2 K.B. 873 (1917).

³⁶⁵ *Id.* (The trading destinations included ports in Sicily, Africa, and North and South America).

outside of the Swedish Kingdom.³⁶⁶ As a result of the emergency legislation, the master refused to transport his cargo from Cardiff to Genoa, Italy.³⁶⁷ A suit ensued for a breach of contract. The Court dismissed the suit and held that the master was duty bound to obey the rules and regulations of the flag state, even if it means violating his contract obligations.³⁶⁸

Therefore, if the flag state has a rule prohibiting master's consent, then the master is obligated to comply.³⁶⁹ However, in the absence of such directive, there is nothing that prohibits the master from consenting to the boarding and searching of his ship.

Relying on LOSC Article 110 as a basis to argue against master's consent is misplaced. A master's consent does not depend on any of the exceptions enumerated in LOSC Article 110. A foreign warship on the high seas does not need the master's consent to approach and request verification of the ship's nationality.³⁷⁰ The foreign warship would, however, need the master's consent to conduct a search, unless there is reasonable suspicion that the ship is engaged in piracy, the slave trade, unauthorized broadcasting, without nationality, or though flying a foreign flag, or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.³⁷¹ Therefore, a warship under customary international law may approach a merchant ship on the high seas for the sole purpose of checking nationality.³⁷² The warship does not need to satisfy any of the LOSC Article 110 five specified circumstances in order to approach a foreign flagged merchant ship.³⁷³

Critics of the master's consent policy argue that LOSC Article 110 is an all-inclusive provision; therefore, if a boarding circumstance is not listed or made pursuant to a treaty, it is expressly prohibited.³⁷⁴ In support of their

³⁶⁶ *Id.* at 874 (Violations of the Swedish emergency statute subjected the *Zamora*'s master and owner to criminal penalties).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 877.

³⁶⁹ See *supra* notes 200-203 and accompanying text.

³⁷⁰ See Odeke, *supra* note 102, at 659.

³⁷¹ See LOSC, *supra* note 21, Art. 110; *supra* notes 101-127 and accompanying text.

³⁷² See *supra* notes 225-230 and accompanying text.

³⁷³ *Id.*

³⁷⁴ This is the view shared by the British Government and the reason for not recognizing the right of master's consent. E-mail from Commander Bob Wood, Directorate of Naval Legal Services, United Kingdom, Minister of Defense, to Commander David G. Wilson, LLM candidate, The George Washington University School of Law (Jan. 23, 2007, 12:14:30 EST) (on file with author) (Boardings must be based on one of the circumstances listed in article 110 or pursuant to a treaty as provided for in article 110. The Narcotic boarding agreement between the United States and the United Kingdom (T.I.A.S. No. 10286) is an example of an agreement envisioned by article 110). See also Clingan, *supra* note 23 at 61 ("Note that [article 110] does not refer to ships carrying illegal

argument, the critics point to the LOSC negotiations where there was an attempt to add narcotics smuggling as a sixth basis for boarding, but a number of states resisted.³⁷⁵ Instead, a compromise was reached and LOSC Article 108 now requires flag state consent if a foreign flagged ship on the high seas is suspected of engaging in narcotics smuggling.³⁷⁶ Another argument is that subsequent treaties, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 Protocol, in particular, do not contain a provision on master's consent.³⁷⁷

These arguments are not persuasive for a number of reasons. First, both the SUA and Narcotics Smuggling conventions are focused on the actual boardings. Under customary international law and LOSC Article 110, a foreign warship is prohibited without flag consent from boarding a merchant ship, even where there is reasonable grounds to believe that the merchant ship is engaged in acts violating either of the above two conventions.³⁷⁸ However, nothing prevents the warship from approaching the merchant vessel to verify its nationality.³⁷⁹ The right to approach and verify a ship's nationality or *enquête ou verification du pavillon* is firmly rooted in international law texts.³⁸⁰

Second, the customary right to approach a ship on high seas to verify nationality has not been superseded by LOSC Article 110.³⁸¹ The customary right to verify a ship's nationality is separate and distinct from the right to board and search based on the LOSC Article 110 criteria.³⁸² There is a split of legal

narcotic drugs. Thus, if boarding is to be carried out on the high seas, it must be done with the consent of the flag State . . .").

³⁷⁵ Clingan, *supra* note 23 at 61.

³⁷⁶ *Id.*; LOSC, *supra* note 21, article 108. Consistent with LOSC Article 108, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires flag consent in order to board a suspected drug smuggler on the high seas. See UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances available at http://www.unodc.org/pdf/convention_1988_en.pdf (last visited Mar. 8, 2007).

³⁷⁷ Commander Wood E-mail, *supra* note 376. Similar to the Convention Against Illicit Traffic in Narcotic Drugs, the SUA 2005 Protocol requires consent of the flag state. See International Maritime Organization, LEG/CONF. 15/21, Nov. 1, 2005.

³⁷⁸ Professor O'Connell explains that it is a fundamental principle of international law that the peacetime interference by a warship with a foreign ship while sailing on the high seas constitutes a violation of flag state's sovereignty. See 2 O'Connell, *supra* note 82, at 808.

³⁷⁹ *Marianna Floria*, *supra* note 226, at 49.

³⁸⁰ See 2 O'Connell, *supra* note 82, at 802. See also 4 Whiteman, *supra* note 29, at 667-668 (In December 1960, the Soviet Union lodged a complaint with the United States Secretary of State alleging a United States warship violated the principle of freedom of navigation when it approached a Soviet merchant ship on the high seas. The United States responded stating in part that "[i]t is common practice for ships moving in international waters to establish mutual identification.").

³⁸¹ See *supra* notes 225-230 and accompanying text.

³⁸² But see Louis B. Sohn, *International Law of the Sea and Human Rights, The Law of the Sea: What Lies Ahead?* 56 - 57 (Thomas A. Clingan, Jr. ed., 1986). Professor Sohn was skeptical of the United States' policy of boarding based on master's consent, which he viewed as a pretext. He

opinion whether there is a customary international law right of “approach and visit.”³⁸³

Some legal scholars are of the opinion that in the absence of a treaty, there is no right to “approach and visit,” because such a right is contrary to the freedom of the seas and the principle of exclusive flag state authority.³⁸⁴ The other group of legal scholars believes that the absence of an international police force on the high seas justifies the right of approach for the purpose of verifying a ship’s nationality.³⁸⁵ Dupuy and Vignes seem to fall within the first group.³⁸⁶ Other international law experts such as Marjorie M. Whiteman and Professor H. A. Smith write that right of “approach and visit” is reflective of customary international law.³⁸⁷

Finally, the Reporters note to section 522 of the Restatement (Third) of the Foreign Relations Law of the United States validates the customary practice of master’s consent.³⁸⁸ The Restatement makes clear that master’s consent is acceptable as the modern practice of states.³⁸⁹

D. Master’s Consent Based Upon Analogy with LOSC Article 27

Additional support demonstrating the historical and inherent authority of a master is found in LOSC Article 27.³⁹⁰ Although Article 27 addresses the coastal state’s criminal jurisdiction over foreign merchant ships exercising the

thought the practice gave leeway to other nations such as Cuba to board U.S.-flagged vessels (“those who have sown the wind, shall reap the whirlwind.”). Additionally, he argued that LOSC Article 110 was meant to reduce the fears of ship owners and mariners that they would be unduly interfered with by foreign warships. Citing the 1956 discussion by the ILC, he pointed out that the Commission’s “major concern was that freedom of navigation should be interfered to the minimum extent possible and that the rights of the vessel’s and the cargo’s owners and of the captain and the crew have to be respected to the maximum extent possible.” See also Rachel Canty, *Limits of Coast Guard Authority To Board Foreign Flag Vessel on the High Seas*, 23 TUL. MAR. L.J. 123, 131 (1998)(Although the author does comment on master’s consent, she makes a similar point raised by Professor Sohn, that if the United States conducts boardings without flag consent, it will be hard pressed to complain if another nation follows suit).

³⁸³ See 1 Dupuy & Vignes, *supra* note 251, at 420.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 420-421 (believing that both Article 22 of the Convention on the High Seas and LOSC Article 110 are the legal basis for the right of “approach and visit”).

³⁸⁷ See 4 Whiteman, *supra* note 29, at 667; Smith, *supra* note 66, at 47. See also 2 O’Connell, *supra* note 84, at 802.

³⁸⁸ Restatement (Third), *supra* note 22, § 522, cmt. e, rn. 4.

³⁸⁹ *Id.*

³⁹⁰ See LOSC, *supra* note 21, Article 27; Sandra L. Hodgkinson, et al., *supra* note 14, at 593 (suggesting that LOSC Article 27 provides a potential basis to support the master’s ability to consent to the boarding and searching of his ship).

right of innocent passage,³⁹¹ it provides tangible support that the Law of the Sea Convention recognizes the historical inherent authority of a master.³⁹²

Article 27(1) provides that a coastal state should not exercise its criminal jurisdiction for crimes committed on board a merchant ship while it is traversing through the coastal state's territorial sea; however, Article 27(1)(c) allows the coastal state to exercise its criminal jurisdiction if assistance is requested by the ship's master.³⁹³ The most striking part of Article 27 is the provision in subparagraph three. Under Article 27(3), the master is not required to first seek the consent of the flag state before requesting the assistance of the coastal state.³⁹⁴

Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone³⁹⁵ was the precursor to LOSC Article 27(1).³⁹⁶ Its provision was adopted entirely into LOSC Article 110, with one slight modification.³⁹⁷ Both articles support the views articulated in Part V (A) that a ship's master has inherent authority to consent to activities involving a ship under his command without first seeking the consent of the flag state.³⁹⁸ If the master is authorized to request assistance involving boarding by the coastal state while in the coastal state's territorial sea, it is both reasonable and logical that the master, similarly,

³⁹¹ In its simplest meaning, the term innocent passage refers to the movement of vessels through a state's territorial waters. See LOSC, *supra* note 21, Art. 21.

³⁹² Article 27(1) reads:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

LOSC, *supra* note 21, Art. 27(1).

³⁹³ *Id.*

³⁹⁴ LOSC, *supra* note 21, Art. 27(3). See also, Sandra L. Hodgkinson, et al., *supra* note 14, at 594.

³⁹⁵ Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 19, *supra* note 20.

³⁹⁶ See 2 O'Connell, *supra* note 84, at 957.

³⁹⁷ *Id.* (Article 27(1) added subparagraph (d), which was not included in the previous Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone).

³⁹⁸ This further indicates the historical authority of the master and the confidence that was placed upon him. See also, Sandra L. Hodgkinson, et al., *supra* note 14, at 593-594.

should be empowered when the ship is on the high seas to consent to the boarding of his ship by non-flag state personnel.³⁹⁹

VI. CONCLUSION

The master's inherent authority to voluntarily consent to the boarding and searching of his ship is predicated on a plethora of documented historical customs and practices dating back to the fifteenth century.

The master's consensual authority is also reflected in several Bilateral Maritime Counter-Drug Operations and Proliferation Security Initiative agreements between the United States and nineteen other coastal states. These agreements constitute compelling evidence of the recognition that a master has the authority to invite guests onboard his ship, regardless of whether the invited guests are private individuals or official representatives of foreign governments.

The United Kingdom's view that a master's consent is violative of LOSC Article 110 is against the prevailing weight of opinion. Master's consent is grounded in the customary norms of mariners and there is no evidence that LOSC Article 110 was meant to overrule that custom.

The paper illustrates that while flags of convenience provide some amount of economic benefits, they do so at the expense of the security of the world community by advancing the cause of international terrorists. However, the loose regulations and lax oversight by flag of convenience states also highlight the critical role of the master because of the increased responsibility that he has to assume in the absence of a detached flag state. The masters and ship owners, not the flag states, are the ones most interested in ensuring that their ships are not used to transport illicit drugs, terrorists, or any instrumentalities of terrorism. This increased responsibility, by default, further contributes to the master's inherent authority over the operation of the ship, thereby lending further support for his authority to voluntarily consent to searches.

The United States should continue its practice of seeking master's consent on the high seas; however, because consent is at the master's discretion, the prudent course of action is to follow Vice Admiral Feldt's recommendation and negotiate bilateral boarding agreements.

³⁹⁹ *See Id.*

THE MILITARY COMMISSIONS ACT OF 2006: AN UNNECESSARY SCHEME FOR SECOND- CLASS JUSTICE OR AN ESSENTIAL MEANS TO PROSECUTE PERSONS WHO OTHERWISE WOULD ESCAPE ACCOUNTABILITY?

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INTRODUCTION

The Military Commissions Act of 2006 (MCA),¹ is an extraordinary development in the American judicial system. Prosecutions of criminal acts have, throughout this nation's history, proceeded almost exclusively under two systems. First, the civilian criminal justice system, with civilian judges, lay juries, and the panoply of constitutional protections afforded defendants, have served as the forum for most prosecutions.² Second, prosecutions of members of the Armed Forces proceeded in courts-martial under the Uniform Code of Military Justice (UCMJ).³ The third path, rarely seen but evident during times of war or post-war occupation of territory, is trial by military commissions. During major wars such as the Revolutionary War, the Civil War, and World War II, the United States employed military commissions on an ad hoc basis.⁴

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¹ Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a-950j (2006)).

² The civilian (Article III) criminal justice system has, as its source, not only the U.S. Constitution, especially the Bill of Rights, but also a plethora of statutes – most of which are in Title 18 of the United States Code but others of which are scattered in other titles of the Code – and in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

³ Uniform Code of Military Justice, 10 U.S.C. §§ 801-948 (2006).

⁴ See A.B.A. Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions (2002), available at <http://www.abanet.org/leadership/military.pdf>.

These trials proceeded under rules promulgated by the military authority holding the accused.⁵ The protections guaranteed an accused in a prosecution in the civilian (Article III) system exceed those afforded in military commissions trials.

One need only review the most celebrated American military commission proceedings of the past century to see that such a comparison is, if anything, an understatement. In World War II, eight accused Nazi saboteurs caught on American soil after landing in submarines; they were accused of capital crimes, tried before military commissions in Washington, D.C., and six of the eight were executed within eight months of landing on American soil. The trials proceeded under an executive order entered by President Franklin Roosevelt – an order that, in its entirety, contained three paragraphs.⁶ Of those three paragraphs, only *one* paragraph addressed the procedures to be followed and that paragraph is thin by anyone’s standards.⁷

At the time of these prosecutions in World War II, Congress had not seen fit to enact procedures for prosecutions by military commissions. Its constitutional authority for doing so was and still is undeniable. Congress has relied on its Article I, Section 8 authority to create rules for prosecution of members of the U.S. Armed Forces.⁸ In delegating broad powers not only in matters of war but also to define the crimes and procedures for those prosecuted for violations of the laws of war, the Framers deemed Congress the most effective check on the executive branch.⁹ The delegated power “[t]o define and

⁵ See David Glazier, *Kangaroo Court or Competent Tribunal? Judging the Twenty-First Century Military Tribunal*, 89 VA. L. REV. 2005, 2023-2073 (2005). See also Harold Wayne Elliott, *The Trial and Punishment of War Criminals: Neglected Tools in the “New World Order?”* (1998) (unpublished Doctor of Juridical Science dissertation available at University of Virginia Law Library).

⁶ See Executive Order No. 74, (July 2, 1942), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16280> (last visited Jan. 1, 2008).

⁷ The one paragraph outlining the procedures by which the eight accused were to be tried, in its entirety, follows:

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction or sentence. The record of the trial including any judgment or sentence shall be transmitted directly to me for my action thereon.

⁸ The first set of rules for courts-martial of members of the U.S. Armed Forces were referred to as the “Articles of War,” 10 U.S.C. §§1471-1593 (repealed 1949). The Articles of War were later reenacted as the Uniform Code of Military Justice (UMCJ), 10 U.S.C. § 801 et seq.

⁹ The classic statement of the jointly shared powers of the President and the Congress in matters of national security is Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). In a case addressing the President’s

punish piracies and felonies committed on the high seas and offences against the law of nations,”¹⁰ leaves no doubt about Congress’ role extending beyond regulation of proceedings involving U.S. armed forces to those accused of war crimes.¹¹

In the MCA, Congress for the first time took on the job of enacting detailed procedures for the trial of those not in the U.S. armed forces charged with crimes against the laws of war.¹² Apparently in return for enacting more robust procedural protections for accused, the MCA precludes jurisdiction in U.S. District Court of habeas corpus petitions by persons charged under the Act.¹³ The MCA nevertheless provides for review of any military commission verdict first by the United States Court of Appeals for the District of Columbia Circuit and ultimately by the Supreme Court.¹⁴ On June 29, 2007, the Supreme Court vacated a previous order denying certiorari from a circuit court decision that had upheld the constitutionality of the MCA’s provisions removing habeas jurisdiction in district courts.¹⁵ Deciding to grant certiorari, the Court will thus hear the challenges of Guantanamo Bay detainees that the MCA’s provisions removing jurisdiction to bring habeas corpus petitions in U.S. District courts are unconstitutional.¹⁶

Those philosophically opposed to the MCA should not be too encouraged by this grant of certiorari. Even if the MCA’s provisions regarding habeas were ruled unconstitutional, the decision would not invalidate the MCA or military

power to create military tribunals absent congressional authorization, the Court characterized Congress’ powers in this arena as broader and capable of circumscribing the President’s. *Madsen v. Kinsella*, 343 U.S. 341, 348-54 (1952).

¹⁰ U.S. CONST. art. I, § 8.

¹¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823-24 (2006).

¹² In the Articles of War (later to become the UCMJ), Congress referred to military commissions and implicitly recognized their authority. Indeed, the Supreme Court in *Ex Parte Quirin*, 317 U.S. 1, 26-37 (1942) – the celebrated case involving military commission trials of the Nazi saboteurs in which six of the eight were convicted and executed for violating war crimes, while the two others were sentenced to life imprisonment – relied on the Articles of War as implicit authorization for trials by military commission. The recent decision in *Hamdan*, however, cast doubt on this World War II decision when referring to “*Quirin’s* controversial characterization of Article of War 15 as congressional authorization for military commissions.” 126 S. Ct. at 2774. The Court clearly suggested (1) that it was reading *Quirin* as, at best, finding implicit authorization for military commissions, and (2) that the Court believed the clear congressional authorization was required to justify military commission trials of those captured since the 9/11 attacks unless they were charged with an offense clearly punishable as such under the common law of war. See *id.* at 2774-87.

¹³ See 10 U.S.C. § 7(a)(1) & (b)(2006).

¹⁴ See Rule 1205(a) & (b) of the Rules for Military Commission adopted by the Secretary of Defense pursuant to 10 U.S.C. § 948(2006).

¹⁵ *Boumediene v. Bush*, 127 S. Ct. 3078 (Jun. 29, 2007)(mem.).

¹⁶ See *id.* By a divided panel, the D. C. Circuit held that the MCA’s removal of habeas jurisdiction in U.S. District courts was not unconstitutional. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

commissions as a means of trying persons accused of violating the laws of war. Habeas corpus challenges to military commission proceedings are nothing new. Indeed, most Supreme Court precedent on the constitutionality of military commission proceedings grew out of habeas petitions.¹⁷ Thus, if the MCA provisions removing habeas challenges in district courts were changed, the only effect should be that constitutional questions could reach the Supreme Court by the habeas route as well as by appeal from verdicts under MCA proceedings. Either way, the propriety of trying someone accused of violating the laws of war in a military commission is well established. Indeed, the Supreme Court's recent decision in *Hamdan v. Rumsfeld*¹⁸ recognized the validity of charging and trying persons by military commissions. *Hamdan* merely held that someone tried by military commission (outside of battlefield conditions) must either be charged with an offense traditionally recognized as an offense triable by military commission, or pursuant to clear congressional authorization.¹⁹ The MCA has since provided such clear congressional authorization, pursuant to Article I, Section 8 of the Constitution.

After the initial challenges to the MCA and military commission procedure are done, there will be trials before military commissions so long as the government can legitimately claim that an accused is an "enemy combatant." Indeed, the MCA only grants jurisdiction for military commissions when an accused has been charged as an enemy combatant.²⁰ If someone is so charged, that means he or she has allegedly violated the laws of war.²¹ The case for

¹⁷ See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942) (reviewing by means of habeas petitions challenges by persons charged as enemy combatants and tried by military commissions, and upholding constitutionality of such proceedings); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (reviewing by means of habeas petition civilian's challenge to conviction before a military commission in post-War occupied Germany and upholding the constitutionality of the proceedings).

¹⁸ 126 S. Ct. 2749, 2823-24 (2006).

¹⁹ See *id.* at 2773-2781; see also Thomas M. Gore, *Commission Control: The Court's Narrow Holding in Hamdan v. Rumsfeld Spurred Congressional Action But Left Many Questions Unanswered. So What Happens Now?*, 58 MERCER L. REV. 741 (Winter 2007).

²⁰ Rules 101 & 202 of the Rules for Military Commission.

²¹ Under the laws of war, one who is a legal combatant may not be punished for the act of fighting on behalf of the nation-state with which it is identified. This principle is memorialized in the Fourth Geneva Convention on Treatment of Prisoners of War, art. 4, Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 of this Convention provides four factors that must be satisfied for someone to qualify as a legal combatant:

1. The person must be commanded by a person responsible for his subordinates;
2. The person must have a fixed distinctive sign recognizable at a distance;
3. The person must be carrying arms openly; and
4. The person must be conducting their operations within the laws and customs of war.

Id.

which the Supreme Court granted certiorari is one in which the accused are claiming that the means by which they are classified as enemy combatants is unconstitutional.²² Ultimately, the means by which accused are classified may have to be modified, but that will not prevent prosecution by military commissions under the MCA.

As the author has contended in another article, the notion that enemy combatants have the panoply of constitutional rights accorded a typical accused is misplaced.²³ Nevertheless, Congress needs to ensure that the judicial system in which such persons are tried is a fair one.²⁴ Even though enemy combatants may forfeit the “premium” rights to which even aliens accused of crimes are entitled in Article III courts, the fathers of international law such as Hugo Grotius recognized certain “laws of Nature” to which every human being lays claim.²⁵ In the case of enemy combatants, however, the Constitution places Congress in the role as the “check” on the Executive – a role it exercises primarily by exercising its Article I power to define the procedures for trying such persons.²⁶ For instance, the author contends that the composition of tribunals – especially where charges carry the death penalty – could be improved by including some civilian representation.²⁷ Indeed, prior to the adoption of the MCA, the Executive had appointed civilians to serve on review panels.²⁸ Nevertheless, the author freely admits that such procedures are not constitutionally mandated.²⁹ To the extent Congress adopts them, it would be on the basis that the principle of having a buffer between the prosecutor and the accused – especially in capital cases – is a one consistent with transcendent principles of justice.³⁰

Conversely, one fighting who does not satisfy the above criteria falls into the category of “illegal combatant” and is not entitled to the protections of the Geneva Convention. Joseph P. Bialke, *Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004). In this category, those accused of war crimes do not qualify for the protections afforded aliens charged with domestic crimes in the U.S. or to the protections afforded prisoners of war under the Geneva Convention. *See generally id.*

²² *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (mem.).

²³ Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the Constitution*, 17 U. FLA. J.L. & PUB. POL’Y 347 (2006).

²⁴ *See id.*

²⁵ *See id.* at notes 426-438 and accompanying text.

²⁶ *See id.* at notes 95-202 and accompanying text.

²⁷ *See id.*

²⁸ The civilians were, however, appointed pursuant to a statute that permits the President to appoint civilians as military officers during national emergencies. *See id.* at 354 nn. 11 & 12 and accompanying text (citing 10 U.S.C. § 603).

²⁹ *See Madison, supra* note 23, at 466-468 and accompanying text.

³⁰ *See id.* at notes 452-572 and accompanying text.

With the adoption of the MCA, we thus now have a third system in which to bring persons to trial for serious crimes – one with its own thorough set of procedures and rules. The MCA includes many procedures duplicating those available to an accused in the civilian (Article III) system and in courts-martial.³¹ As explained above, the author has identified a potential (though not Constitutionally mandated) improvement in the composition of the tribunals.³² Nevertheless, this Article has a different purpose. Recognizing that the MCA like any new statute may require some modifications, the question explored here is whether the MCA is an important – perhaps crucial – means for ensuring justice in the modern world. The focus is on the kind of prosecutions that will typically be the subject of military commission proceedings – ones in which classified information will form part of the necessary proof, and in which testimony will derive from intelligence operatives. Working for the United States and other countries cooperating in combating terrorism, these operatives' lives will be endangered if the system cannot ensure adequate protection of their identity. Beyond the lives of these persons, the national security implications of classified information leaking out of a proceeding may otherwise result in the government's choice to forego prosecution rather than take risks with such weighty consequences.

An example may help to illustrate this point. The U.S. has captured and is holding Khalid Sheik Mohammed, widely regarded as the mastermind of the September 11 attacks.³³ Assume that the government charges Mohammed with capital crimes arising from planning and carrying out the 9/11 attacks resulting in the deaths of thousands of innocent persons. Let us also presume that witnesses to Mohammed's participation in the attack are operatives in countries other than the U.S. and its allies. Proving a case against this defendant will clearly hinge on classified evidence. For reasons explained below, prosecution of such a case may well be difficult, if not impossible, in

³¹ See 10 U.S.C. § 948k (requiring well qualified defense counsel); *id.* § 948l (providing for reporters and interpreters); *id.* § 948q (requiring charging documents); *id.* § 948r (prohibiting self-incrimination and excluding statements obtained by prohibited interrogation techniques); *id.* § 949a (placing limits on use of hearsay greater than those typical in military tribunal proceedings); *id.* § 949d (limiting exclusion of accused from proceedings); *id.* 949f (permitting challenges to military judge and tribunal members); *id.* § 949h (imposing double jeopardy rule); *id.* § 949j (allowing accused ability to obtain witnesses and other evidence); *id.* § 949k (allowing defense of lack of mental responsibility); *id.* § 949m (requiring three-quarters vote for sentence of more than ten years and unanimous vote for death sentence). With the adoption of a Manual for Military Commissions containing not only Rules for Military Commissions but also Military Commission Rules of Evidence, the procedural safeguards afforded an accused in proceedings under the MCA have been expanded. See *infra* text accompanying note 263. For a comparison of procedural protections available in courts-martial with those now available in military commissions, see the chart entitled Table 2 at the end of this Article.

³² See *supra* notes 23-30 and accompanying text.

³³ *Profile: Al-Qaeda 'Kingpin,'* B.B.C. NEWS, Sept. 28, 2006 (available at http://news.bbc.co.uk/2/hi/south_asia/2811855.stm) (last visited Jan. 1, 2008).

usual criminal justice system because the result is often dismissal in lieu of disclosure of classified evidence.³⁴ The MCA preserves the historic practice in military commission trials not only of allowing more flexibility in dealing with classified evidence, but in fact permitting closure of the trial altogether.³⁵ The key question this Article explores is whether the value of providing a forum in which to prosecute those who may otherwise escape accountability is warranted.

This Article unfolds in four parts. Part I reviews the traditional method of prosecuting those accused of crimes in the federal criminal justice system – *i.e.*, in Article III courts – and how classified evidence has typically been handled in such proceedings. This section reviews cases decided before and after the enactment of the Classified Information Procedures Act (“CIPA”). Part II addresses the analogue to CIPA employed in courts martial proceedings to protect classified information. Part III then explains the procedures by which prosecutions have typically proceeded in military commissions and how the Military Commissions Act of 2006 codifies these practices. Because Parts I, II, and III demonstrate that trials under CIPA and courts martial proceedings will preclude prosecution of a certain class of cases, Part IV addresses whether principles of societal justice militate in favor of another process, namely military commissions to prosecute those cases that may otherwise go unprosecuted under CIPA or courts-martial. This section first surveys major philosophical views on the need for justice and, in particular, for punishment of crimes. The section then reviews Judeo-Christian theology on these subjects. The Article concludes with a synthesis of the philosophical and theological principles and an application to the pending military commission cases. As this Article will demonstrate, the notion of prosecuting those accused of crimes is a principle inherent in most philosophical systems and certainly in Judeo-Christian theology. Although societal justice and individual justice usually merge in most prosecutions – and the civilian system balances those interests well – the presence of classified information as part of the prosecution’s case makes the cases against those accused of plotting the 9/11 attacks or other acts of terror problematic. This Article demonstrates that the Military Commissions Act of 2006 is an important effort to balance societal justice with individual justice, whereas the civilian system fails to achieve a proper balance.

³⁴ See Classified Information Procedures Act, 18 U.S.C. App. § 6(e)(2) (2007) (“Whenever a defendant is prevented . . . from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information”); MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 505(i)(4)(E)(IV) (2005) [hereinafter “MCM”] (“If the military judge determines that alternatives to full disclosure may not be issued and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order . . . dismissing the charges, with or without prejudice.”). See also *infra* notes 252-336 and accompanying text.

³⁵ See *infra* notes 252-336 and accompanying text.

I. TRIALS IN THE CIVILIAN CRIMINAL JUSTICE SYSTEM

One cannot appreciate the challenges to prosecuting enemy combatants in the civilian (Article III) system without reviewing the strong presumptions in favor of public trials and against withholding any evidence, even if it is classified information. This section thus reviews the line of precedent strongly favoring open and public trials. Then Part II reviews the Classified Information Procedures Act (CIPA),³⁶ which is designed to protect classified evidence in ordinary domestic prosecutions. As Part II shows, however, CIPA operates in such a manner that many prosecutions end up dismissed when the court – pursuant to CIPA’s own provisions – require dismissal of the prosecution if the evidence at issue is significant to the accused’s defense. Part III, which discusses courts-martial under the UCMJ, explains that the functional equivalent of CIPA’s provisions work to produce much the same results there as in domestic prosecutions in which classified information or sources would be disclosed. Part IV demonstrates, by contrast, that the presumption against open proceedings in military commissions – as well as the more flexible approach permitted in handling classified evidence and sources – may make this forum the only one in which accused charged with war crimes that will involve proof from classified sources or information can realistically be prosecuted.

A. Presumption That All Trials Are Public

The U.S. Constitution provides for public access to criminal proceedings. On its own, the First Amendment protects the press and freedom of expression, as well as a “freedom to listen” that requires all criminal trials be open to the press and to the public unless the prosecution shows a compelling and clearly articulated reason demanding closure.³⁷ In addition, the Sixth Amendment provides that an accused have a right to a public trial in all federal criminal prosecutions.³⁸ When balancing the First and Sixth Amendment rights, the Supreme Court recognizes the public’s right to observe the processes of justice as an essential “outlet for community concern, hostility, and emotion.”³⁹

Secret trials have a long and sordid history – from those practiced by the English Court of Star Chamber to those of the Spanish Inquisition and even the less known but equally unjust abuses of the French Monarchy’s through “letters de cachet.”⁴⁰ Given the benefit of these experiences, the Framers sought

³⁶ 18 U.S.C. app. §§ 1-16 (2000).

³⁷ U.S. CONST. amend. I. *See also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *see also* *A.B.C., Inc. v. Powell*, 47 M.J. 363 (C.M.A. 1997).

³⁸ U.S. CONST. amend. VI.

³⁹ *See Richmond Newspapers*, 448 U.S. at 571.

⁴⁰ *See In re Oliver*, 333 U.S. 257, 268-269 (1948).

to avoid the repetition of similar abuses.⁴¹ With its roots in the English common law, the public right to observe a trial derives from ancient “town meetings”⁴² and flourished into the twelve-member jury. Due to these protections, “the community [never surrendered] its right to observe the conduct of trials.”⁴³ Dating back to the inception of our nation, Alexander Hamilton commented in *The Federalist Papers* on the value of public jury trials, labeling them as a “safeguard to liberty” and “the very palladium of free government.”⁴⁴

The Supreme Court’s *In re Oliver* decision addressed the unprecedented issue of an accused who was tried in a judge’s chambers, with the public excluded due to the trial judge’s belief that the grand jury testimony at issue warranted such secrecy. Despite exhaustive review, the Court was “unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.”⁴⁵ In fact, by the middle of the twentieth century nearly every state required criminal trials to be open to the public by a constitutional provision, by statute, or by judicial decision.⁴⁶ Open trials are bulwarks of a free society, providing one of the checks and balances on our system of government.⁴⁷ The Court upheld the “universal requirement” of public criminal trials, and ruled squarely that an accused could not be charged, convicted, and sentenced in secret proceedings.⁴⁸

Several years later, the Supreme Court again engaged the right of access to criminal proceedings and trials in four key cases. First, in *Richmond Newspapers, Inc. v. Virginia*, the trial court closed a murder trial to prevent the release of testimony during the proceedings and excluded two reporters from Richmond Newspapers, Inc.⁴⁹ Disagreeing with the trial court’s closure, the Supreme Court conclusively held that criminal trials are presumptively open.⁵⁰ Chief Justice Burger, in a plurality opinion, held that openness is an

⁴¹ *Id.*

⁴² See *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 505 (1984) (Open trials date back to the days before the Norman Conquest when cases were brought before a town body).

⁴³ *Richmond Newspapers*, 448 U.S. at 572. See also *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials.’”).

⁴⁴ THE FEDERALIST (No. 83)(Alexander Hamilton); see also Paul Haridakis, *The War on Terrorism: Military Tribunals and the First Amendment*, 9 COMM. L. & POL’Y 317, 323 (2004).

⁴⁵ *Oliver*, 333 U.S. at 266.

⁴⁶ *Id.* at 267-268. See also *Gannett Co. v. DePasquale*, 443 U.S. 368, 414-15 (1979) (Today, the overwhelming majority of States secure the right to public trials).

⁴⁷ *Oliver*, 333 U.S. at 270.

⁴⁸ *Id.* at 273.

⁴⁹ *Richmond Newspapers*, 448 U.S. at 559.

⁵⁰ *Id.* at 569.

“indispensable attribute” to the proper functioning of a trial and the First Amendment confers a right of access to the public.⁵¹

In *Richmond Newspapers*, the Court recognized the “therapeutic value” of public trials.⁵² The public needs to see the administration of justice, both the process and its results, when the community has suffered from a shocking crime.⁵³ If the people cannot see justice done, they may take the law into their own hands.⁵⁴ As Justice Brennan stated in his concurring opinion, “[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law.”⁵⁵ Conversely, allowing public access to criminal proceedings instills the “perception of fairness” and erases the “urge for retribution.”⁵⁶ In addition, the Court acknowledged that open trials can educate the public about the justice system in general, enhance public confidence in the system, and discourage perjury and biases in decision-making.⁵⁷ Although attendance at court proceedings may no longer be a widespread pastime by members of the community,⁵⁸ the media, through its right to publish information received at trial, serves as a “surrogate for the public” and supplies information necessary for the public to put their trust in the criminal justice system.⁵⁹

The Court concluded that a “presumption of openness inheres in the very nature of a criminal trial under our system of justice.”⁶⁰ Justice Brennan, in his concurrence, added another dimension for courts to consider in determining the right of access. He suggested not only the history and tradition of First Amendment rights, but found that the First Amendment plays a structural role in our “government of laws.”⁶¹ The structural role not only fosters public debate of public issues, but the basic fact that the debate must be informed by meaningful communication to the public of those issues.⁶² Public access to criminal trials enhances the quality and integrity of the fact-finding process.⁶³ Echoing the Court’s earlier decision in *Oliver*, Justice Brennan stated that public access to trials is an important check on the judicial process.⁶⁴ An

⁵¹ *Id.* The Court referred here to Sir Matthew Hale, Blackstone, and Jeremy Bentham.

⁵² *Id.* at 570.

⁵³ *Id.* at 571.

⁵⁴ *Id.*

⁵⁵ *Id.* at 595 (Brennan, J. concurring).

⁵⁶ *Id.*

⁵⁷ *Id.* at 569, 572.

⁵⁸ *Id.* at 573.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 587, 597 (Brennan, J. concurring).

⁶² *Id.*

⁶³ *Id.* at 596.

⁶⁴ *Id.*

abuse of such judicial power would affect more than the parties in a particular case – it would affect the government as a whole. According to Justice Brennan, “[w]ithout publicity, all other checks are insufficient.”⁶⁵

In *Globe Newspapers Co. v. Superior Court for the County of Norfolk*,⁶⁶ the Court held unconstitutional a Massachusetts statute that required mandatory closure of trials for sex offenses involving minors.⁶⁷ The Court recognized that the First Amendment right of access is not absolute.⁶⁸ Nevertheless, the presumption of openness requires the prosecution must assert a compelling government interest that is narrowly tailored to serve that interest.⁶⁹ The Court agreed in *Globe Newspapers* that, although protecting the physical and psychological well-being of minors and encouraging victims to come forward are compelling interests, they did not justify mandatory closure in all cases.⁷⁰

The Supreme Court then turned to the question whether the public access right extended to criminal proceedings outside of the trial proper. In *Press-Enterprise Co. v. Superior Court of California (“Press Enterprise I”)*,⁷¹ the Court found it unconstitutional to close a six-week *voir dire* proceeding. After analyzing the history of public access to jury selection hearings and reiterating the structural role of the public access right,⁷² the Court did not find an overriding interest that demanded closure. Although the government asserted an interest in the defendant’s right to a fair trial and privacy interests for the jurors, the government lacked adequate findings that an open proceeding actually threatened those interests.⁷³ Furthermore, the Court held that the trial court could not constitutionally close the *voir dire* without considering alternatives to closure.⁷⁴

In *Press-Enterprise Co. v. Superior Court of California (“Press Enterprise II”)*,⁷⁵ the Supreme Court addressed its last major right of public access case – one involving the closure of a preliminary hearing.⁷⁶ Rejecting an approach that labeled phases of criminal proceedings “pretrial” and “trial,” the

⁶⁵ *Id.* (citing *Oliver*, 333 U.S. at 270 (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827))).

⁶⁶ 457 U.S. 596 (1982).

⁶⁷ *Id.* at 606, 610-11.

⁶⁸ *Id.* at 607.

⁶⁹ *Id.*

⁷⁰ *Id.* at 608-10.

⁷¹ 464 U.S. 501 (1984)(*Press-Enterprise I*).

⁷² *See id.* at 505-508.

⁷³ *Id.* at 510-11.

⁷⁴ *Id.*

⁷⁵ 478 U.S. 1 (1986).

⁷⁶ *Id.*

Court held that public access applies in preliminary hearings just as in trials.⁷⁷ The Court returned to the two major considerations from its public access jurisprudence – experience and logic – and stated that “[i]f the particular proceeding in question passes these tests, . . . a qualified First Amendment right of public access attaches.”⁷⁸

Richmond Newspapers and its progeny, therefore, strongly entrenched a presumption in favor of public trials. The Court has saluted the possibility of closure in certain circumstances, such as where the government seeks to avoid disclosure of sensitive information.⁷⁹ The threshold for justifying closure, however, remained so high that it remained more an abstraction than a reality.⁸⁰

B. How Courts Dealt with Classified Evidence in Article III Courts Before CIPA

Congress enacted the Classified Information Procedures Act (“CIPA”)⁸¹ to limit “graymailing”,⁸² a “subtle form of blackmail” employed by criminal defendants to escape government prosecution.⁸³ Graymailing works this way: a defendant threatens to reveal classified information at trial if the prosecution goes forward.⁸⁴ The government then has a choice.⁸⁵ The government can drop the prosecution even though it believes the accused is guilty.⁸⁶ Alternatively, the government can prosecute the accused and face the risks from release of classified information.⁸⁷ If the classified evidence becomes public, the government can never really pinpoint the precise amount of resulting damage.⁸⁸

⁷⁷ *Id.* at 7 (recognizing the right in California, especially where the preliminary hearings are like a full-scale trial).

⁷⁸ *Id.* at 9.

⁷⁹ See *Press Enterprise I*, 464 U.S. at 510.

⁸⁰ See *id.*

⁸¹ 18 U.S.C. app. §§ 1-16 (1982).

⁸² See *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

⁸³ Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84, 85 (1980) [hereinafter “The Disclose or Dismiss Dilemma”]. According to this commentator, there are two types of graymail: express or implied. Express graymail occurs when the defendant intentionally attempts to discover sensitive information in the hope of thwarting prosecution. Implied graymail occurs when the defendant is simply exercising his right to prepare a defense, and the sensitive information is part of his right to discovery.

⁸⁴ See *id.*

⁸⁵ *Smith*, 780 F.2d at 1105; see also Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277 (1986).

⁸⁶ *Smith*, 780 F.2d at 1105.

⁸⁷ *Id.*

⁸⁸ The Disclose or Dismiss Dilemma, *supra* note 83, at 85-95.

Several incidents in the 1970s, including Watergate and the “Pentagon Papers,”⁸⁹ brought concern for national security and the secrecy of confidential government information to the forefront. However, graymailing is nothing new. The first known defendant to employ this tactic was Aaron Burr, who was on trial for treason.⁹⁰ Burr wished to produce a letter at trial that was addressed to the President and contained some confidential matters.⁹¹ He claimed the letter was material to his defense.⁹² Burr’s counsel insisted that the letter ought to be read publicly and objected to a secret tribunal.⁹³ Ultimately, Chief Justice Marshall found in favor of the defendant and issued a subpoena duces tecum to the President requiring production of the letter.⁹⁴

Although the need for secrecy of certain information dates back to the Constitution,⁹⁵ the government did not develop an official classification system for official information until the early 1800s,⁹⁶ perhaps in response to Chief Justice Marshall’s decision in *Burr*. However, the government did not develop the system to specifically protect national security.⁹⁷ Some general guidelines arose during the Civil War, which precluded the press from printing any information that would aid the enemy, while the government provided all “suitable” information to the public.⁹⁸ At the beginning of the twentieth century and during World War I, Congress enacted and expanded espionage laws that prevented the unauthorized communication of defense information.⁹⁹ These new laws spawned a classification system that required official information be marked “Secret,” “Confidential,” or “For Official Circulation Only.”¹⁰⁰ Since 1940, executive orders have been the means for classifying information.¹⁰¹

Before CIPA, government investigations thwarted by graymail were rarely publicized and the reasons for abandoning the charges remained

⁸⁹ For a discussion of these incidents, see notes 113-128 *infra* and accompanying text.

⁹⁰ *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807).

⁹¹ *Id.* at 190.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 191.

⁹⁵ See Note, *The Need for Government Secrecy: Why the U.S. Government Must be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT’L L. 1071, 1073 (2003).

⁹⁶ See Harvard Law Review Association, *Information Security: Classification of Government Documents*, 85 HARV. L. REV. 1189, 1192 (1972) (hereinafter *Information Security*).

⁹⁷ *Id.* at 1192-93.

⁹⁸ *Id.* at 1193.

⁹⁹ *Id.* See Act of March 3, 1911, ch. 226, 36 Stat. 1084 (repealed 1917); Espionage Act of 1917, ch. 30, 40 Stat. 217, as amended, 18 U.S.C. §§ 793-94 (1970).

¹⁰⁰ *Information Security*, *supra* note 96, at 1193 (citing FOREIGN AFFAIRS DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, 92d Cong., 1st Sess., *Security Classification as a Problem in the Congressional Role in Foreign Policy* 2 (Comm. Print 1971)).

¹⁰¹ Tamanaha, *supra* note 85, at 286.

undisclosed.¹⁰² Graymailing is usually most effective when the defendant is charged with a crime that involves classified information.¹⁰³ Prosecutions in this vein include those for espionage, extortion, bribery, perjury, and even narcotics trafficking.¹⁰⁴

In *United States v. Andolschek*,¹⁰⁵ the United States Court of Appeals for the Second Circuit addressed one of the first modern graymail cases. The case involved several defendants convicted of conspiracy to commit bribery on the Alcohol Tax Unit.¹⁰⁶ On appeal, three of the defendants complained of the exclusion of certain official reports that may have been material to their defense.¹⁰⁷ Reversing, the court came down decidedly on the side of the accused:

So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in open, and will lay bare the subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.¹⁰⁸

The court ordered a new trial and required production of the reports.¹⁰⁹

According to a Justice Department report, the CIA reported twenty cases between 1954 and 1975 involving criminal conduct by government employees.¹¹⁰ Two of these cases related to espionage, while the rest involved theft and embezzlement.¹¹¹ The government did not pursue prosecutions due to possible disclosure of national security information.¹¹² Indeed, one may fairly presume that the government chose not to prosecute – and thereby avoided raising the graymailing issue – until it had the political climate of a war.

¹⁰² See The Disclose or Dismiss Dilemma, *supra* note 83, at 88.

¹⁰³ See Tamanaha, *supra* note 85, at 281.

¹⁰⁴ The Disclose or Dismiss Dilemma, *supra* note 83, at 85 n.6; see also Tamanaha, *supra* note 85, at 279 n.9.

¹⁰⁵ 142 F.2d 503 (2d Cir. 1944).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 505.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Justice Department Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security: Hearings Before a Subcomm. of the Comm. on Government Operations, 94th Cong., 1st Sess. 392-97 (1975)*[hereinafter “Justice Department Report”]; see also Tamanaha, *supra* note 85, at 278 n.9.

¹¹¹ *Id.* Of the reported cases, only two of them actually resulted in a conviction, one by a plea of guilty and the other by jury verdict.

¹¹² See *id.*

During the Vietnam War, the Court reached other key decisions. Decided in this period, *New York Times v. United States*,¹¹³ dealt with a study that included excerpts from a classified Defense Department report on decision-making of the Vietnam policy. The government sought to preclude two newspapers from publishing the documents because of the potential danger to national security, but the Supreme Court refused to enjoin the publications.¹¹⁴

Although *New York Times* was a spectacular defeat for the government, a modest victory or two followed. The targets of congressional investigations used the graymail tactic frequently as a way to evade prosecution. In *United States v. Ehrlichman*,¹¹⁵ defense counsel warned the Watergate special prosecutor that he intended to seek discovery of highly classified documents at trial. The Special Prosecutor asserted that he produced all documents that were even remotely relevant to the case, and contacted all government departments that might have exculpatory information.¹¹⁶ The court allowed Ehrlichman to issue a subpoena duces tecum for his notes recording private Presidential conversations and meetings.¹¹⁷ The White House submitted the notes to the judge for an in camera inspection. The judge thereafter quashed the subpoena finding the Presidential material, which consisted of strategic nuclear targeting plans, irrelevant and not essential to his defense.¹¹⁸

The graymail dilemma arose yet again in the late 1970s with the *International Telegraph & Telephone* (“ITT”) cases.¹¹⁹ The government charged two high ITT officials of lying to a Senate subcommittee regarding ITT’s involvement in Chile’s domestic political activities.¹²⁰ The officials denied that ITT offered financial aid to enemies of Salvadore Allende and collaborated with the CIA in an attempt to prevent Allende’s election as president.¹²¹ The defendants threatened to reveal sensitive information at trial – specifically, that they were instructed to give false testimony by top United States government officials.¹²² The judge refused to determine the admissibility

¹¹³ 403 U.S. 713 (1971).

¹¹⁴ *Id.*

¹¹⁵ 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

¹¹⁶ *Id.* at 930.

¹¹⁷ *Id.* at 931.

¹¹⁸ *Id.* at 931-32.

¹¹⁹ *United States v. Berrellez*, Crim. No. 78-120 (D.D.C. Feb. 8, 1978), *mandamus denied sub. nom. In re United States of America*, No. 78-2158 (D.C. Cir. Jan. 26, 1979); and *United States v. Gerrity*, Crim. No. 78-121 (D.D.C. Mar. 20, 1978).

¹²⁰ *Id.*

¹²¹ *Id.* See The Disclose or Dismiss Dilemma, *supra* note 83, at 93.

¹²² *Id.* See also Thomas G. Stacy, *The Constitution in Conflict: Espionage Prosecutions, the Right to Present a Defense, and the State Secrets Privilege*, 58 U. COLO. L. REV. 177, 178 n.8 (1987).

of the classified information in camera,¹²³ which could have ultimately led to disclosure. The Justice Department appealed the decision, arguing that the court should establish pretrial procedures for cases involving secret information that may compromise national security.¹²⁴ The court denied the petition for mandamus.¹²⁵ Left in a Catch-22, the government ultimately dismissed the prosecutions to prevent the disclosure of national security information.¹²⁶

The *ITT* decision, along with other similar cases, created a public perception of immunity for high-level government officials.¹²⁷ As later noted in the Senate Report addressing CIPA, this perception undermines public confidence in the criminal justice system and gives the impression of ineffective checks on the conduct of members of our intelligence agencies.¹²⁸ Thus, new classified information procedures were essential to deal with the graymail dilemma.

C. CIPA

1. Legislative History

Before CIPA, the government would not learn about classified information the defendant possessed until it was introduced at trial.¹²⁹ The government could only hope that the defendant did not disclose any confidential information. If he did, whether the court would admit the evidence upon objection was anyone's guess.¹³⁰ CIPA changed that. Under the Act, the judge can rule on the relevance and admissibility of confidential information before the introduction of such evidence in open court.¹³¹ This would allow the Government to ascertain the possible damage to national security before trial.¹³²

In 1977, the Senate Subcommittee on Secrecy and Disclosure of the Senate Intelligence Committee began to study unauthorized disclosure of intelligence information; several government agencies took part.¹³³ The

¹²³ See H.R. REP. NO. 96-831 at 8-10 (1980).

¹²⁴ *Berrellez*, Crim. No. 78-120, *mandamus denied sub. nom. In re United States of America*, No. 78-2158.

¹²⁵ *Id.*

¹²⁶ *Id.* See *The Disclose or Dismiss Dilemma*, *supra* note 83, at 94.

¹²⁷ See S. REP. NO. 96-823 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4297 [hereinafter Senate Report].

¹²⁸ *Id.* (statement made by Philip Heymann, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 4294.

¹³² *Id.*

¹³³ *Id.*

subcommittee asked each agency to provide ten cases in which intelligence information had been disclosed to unauthorized individuals, particularly foreign powers.¹³⁴ After several interviews and hearings, the subcommittee issued a report that detailed the problem the Government faced in prosecuting espionage and criminal leak cases.¹³⁵ The findings recognized that “[t]he more sensitive the information compromised, the more difficult it became to enforce the laws that guard our national security. . . . The Government [] must choose between disclosing classified information in the prosecution or letting the conduct go unpunished.”¹³⁶ In 1979 the subcommittee proposed draft CIPA legislation.¹³⁷

The report of the subcommittee urged Congress to consider the enactment of protective legislation detailing pretrial proceedings in criminal prosecutions that involve national security secrets.¹³⁸ Congress was now well aware that “[w]ithout a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with cases because all of the sensitive items that could see the light of a trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.”¹³⁹ If pretrial proceedings required a ruling on the admissibility of any confidential information before trial, the government could make an informed decision on whether the benefit of prosecution outweighed the harm of public disclosure.¹⁴⁰ Another draft of the legislation followed, and after six months of congressional negotiations and a hearing, Congress unanimously enacted the legislation.

CIPA has two overarching goals. First, CIPA seeks to ensure that the intelligence agencies are subject to the rule of law.¹⁴¹ Second, the Act attempts to strengthen the enforcement of laws designed to protect both national security and civil liberties.¹⁴² At the time of its enactment, only a small number of criminal cases involved confidential information.¹⁴³ The number has continually increased over the decades and now has become a significant factor during the war on terror.¹⁴⁴ Because these cases involve “important matters of considerable

¹³⁴ *Id.*

¹³⁵ *National Security Secrets and the Administration of Justice Report of the Select Committee on Intelligence*, S. REP. NO. 95-701 (1978).

¹³⁶ Senate Report, *supra* note 127, at 4295.

¹³⁷ *Id.* at 4297.

¹³⁸ *Id.* at 4296.

¹³⁹ *Id.*

¹⁴⁰ 126 CONG. REC. 26504 (1980).

¹⁴¹ Senate Report, *supra* note 127, at 4296.

¹⁴² *Id.*

¹⁴³ *Id.* at 4297.

¹⁴⁴ See Joshua E. Kastenberg, *Analyzing the Constitutional Tension and Applicability of Military Rule of Evidence 505 in Courts-Martial Over United States Service Members: Secrecy in the Shadow of Lonetree*, 55 A.F.L. REV. 233, 235 (2004).

public interest,” CIPA is an important means for guiding pretrial proceedings and aiding the government in protecting national security.¹⁴⁵

2. The Requirements of CIPA

The first section of the Act sets forth the necessary procedures that litigants must follow whenever a case involves classified information.¹⁴⁶ The final six sections of CIPA deal with application of the Act to criminal proceedings.

Section 1 – Section 1 of CIPA is a brief but significant part of CIPA. It sets forth the definitions of “classified information” and “national security.” Section 1(a) defines classified information as “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security[.]”¹⁴⁷ Pursuant to President Bush’s Executive Order No. 13292,¹⁴⁸ information will be classified if its disclosure “reasonably could be expected to cause damage to national security, which includes transnational terrorism...”¹⁴⁹ Such information may include documents, information known but not in documentary form, or the identity of sources (e.g. witnesses).

CIPA defines national security as “the national defense and foreign relations of the United States.”¹⁵⁰ Although broad, this definition provides a basis for the government’s capacity to protect as well as to operate by serving domestic and foreign interests.¹⁵¹

Section 2 – This section simply restates procedures already established by Rule 17.1 of the Federal Rules of Criminal Procedure.¹⁵² The Rule allows the court to hold a pretrial conference on motion of a party, or on its own motion, to consider matters that will promote a fair and expeditious trial.¹⁵³ A pretrial conference is practically essential in matters involving classified information because it ensures that the information will be identified at the earliest possible

¹⁴⁵ Senate Report, *supra* note 127, at 4296.

¹⁴⁶ 18 U.S.C. app. § 1(a) (1982).

¹⁴⁷ *Id.*

¹⁴⁸ This Executive Order is an amendment to President Clinton’s Classified National Security Information, Exec. Order No. 12,958.

¹⁴⁹ Exec. Order No. 13,292 (2003).

¹⁵⁰ 18 U.S.C. app. § 1(b) (1982).

¹⁵¹ See Tamanaha, *supra* note 85, at 285.

¹⁵² Senate Report, *supra* note 127, at 4298.

¹⁵³ See FED. R. CRIM. P. 17.1.

time.¹⁵⁴ The hearing should establish a schedule for discovery of the classified information, notice requirements that a defendant must respect, and answer any other questions relating to the use of the classified information.¹⁵⁵ As stated in the legislative history, no substantive issues concerning the use of the classified information will be decided at the pretrial conference.¹⁵⁶ Instead, those issues are decided at the hearing specified under section 6 of the Act.¹⁵⁷

Section 3 – Section 3 of CIPA allows the court to issue a protective order covering any classified information connected to the case, regardless of the source of the information.¹⁵⁸ Partially duplicating Rule 16 of the Federal Rules of Criminal Procedure,¹⁵⁹ this section forbids the defendant to disclose any classified information produced to the defendant in discovery.¹⁶⁰ In addition, this section extends beyond Rule 16 by further protecting classified information that the defendant already possesses that is connected to the trial.¹⁶¹

Section 4 – Section 4 of CIPA governs the discovery of classified information requested by a defendant. The court may authorize the government to redact confidential information from materials to be made available to the defendant, to substitute a summary of the information, or to submit a statement admitting the relevant facts the classified information may prove.¹⁶² This section also mirrors Rule 16 of the Federal Rules of Criminal Procedure. Congress included this section in CIPA, however, because it recognized that “some judges have been reluctant to use their authority under [Rule 16] . . . in deciding on whether to permit discovery to be ‘denied, restricted or deferred’” for the protection of information on national security.¹⁶³

The standards set forth in Rule 16 control discovery in CIPA cases, and the burden of persuasion is on the Government to show why the materials should be deleted, modified, or substituted before they are released to the defendant.¹⁶⁴ The government must make a “sufficient showing” that the information at issue, if disclosed, will damage national security.¹⁶⁵ The legislative history in the Act fails to define “sufficient showing” and, thus, leaves to courts the task of interpreting the phrase. If the government fails to

¹⁵⁴ Senate Report, *supra* note 127, at 4298.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 4299.

¹⁵⁸ *See* Tamanaha, *supra* note 85, at 287.

¹⁵⁹ *See* FED. R. CRIM. P. 16(d).

¹⁶⁰ Senate Report, *supra* note 127, at 4299.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 4299-4300.

¹⁶⁴ *See* FED. R. CRIM. P. 16.

¹⁶⁵ 18 U.S.C. app. § 4.

meet this standard, it must disclose the classified information to the defendant or face sanctions.¹⁶⁶

Section 5 – As a key part of CIPA,¹⁶⁷ this section establishes a notice requirement by the defendant in cases involving classified information. Subsection (a) provides that when a defendant expects to disclose, or cause the disclosure of, classified information, the defendant must give written notice to the Government and the court before trial or as soon as he discovers the possibility of such disclosure during trial.¹⁶⁸ A brief description of the classified information must accompany the notice.¹⁶⁹ The defendant is under a continuing obligation throughout the trial process to give notice to the Government of any new classified information it obtains and plans to disclose.¹⁷⁰ The defendant is precluded from disclosing any information which is classified, or believed to be classified, until the court holds a hearing and an appeal, if any, has been completed.¹⁷¹ If the defendant fails to comply with the notice requirement, the court may completely preclude the defendant from disclosing the information at trial.¹⁷²

The proceedings under this section of CIPA are extremely important because they represent the first time the government may be alerted to the classified information and the first opportunity to protect information that presents a risk to national security. Some defendants have challenged this provision of CIPA, arguing that it requires them to give up too much detail regarding their defense in order to satisfy the notice requirement.¹⁷³ Although Congress did not set forth a clear standard regarding the necessary detail the defendant must provide, the legislative history reveals that Congress recognized that the defendant may be “required to disclose information not otherwise discoverable by the government.”¹⁷⁴ Congress did not intend this section to

¹⁶⁶ See Tamanaha, *supra* note 76, at 291-92.

¹⁶⁷ *Id.* at 292.

¹⁶⁸ 18 U.S.C. app. § 5; see Senate Report, *supra* note 118, at 4300.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 18 U.S.C. app. § 5(b).

¹⁷³ See, e.g., *United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984) (court required defendant to disclose the precise classified information he intended to use); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (defendant challenged § 5 as violating his Fifth Amendment right against self-incrimination); *United States v. Collins*, 720 F.2d 1195 (11th Cir. 1983) (court held the defendant will be required to disclose much of his defense); *United States v. Wilson*, 571 F.Supp. 1422 (S.D.N.Y. 1983 (court held the defendant was only required to disclose a brief description of the classified information to be used)), *aff'd*, 750 F.2d 7 (2d Cir. 1984).

¹⁷⁴ Senate Report, *supra* note 127, at 4303.

restrain a defendant's right to free speech, but merely to forbid disclosure of classified information until notice has been given.¹⁷⁵

Section 6 – Section 6 of CIPA establishes the procedures regarding the form and use of classified information and is the most controversial section of the Act. Congress in any event considered this section to be the “heart of the bill.”¹⁷⁶ In cases involving classified information, the court must conduct a hearing, with both parties present, to determine the use, relevance, and admissibility of the classified information.¹⁷⁷ When the government discovers that the defendant may disclose, or cause to be disclosed, confidential information, it may request the court to conduct an in camera hearing.¹⁷⁸ The legislative history suggests that the government should provide the judge with an explanation as to why the information is classified before the judge determines relevance and admissibility.¹⁷⁹ Otherwise he is “operating in a vacuum” in making his determination.¹⁸⁰ The judge needs an explanation of the classification so that the judge can “fashion creative and fair solutions to these problems.”¹⁸¹ Before the court conducts a hearing, the government must give notice to the defendant of the classified information that is at issue.¹⁸²

These hearings are public as often as possible because no specific information need be proffered to determine relevancy and admissibility.¹⁸³ Instead, the information can be discussed by the parties “in the abstract” for the judge to determine whether the defendant may introduce the evidence at trial, unless such a hearing would “compromise the integrity of the sensitive information.”¹⁸⁴

The court shall give a written determination of admissibility to the parties after the hearing.¹⁸⁵ The court has various options. First, if the court finds that the information will present a risk to national security and will not prejudice the defendant's case, the court rule the evidence inadmissible.¹⁸⁶ Second, if the court finds that the defendant will be prejudiced by preclusion of

¹⁷⁵ *Id.* at 4300.

¹⁷⁶ *Id.*

¹⁷⁷ 18 U.S.C. app. § 6(a).

¹⁷⁸ *Id.*

¹⁷⁹ Senate Report, *supra* note 127, at 4301.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 18 U.S.C. app. § 6(b). If the defendant already has the information, he is precluded from disclosing it until the Government has a chance to request a hearing. If the information has not yet been made available to the defendant, the Government may give notice by “general category.”

¹⁸³ Senate Report, *supra* note 127, at 4301.

¹⁸⁴ *Id.*

¹⁸⁵ 18 U.S.C. app. § 6(a).

¹⁸⁶ 18 U.S.C. app. § 6(c)(A).

the information, the court can order the government to provide substitutes for classified information. One type of substitute is a stipulation of the relevant facts that the classified information would prove.¹⁸⁷ A second type of substitute is an unclassified summary rather than the specific classified information.¹⁸⁸ Any substitute must provide the defendant with substantially the same ability to make his defense as would disclosure of the specific information.¹⁸⁹ If the defendant will not be prejudiced by a substitution, that is preferable to the risk that may be presented to national security.¹⁹⁰ The court must consider the options and uphold the defendant's right to a fair trial.¹⁹¹

If the government does not consent to an alternative to the disclosure and does not accede to the use of the information at trial, the Attorney General may file an affidavit objecting to any disclosure by the defendant and certifying the risk of "identifiable damage" to national security.¹⁹² The court then must make a determination based on a "sliding scale" – on one end whether the trial can continue without prejudice to the defendant, while on the other end whether the case will have to be dismissed because the defendant's guilt or innocence relies on the information.¹⁹³ The Act, however, allows one exception to a dismissal: if the "interest of justice" will not be served, the court may dismiss specific counts of the indictment that involve classified information, or strike or preclude witness testimony expected to disclose classified information.¹⁹⁴ Another way that the government may continue a prosecution, despite a ruling that substitutes will not provide the defendant with substantially the same ability to make his defense as disclosure of the information at issue, is simply to declassify the materials at issue.¹⁹⁵ In doing so, the issue of course becomes moot.¹⁹⁶

Finally, Congress established an additional element to this section of CIPA that is a reciprocal action to the notice requirement of the defendant in section 5. If the court determines that classified information may be disclosed by the defendant, the Government must notify the defendant of evidence and

¹⁸⁷ 18 U.S.C. app. § 6(c)(A).

¹⁸⁸ 18 U.S.C. app. § 6(c)(B). *See also* Senate Report, *supra* note 127, at 4302.

¹⁸⁹ *Id.*; *see also* H. R. Rep. No. 1980-1436, *as reprinted in* 1980 U.S.C.C.A.N. 4307, 4310 [hereinafter House Conference Report].

¹⁹⁰ Senate Report, *supra* note 127, at 4302.

¹⁹¹ 18 U.S.C. app. § 6(c)(B).

¹⁹² 18 U.S.C. app. § 6(c)(2).

¹⁹³ Senate Report, *supra* note 127, at 4302.

¹⁹⁴ 18 U.S.C. app. § 6(e)(2).

¹⁹⁵ *See* Symposium, *Secret Evidence and the Courts in the Age of National Security*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 45, 60 (Fall 2006) (discussing instances when the prosecution has chosen to declassify information rather than disclosing it, and the effects when this occurs).

¹⁹⁶ *See id.*

witnesses it expects to use to rebut that information.¹⁹⁷ Congress acknowledged that placing such a duty on the Government was a “matter of fairness.”¹⁹⁸

Section 7 – This section establishes a means for the Government to appeal any adverse decision of the district court judge relating to the disclosure of confidential information.¹⁹⁹ Prior to the enactment of CIPA, the government had no right to appeal such decisions and was forced to decide whether to disclose the sensitive information or dismiss the case.²⁰⁰ Section 7 now allows the government to pursue an expedited interlocutory appeal when a district court has authorized the disclosure of classified information, sanctioned the government for nondisclosure, or refused to issue a protective order sought by the government.²⁰¹

Section 8 – This section of CIPA provides that evidence containing classified information may be admitted at trial without changing its classification status. The court may admit only a part of a piece of evidence to prevent the unnecessary disclosure of classified information, as long as fairness does not require the entire document to be admitted.²⁰² In addition, during trial the government may object to the questioning of a witness that will likely result in the disclosure of classified information.²⁰³ Such a scenario would occur in the narrow circumstance where the defendant was unaware of the potential disclosure of classified information since, under the procedures set forth in Section 5, the defendant was required to notify the government of any expected disclosure of classified information.

Essentially, this section recognizes that “classification is an executive, not a judicial function.”²⁰⁴ In reality, classified information that the court deems admissible may be heard by the public and press observing the hearings and subsequently repeated outside the courtroom.²⁰⁵ After trial, it is up to the

¹⁹⁷ 18 U.S.C. app. § 6(f).

¹⁹⁸ Senate Report, *supra* note 127, at 4303.

¹⁹⁹ 18 U.S.C. app. § 7.

²⁰⁰ Senate Report, *supra* note 127, at 4303.

²⁰¹ 18 U.S.C. app. § 7(a).

²⁰² 18 U.S.C. app. § 8(b). The second part of this sentence and this section were added to make it clear that a court should make a determination based on the Rule of Completeness when considering just a piece of evidence. *See* FED. R. OF EVID. 106; House Conference Report, *supra* note 189, at 4311.

²⁰³ 18 U.S.C. app. § 8(c).

²⁰⁴ Senate Report, *supra* note 127, at 4304.

²⁰⁵ There is a potential risk of violation by such observers of the espionage statutes. *But see* Craig v. Harney, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the courtroom is public property.”).

classifying agency to decide whether the information was compromised during the proceedings such that it no longer carries a classified status.²⁰⁶

Remaining Sections of CIPA. The rest of CIPA deals primarily with protection of the classified information and effectiveness of the Act. Section 9 establishes security procedures to protect classified information that is in the custody of the federal courts.²⁰⁷ Section 10 provides that, in cases where the classified information is necessary to prove an element of the offense, the government must identify those materials it plans to use to satisfy its burden.²⁰⁸ Before CIPA, defendants often were blind to the classified information the government possessed and would use to meet its burden of proof.²⁰⁹ Section 11 established that amendments could be made to the Act in the same manner as the Federal Rules of Evidence.²¹⁰

Under Section 12 of CIPA, Congress directed the Attorney General to issue guidelines to the Department of Justice, including factors to consider, when determining whether to prosecute a case that might involve the disclosure of classified information.²¹¹ If the Attorney General decides not to prosecute a defendant based on a threat of graymail or the risk to national security, he must offer written findings to Congress detailing an explanation and the importance and sensitivity of the information involved.²¹² This provision was included in CIPA because Congress strongly favors punishing illegal activity even when there are national security concerns, and it has a constitutional power of inquiry to ensure there is no abuse of prosecutorial discretion.²¹³ Section 13 further provides that the Attorney General must report to Congress when a decision has been made not to prosecute a defendant so that Congress can evaluate the operation and effectiveness of the Act.²¹⁴

3. Precedent for Handling Classified Information in Article III Courts Since Enactment of CIPA

Criminal defendants have continually challenged the validity of CIPA since its enactment. The courts have addressed challenges to almost every section, but the most significant and controversial sections are 4 through 6 –

²⁰⁶ *Id.*

²⁰⁷ 18 U.S.C. app. § 9.

²⁰⁸ 18 U.S.C. app. § 10.

²⁰⁹ Senate Report, *supra* note 127, at 4305.

²¹⁰ 18 U.S.C. app. § 11.

²¹¹ 18 U.S.C. app. § 12.

²¹² *Id.*

²¹³ Senate Report, *supra* note 127, at 4305.

²¹⁴ 18 U.S.C. app. § 13.

discovery, notice, and proceedings in cases involving classified information. Despite such attacks, no part of CIPA has been held unconstitutional.

One preliminary point worth noting is that the Act does not alter existing rules of evidence or procedure, but rather duplicates – and in some instances expands on – procedures that already exist in the federal process.²¹⁵ Dismissing the first challenge to the Act, the courts have held that the terms set forth in Section 1, “classified information” and “national security,” have passed the “void for vagueness” test – whether the language conveys a sufficient warning as to the required conduct.²¹⁶ CIPA’s terms have been held to give defendants sufficient notice of required conduct and, therefore, are not unconstitutionally vague.²¹⁷ Furthermore, courts have rejected the contention that Section 2 of the Act violates the defendant’s constitutional right to a fair trial because it allows the government to obtain pretrial proceedings upon request.²¹⁸ Indeed, the government must still prove that the information is classified.²¹⁹

a. Precedent dealing with Section 4 – Discovery of Classified Information

One of the major disputes raised in CIPA cases relates to Section 4, which governs discovery and authorizes an ex parte, in camera inspection of the classified documents at issue.²²⁰ Despite challenges to the private judicial inspections of classified documents, section 4 procedures do not violate defendants’ statutory or due process rights.²²¹ In *United States v. Pringle*,²²² the defendants, who were indicted for various narcotics charges, requested disclosure of any materials the government possessed relating to the Nirvana, their boat. The government moved for an in camera hearing because the requested material contained classified information, including Coast Guard Intelligence information.²²³ The government further submitted in camera ex parte pleadings explaining the risk to national security.²²⁴ On appeal, the court reiterated the fact that CIPA was enacted to allow the government to assess risk to national security before trial and that Section 4 provides for an ex parte

²¹⁵ See Tamanaha, *supra* note 76, at 303.

²¹⁶ *United States v. Joliff*, 548 F. Supp. 229 (D. Md. 1981); *see also* *United States v. Wilson*, 571 F. Supp. 1422 (S.D.N.Y. 1983).

²¹⁷ *Id.* at 230.

²¹⁸ *Id.* at 231.

²¹⁹ *Id.*

²²⁰ See 18 U.S.C. app. § 4.

²²¹ *United States v. Pringle*, 751 F.2d 419 (9th Cir. 1984).

²²² *Id.* at 425.

²²³ *Id.*

²²⁴ *Id.* at 426.

examination by the court.²²⁵ Consequently, the court found no violation of the defendants' constitutional rights.

When determining discovery issues, the courts have generally applied the balancing test developed in *Roviaro v. United States*,²²⁶ to determine if the information sought by the defendant should be disclosed. The test balances the defendant's need to know against national security concerns. Although defendants have tried to assert that CIPA forbids such a balancing, the Ninth Circuit has held that "Congress intended Section 4 to clarify the court's powers under Fed. R. Crim. P. 16(d)(1) to deny or restrict discovery in order to protect national security."²²⁷ A fair application of the balancing test, however, does not always result in a denial of or restriction on discovery. In *United States v. Clegg*,²²⁸ the defendant faced indictments for exporting firearms and sought production of all documents in the possession of the Department of State, Department of Defense, and the CIA that contained information regarding his gunrunning.²²⁹ The government sought to bring the classified documents under the protection of CIPA, but upon review of the district court's order to disclose, the appellate court found the materials relevant to Clegg's defense.²³⁰

In *United States v. Yunis*,²³¹ the court developed a three-step analysis in ruling on discovery requests: first, the court asks whether the evidence is relevant; second, if relevant, the court must determine materiality; and third, the court must balance the defendant's need to know the information against the potential harm to national security if the information is disclosed.²³² In *Yunis*, the defendant was charged with air piracy, conspiracy, and hostage taking.²³³ In his discovery, the defendant particularly sought copies of tapes and documents that recorded conversations between him and a government informant.²³⁴ The government immediately filed a motion for a pretrial conference and filed

²²⁵ *Id.* at 427.

²²⁶ 353 U.S. 53 (1957). This test is often used in cases involving classified information. In *Roviaro*, the defendant sought the identity of a government informer who was involved in the activities for which the defendant was charged. The court allowed the discovery, but recognized a government privilege to withhold an informant's identity or contents of communication if it would endanger the secrecy of that information. *Id.* at 59.

²²⁷ *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (citing S.REP. NO. 1980-823, as reprinted in 1980 U.S.C.C.A.N. 4299-4300). See also *Pringle*, 751 F.2d at 426 (the court applied the *Roviaro* balancing test and found that national security would be threatened if the materials sought by the defendant were disclosed).

²²⁸ 740 F.2d 16 (9th Cir. 1984).

²²⁹ *Id.* at 17.

²³⁰ *Id.*

²³¹ 867 F.2d 617 (D.C. Cir. 1989).

²³² *Id.* at 620. Note that the final step is the *Roviaro* balancing test.

²³³ *Id.* at 617.

²³⁴ *Id.* at 619.

several *ex parte* in camera pleadings, pursuant to the CIPA provisions.²³⁵ Despite the government's assertion that disclosure of the requested information threatened national security, the district court applied the three-step analysis and, finding that all three steps favored the defendant, ordered the government to release the tapes and transcripts of the conversations.²³⁶

The government immediately exercised its right to appeal.²³⁷ The United States Court of Appeals for the District of Columbia agreed that the defendant met the first two steps of the analysis, but ruled that the district court misapprehended the nature of the sensitive nature the government sought to protect.²³⁸ The court reversed the district court order, finding that the requested discovery was only "theoretically relevant" and not essential to the defendant's defense.²³⁹

b. Precedent Regarding CIPA's Notice Provision (Section 5)

The notice requirement under Section 5 of CIPA has triggered a plethora of unsuccessful appeals in the federal courts. According to the Act, defendants are required to give written notification to the government of any classified information expected to be admitted at trial, and to concurrently submit a brief description with such notice.²⁴⁰ Criminal defendants have used the requirement as a defensive tactic by arguing that it violates general constitutional rights and due process, the defendant's right against self-incrimination, and even the right to effective assistance of counsel.

In *United States v. North*,²⁴¹ the defendant, who was charged with numerous offenses for his involvement in the Iran-Contra affair, was ordered to file written notice of information he expected to present at trial.²⁴² The defendant filed the notice with objection and attached a Warning Notice to his narrative statement.²⁴³ The defendant asserted that the required narrative violated, among other rights, his due process rights under the Fifth Amendment.²⁴⁴ However, the defendant already possessed over 900,000 pages of government documents and had been notified on the classified documents the

²³⁵ *Id.* at 619-20.

²³⁶ *Id.*

²³⁷ *Id.* at 621.

²³⁸ *Id.* at 623.

²³⁹ *Id.* at 625.

²⁴⁰ See 18 U.S.C. app. § 5.

²⁴¹ 708 F. Supp. 399 (D.D.C. 1988).

²⁴² *Id.* at 400.

²⁴³ *Id.*

²⁴⁴ *Id.*

government would be using in its prosecution.²⁴⁵ The court held that North was not entitled to get everything and to disclose nothing, because due process is an “even-handed concept.”²⁴⁶ Thus, Section 5 does not violate due process.

The courts have also held that Section 5 does not impermissibly burden the defendant’s Fifth Amendment right to remain silent. In *United States v. Wilson*,²⁴⁷ the defendant argued that CIPA’s notice requirements were unconstitutional because they required him to “produce his entire factual defense” prior to trial.²⁴⁸ However, the court, noting the plain language of the statute, said the defendant was only required to give a brief description to the classified information to be provided.²⁴⁹ Furthermore, in complying with the notice requirement, the defendant need neither admit incriminating conduct he has no intention of disclosing at trial²⁵⁰ nor specify whether he will testify, or the content of his testimony.²⁵¹

c. Precedent Addressing Admissibility and Substitutions of Evidence (Section 6)

Pursuant to Section 6 of CIPA, the government may request an in camera hearing “to make all determinations concerning the use, relevance, or admissibility of classified information.”²⁵² At the Section 6 hearing, defense counsel has the burden of proving that the information is relevant. The relevancy determination in CIPA cases is similar to the Federal Rules of Evidence: the classified information should be admitted if it would make the facts of the case more probable than without that evidence.²⁵³ As one court has held, the contents of the classified information must be “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.”²⁵⁴ CIPA cases do, however, require the courts to apply the relevance standard more literally and strictly than typical cases.²⁵⁵ The court may exclude irrelevant evidence in its entirety.

²⁴⁵ *Id.* at 401.

²⁴⁶ *Id.* See also *United States v. Poindexter*, 725 F. Supp. 13, 57 (D.D.C. 1989) (“CIPA burdens are not one-sided, but they are carefully balanced, and there is therefore no basis for a due process complaint.”); *United States v. Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000) (due process not violated because CIPA does not unfairly impose a one-sided burden on the defendant).

²⁴⁷ 571 F. Supp. 1422 (S.D.N.Y. 1983).

²⁴⁸ *Id.* at 1427.

²⁴⁹ *Id.*

²⁵⁰ *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984).

²⁵¹ *Poindexter*, 725 F. Supp. at 33.

²⁵² 18 U.S.C. app. § 6(b).

²⁵³ See FED.R.EVID. 401.

²⁵⁴ *Smith*, 780 F.2d at 1107.

²⁵⁵ See Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 AM. CRIM. L. REV. 191, 204 (1994).

Upon a finding that classified information is relevant, the government may propose substitutions for the classified information, including admissions or summaries of the relevant information.²⁵⁶ Such substitutions are allowed only if the defendant has “substantially the same ability to make his defense as would disclosure of the specific classified information.”²⁵⁷ Despite constitutional attacks, the courts have found CIPA not to impinge on a defendant’s rights to compulsory process, to due process, or to equal protection.²⁵⁸

Allowing substitutions remains the single greatest source of controversy under CIPA because the evidence is, in effect, altered from its original form. If the court rejects the government’s proposed substitution, however, the result will often be an outright dismissal. That is exactly what happened in *United States v. Fernandez*.²⁵⁹ Fernandez was a former CIA officer who was indicted for giving false statements and for obstructing proceedings in the Iran-Contra affair.²⁶⁰ He filed written notice of his intention to produce classified information at trial.²⁶¹ After the court found some of the information relevant to Fernandez’s case, the government proposed to substitute unclassified summaries for the classified information Fernandez intended to use.²⁶² The court, however, did not accept the substitutions and set a trial date.²⁶³

On the morning of trial, and after the court’s rejection of revised proposals, the government exercised its right to interlocutory appeal under CIPA.²⁶⁴ The United States Court of Appeals for the Fourth Circuit refused to hear the appeal for lack of standing because an Independent Counsel, not the Attorney General, was prosecuting the case.²⁶⁵ The Attorney General then filed an affidavit, pursuant to Section 6(e)(1) of CIPA, certifying the risk to national security and prohibiting the disclosure of any classified information.²⁶⁶ Ultimately, the court dismissed the indictment with prejudice because the information was, in the court’s view, “essential for the defendant to put forth a defense . . . and to receive a fair trial.”²⁶⁷

²⁵⁶ *Id.* at § 6(c).

²⁵⁷ 18 U.S.C. app. § 6(c).

²⁵⁸ *United States v. Collins*, 603 F. Supp. 301, 303-306 (S.D.Fla. 1985).

²⁵⁹ *See, e.g.*, 887 F.2d 465 (4th Cir. 1989) [hereinafter *Fernandez I*].

²⁶⁰ *Id.* at 467.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *United States v. Fernandez*, 913 F.2d 148, 153 (4th Cir. 1990) [hereinafter *Fernandez II*].

²⁶⁵ *Id.*

²⁶⁶ *See Fernandez I*, 887 F.2d at 467.

²⁶⁷ *Fernandez II*, 913 F.2d at 153.

Judicial rejection of substitutions also thwarted the government's prosecution of Oliver North, a cohort in the Iran-Contra matter.²⁶⁸ Finding that certain intelligence reports were relevant to the defense, the court required the text of the documents to be presented "verbatim."²⁶⁹ Realizing that the intelligence agencies would not declassify the relevant information, the Independent Counsel dismissed the case before even filing a 6(e)(1) affidavit by the Attorney General.²⁷⁰

Recently, in *United States v. Moussaoui*,²⁷¹ the court again confronted the issue of evidentiary substitutions. Although *Moussaoui* was not directly a CIPA case, the court used the provisions of the Act as guidelines.²⁷² Zacarias Moussaoui was indicted on several charges of conspiracy relating to the September 11 attacks on the United States.²⁷³ After the United States captured some members of the al-Qaeda group, Moussaoui asserted that access to the witnesses was essential to his defense.²⁷⁴ After the government objected, the district court conducted a hearing and concluded that the witnesses could offer material testimony in Moussaoui's defense, perhaps even exonerating him from involvement in the terrorist attacks.²⁷⁵

Though finding the witness testimony relevant to Moussaoui's defense, the court acknowledged that there was a national security interest at stake.²⁷⁶ Accordingly, the court declined to order production of the witnesses at trial and, instead, ordered depositions of each witness.²⁷⁷ While the government's interlocutory appeal was pending, the district court allowed the government to submit proposed substitutions to the witness testimony.²⁷⁸ However, the court rejected the substitutions because they would not place Moussaoui in the same position as would the depositions.²⁷⁹

²⁶⁸ *United States v. North*, Crim. No. 88-0080-02, 1988 U.S. Dist. LEXIS 16008 (D.D.C. Dec. 12, 1988).

²⁶⁹ *Id.* at 6.

²⁷⁰ See Lawrence E. Walsh, SECOND INTERIM REPORT TO CONGRESS BY INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1989). The Attorney General was required, however, to make a statement that an affidavit would have been filed but for the dismissal.

²⁷¹ 382 F.3d 453 (4th Cir. 2004).

²⁷² See *id.* at 476-77.

²⁷³ *Id.* at 457. Moussaoui was not declared an enemy combatant as violating the laws of war by the President. If, however, he was declared as such, he would not have been tried in the U.S. District Court.

²⁷⁴ *Id.* at 458. Moussaoui first moved as to Witness A, but later asserted the same argument for Witnesses B and C.

²⁷⁵ *Id.* at 458, 460.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 458-59.

The government informed the court that it would refuse to provide Moussaoui with access to the witnesses, violating the district court's order.²⁸⁰ The court directed the parties to submit briefs on the appropriate sanction for noncompliance.²⁸¹ Moussaoui moved for a dismissal of the case, and the government did not oppose his suggestion.²⁸² Significantly, the government, although it was prepared to dismiss the charges against Moussaoui, informed the court that CIPA "prescribes dismissal as the presumptive action . . . in these circumstances" and dismissal was the fastest route to the court of appeals.²⁸³ The district court did not, in fact, dismiss the case, but simply dismissed the part of the indictment seeking capital punishment.²⁸⁴ On appeal, the court addressed appropriate substitutions for the witnesses' testimony. Similar to the CIPA requirement, the court recognized that substitutions are appropriate when it does not materially disadvantage the defendant.²⁸⁵ The court upheld the district court's ruling that the government's substitutions were inadequate, but that did not mean there could be *no* adequate substitution.²⁸⁶ Furthermore, despite the flaws in the proposed substitutions, the court attributed the particular problems to the task of distilling voluminous information for presentation to a jury.²⁸⁷ The court did not take the usual course of action and dismiss the case,²⁸⁸ but instead instructed the district court to create written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony.²⁸⁹

II. CLASSIFIED EVIDENCE IN COURTS-MARTIAL

Similar to the civilian court system, military courts have addressed the First Amendment right of public access in trials involving classified information. The courts-martial system does, however, provide a privilege that is not offered in Article III civilian courts. Rule for Courts-Martial 806(a) provides that courts-martial will be open to the public with the limited exception of circumstances where government information will be detrimental to the public if disclosed.²⁹⁰ In addition, Military Rule of Evidence 505(j) states that a

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 459. The first four charges that Moussaoui was charged with sought the death penalty. Because the government had failed to comply with court orders to produce the witnesses, the court dismissed the death notice, reasoning that Moussaoui had adequately demonstrated that the witnesses could provide testimony that, if believed, might preclude a jury from finding Moussaoui eligible for the death penalty.

²⁸⁵ *Id.* at 477.

²⁸⁶ *Id.* at 478.

²⁸⁷ *Id.* at 479.

²⁸⁸ *See id.* at 476.

²⁸⁹ *Id.*

²⁹⁰ MCM, *supra* note 34, MIL. R. EVID. 506(i); *see also id.* para. 53e.

“military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.”²⁹¹

Nevertheless, the Court of Military Appeals does not recognize an absolute right to close criminal trials when classified information is involved. In *United States v. Grunden*,²⁹² an airman was convicted of attempted espionage and failure to report contact with individuals he believed to be hostile intelligence agents.²⁹³ The defense challenged the closing of the court-martial proceeding by the judge, which was closed because the government was concerned about the disclosure of classified information.²⁹⁴ On appeal, the court recognized that, although the Manual for Courts-Martial allows the trial to be closed, such closure is subject to limitations.²⁹⁵ Excluding the public “must be used sparingly with the emphasis always toward a public trial.”²⁹⁶

The military court in *Grunden* disapproved of a blanket closure of all or most of a trial.²⁹⁷ Acknowledging that matters of national security should be awarded special deference, the court developed a balancing test, similar to that set forth in *Richmond Newspapers* and its progeny, to employ when determining whether closure of the trial is necessary.²⁹⁸ First, the military judge must determine whether the need for closure outweighs the “danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.”²⁹⁹ The government must show more than a “military necessity” or do more than simply throw out the term “security” in order to meet the heavy burden that justifies overriding the protections offered by the First and Sixth Amendments.³⁰⁰ Such a determination can be made at a closed preliminary hearing where the government details which materials are classified.³⁰¹ This initial review requires the trial judge to ensure that the materials in question have been classified by the proper authorities.³⁰² The trial judge can order closure of the proceedings on a finding of a “reasonable danger” that the

²⁹¹ MCM, *supra* note 34, MIL. R. EVID. 505(j).

²⁹² 2 M.J. 116 (C.M.A. 1977).

²⁹³ *Id.* at 119.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 120.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 121.

²⁹⁸ *Id.* at 121-22. The balancing test was first expressed in the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, [pt. x], para. 53e.

²⁹⁹ *Id.* at 122 (citing *Stamicarbo, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 539 (2d Cir. 1974)).

³⁰⁰ *Id.* at 121.

³⁰¹ *Id.* at 122.

³⁰² *Id.* at 122-23. The trial judge reviews classifications decisions by an “arbitrary and capricious” standard, rather than by de novo review. *Id.* at 123 n.14.

classified materials “will expose military matters which in the interest of national security should not be divulged.”³⁰³

Second, the judge must determine the scope of the exclusion of the public.³⁰⁴ The government must state which witnesses will testify to classified material and how much of that testimony should be protected from public disclosure.³⁰⁵ The court emphasized that closure should be the exception to the rule.³⁰⁶ In the court’s estimation, it would commit an error of “constitutional magnitude” to exclude the public from observing all of a witness’ testimony when only part of the testimony was classified.³⁰⁷ The result is a bifurcated presentation of the evidence where any testimony that does not deal with classified matters must be made in open court.³⁰⁸ The *Grunden* court held that the trial judge, when determining public access to the court-martial, used an “ax in place of the constitutionally required scalpel.”³⁰⁹ Essentially, the blanket exclusion of the public from the court-martial denied the appellant his right to a public trial.³¹⁰

Military Rule of Evidence 505(j) gives military judges the discretion to limit the public’s First Amendment and the accused’s Sixth Amendment rights.³¹¹ After *Grunden*, however, this discretion has been further limited. In *United States v. Hershey*,³¹² the Military Court of Appeals questioned the trial judge’s partial closure of a trial involving a staff sergeant convicted of attempted sodomy and lewd and lascivious acts involving his minor daughter. Following the decision in *Grunden*, the court held that “the Government must *demonstrate* a compelling need to exclude the public from a court-martial . . . and the mere utterance by trial counsel of a conclusion is not sufficient.”³¹³ Embracing the stringent test set forth in *Press Enterprise I*,³¹⁴ a federal civilian case, the court held that the test had not been met and trial counsel merely stated his position for closure and the military judge submitted to his request.³¹⁵ Essentially, the

³⁰³ *Id.* at 122.

³⁰⁴ *Id.* at 123.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 120.

³¹⁰ *Id.* at 123.

³¹¹ MCM, *supra* note 34, MIL. R. EVID. 505(j).

³¹² 20 M.J. 433 (C.M.A. 1985).

³¹³ *Id.* at 436.

³¹⁴ 464 U.S. 501 (1984). The four part test includes: “the party seeking closure must advance an overriding interest this is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review.” *Hershey*, 20 M.J. at 436.

³¹⁵ *Hershey*, 20 M.J. at 436.

exclusion of the public must be made on a case-by-case basis and not based on the mere conclusions expressed by trial counsel.³¹⁶ Although disagreeing with the partial closure of the trial, the court in *Hershey* held that the accused's constitutional rights were not violated.³¹⁷ Because only two people performing official functions were excluded from the courtroom, the court considered the error to be harmless.³¹⁸

Over a decade after *Hershey*, the Military Court of Appeals again relied upon federal civilian law in *ABC, Inc. v. Powell*.³¹⁹ In *Powell*, the Army investigated a sergeant major on allegations of misconduct and the special court-martial convening authority closed the proceedings.³²⁰ Reversing, the court in *Powell* first established that the military accused is entitled to public proceedings absent "cause shown that outweighs the value of openness."³²¹ The court then held that the scope of closure must be specifically tailored and "reasoned, not reflexive."³²² Reviewing the facts, the witnesses, and the circumstances, the court granted the appellant's petition after it found no record that justified a sweeping closure of the entire proceeding to the public and press.³²³

Although there are few other reported cases where closures of court-martial proceedings have been challenged, it is evident that the Military Court of Appeals has condemned any unnecessary blanket closure. Although military judges have the discretion to close trials under the courts-martial privilege, they must use this discretion with caution in order to guarantee the constitutional rights granted to the public and the accused.

Finally, Military Rule of Evidence 505 includes a provision modeled on CIPA requiring the military judge to levy sanctions including dismissal if the judge determines that withholding classified information jeopardizes a fair trial.³²⁴ Although most instances of prosecutions being dropped or dismissed due to withholding classified information go unreported, there can be little doubt that Military Rule of Evidence 505 results in prosecutions being abandoned in the same way that CIPA forces such a result in the civilian system.³²⁵

³¹⁶ *See id.*

³¹⁷ *Id.* at 438.

³¹⁸ *Id.*

³¹⁹ 47 M.J. 363 (C.M.A. 1997).

³²⁰ *Id.* at 364.

³²¹ *Id.* at 365 (citing *Press Enterprise I*, 464 U.S. at 509).

³²² *Id.*

³²³ *Id.* at 366.

³²⁴ MCM, *supra* note 25, MIL. R. EVID. 505 (i)(4)(E)(III); *see also* Kastenber, *supra* note 135, at 247.

³²⁵ *See generally* Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, 105 (1998) (explaining the

III. TRIALS UNDER MILITARY COMMISSIONS

A. Overview of Use of Military Commissions

Historically, trials by military commissions have occurred only in times of war or national emergency.³²⁶ Military commissions originated as means during ongoing conflicts for the commanding officer to try and punish conduct in violation of the laws of war.³²⁷ They also, however, have a substantial history of use even when not under extreme conditions, but rather to try persons accused of the laws of war in locations free from conflict.³²⁸ Military commissions alleviate burdens to the prosecution associated with both the Article III system and the military court-martial system.³²⁹ The Article III system is problematic because the system is slow and threatens both security of classified information and at times those involved in the prosecutions.³³⁰ Even though CIPA exists to deal with this classified information, CIPA gives broad discretion to the trial judge to dismiss prosecutions³³¹ and often does not result in bringing the accused to trial on charges that, for reasons discussed below, serve justice simply by having a trial regardless of whether the accused is convicted.³³² The UCMJ system is likewise problematic because it is only required to be used if the defendant is considered a prisoner of war.³³³ It is “unlikely that a suspected terrorist who is not part of an opposition regular army would be treated as a prisoner of war under the UCMJ.”³³⁴ Nevertheless, the Court in *Hamdan* has held that even a prisoner be treated as such until determined not to be a prisoner of war.³³⁵ Even so, courts-martial – with Military Rule of Evidence 505 serving effectively as the equivalent of CIPA – present many of the same problems as prosecuting in Article III courts.³³⁶

military convening authority’s broad discretion to refuse to proceed with court martial through proceedings that will not be publicly available).

³²⁶ Judge Eugene R. Sullivan, *Some Thoughts on Justice In America’s Future Wars*, in *BEYOND SHOCK & AWE: WARFARE IN THE 21ST CENTURY* 110, 117-18 (Eric L. Haney ed. 2006).

³²⁷ Jennifer A. Lohr, *A “Full and Fair” Trial: Can the Executive Ensure It Alone? The Case for Judicial Review of Trials by Military Commission at Guantanamo Bay*, 15 *DUKE J. OF COMP. & INT’L LAW* 387, 392 (Spring-Summer 2005).

³²⁸ See Haridimos V. Thravalos, *The Military Commission in the War on Terrorism*, 51 *VILL. L. REV.* 737, 748-750 (2006).

³²⁹ *Id.* at 111.

³³⁰ *Id.*

³³¹ *Id.* at 114.

³³² See *supra* notes 252-290 and accompanying text.

³³³ *Id.* at 115.

³³⁴ *Id.*

³³⁵ *Hamden*, 126 S. Ct. at 2795-99.

³³⁶ See *supra* notes 271-301 and accompanying text.

B. Precedent For Closed Proceedings in Military Commissions

It has long been accepted that military commission proceedings operate outside the more stringent requirements of civilian trials and courts-martial.³³⁷ Indeed, the Supreme Court has recognized that one of the most hallowed of constitutional rights – that of trial by jury – does not apply in military commission proceedings.³³⁸ When constitutional rights of this magnitude do not apply, one should not be surprised when other rights customary in civilian prosecutions are not observed. The closure of some, or even all, of a military commission proceeding is but one example. For instance, the entirety of the World War II military commission proceedings in the landmark case of *In re Quirin*³³⁹ were closed to the public.³⁴⁰ When one considers the genesis of military commission proceedings, the ability to control every aspect of the proceedings makes perfect sense. Such proceedings grew out of the necessity to mete out justice in the context of war, including proceedings on the theater of battle if necessary.³⁴¹ In this light, the Supreme Court has recognized that the standards by which such proceedings are measured must be different from those applied to ordinary prosecutions or to courts-martial.³⁴² The Court's recent decision in *Hamdan v. Rumsfeld* did not retreat from this position.³⁴³

C. Military Commissions After the 9/11 Attacks

The procedures governing military commissions formed after the 9/11 attacks have since been supplanted by the MCA. Nevertheless, a review of the evolution of the procedures is instructive.

³³⁷ See EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 312 (1907) (for military commissions the “safeguards of the Bill of Rights of the Constitution are for the time being set aside.”); see also LEONARD CUTLER, *THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11*, 61 (2005) (recognizing that courts have recognized the ability of military commissions to vary from the Manual of Courts-Martial and the Articles of War); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 841 (2d ed. 1920) (military commissions “will not be rendered illegal by the omission of details required upon trials by courts-martial.”).

³³⁸ See *Ex parte Quirin*, 317 U.S. 1, 38-41 (1942).

³³⁹ *Id.*

³⁴⁰ See MICHAEL DOBBS, *SABOTEURS*, 215-19 (2004).

³⁴¹ See WINTHROP, *supra* note 337 at 832-33.

³⁴² See, e.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding trial of civilian in occupied Europe after World War II pursuant to constitutional power to convene military commissions and prescribe the rules by which they should operate).

³⁴³ The Court in *Hamdan* held that the charges for which Hamdan's military commission proceedings had been formed were not those within the traditional law of armed conflict and, thus, required explicit congressional authorization before such charges could proceed. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-75 (2006).

After the 9/11 attacks, President Bush established the Military Commissions Plan to provide procedures for the detention, treatment, and trial of non-citizen terrorists suspected of having ties to terrorist organizations.³⁴⁴ President Bush enacted the Military Commissions Plan through an executive order issued on November 13, 2001.³⁴⁵ Because the Military Commissions Plan only consisted of a general outline and left many uncertainties concerning the treatment of these non-citizen terrorists, the Military Commissions Plan was supplemented by Department of Defense orders. Although the enactment of the Military Commissions Act of 2006 has supplanted these procedures, it is useful to first review the Department of Defense orders.

1. Military Order No. 1

a. *General Procedures*

Military Commission Order No. 1 (“Order No. 1”) bore the title “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.”³⁴⁶ Order No. 1 provided a number of procedural safeguards for the accused.³⁴⁷ Order No. 1 established that each commission should consist of three to seven commissioned military officers.³⁴⁸ Furthermore, a judge advocate had to preside over each commission.³⁴⁹ Different judge advocates prosecuted and defended each case.³⁵⁰ In addition to the judge advocate provided to the defendant, the defendant could, at his own expense, retain a civilian attorney.³⁵¹ A vote of two-thirds of the commission would suffice to convict or sentence the accused except for imposition of the death penalty, which must have a unanimous vote.³⁵² In many respects, the rules, procedures, standards of proof, and the presumption of innocence in the procedures were similar to civilian courts.³⁵³ For example, in both the civilian courts and the commissions, conviction could only occur if the trier of fact is

³⁴⁴ Sullivan, *supra* note 326, at 116.

³⁴⁵ Exec. Order. “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” Nov. 13, 2001, 66 FR 57833, 2001 WL 1435652.

³⁴⁶ U.S. DEP’T OF DEFENSE, Military Commission Order No. 1 (21 Mar.2002), 66 F.R. 57833, [hereinafter Order No. 1], available at <http://www.defenselink.mil/news/Mar2002/d2002032lord.pdf> (last visited June 5, 2006). For a comparison of the provisions in Order No. 1 with courts-martials under the UCMJ, and to military commissions pursuant to the Military Commissions Act and the MCM (with Rules for Military Commission and Military Commission Rules of Evidence), see the charts entitled “Table 1” and “Table 2” at the end of this Article.

³⁴⁷ *Id.* at § 5.

³⁴⁸ *Id.* at § 4(A)(2)-(3).

³⁴⁹ *Id.* at § 4(A)(4)-(B)(1)-(2).

³⁵⁰ *Id.* at § 4(B)(1)-(2).

³⁵¹ *Id.* at § 4(C)(3)(b).

³⁵² *Id.* at § 6(F).

³⁵³ Sullivan, *supra* note 317, at 116.

convinced beyond a reasonable doubt.³⁵⁴ Even though most of the procedures were the same as the civilian courts, several differences existed.

First, the rules of evidence were relaxed because evidence is admissible simply if it has “probative value to a reasonable person.”³⁵⁵ Second, the defendant was not entitled to judicial review.³⁵⁶ Instead of judicial review, the defendant received a three-step appeals process. First, the defendant was entitled to a review panel that included an experienced judge.³⁵⁷ Second, the Secretary of Defense could review the judgment against the defendant.³⁵⁸ Third, the President reviewed the judgment and rendered a final decision.³⁵⁹ Finally, as the next section explains, the military commission has great flexibility in handling classified information.

b. Protection Of Classified Information Under The Military Commissions Orders

In addition to the procedural safeguards described in the above mentioned section, Order No. 1 also provided mechanisms by which classified information may be protected from disclosure.³⁶⁰ The following rules applied to any “Protected Information.”³⁶¹ “Protected Information,” under the Order, included classified information, information protected by law from unauthorized disclosure, information that, if disclosed, would endanger the safety of someone involved in the proceeding, intelligence or law enforcement sources, or any other information relating to national security.³⁶²

The rules governing protection of information applied to both the government and the defendant.³⁶³ First, when either party intended to use “Protected Information,” the party had to notify the presiding officer of the commission of his intent to use the “Protected Information.”³⁶⁴ Once notice had been given, the presiding officer could direct that the party either redact the “Protected Information” from the document, provide a summary of the

³⁵⁴ Order No. 1, *supra* note 337, § 5(C).

³⁵⁵ *Id.* at § 6(D)(1).

³⁵⁶ Sullivan, *supra* note 317, at 117.

³⁵⁷ Order No. 1, *supra* note 346, § 6(H)(4).

³⁵⁸ *Id.* at § 6(H)(5). The relaxation of the rules of evidence is not surprising because the nature of the offenses in question often does not allow the luxury of traditional criminal investigations, such as take place in domestic crimes. The offense usually are either in areas involving active conflict or at least where there is the threat of such conflict.

³⁵⁹ *Id.* at § 6(H)(6).

³⁶⁰ *Id.* at § 6(D)(5).

³⁶¹ *Id.* at § 6(D)(5)(1).

³⁶² *Id.*

³⁶³ *Id.* at § 6(D)(5).

³⁶⁴ *Id.* at § 6(D)(5)(a).

“Protected Information,” or provide a statement of the facts that the “Protected Information” would prove.³⁶⁵ The redactions, summaries, or statements of fact did not have to meet any particular standard. Even though the defendant was not allowed to see the “Protected Information,” no evidence could be used against the defendant unless it has been made available to the judge advocate defense counsel.³⁶⁶ Although the defendant’s civilian defense counsel could be precluded from seeing the classified information, the presiding officer could allow the defendant’s civilian attorney access to the “Protected Information.”³⁶⁷ Order No. 1 never stated that prosecution must be dropped or is hindered by the use of classified information.

Because the original Order No. 1 did not give standards for the summaries or provide a penalty for providing inadequate summaries, a revised version of Order No. 1 was released on August 31, 2005.³⁶⁸ Even though this revision was an attempt to further clarify the rules regarding classified information, one commentator noted that “[t]here nonetheless remain[ed] no clear and fixed rule protecting the defense’s access to relevant evidence.”³⁶⁹ The clarified rule stated that “if . . . an adequate substitute for [Protected Information] is unavailable . . . the Presiding Officer, notwithstanding any determination of probative value . . . shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.”³⁷⁰ While the rule was clear that the evidence would not be admitted if it would result in the denial of a full and fair trial, the rule did not require dismissal of the case.

*c. Protection of Classified Information Under The
Military Commissions Act of 2006*

The Military Commissions Act of 2006 contains the following detailed provisions concerning the use of classified evidence and information, but the two most significant subsections are (f)(2)(A) regulating limitations on introduction of classified information, and (f)(2)(B) that goes even further by protecting sources of classified information. These key provisions follow (with

³⁶⁵ *Id.* at § 6(D)(5)(b).

³⁶⁶ *Id.* at § 6(D)(5)(b).

³⁶⁷ *Id.* at § 4(C)(3)(b).

³⁶⁸ U.S. DEP’T OF DEFENSE, Military Commission Order No. 1 (31 Aug. 31 2005), [hereinafter “Order No. 1 (Revised)”].

³⁶⁹ *Trials Under Military Order: A Guide to the Rules for Military Commissions*, updated May 2006, http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf (last visited March 6, 2007).

³⁷⁰ Order No. 1 (Revised), *supra* note 368, § 6(D)(5)(b).

the entire section on protection of classified information in the accompanying footnote).³⁷¹

³⁷¹ The entire section (f) of the MCA entitled "Protection of Classified Information," codified at 10 U.S.C. § 949d(f)(2)(2007), reads as follows:

(1) NATIONAL SECURITY PRIVILEGE-

(A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter.

(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that--

- (i) the information is properly classified; and
- (ii) disclosure of the information would be detrimental to the national security.

(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

(2) INTRODUCTION OF CLASSIFIED INFORMATION-

(A) ALTERNATIVES TO DISCLOSURE- To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable--

- (i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;
- (ii) the substitution of a portion or summary of the information for such classified documents; or
- (iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES- The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.³⁷¹

(C) ASSERTION OF NATIONAL SECURITY PRIVILEGE AT TRIAL- During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military

(f) Protection of Classified Information-

(2) INTRODUCTION OF CLASSIFIED INFORMATION-

(A) ALTERNATIVES TO DISCLOSURE- To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable--

- (i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;
- (ii) the substitution of a portion or summary of the information for such classified documents; or
- (iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES- The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources,

judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(3) CONSIDERATION OF PRIVILEGE AND RELATED MATERIALS- A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

(4) ADDITIONAL REGULATIONS- The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulations so prescribed, or modified, shall be submitted to the Committees on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications, as the case may be, go into effect.

methods, or activities by which the United States acquired the evidence.

This section of the Act appeared at first to broaden the prosecuting authority's ability to charge and try an accused. It seemed to permit prosecutions without disclosure of classified evidence, by substitute forms of the evidence, and without the risk of dismissal presented by CIPA and Military Rule of Evidence 505. Notwithstanding, consistent with subpart (4), the Secretary of Defense has recently presented to Congress a Manual for Military Commissions that voluntarily adopts the same procedural protections for an accused as those set forth in Military Rule of Evidence 505. As with that Rule, the Military Commissions Rule of Evidence (also 505), provides not only a variety of ways of protecting classified information from disclosure, but also great flexibility to the military judge to deal with situations in which the government's form of disclosure is challenged by the accused.³⁷²

(3) *Alternatives to discovery of classified information.* The military judge, upon motion of the Government, shall authorize, to the extent practicable, (A) the deletion of specified items of classified information from materials to be made available to the defense, (B) the substitution of a portion or summary of the information for such classified materials, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, subject to subsection (e)(4) of this rule. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and *ex parte*.

(4) *Protection of the fairness of the proceeding.* If the military judge determines that the government's proposed alternative to full disclosure under subsection (3) would be inadequate or impracticable, and the Government objects to disclosure of the information in a form approved by the military judge, the military judge, upon a finding that the information in question is evidence that the Government seeks to use at trial, exculpatory evidence, or evidence necessary to enable the defense to prepare for trial, shall issue any order that the interests of justice require. Such an order may include:

- (A) striking or precluding all or part of the testimony of a witness at trial;
- (B) declaring a mistrial;
- (C) finding against the Government on any issue as to which the evidence is probative and material to the defense;
- (D) dismissing the charges, with or without prejudice; or
- (E) dismissing the charges or specifications or both to which the information relates with or without prejudice.

U.S. DEP'T OF DEFENSE, THE MANUAL FOR MILITARY COMMISSIONS (18 Jan. 2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf> (last visited Jan. 8, 2008).

2. Comparison of CIPA, Federal Rule of Military Evidence 505 in Courts-Martial, and the Protection of Classified Information Under the Military Commissions Act of 2006

The following discussion will explain the similarities and the differences between the treatment of classified information under the Article III courts and the military commissions. For the reasons that follow, and others discussed in the final section of this Article,³⁷³ the adoption of military commission procedures that resemble those in courts-martial does not undercut the value of military commissions in permitting for prosecutions that otherwise could be aborted due to national security risks. To see how this is true, one needs to compare MCA procedures both with CIPA and with courts-martial procedures.

a. *Comparison of MCA Procedures with CIPA Procedures*

Under both MCA and CIPA procedures, if classified information exists, redactions or summaries may be given to the defendant in place of the classified information, but the MCA's treatment of classified information is different from CIPA in significant ways. Because of these differences, prosecutions and the protection of classified information can coexist much more easily in a military commission than under the Article III system.

The two systems are different, however, for several reasons. First, the government under CIPA can use a redaction or summary of classified information instead of the classified information solely when the information would provide the defendant with "substantially the same ability to make his defense as would disclosure of the specific classified information."³⁷⁴ Conversely, under the MCA, the government can use summaries, redactions, or statements of facts with less demanding constraints.³⁷⁵ The Military Commissions Rules of Evidence promulgated pursuant to the MCA do provide guidelines for the military commission to determine whether a fair trial will result with use of the classified information and even allows for dismissal with or without prejudice.³⁷⁶ The MCA system does not, however, require that the defendant have "substantially" the same ability to make his defense.³⁷⁷ The difference in language between CIPA and the MCA (and its Rules of Evidence) cannot be unintentional.

³⁷³ See *infra* notes 583-610 and accompanying text.

³⁷⁴ 18 U.S.C. app. § 6(c).

³⁷⁵ 10 U.S.C. § 949d.

³⁷⁶ THE MANUAL FOR MILITARY COMMISSIONS, *supra* note 372, Military Commission Rule of Evid. 505.

³⁷⁷ See *id.*

Second, the two systems are different because the civilian system requires that if the summary of the classified information fails to provide the defendant with “substantially the same ability to make his defense,” the prosecution must dismiss the case if it wants to use the information.³⁷⁸ Under the military commission system, the ultimate penalty of dismissal, if the summaries of the classified information are inadequate, is not mandated, though it is an option available to the presiding officer.³⁷⁹ The government may still continue the prosecution under all counts of the indictment.³⁸⁰

Finally, and perhaps most importantly, the Military Commissions proceedings may be closed more easily than civilian³⁸¹ or even court-martial proceedings.³⁸² Consistent with precedent for closure of military commission proceedings are closed rather than open,³⁸³ the Military Commissions rules contemplate that the presiding officer can close the proceedings to protect national security by avoiding disclosure of classified information.³⁸⁴ Although the rules express a desire that the proceedings be open as far as possible, they clearly allow for closure more readily than in a civilian setting.³⁸⁵ One question here will result from the MCA’s indication that the Article III courts granted appellate review – the United States Court of Appeals for the D.C. Circuit, and the United States Supreme Court – have authority under the Act to review (1) whether the provisions of the MCA are followed, and (2) “to the extent applicable, the Constitution and laws of the United States.”³⁸⁶ Many of the constitutional rights available in the civilian system and in courts-martial, however, are not accorded to enemy combatants in military commissions.³⁸⁷ In any event, the Supreme Court has shown, even in the civilian context, the willingness to allow closure of trial proceedings for purposes such as protecting national security.³⁸⁸ One would expect the Court, therefore, to permit closure of

³⁷⁸ See *supra* notes 259-271 and accompanying text.

³⁷⁹ See THE MANUAL FOR MILITARY COMMISSIONS, *supra* note 372, Military Commission Rule of Evid. 505.

³⁸⁰ See *id.*

³⁸¹ See *supra* notes 37-128 and accompanying text.

³⁸² See *supra* notes 290-336 and accompanying text.

³⁸³ See *supra* notes 337-343 and accompanying text.

³⁸⁴ See THE MANUAL FOR MILITARY COMMISSIONS, *supra* note 372, Military Commission Rule Evid 806(b).

³⁸⁵ See *id.*

³⁸⁶ See 10 U.S.C. § 950g(c).

³⁸⁷ The Supreme Court in *Hamdan* acknowledged that, if the accused fell within one of the recognized categories of conduct triable by military commission, the accused would lack many of the constitutional rights afforded in Article III proceedings. See 126 S. Ct. at 2772-2886

³⁸⁸ See *Press Enterprise I*, 464 U.S. at 510.

military commission proceedings, which historically have been closed, whenever a risk to national security existed.³⁸⁹

b. Comparison of MCA Procedures with Courts-Martial Procedures

Although the difference between MCA procedures and court-martial procedures bearing on the protection of classified information are less striking than with CIPA, the differences are sufficient that the MCA procedures can make the difference between carrying forward with a prosecution or aborting it.

Although it may not initially stand out as a major difference, the provision in the MCA for protection of the sources of classified information is significant. The provision in the MCA – which has no counterpart in the UCMJ or court-martial procedures – permits the government to not disclose how evidence was acquired if the military judge finds that the sources, methods, or activities by which the government acquired the evidence are classified and that the evidence itself is reliable.³⁹⁰ The government may in many instances be able offer evidence that itself is not classified but which has been developed by either United States intelligence or operatives of other countries. An example should illustrate the value of the MCA’s approach. Let us suppose that a foreign intelligence operative is able to link someone to a terrorist act. Suppose further that the operative obtains photographs placing the person in a location that incriminates the person. The photographs themselves will be admissible. Another witness, if he or she is familiar with the surroundings shown in the photographs, can provide whatever foundation may be necessary to get the photographs into evidence. However, the defense would not be permitted to inquire into the identity of the person – or the means by which – the operative obtained the photographs.

³⁸⁹ In the following passage from a recent article, another author has reached a conclusion similar to the one articulated in this Article:

If disclosing classified information “would be detrimental to the national security,” section 949d(f) [of the MCA] directs that the information must be protected during “all stages” of the military commission proceeding. The military judge is required to allow redaction, substitution or summary, or stipulation of classified information by the Government to the extent practicable during both discovery and trial. And the use of *ex parte*, in camera review of trial counsel’s national security privilege assertion remains intact, as does the protection of “sources, methods or activities” used by the Government to obtain its evidence. . . .

Sherry M. Barnash, *What We Owe the World Are Thoughtful War-Crimes Trials That Do Justice Without Unduly Jeopardizing Innocent Lives by Compromising Vital Intelligence*, 39 ST. MARY’S L. J. 231, 270-71 (2007) (citations omitted).

³⁹⁰ 10 U.S.C. § 949d(f)(2)(B).

Defense counsel would want to discover information on the manner in which evidence, such as the photographs in the above hypothetical, came into the prosecution's hands. What if the operative in our possible scenario has been involved in distorting information in the country where he or she operates? Such activity may be part of the operative's function there – to raise concerns about the “host” country, or factions within it – but the very fact that the person is involved in tactics that mislead would be something that a cross-examiner would want to bring out. Under the MCA procedures, the evidence could end up being offered without anything about the operative's having taken them and provided them being known. In both the civilian system and the court-martial system, the accused would almost certainly obtain this information through pretrial discovery.³⁹¹

This ability to shield sources of evidence, at least in the estimation of one commentator, is “the true gravamen of the change under the commissions and [is] sure to be the most troubling to judicial observers.”³⁹² Those troubled by this difference no doubt will question whether the withholding of information about the means by which evidence is obtained is fair to the accused.³⁹³ However, it is just such accommodations that make military commissions unique in taking into account the interests of all concerned. That inclusion of this provision in fact can be seen as a recognition by Congress that some prosecutions would not be pursued without the protection of sources.

A less direct way that military commission procedures can avoid disclosure of classified information – and thereby permit a prosecution to go forward – is by employing more relaxed evidentiary rules than in civilian courts or courts-martial. If the government can prove a fact through hearsay evidence or through non-hearsay classified evidence, the government may well choose the hearsay evidence. “Hearsay may be admitted on the same terms as any other form of evidence . . . if it would be admitted under the rules of evidence applicable in trial by general courts-martial,” or “if the proponent of the

³⁹¹ In the civilian system, Federal Rule of Criminal Procedure 16 would authorize pretrial discovery of such information by an accused. *See* FED. R. CRIM. P. 16. In the Rules for Courts-Martial, Rule 703(f) provides a mechanism similar to Rule 16 in the civilian system. *See* 10 U.S.C. § 846; R.C.M. 703(f); *see also* United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986) (“Article 46, 10 U.S.C. § 846, seems to go beyond [a] . . . constitutional minimum in directing ‘the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence’ . . .”).

³⁹² Richard V. Meyer, *When a Rose Is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48, 58 (March 2007). Indeed, those invested with the protection of national security would probably not want the photographs themselves to become known. The taking of photographs alerts persons who are enemies or terrorists that surveillance is being conducted, and from what locations.

³⁹³ *See id.* (if such information about sources is withheld, “defence counsel will have a difficult time discrediting or explaining the information without knowing its true provenance”).

evidence makes known to the adverse party” the intention to offer, and the particulars of, the evidence.³⁹⁴ The approach to hearsay in courts-martial is not significantly different from that in civilian courts.³⁹⁵ However, the applicable military rule of evidence appears to contemplate the use of the notification of one’s opponent of the intent to offer hearsay as more than a limited exception.³⁹⁶ Such an approach is consistent with practice in military commissions such as the Nuremberg tribunals, where “hearsay evidence was frequently admitted. . . .”³⁹⁷ This practice, as well as the generally more flexible approach to receiving evidence, is actually more typical of practice outside the United States, in particular, and of military commissions, in general.³⁹⁸ In any event, the relaxed approach to hearsay – especially when combined with the government’s ability to shield sources of evidence if classified – could prove to be the difference in a prosecution where the government otherwise would drop the case.

A final and more subtle difference between MCA procedures and court-martial procedures relates to the precedential effect of prior cases. Even for provisions in the court-martial system that now have analogues in the Manual for Military Commissions, courts evaluating an issue under the MCA are not bound to follow precedent interpreting the UCMJ or Manual for Courts-Martial. For instance, a court might be addressing whether a MCA military commission proceeding needed to be dismissed when substitutes for classified information (rather than the actual information) were produced. The Manual for Military Commissions now contains a provision analogous to that in the Manual for Courts-Martial allowing for dismissal in these circumstances. Nevertheless, the court could distinguish decisions under courts-martial procedure. For instance, such a court could rely on the manner in which the MCA procedures depart from CIPA’s requirement that the substitutes for classified information must allow the defendant to make “substantially the same defense” as if the defendant had the classified information to offer. The MCA places no such requirement in place and, as such, sets up a standard for dismissal that is likely higher. Although the Manual for Military Commissions does not similarly depart from court-martial procedures, a court could note that precedent under court-martial procedures has in many ways mirrored precedent in the civilian courts regarding classified information.³⁹⁹ By contrast, the court might reason,

³⁹⁴ THE MANUAL FOR MILITARY COMMISSIONS, *supra* note 372, Military Commission Rule of Evidence 802, 803.

³⁹⁵ MCM, *supra* note 25, MIL. R. EVID. 801-807.

³⁹⁶ See Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terror*, 42 HARV. C. R.-C.L. REV. 139, 162 (Winter 2007).

³⁹⁷ JOHN ALAN APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 323 (Greenwood Press 1954).

³⁹⁸ See *id.* at 322-23.

³⁹⁹ See *supra* notes 290-325 and accompanying text.

military commissions have a unique history and purpose.⁴⁰⁰ In short, courts are much less bound by existing precedent in dealing with issues that arise under the MCA than courts-martial. That on its own may lead to a prosecution whereas, absent MCA procedures, the prosecution would be dropped.

IV. HIGHER LAW PRINCIPLES OF JUSTICE AND HOW MILITARY COMMISSIONS SERVE A CRUCIAL ROLE IN PRESERVING THESE PRINCIPLES

As the previous sections of this Article show, the civilian criminal justice system will lead in many instances to abandoned prosecutions where evidence required to prosecute the accused cannot be adequately protected. CIPA has permitted some prosecutions in the civilian system, yet there remain a group of cases in which prosecution will simply fail.⁴⁰¹

Conversely, military commissions likely will permit the prosecution of accused – in a limited category of cases – where civilian prosecutions cannot. As shown in Part III, military commissions have greater flexibility in protecting national security and sensitive information than the civilian criminal justice system. They also have the ability to proceed with prosecutions where, under CIPA, a court may require dismissal of the prosecution.

If the percentage of cases that cannot be prosecuted in the civilian system is relatively small, and the protections to accused in the civilian system are greater, one may ask: why bother? Why not prosecute as many accused as possible in the civilian system and, for those cases where the risk is too great because of evidence implicating national security or the lives of persons who supplied evidence, simply let those cases go unprosecuted?

The overall concern is one of justice. Many like to recite the following statement from Blackstone: “Better that ten guilty persons escape than that one innocent suffer.”⁴⁰² That principle, at its best, expresses the notion that we ought to insist on fundamentally fair procedures before we convict persons and sentence them. The MCA, however, offers procedural protections designed to produce a just verdict.⁴⁰³ There is still the matter, however, of how to bring to

⁴⁰⁰ See *supra* notes 337-343 and accompanying text.

⁴⁰¹ For cases discussing graymailing and resultant dismissals of prosecutions, see *supra* notes 259-270 and accompanying text.

⁴⁰² IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (1769).

⁴⁰³ See, e.g., Military Commission Act of 2006, *supra* note 1 (requiring well qualified defense counsel); *id.* § 948l (providing for reporters and interpreters); *id.* § 948q (requiring charging documents); *id.* § 948r (prohibiting self-incrimination and excluding statements obtained by prohibited interrogation techniques); *id.* § 949a (placing limits on use of hearsay greater than those typical in military tribunal proceedings); *id.* § 949d (limiting exclusion of accused from

trial accused when the evidence is so confidential, or the sources so vulnerable, that the very act of conducting the trial creates intolerable risks – that is, unless the procedures allow more flexibility in the protection of classified information and identity of sources.

These procedures do not rise to the level of those afforded the accused in civilian prosecutions or even in courts-martial. Accused enemy combatants are not entitled to procedures guaranteed in the Constitution to other accused.⁴⁰⁴ Although these deficiencies are not of a constitutional magnitude,⁴⁰⁵ Congress may nevertheless address them in its role as the primary check on the Executive in matters of national security. Yet, for the reasons set forth above, the MCA likely provides in some cases the *only* system in which the charges against some of the accused can be tried without the government's risking disclosure of classified information and endangering national security.

Here, then, is the rub: If the MCA offers the only realistic chance to prosecute those who participated in the 9/11 attacks, or similar acts in violation of the laws of war, do the philosophical and theological traditions have anything to say about whether we have the responsibility to use the MCA to pursue such prosecutions?

To explore this question, we now consult the views of philosophers and theologians from antiquity through the present. The philosophers – discussed in subpart A below – may be broken roughly into three categories—(1) two from classical philosophy, Aristotle representing the ancient Greek philosophers and Aquinas representing those who later built upon Aristotle's work; (2) two from the Enlightenment, Jeremy Bentham and John Stuart Mill; and (3) several from the modern period, including the group influenced by the philosophies of Bentham, on the one hand, and C.S. Lewis, who in many ways is the intellectual descendant of Aristotle and Aquinas, at least on the subject of the need for civil justice, on the other hand. The Article then explores – in subpart B below – the theological views deriving primarily from the Judeo-Christian heritage.

The Article concludes – in subpart C – with a discussion of whether military commissions have a unique role to play in serving justice. Most of the philosophers and theologians discussed in Parts A and B assume that a person

proceedings); *id.* 949f (permitting challenges to military judge and tribunal members); *id.* § 949h (imposing double jeopardy rule); *id.* § 949j (allowing accused ability to obtain witnesses and other evidence); *id.* § 949k (allowing defense of lack of mental responsibility); *id.* § 949m (requiring three-quarters vote for sentence of more than ten years and unanimous vote for death sentence).

⁴⁰⁴ The Supreme Court has recognized that persons subject to trial by military commissions do not enjoy the same constitutional protections as those tried in the civilian or courts-martial systems. *See supra* notes 10-11 and accompanying text.

⁴⁰⁵ *See* Madison, *supra* note xx, at 276-279 (citing *Hamdan*, 126 S. Ct. at 2773-75).

has committed a crime. In other words, they discuss the role of justice in dealing with criminal acts, without questioning whether the particular accused has committed the acts. In Part C, this Article will discuss how we cannot assume the guilt of any particular person accused of violating the laws of war. Nevertheless, as explained there, we can fairly assume that at least some of those captured and charged will have actually committed crimes. With that assumption, the Article concludes with a discussion of whether military commissions represent a limited but crucial role in serving justice.

A. Philosophical Views on the Need for Justice

1. Classical Philosophy – Aristotle and Aquinas

Aristotle maintained that society exists because men and women instinctively seek happiness and recognize that it requires collaboration with others to reach the fulfillment for which they are designed.⁴⁰⁶ Moreover, society cannot exist solely in clusters such as families, churches, associations, or the like. Each of these must exist within a broader association, subject to the rule of law equally applied.⁴⁰⁷ Without this overarching association mediated by law, justice could not be assured.⁴⁰⁸ And, without justice, Aristotle recognized that all other virtues would be impossible.⁴⁰⁹ Although friends could be expected to treat their friends justly, the state of mankind was such that persons in the community would not always be dealing with friends.⁴¹⁰ A system had to exist in which law demanded justice for all persons within the society.⁴¹¹ In short, justice was the preeminent value to Aristotle by which persons could achieve their built-in desire for happiness.⁴¹²

Aristotle also addressed the subject of individual responsibility for one's actions. Aristotle believed that those who violated the law had to be brought to justice; everyone bears responsibility for his or her choices.⁴¹³ "Therefore virtue also is in our own power, and so too vice. For where it is in our power to act it is also in our power not to act."⁴¹⁴ The law serves the crucial instructive role of

⁴⁰⁶ ARISTOTLE, POLITICS, Bk I, § 1, Bk III, § 9 (Benjamin Jowett trans., Oxford, Clarendon Press 1885). For an excellent description of Aristotle's philosophies on the subjects addressed in this section, see J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 13-49 (InterVarsity Press, 1997).

⁴⁰⁷ *Id.* Bk III, §§ 11-12.

⁴⁰⁸ ARISTOTLE, POLITICS, *supra* note 406, Bk I, § 1.

⁴⁰⁹ *Id.*

⁴¹⁰ See Bk III, §§ 11-12; ARISTOTLE, THE NICHOMEAN ETHICS Bk IX (David Ross trans., Oxford University Press 1998).

⁴¹¹ ARISTOTLE, *supra* note 406, Bk I, § 1, Bk III, §§ 11-12.

⁴¹² *Id.*

⁴¹³ ARISTOTLE, *supra* note 406, Bk I, § 5.

⁴¹⁴ *Id.*

pointing toward the virtuous.⁴¹⁵ Moreover, Aristotle conceived of natural justice such that everyone knew certain fundamental truths about the difference between acting with virtue and acting with vice.⁴¹⁶ Aristotle likewise recognized the reality of human nature and the propensity to stray from virtue.⁴¹⁷ The law thus constrains a person's actions by providing a framework within which the person may act without suffering punishment.⁴¹⁸ Criminal justice is an essential complement to the law's instructive function.⁴¹⁹ One cannot choose an action without also choosing the consequences of one's actions.⁴²⁰ If the law does not lead a person to virtue by serving as a beacon, the law will produce virtue by serving as a stick.⁴²¹ The necessary pain associated with the punishment actually serves to heal the individual, to point the person back toward virtue.⁴²²

Thomas Aquinas, the medieval philosopher and Dominican monk, built upon the foundation left by Aristotle for understanding the role of justice in society. Because Aquinas' discussion of this subject is in many ways an amplification of Aristotle's views, Aquinas' approach is discussed both here and in the section below dealing with theology. Aquinas believed that Christian theology, rooted in the Scriptures, provided a clear explanation of the need for law and for criminal justice.⁴²³ Alternatively, Aquinas held that these truths could also be known from the dictates of practical reason implanted in every human being.⁴²⁴ The same dictates of practical reason – or Natural law – that guided Aristotle would lead anyone to the same conclusions about fundamental truths like the role of civil authorities, the need for justice, and the function of law in serving both.⁴²⁵

In his *Treatise on Law*, Aquinas amplifies significantly on Aristotle's teachings concerning the role of law in serving justice.⁴²⁶ Aquinas' general definition of law is "an ordinance of reason, for the common good, made by him who has care of the community, and promulgated."⁴²⁷ When one unpacks this

⁴¹⁵ *Id.* Bk X, § 9.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* Bk V, § 7.

⁴¹⁷ *Id.* Bk X, § 9.

⁴¹⁸ *See id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* Bk III, § 5.

⁴²² *Id.* Bk X, § 9.

⁴²³ THOMAS AQUINAS, *SUMMA THEOLOGICA* Quest. 91, Art. 4 (Fathers of English Dominican Province trans., Univ. of Chicago Press 1952).

⁴²⁴ *Id.* Quest 91, Art. 2, Quest. 94, Art. 2.

⁴²⁵ *Id.*

⁴²⁶ *Id.* Quest. 90-Quest. 108.

⁴²⁷ *Id.* Quest. 90, Art. 4.

dense statement, one sees the correlation between Aristotle and Aquinas' views of law.⁴²⁸ Practical reason, according to Aquinas, leads persons to choose their actions.⁴²⁹ Practical reason, moreover, rests on certain "first principles" – basic understandings inherent in human nature.⁴³⁰ Chief among these dictates of practical reason is that "good is to be done and pursued, and bad is to be avoided."⁴³¹ When one carries forward the implications of this first principle, the relationship to Aristotle's concept of virtue becomes clearer:

So the goods {bona} which he proceeds to identify will all be referred to in principles of the form: *X* (say, human life) is a good, to be pursued and preserved {*vita conserva[nda]*}, and what damages *X* is a bad, to be avoided; actions that are good as means to realizing such basic human goods are to be done; actions bad as harming a basic good are to be avoided.⁴³²

Practical reason will always lead one to act in accordance with basic human goods.⁴³³ As law guides one to act virtuously in Aristotle's scheme, law directs one to act consistently with basic human goods in Aquinas' scheme.⁴³⁴ Aquinas proceeds to categorize law in more depth than Aristotle and, by so doing, allows us to understand the particular role of human law.⁴³⁵ Eternal law stands in the background – the objective truths that have always existed, exist now, and forever will exist.⁴³⁶ Divine law represents the Eternal law as revealed through the Bible.⁴³⁷ Natural law also reveals Eternal law, but not through explicit revelation; instead, Natural law comprises those basic first precepts that are written on the heart of every human.⁴³⁸ Human law is the civil law of a given society governing the behavior of its members.⁴³⁹ Ideally, human law will be consistent with Eternal law, Divine law, and Natural law, but is not always so.⁴⁴⁰

In one of the richest sections of Aquinas' *Treatise on Law*, he acknowledges the reality of the human condition and the manner in which each category of law helps mankind.⁴⁴¹ Divine law reveals Eternal law to mankind

⁴²⁸ See *id.* Quest 93, Art. 2, Quest. 94, Art. 2

⁴²⁹ *Id.*

⁴³⁰ See *id.* Quest 94, Art. 2.

⁴³¹ *Id.*

⁴³² JOHN FINNIS, *AQUINAS* 86 (Oxford Univ. Press 1998).

⁴³³ See *AQUINAS*, *supra* note 423, Quest 94, Art. 2.

⁴³⁴ *Id.*

⁴³⁵ See *id.* Quest. 91, Art. 1, Art. 2, Art. 3 & Art. 4.

⁴³⁶ *Id.* Art. 1

⁴³⁷ *Id.* Art. 4

⁴³⁸ *Id.* Art. 2

⁴³⁹ *Id.* Art. 3

⁴⁴⁰ *Id.* Quest. 96, Art. 4.

⁴⁴¹ *Id.* Quest 91, Art. 4.

most clearly.⁴⁴² Nevertheless, the Natural law inherent in one's nature reveals certain truths as well.⁴⁴³ Human nature, however, is vulnerable to error and may not fully comprehend the Natural law written on one's heart.⁴⁴⁴ The choices that persons make will have an impact in this regard.⁴⁴⁵ Those who seek to follow Eternal law principles – what Aristotle would call virtues – will develop habits that make them more inclined to know the truths, the human goods for which they are designed to do and seek.⁴⁴⁶ Those who choose consistently to violate principles of Eternal law – i.e., to commit vices – may so mar their capacity to know the Natural law within their nature.⁴⁴⁷

Aquinas, moreover, was a realist. He recognized that most persons would be somewhere between these extremes – they would not always act in accordance with eternal law, nor would they always act contrary to it.⁴⁴⁸ In light of this, Aquinas believed it to be unrealistic for human law to duplicate Divine law.⁴⁴⁹ Few persons indeed could do that. Instead, Aquinas reasoned that human law should be consistent with Divine law (and thus eternal law), but set standards that might be called minimally acceptable behavior.⁴⁵⁰ Human law would outlaw killing, theft, and other such conduct.⁴⁵¹ The human law should point toward the truths of Eternal law.⁴⁵² A law prohibiting murder points toward the truth that human life should be preserved. Divine law would point further by requiring not only that one refrain from murdering one's fellow human being, but that one must love one's brothers and sisters. While the minimal requirement of this human law could be enforced, the demands of Divine law would be impossible to police.⁴⁵³ Indeed, enforcing Divine law would be beyond the State's proper role.⁴⁵⁴

The role of a civil justice system – by which those who violate human law are prosecuted and punished – was nevertheless central to Aquinas' conception of a just society. Like Aristotle, Aquinas saw the prosecution and

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *See id.*

⁴⁴⁶ *Id.* Quest. 92, Art. 1.

⁴⁴⁷ *Id.* Quest. 94, Art. 6.

⁴⁴⁸ *Id.* Quest. 92, Art. 1.

⁴⁴⁹ *Id.* Quest. 96, Art. 3.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *See id.*

⁴⁵³ *Id.* Quest. 96, Art. 2.

⁴⁵⁴ For excellent discussions of civil government's limited role in enforcing divine law, see Craig A. Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 CATH. U. L. REV. 801 (Spring 1999); Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1 (Spring 1997).

punishment of those found guilty of violating the law as a medicine or cure for the wrongdoer – to correct the harm done to the wrongdoer and allow for the healing of turning away from vices and toward truth.⁴⁵⁵ Aquinas, however, sees the role of prosecution and punishment of violators of the law in broader terms. One effect is the deterrence not simply of the wrongdoer but of others in society.⁴⁵⁶

2. Enlightenment Philosophers on the Need for Civil Justice:
Bentham and Mill

The Enlightenment philosophy, which took hold in the eighteenth century, viewed the role of society, law, and justice from a completely different standpoint than that accepted before. In the view of Enlightenment philosophers, society did not form as a result of the inherent nature of human beings, but rather by the choice of human beings to form a society.⁴⁵⁷ Law was a means of enforcing individuals' rights that they had, by agreement, delegated to the state for that purpose.⁴⁵⁸ The purpose of law and government, therefore, was not to guide persons to virtue (as Aristotle would say) or to Eternal law (as Aquinas would say), but rather to set forth the rights and responsibilities agreed upon by members of society so that they could be enforced.⁴⁵⁹ The important difference between the legal schemes contemplated by Aristotle and Aquinas and that of the Enlightenment thinkers is this: the former held that objective truths were the measure of person's actions, that natural rights existed regardless of what mankind said or did, whereas the Enlightenment maintained that rights were legitimate and enforceable only if adopted by the state.⁴⁶⁰ The Enlightenment view has properly been characterized as one of "positivism" or "positive law," in which law has force only when positively legislated by the state.⁴⁶¹

An offshoot of the development of positivism was an influential philosophy of utilitarianism developed by Jeremy Bentham and later John Stuart Mill. Utilitarianism presumes that that human good may be measured by one ultimate criterion: the aggregate pleasure of those in society.⁴⁶² The source of all human conduct, this philosophy maintains, is to seek the feeling of happiness

⁴⁵⁵ IV THOMAS AQUINAS, SCRIPTUM SUPER LIBROS SENTENTIARUM (1252).

⁴⁵⁶ *Id.*

⁴⁵⁷ S.E. FROST, JR., BASIC TEACHINGS OF THE GREAT PHILOSOPHERS 199, 202-04 (Anchor Books 1989).

⁴⁵⁸ *Id.*

⁴⁵⁹ CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 42-43 (Ignatius Press 1999).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 43-45; FROST, *supra* note 457, at 97-98, 277.

or pleasure.⁴⁶³ Feelings are the only certainties, and thus, this philosophy rejects the notion of objective moral virtues or eternal truths as a guide for conduct.⁴⁶⁴ Ultimately, the measure of a person's actions must therefore take into account the pleasure that will result, minus the pain of the action.⁴⁶⁵ Moreover, utilitarians conceive of one's actions necessarily involving the aggregate pleasure of all persons in society, minus the pain to all persons.⁴⁶⁶ Whereas a hedonist seeks pleasure but measures it based on his or her own pleasure, a utilitarian measures the pleasure of all versus the pain to all.⁴⁶⁷

Bentham applied utilitarianism directly to the question of the purpose of justice and punishment for violations of law. His *Introduction to the Principles of Morals and Legislation*, for instance, advocated that punishment for admitted violations of crimes should be imposed only when the benefits outweigh the costs.⁴⁶⁸ A convicted criminal should not be punished when it would not effectively prevent or deter the conduct or "where the mischief [punishment] would produce would be greater than what it prevented . . . [or where] the mischief may be prevented at a cheaper rate."⁴⁶⁹ Bentham elaborates by maintaining "[t]hat the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence."⁴⁷⁰ Nevertheless, Bentham elsewhere opines that "it may sometimes be of use to stretch a little beyond that quantity [of punishment] which, on other accounts, would be strictly necessary."⁴⁷¹ In other words, Bentham seems to be advocating the use of punishment out of proportion to a person's crime if that would serve the greater goal of deterring others. Bentham recognizes rehabilitation of a criminal as a subsidiary goal of punishment. Rehabilitation, however, is not the correction in a person's character so that he or she seeks virtue or follows moral truths. Rather, punishment serves a rehabilitative corrective purpose by stopping the person from repeating criminal behavior. As with deterrence, Bentham is willing to allow punishment out of proportion to the offense because "the greater a punishment a man has experienced, the stronger is the tendency it has to create in him an aversion towards the offence."⁴⁷²

⁴⁶³ See FROST, *supra* note 457, at 97-98, 277.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J. H. Burns & H.L.A. Hart, eds. 1970).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 166.

⁴⁷¹ *Id.* at 171.

⁴⁷² *Id.* at 189.

Mill likewise reasoned that justice was a product of utility. “It has always been evident that all cases of justice are also cases of expediency”⁴⁷³ Mill predicated his views here on the notion that the strongest of human feelings – that of anger at an injustice – fueled the need for justice.⁴⁷⁴ This view of justice, of course, had as its focal point humans as the measure of the ultimate end: the aggregate pleasure of those in society from doing justice was greater than the pain.⁴⁷⁵ Some may be surprised to find that Mills’ views led him to favor capital punishment on the theory that the deterrence had more aggregate value (pleasure).⁴⁷⁶ He argued in a famous speech to Parliament that, even as to the person convicted of an egregious crime, the utility of capital punishment outweighed the pain of the kinds of alternative punishments that would be necessary to deter from such crimes.⁴⁷⁷

3. Modern Developments: H.L.A. Hart, Humanitarians, and C.S. Lewis

The ripple effects of positivism, in general, and utilitarianism, in particular, flowed strongly into twentieth century thinking on the bases for criminal punishment. H.L.A. Hart, a positivist, offers a good example of the effect of these philosophies. Counter-movements developed, however, even as positivist thinking gained influence. One of these – the humanitarian approach to crime and punishment – is like positivism in that its underlying philosophy is humanist rather than one based on objective truths. The other counter-movement – represented best by C.S. Lewis – is a philosophy of crime and punishment based on objective truths and emphasizing individual responsibility for one’s choices, reminiscent of Aristotle and Aquinas.

a. *Twentieth Century Positivism: H.L.A. Hart*

In *Punishment and Responsibility*, Hart advances utilitarianism as the justification for punishment in the legal system.⁴⁷⁸ Hart attempts, moreover, to integrate retributive theories of punishment into his scheme.⁴⁷⁹ Hart’s acceptance of retributive theories, however, is a distinctly utilitarian one. He

⁴⁷³ JOHN STUART MILL, UTILITARINISM AND ON LIBERTY 234 (CH. 5) (Blackwell Publishing 2003)

⁴⁷⁴ *See id.* at 216-35.

⁴⁷⁵ *See id.*

⁴⁷⁶ John Stuart Mill, Speech in Favor of Capital Punishment, delivered to Parliament (April 21, 1868), available at <http://ethics/acusd.edu/Mill.html>.

⁴⁷⁷ *Id.* Ironically, many utilitarians oppose the death penalty on the grounds that the process of providing procedures to try and follow through with the punishment is costly, that human capital is lost, and thus does not adequately prove its utility.

⁴⁷⁸ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 2-13 (Oxford Univ. Press 1962).

⁴⁷⁹ *Id.* at 210-37.

does not see punishment as an intrinsic good.⁴⁸⁰ He sees in those who advance “Retribution,” “Expiation,” and “Reprobation” as justifying aims of punishment really “disguised forms of Utilitarianism.”⁴⁸¹ In other words, the retributive basis for punishment serves society to some extent, as does deterrence.⁴⁸² Nevertheless, Hart avoids tackling the more difficult challenges of integrating utilitarianism and retributivism as justifications for punishment but carving out different roles in which each may operate. He sees utilitarianism operating as the justification for the “General Aim” of punishment; retributivism operates instead in the distribution of punishment to particular offenders.⁴⁸³ Such an approach has been criticized as overly artificial in its jurisdictional approach and failing to “operate on one level.”⁴⁸⁴

b. Humanitarian Theories of Criminal Justice

The humanitarian approach to criminal justice is another Twentieth-Century phenomenon with a unique view of the role of criminal justice.⁴⁸⁵ As with any of the positivist approaches, humanitarianism rejects an objective, morality-based scheme of criminal justice.⁴⁸⁶ Moreover, the humanitarian is distinct in the degree to which it rejects individual responsibility of the person who committed the crime.⁴⁸⁷ This view maintains that the actor’s conduct resulted from psychological or environmental factors beyond his or her control.⁴⁸⁸ Thus, notions of blame or retribution have no place in the discussion.⁴⁸⁹ This approach, not surprisingly, sees rehabilitation as the only legitimate purpose of the criminal justice system.⁴⁹⁰

Karl Menninger, a psychiatrist, and B.F. Skinner, a psychologist, represent the humanitarian approach as well as any. In *The Crime of Punishment*, Menninger sets forth his thesis that responsibility for criminal acts rests within unconscious motivations for which the actor cannot legitimately be held responsible in the sense of punishing for voluntary actions.⁴⁹¹ Thus, as Menninger maintains, it is unjust for the criminal justice system to do more than

⁴⁸⁰ *See id.*

⁴⁸¹ *Id.* at 9.

⁴⁸² *See id.*

⁴⁸³ *See id.* at 8-13.

⁴⁸⁴ LEO KATZ, MICHAEL S. MOORE & STEPHEN J. MORSE, FOUNDATIONS OF CRIMINAL LAW 113 (Foundation Press 1999).

⁴⁸⁵ *Id.* at 96-97.

⁴⁸⁶ *See id.*

⁴⁸⁷ *See id.*

⁴⁸⁸ *See id.*

⁴⁸⁹ *See id.*

⁴⁹⁰ *See id.*

⁴⁹¹ KARL MENNINGER, THE CRIME OF PUNISHMENT 4-18 (Viking Press 1969).

use the enforcement arm of the state to bring about rehabilitation.⁴⁹² Because criminal conduct is really the result of a disease, the role of the state should be to assist in promoting a cure or treatment for the disease, rather than to exact punishment.⁴⁹³ Although Menninger later retreated from these views in later works,⁴⁹⁴ his original theories were influential and perhaps shaped in part Skinner's views. Skinner's approach is very similar to Menninger's except for his rationale explaining how criminal behavior is not the result of voluntary choices.⁴⁹⁵ Skinner points to a multitude of environmental factors as the determining factors in a person's conduct, but like Menninger believes that the actions are largely outside the control of the actor.⁴⁹⁶

c. *C.S. Lewis: A Twentieth Century Return to Objective/Morality-Based Theories of Criminal Justice and Punishment*

One may at first wonder why Lewis is included in this discussion of philosophical approaches to justice, rather than the next section on theological approaches. Lewis, like Aquinas, relied on scriptural authority for his theories of criminal justice and responsibility. However, he also, like Aquinas, relied on Natural law reasoning that places him in the tradition of Aristotle and Aquinas.

In *The Abolition of Man*, Lewis offers perhaps the most articulate treatment of Natural law in the Twentieth Century.⁴⁹⁷ The book grew out of a series of lectures in which Lewis addressed education in Britain. One of the primary educational texts then in use, *The Green Book*, reflected the deep influence of positivism – with its notion that values are relative to humans at given times, and that “traditional moral values” may be discarded.⁴⁹⁸ Lewis examined the process by which those in the past century before him had attempted to debunk objective values and to set up alternative ideologies.⁴⁹⁹ Lewis pointed to the universality of certain values, spanning all civilizations and religions.⁵⁰⁰ He noted that this set of universal values could be called a variety of things, “the *Tao* . . . Natural Law or Traditional Morality or the First Principles of Practical Reason. . . .”⁵⁰¹ Call them what you will, Lewis contends

⁴⁹² *See id.*

⁴⁹³ *See id.*

⁴⁹⁴ *See* KARL MENNINGER, *WHATEVER BECAME OF SIN* (Hawthorne Books, Inc. 1973).

⁴⁹⁵ *See* B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 62-77 (Alfred Knopf, Inc., 1971).

⁴⁹⁶ *Id.*

⁴⁹⁷ C.S. LEWIS, *THE ABOLITION OF MAN* (Harper Collins Publishers 1947).

⁴⁹⁸ *Id.* at 18-26.

⁴⁹⁹ *Id.* at 1-42, 53-81.

⁵⁰⁰ *Id.* at 83-101.

⁵⁰¹ *Id.* at 43.

that they are the objective values within every human being.⁵⁰² With his characteristic eloquence, Lewis concludes: “There has never been, and never will be, a radically new judgment of value in the history of the world.... The human mind has no more power of inventing a new value than of imagining a new primary color, or, indeed, of creating a new sun and a new sky for it to move on.”⁵⁰³ The necessity for a Natural law that defies manipulation, moreover, is the bedrock for a system of justice. It provides nothing less than a “law . . . which can overarch rulers and ruled alike” – an essential protection against tyranny.⁵⁰⁴

In one of his articles in another book, *God in the Dock*, Lewis brings his thinking to bear directly on the grounds for criminal justice. He there “urge[s] a return to the traditional or Retributive theory not solely, not even primarily, in the interests of society, but in the interests of the criminal.”⁵⁰⁵ In his defense of the retributive theory, moreover, Lewis takes aim not only at the humanitarian approach, but also of Utilitarianism in general.

We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a case.⁵⁰⁶

Conversely, Lewis sees the “concept of Desert” as “the only connecting link between punishment and justice.”⁵⁰⁷ Without the measure of whether something is deserved or not, one lacks a basis on which to keep punishment within bounds that make sense. Traditionally, judges applied standards deriving from moral sources. If punishments exceeded what persons observed, the injustice would sooner or later lead to reform. “This was possible because, so long as we are thinking in terms of Desert, the propriety of the penal code, being a moral question, is a question on which every man has a right to an opinion . . . because he is simply a man, a rational animal enjoying the Natural Light.”⁵⁰⁸

Absent the question of whether someone deserves punishment, Lewis sees punishment based on humanitarianism and deterrence as lawless. If humanitarian justifications seek to cure the criminal, the likely result will be

⁵⁰² *Id.*

⁵⁰³ *Id.* at 42-43.

⁵⁰⁴ *Id.* at 73.

⁵⁰⁵ C.S. LEWIS, *GOD IN THE DOCK* 287 (William B. Eerdsman Publishing 1970).

⁵⁰⁶ *Id.* at 288.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 289.

detentions for indeterminate periods. Thus, we see substituted “for a definite sentence (reflecting to some extent the community’s sense of moral judgment on the degree of ill-desert involved) an indefinite sentence terminable only by the word of those experts – and they are not experts in moral theology or even in the Law of Nature – who inflict it.”⁵⁰⁹ And deterrence could not stand on its own as a justification for punishment. To do so would clearly be using a person as a means to an end, “someone else’s end . . . , a very wicked thing to do.”⁵¹⁰ Traditionally, the justification for deterrence had presumed that the person deserved the punishment. By imposing punishment for a legitimate reason – that the subject deserved it, based of course on the notion of human responsibility – society also achieved another purpose, that of deterrence. “But take away desert and the whole morality of the punishment disappears.”⁵¹¹ One may then ask: “Why, in Heaven’s name, am I to be sacrificed for the good of society in this way? – unless, of course, I deserve it.”⁵¹²

B. Theological Views on the Need for Justice in the Judeo-Christian Traditions

Both Judaism and Christianity deal with questions of the need for justice for those who violate the law. Both, moreover, address the more specific question of the justifications for trying and punishing those who violate law. Christianity addresses more specifically than Judaism the question of the extent to which civil government can and should punish violations of human law.

1. Judaism on Justice and Punishment

The foundation of Jewish theology is the Written Torah – the Books given to Moses at Sinai (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy).⁵¹³ Judaism also maintains that, when God revealed the Written Torah, he also revealed to Moses the Oral Law.⁵¹⁴ The Oral Law was codified in the Second Century into the “Mishnah.”⁵¹⁵ After codification of the Mishnah, discussions about it proceeded for three more centuries before these discussions were recorded in the “written Gemarah.”⁵¹⁶ Together, the Mishnah and the Gemarah form “the Talmud.”⁵¹⁷ The Oral Law plays a central role in Jewish

⁵⁰⁹ *Id.* at 290.

⁵¹⁰ *Id.* at 291.

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 233 (Bernard Anerbach & Melvin J. Sykes trans. Jewish Publication Soc’y 1994).

⁵¹⁴ *Id.*

⁵¹⁵ I ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 32-33 (1980).

⁵¹⁶ ADIN STEINSALTZ, THE ESSENTIAL TALMUD 28-39 (1976).

⁵¹⁷ *Id.*

theology by reconciling provisions of the Torah, illuminating ambiguities, and in general bringing the teachings into an integrated theology.⁵¹⁸ Nevertheless, the Talmud – as the guiding light of the Oral Law – itself is difficult to access without help.⁵¹⁹ Hence, codifications of Jewish law provide often indispensable help in understanding Judaism.⁵²⁰ Rashi (Rabbi Shelomoh Yitzhaq), who lived a century before Maimonides, represents an equally influential figure whose commentaries on the Torah are considered indispensable by many for interpreting Jewish law.⁵²¹

One of the twelve foundations of Jewish Law set forth in Maimonides' *Commentary on the Mishnah*, is that God rewards those who obey the commandments of the Torah and punishes those who violate them.⁵²² How is someone who disobeys the Torah to be punished? If one were to take isolated passages from the Torah, one could suggest a highly retaliatory approach. Take, for example, this familiar passage from the Book of Exodus: "And if men strive together, and . . . any harm follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."⁵²³ Other passages from the Torah ostensibly conflict with the Exodus passage:

If there be a controversy between men, and they come unto judgment, and the judges judge them, by justifying the righteous, and condemning the wicked, then it shall be, if the wicked man deserve to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to the measure of his wickedness, by number. Forty stripes he may give him, he shall not exceed; *lest, if he should exceed, and beat him above these with many stripes, then thy brother should be dishonoured before thine eyes.*⁵²⁴ The restraint on punishment, based on preserving the dignity of the person being punished, might seem inconsistent with retaliatory ring of exacting an "eye for an eye."

⁵¹⁸ Chad Baruch, *In the Name of the Father: A Critique of Reliance Upon Jewish Law to Support Capital Punishment in the United States*, 78 U. DET. MERCY L. REV. 41, 51-52 (Fall 2000).

⁵¹⁹ *Id.* at 51.

⁵²⁰ Maimonides, also known as Rabbi Moses ben Maimon Maimonides and by the acronym RaMBa'M, wrote the following seminal works: *Commentary on the Mishnah*, *Mishnah Torah*, and *Moreh Nevuhim (Guide for the Perplexed)*, *ENCYCLOPEDIA OF THE MIDDLE AGES* 294 (Norman Cantor ed. 1999).

⁵²¹ See generally EDWARD L. GRENSTEIN, *RASHI: COMMENTATOR EXTRAORDINAIRE*, reprinted in *BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS* 139-142 (Simon & Schuster, Inc. 1984).

⁵²² MAIMONIDES, *COMMENTARY ON THE MISHNAH*, 10th ch. Tractate Sanhedrin.

⁵²³ *Exodus* 21:22-25.

⁵²⁴ *Deuteronomy* 25:1-3

A closer analysis, however, demonstrates no inconsistency. First, the Exodus passage, according to the Talmud, was not meant to be taken as an absolute rule of retaliation but rather as a principle of making right the wrong.⁵²⁵ In addition, Talmudic scholars recognize that the Jewish law's views of punishment are multifaceted. The wrongdoer's conduct injures not only individual victims, but also society as a whole.⁵²⁶ Thus, punishment will have a retributory element so as to heal the injury to the victim and society, but the purposes also include rehabilitation of the criminal.⁵²⁷

Nevertheless, Jewish law operates from a conceptual framework in which the law is integrated into the fabric of one's life.⁵²⁸ Thus, it does not pose or answer the question of how civil courts should punish those who violate man-made laws.⁵²⁹ Judaism's views on the Torah and appropriate justice and punishment remain instructive in the question of how divine justice and punishment apply to those who violate God's laws.⁵³⁰ Christian theology, however, delves into the specific question of justice and punishment by the civil government.

2. Christian Theology on Justice and Punishment

The role of justice and punishment for violations of law in Christian theology begins with evaluation of divine law and punishment outside the context of the civil government's legal system. Then one may consider Christian theology's views on the role of the State in enforcing laws.

a. *Justice and Divine Law*

Christian theology views justice as an aspect of the God.⁵³¹ God is absolutely just.⁵³² Christianity recognizes of course that God also perfectly

⁵²⁵ See TALMUD, MISHNAH SANHEDRIN, 79a (Jacob Shacter and H. Freedman, tr., and Rabbi Dr. Isidore Epstein, ed. 1952), available at http://www.come-and-hear.com/sanhedrin/sanhedrin_79.html; last visited June 6, 2006).

⁵²⁶ RASHI, COMMENTARY ON DEUTERONOMY 25:3 (available online at <http://www.chabad.org/library/article.asp?AID+9989&showrashi=true>) (last checked June 7, 2006); MYER S. LEW, THE HUMANITY OF JEWISH LAW 165 (1985) (observing that among the main purposes of Jewish law was "to reform the character of the offender").

⁵²⁷ See *id.*

⁵²⁸ See Samuel J. Levine, *A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics, and Tradition: A Conceptual Overview*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (2006).

⁵²⁹ *Id.*

⁵³⁰ See generally VERN S. POYTHRESS, THE SHADOW OF CHRIST IN THE LAW OF MOSES (P & R Publishing 1991) (explaining the way in which the Old Testament – including, of course, the Jewish Torah – reflects Christian truth ultimately revealed in more depth in the New Testament).

⁵³¹ For an excellent discussion of Christian theology underlying the American criminal justice system, see Jeffrey C. Tuomala, *The Value of Punishment: A Response to Judge Richard L.*

represents other characteristics.⁵³³ Indeed, the confusion of two of these characteristics – justice and mercy – has led to much confusion over the question of appropriate punishment.⁵³⁴

God’s law comes to mankind in a number of ways. It is revealed most explicitly in Holy Scriptures – i.e., where God gives mankind explicit laws to follow. The laws revealed to Moses at Sinai are the basis of the Old Testament in the Christian Bible.⁵³⁵ The New Testament reveals God’s laws in the light of the life, death, and resurrection of Jesus Christ.⁵³⁶ God’s laws are also revealed through Natural law – i.e., through God’s creation and mankind’s inherent nature by which certain fundamental truths are innate.⁵³⁷

Both the Old Testament and New Testament show that God encompasses the concept of truth.⁵³⁸ God’s laws ineluctably point to God, to truth, and to the way of right action.⁵³⁹ The term for “sin” in Greek means missing the mark or missing the target; if the truth, or conduct consistent with truth is the “bull’s eye” of a target, sinning is to miss the target.⁵⁴⁰ All persons, according to scriptures, inevitably miss the mark and have violated God’s laws.⁵⁴¹ Violation of God’s laws, moreover, require consequences.⁵⁴² The ultimate consequence of original sin is death; lesser consequences, moreover, were set forth in the Old Testament for violations of God’s laws while still alive.⁵⁴³

St. Paul recognized the predicament. God, with justice as an inherent characteristic, is incapable of foregoing consequences for violating the law.⁵⁴⁴ Nevertheless, Christ’s serving as a sacrifice for mankind achieved both justice and mankind’s reconciliation with God.

God presented him as a sacrifice of atonement, through faith in his blood. He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished— he did it to demonstrate his justice at

Nygaard, 5 REGENT U. L. REV. 13 (1995), reprinted in JEFFREY A. BRAUCH, IS HIGHER LAW COMMON LAW, 273-79 (1999).

⁵³² See *id.* at 275.

⁵³³ See *id.*

⁵³⁴ See *infra* note 582 and accompanying text.

⁵³⁵ See generally POYTHRESS, *supra* note 530.

⁵³⁶ See *id.*

⁵³⁷ See *supra* notes 443-447 and accompanying text.

⁵³⁸ See, e.g., *Deuteronomy 32:4; Isaiah 65:16; Matthew 5:48.*

⁵³⁹ See *supra* notes 382-415 and accompanying text.

⁵⁴⁰ See NEW SCOFIELD CONCORDANCE 3:23 (Reference Ed).

⁵⁴¹ See generally POYTHRESS, *supra* note 530.

⁵⁴² See generally Tuomala, *supra* note 531.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

the present time, so as to be just and the one who justifies those who have faith in Jesus.⁵⁴⁵

Christ thus accomplished a reconciliation that mankind on its own could not achieve. Moreover, Christ revealed the truth and God's law in a depth greater than ever revealed before. In the Sermon on the Mount, for instance, Christ contrasts the old law – still valid but not fully revealed – with the new law. Following are two instances of many in which Christ follows the pattern of calling to attention the old law and then amplifying on it:

You have heard that it was said to the people long ago, 'Do not murder, and anyone who murders will be subject to judgment. But I tell you that anyone who is angry with his brother will be subject to judgment. . . .

You have heard that it was said, 'Do not commit adultery.' But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart. . . .⁵⁴⁶

Divine law calls mankind to compassion, wholeness, and love.⁵⁴⁷ The message has always been there – in the Old Testament, in Natural law.⁵⁴⁸ Christ unpacks the meaning of Divine law to demonstrate its depth.⁵⁴⁹ When one comprehends his message, one realizes that the standard of Divine law is far higher than previously assumed. Abstaining from murder is barely minimal conduct; living without anger and hate toward one's fellow man, and if at all possible with love toward others, is the true goal.⁵⁵⁰ Not committing adultery, again, is a bare minimum; respecting the dignity of members of the opposite sex, such that we respect them as equal persons rather than sex objects, is the law's true goal.⁵⁵¹

Christian theology maintains that, on our own, humans cannot reach the wholeness (holiness) to which the Divine Law calls us. The power of the triune God – God the Father, God the Son, and God the Holy Spirit – accomplishes for those who seek what cannot be accomplished without them. Nor will that process occur all at once. Christ, "by one sacrifice . . . has made perfect forever those *who are being made holy*."⁵⁵² For many if not most that process will last a lifetime.

⁵⁴⁵ *Romans 3:25-26.*

⁵⁴⁶ *Matthew 5:21-22, 5:27-28.*

⁵⁴⁷ *See generally POYTHRESS, supra note 530.*

⁵⁴⁸ *See id.*

⁵⁴⁹ *See id.*

⁵⁵⁰ *See id.*

⁵⁵¹ *See id.*

⁵⁵² *Hebrews 10:14* (emphasis added).

Thus, the Divine Law sets a high standard. And there are consequences for failing to meet that standard – the necessary consequences required for justice. Yet God’s mercy, through his Son and the intercession of the Holy Spirit, allows forgiveness to those who falter if they seek it.⁵⁵³ The ultimate judgment on the consequences of any person’s conduct rests exclusively with God and cannot be rendered by any human authorities.⁵⁵⁴

b. The Civil Government’s Role in Justice and Punishment for Violations of Law

Even though, as explained above, Christian theology recognizes that the civil government cannot enforce Divine Law,⁵⁵⁵ the civil authorities do have a role in advancing justice and punishing violations of human law.⁵⁵⁶ Aquinas was among the first to formulate a systematic theological framework in which to assess civil authorities’ role in enforcing law. After examining Aquinas’ views, the approach of Catholic and Protestant theologians will be addressed. The ultimate question at issue, as with the earlier discussion of the philosophical bases justice and punishment, revolves around the implications of failing to prosecute those accused of crime.

(1) Aquinas

Aquinas categorized the law as follows: (1) Eternal law, which was the Truth represented by God and to which all other true laws point; (2) Divine Law, in which Eternal law is expressly revealed to mankind, both in the old law (Old Testament) and new law (New Testament); (3) Natural Law, or those truths that are inherently part of human nature and we innately know; and (4) Human Law, meaning the law adopted by a sovereign.⁵⁵⁷ Aquinas maintained that Human Law pointed toward the same truths as are revealed in Divine Law and known by Natural Law.⁵⁵⁸ Aquinas recognized, however, that the Human Law had to set a lower standard because many if not most cannot meet the higher standard of the Eternal law.⁵⁵⁹ Human Law, nevertheless, served the role of teaching of the greater truths and of pointing men and women in the right direction.⁵⁶⁰ If persons violated the Human Law, they had to be held

⁵⁵³ See Tuomala, *supra* note 531.

⁵⁵⁴ See *id.*

⁵⁵⁵ See *supra* notes 448-452 and accompanying text.

⁵⁵⁶ See Tuomala, *supra* note 531.

⁵⁵⁷ See *supra* notes 423-456 and accompanying text.

⁵⁵⁸ See *supra* notes 423-456 and accompanying text.

⁵⁵⁹ See *supra* notes 423-456 and accompanying text.

⁵⁶⁰ See *supra* notes 423-456 and accompanying text.

accountable for the consequences of doing so.⁵⁶¹ In that way, not only would the effect of the wrongdoer's conduct on society be ameliorated, but the person would be redirected toward the truth.⁵⁶² The civil government's indispensable role was to serve as God's agent in adopting and enforcing Human Law.⁵⁶³

(2) *Catholic Theology*

Catholic theology on the role of the state, like Protestant theology on the subject, begins with the following passage from Paul's *Epistle to the Romans*: Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.⁵⁶⁴

Catholic theology recognizes, as this passage clearly states, that the civil government's authority derives from God.⁵⁶⁵ The government may take different forms so long as it exercises the authority for the common good of the people.⁵⁶⁶ A crucial part of the government's role in this regard is to maintain order.⁵⁶⁷ Although human law is not a vehicle for sanctification, human law is necessary to permit an environment in which that may occur.⁵⁶⁸ Moreover, human law can prepare those who are not yet ready to receive the good news of scriptures by pointing them toward truth.⁵⁶⁹ Punishment for violating the laws thus has several goals – “preserving public order,” redressing “the disorder caused by the offense” on a societal scale, and “as far as possible it should [also] contribute to the correction of the offender.”⁵⁷⁰

⁵⁶¹ See *supra* notes 423-456 and accompanying text.

⁵⁶² See *supra* notes 423-456 and accompanying text.

⁵⁶³ See *supra* notes 423-456 and accompanying text.

⁵⁶⁴ *Romans* 13:1-6.

⁵⁶⁵ CATECHISM OF THE CATHOLIC CHURCH § 1899 (1997).

⁵⁶⁶ *Id.* 1901.

⁵⁶⁷ *Id.* 1897-1917

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.* 2266.

(3) *Protestant Theology*

The Protestant Reformation produced theological doctrines on the use of the law. John Calvin, in the Calvinist tradition, along with Martin Luther and Philip Melancthon, in the Lutheran Tradition, contributed to an understanding of the role of law. The three purposes of law were: (1) to provide a standard by which we can see the goal to which God calls us, by which we can be held accountable, and by which we will be led inevitably to Christ as our only hope of meeting the standard;⁵⁷¹ (2) the educational role by which law leads those who voluntarily seek God;⁵⁷² and (3) to restrain those who, in a fallen world, sorely need the confines of the law to keep mankind within proper boundaries.⁵⁷³ It is this last function for which the civil government has a role. Law preserves peace and order. “Unless there is some restraint,” as Calvin declared, “the condition of wild beasts would be better and more desirable than ours.”⁵⁷⁴ The law imposed a “constrained and forced righteousness,” to use Calvin’s phrase, or “an external or public morality,” to use Melancthon’s terminology.⁵⁷⁵

Civil government had a responsibility to punish violations of its laws. “[T]he magistrate in administering punishments does nothing by himself, but carries out the very judgments of God”⁵⁷⁶ Nevertheless, the scope of the civil magistrate’s powers were limited by two principles. First, human law did not incorporate all of Divine law.⁵⁷⁷ Second, the magistrate was bound to mete punishment in accordance with the violation, “lest by excessive severity he either harm more than heal.”⁵⁷⁸

Theology recognizes that the punishment of crime has not only a legitimate – but indeed a crucial – role. As explained above, the need for justice is what required the sacrifice of Christ. One had to bear the consequences of

⁵⁷¹ See John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J. L. & RELIGION 433, 435 (1993/1994); JOHN CALVIN, *INSTITUTES OF CHRISTIAN RELIGION* bk. 2, ch. 7, §§ 1-9 (1536).

⁵⁷² See Witte & Arthur, *supra* note 571, at 438; CALVIN, *supra* note 571, bk. 2, ch. 7, §§ 12-17.

⁵⁷³ See Witte & Arthur, *supra* note 571, at 437-38; CALVIN, *supra* note 571, bk. 2, ch. 7, §§ 10-11; MARTIN LUTHER, *TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED* at 54-55, *reprinted in* LUTHER: *SELECTED POLITICAL WRITINGS* (tr. J.J. Shindell; ed. J.M. Porter Samford Univ. Press 1974) (1523).

⁵⁷⁴ CALVIN, *supra* note 571, bk. 2, ch. 7.10 (1536).

⁵⁷⁵ *Id.* bk. 2, ch. 7.10, bk 4, ch. 20.3; PHILIP MELANCTHON, *LOCI COMMUNES THEOLOGICI RECENS COLLECTI RECOGNITI A PHILIPPO MELANCTHONE* (1535), *reprinted in* 21 *CORPUS REFORMATORUM* 405-406 (G. Bretschneider eds. 1834-1860).

⁵⁷⁶ CALVIN, *supra* note 571, at bk. 4, ch. 20, § 10.

⁵⁷⁷ Calvin’s classic formulation separated ceremonial laws and judicial laws, both of which had been supplanted by the New Testament, from moral laws exemplified by the Ten Commandments and carried forward in the New Testament. *Id.*

⁵⁷⁸ *Id.* Bk 4, ch. 20, § 10.

sin. Without punishment, there would be no justice. Likewise, in the human arena, crime demands punishment.

As an agent exercising delegated authority, the judge must administer human justice according to the same principles by which God dealt with all sin through Christ's atonement. . . . The desire to see criminals punished need not be irrational or vindictive. In fact, we should be reluctant to call a man good who does not respond with indignation toward the wickedness he sees in the world. We should respond with satisfaction in seeing wickedness punished, not out of vengeance, but out of respect for justice.⁵⁷⁹

It was in this light that C.S. Lewis contended that we ought not be embarrassed to admit that, in punishment of crime, the only really legitimate end is to give the criminal his or her just dessert.⁵⁸⁰ As he maintained, doing so is the only way to connect the actions of the person being punished with the punishment.⁵⁸¹ In seeking to introduce humanitarian theories in place of the retributive purpose, Lewis observed that reformers sought to "abolish Justice and substitute Mercy for it. . . . Mercy, [however], detached from Justice, grows unmerciful. . . . As there are plants that will flower only in mountain soil, so it appears that Mercy will flourish only when it grows in the crannies of the rock of Justice. . . ."⁵⁸²

C. Application of Philosophical and Theological Principles on Need for Justice in Punishment To Cases Against Persons Most Likely To Be Tried in Military Commissions

Even though we cannot presume any particular persons charged as an enemy combatant is guilty, we may fairly assume that some persons have committed violations of the law of war. In that light, we may engage the question that is the central theme of this article: Do military commissions serve justice because the other available systems – civilian and courts-martial – will at times prevent the prosecution of an accused by forcing the government to reveal classified information in a fashion that prevents too great a risk to national security?

Before engaging this question further, the author acknowledges that there are further questions to be answered that other scholars have – fortunately – started to engage. Particularly encouraging is the scholarship recognizing that

⁵⁷⁹ Tuomala, *supra* note 531.

⁵⁸⁰ See *supra* note 505-512 and accompanying text.

⁵⁸¹ See *supra* note 505-512 and accompanying text.

⁵⁸² LEWIS, *supra* note 494, at 294.

principles of justice normally formulated solely with a nation state in mind may well be applied on international scale, regardless of the actor's particular nationality. Some contend that the legacy of the Nuremberg tribunals requires similar tribunals in which persons who commit terrorist acts would be brought to justice.⁵⁸³ Others take an approach more like the one proposed in this Article – *i.e.*, treating the accused as enemy combatants subject to rules outside the ordinary systems of justice and allowing for protection of classified information and sources while ensuring those accused of the acts are brought to trial.⁵⁸⁴

1. Without Assuming the Guilt of a Particular Accused, We May Fairly Assume that Some Charged with Violating the Laws of War Have Actually Done So

An important qualification to this discussion needs to be made at the outset. No one should assume that any particular persons accused of violating the laws of war is guilty. Indeed, the Rules for Military Commission provide that members of a military commission must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond reasonable doubt.”⁵⁸⁵ The question remains whether we may assume that some persons have in fact violated the laws of war so as to justify military commissions in the first place. For the reasons that follow, one would have to strain credulity to believe that none of those in U.S. custody have committed violations of the laws of war.

The Department of Defense released a list of the persons in custody who have gone through the combatant status review and been classified as dangers to national security.⁵⁸⁶ The list originally contained 558 persons, but later lists suggest significantly less (perhaps between 200 and 300) being held and considered for prosecution, the remaining detainees having been released through combatant status review panels or otherwise.⁵⁸⁷ A separate document on the Department of Defense website describes the information obtained from questioning these persons.⁵⁸⁸ This document relates that “[m]any of these enemy combatants are highly trained, dangerous members of al-Qaida, its

⁵⁸³ See Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement of International Criminal Law*, 15 AM. U. INT’L L. REV. 321 (2007).

⁵⁸⁴ See Barnash, *supra* note 389.

⁵⁸⁵ MANUAL FOR MILITARY COMMISSIONS, *supra* note 372, Rule for Military Commission 920(e).

⁵⁸⁶ The list is available on the Department of Defense’s official website, under Detainee Affairs, at http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf (last visited July 7, 2007).

⁵⁸⁷ See *id.* Recent documents reflect the release of a substantial number of detainees. See http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf (last visited Jan. 1, 2008).

⁵⁸⁸ This document, also under the Department of Defense’s Internet site under “Detainee Affairs,” can be accessed at <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf>.

related terrorist networks, and the former Taliban regime.”⁵⁸⁹ Detainees either are members of al-Qaida, the Taliban, or related groups or supported such groups.⁵⁹⁰ The report relates terrorist activities in which detainees participated, including terrorist training, bomb-making, spying, and attacks on the United States and its allies.⁵⁹¹ In the words of the report: “Detainees were either actively involved in operational planning for terrorist attacks or had already participated in attacks in Europe, the United States, and/or central Asia at the time of detention.”⁵⁹²

One of the detainees, David Hicks, pled guilty to charges of violating laws of war and was sentenced to nine months in prison to be served in Australia.⁵⁹³ The military commission recommended a sentence of seven years imprisonment, but the shorter sentence was imposed by the military judge who considered the agreement between the U.S. and Australian governments in his sentencing.⁵⁹⁴ Hicks admitted to supporting terrorists and engaging in terrorist activities.⁵⁹⁵

We thus have the Department of Defense relating the fact of substantial persons in custody, not counting those captured and already released. And we have one of that group who has admitted involvement in supporting al-Qaida. One cannot ignore the fact, moreover, that most of these persons have been captured while fighting against U.S. and allied forces.⁵⁹⁶

Assuming that some part of the more than 550 persons in custody have committed acts triable by military commissions, we can engage the question of whether commissions are necessary. The point of this Article is that, due to the procedures in place for trials in the civilian and courts-martial system, some who have violated the laws of war by terrorism or similarly activity will go without being prosecuted. Add to this the fact that the evidence garnered in these cases will frequently involve information gained through classified sources.⁵⁹⁷ Indeed,

⁵⁸⁹ *See id.*

⁵⁹⁰ *See id.*

⁵⁹¹ *See id.*

⁵⁹² *See id.*

⁵⁹³ *Hicks To Serve Nine Months in Terrorism Case*, BreakingLegalNews.Com (March 31, 2007), available at <http://www.breakinglegalnews.com/entry/Hicks-to-Serve-9-Months-in-Terrorism-Case> (last checked July 7, 2007).

⁵⁹⁴ *See id.*

⁵⁹⁵ *See e.g.*, the report of Hicks’ admissions, *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=10678> (last visited July 7, 2007).

⁵⁹⁶ *See* Department of Defense’s report on its Internet site under “Detainee Affairs,” *available at* <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf>.

⁵⁹⁶ *See id.*

⁵⁹⁷ A review of the report filed by the Department of Defense on information gathered from detainees makes clear that foreign and U.S. intelligence are inextricably linked in the process of

the 9/11 Commission Report emphasized that the cooperation of intelligence agencies in the U.S. and allied countries would be essential to preventing another attack.⁵⁹⁸ The evidence in cases before military commissions, therefore, will often involve the very classified information that has led the government in the past to drop prosecutions out of concern for national security. Unlike the civilian system and even the courts-martial system, military commissions under the MCA and its procedures are uniquely designed to balance the interests of the accused, the government, and national security. If it is important to prosecute persons who have committed violations of the laws of war, then military commissions can end up serving a role in securing justice. The remainder of this Article explores more fully why it is important to prosecute persons charged with committing violations of the laws of war or similarly egregious acts.

2. Synthesis of Philosophical and Theological Principles on Need for Justice and Punishment

Virtually all of the philosophical systems and theological traditions discussed above agree on the need for justice and punishment of criminal conduct. Even philosophical systems that rest on contradictory foundations see the need. They disagree only on the reasons for the need. Aristotle, Aquinas, and Lewis – who believe in objective morality – believe that those who violate the law must be held accountable. Theirs is a system premised on human responsibility for one’s actions. Theirs is also a system in which punishment is necessary not only to mend the effect of crime on society, but also to help the actor correct his or her course. Utilitarians like Bentham and Mill believe that justice derives from the socially defined framework of moral values. Punishment is necessary because it will ultimately produce the greatest utility to the greatest number. Unlike either the objective morals group or the utilitarians, the humanitarian philosophy is anomalous. Because humanitarians attribute criminal conduct to environmental factors and wish to treat the actor so as to ameliorate his or her condition, they tend to reject the notion that either retributivism or deterrence are appropriate values.

Judaism and Christianity recognize the need for justice and for prosecution and punishment of offenses against the law. Both see this as a matter related to the spiritual health of society at large and the actor as well. Judaism, however, approaches the law as a matter of religious law, without

capturing persons such as those detained, and in finding other persons at large so as to conduct surveillance in light of their threat to the security of not only the United States but other countries and civilians. See Department of Defense’s report on its Internet site under “Detainee Affairs,” available at <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf>.

⁵⁹⁸ See generally NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004).

distinguishing Divine law and civil law. Both Catholic and traditional Protestant theologians recognize that human law and the civil government have a different set of laws from Divine laws to enforce. Although consistent with Divine laws, human laws are far less demanding than Divine laws. The civil government's role is one of delegated authority from God to enforce the more modest set of laws designed to keep order and to at least point humankind in the direction of proper conduct.

Many of the philosophical systems discussed – and every one of the theological traditions – view a criminal act as injuring not just the victim, but also the actor and society. Because criminal acts vary in degree, the extent of injury also varies. It stands to reason, therefore, that the justifications for prosecuting criminal actors intensify along with the severity of the crime. Those who favor deterrence, for instance, would agree that a heinous crime should be dealt with more severely than a lesser crime; otherwise, future actors would not be deterred as effectively. Retributivists would clearly support greater punishment as the just desert for a more serious crime.

3. Application to Cases Likely To Be Tried By Military Commissions

The cases in which charges have already been referred to military commissions allege egregious crimes. The charges filed to date assert numerous violations of the laws of armed conflict committed as “unlawful combatants.”⁵⁹⁹ The allegations include conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.⁶⁰⁰

The charges of many in line to be tried by military commission will almost certainly require classified information and witnesses who are confidential operatives. The charge sheets previously filed routinely refer to events in foreign countries, including al Qaida bases and activities in these

⁵⁹⁹ See e.g., Hamdan Charge Sheet (the charge against Salim Ahmed Hamdan is conspiracy to commit the offenses of attacking civilians, attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism) available at <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf> (last visited June 6, 2006); Hicks Charge Sheet (the charges against Australian David Matthew Hicks which includes conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy), available at <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf> (last visited June 6, 2006); the al-Qosi Charge Sheet (the charge against Ibrahim Ahmed Mahmoud al-Qosi is conspiracy to commit the offenses of attacking civilians, attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism) available at <http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf> (last visited June 6, 2006).

⁶⁰⁰ See, e.g., Charge Sheet in *United States v. Salim Ahmed Hamdan*, available at <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf> (last visited March 16, 2006).

countries.⁶⁰¹ The information leading to the charges, moreover, almost certainly derives from many foreign persons cooperating with the United States. If the identity of these witnesses is revealed, their lives will be at risk.

Prosecuting these cases in the civilian system is problematic because of the proof that will be required. Unlike fringe figures in al Qaida activities, such as Zaccarias Moussaoui, the accused in these cases are allegedly active participants in numerous terrorist activities. The likely result of prosecuting these accused in the criminal justice system would be dismissal. The accused would have the benefit of the procedural safeguards available to any defendant in this system. These constitutional safeguards would make it difficult to prosecute the accused without revealing confidential evidence and the identity of persons whose lives would thereby be endangered. Indeed, as noted above, the Classified Information Procedures Act explicitly requires such a result if substitute forms of evidence do not withstand scrutiny.

Military commissions fill an important role in this type of case. At the time of the Constitution's ratification, persons accused of violating the laws of armed conflict – typically called illegal or enemy combatants – faced prosecution by military commission, and could not insist on the constitutional rights available in the civilian criminal justice system.⁶⁰² Prosecutions in a military commission provide far greater protection to classified information and to the identity of witnesses.⁶⁰³ Trial by military commission may, therefore, represent the only realistic way to prosecute the accused.

The reality is that trials serve a cathartic function.⁶⁰⁴ Regardless of whether a particular accused is convicted, the effort to prosecute persons whom the government has reason to believe committed serious offenses thus serves a legitimate function. Although the Nuremberg trials resulted in quite a few acquittals,⁶⁰⁵ not many argue over whether they served a cathartic function.⁶⁰⁶ The challenge is, to borrow the words of Justice Robert Jackson, the chief prosecutor in Nuremberg, to resist the temptation to “use the forms of judicial proceedings to carry out or rationalize previously settled political or military

⁶⁰¹ *See id.*

⁶⁰² *See supra* note 326-336 and accompanying text.

⁶⁰³ *See supra* notes 373-405 and accompanying text.

⁶⁰⁴ *See generally* David P. Leonard, *The Use of Character To Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-1987).

⁶⁰⁵ *See* APPLEMAN, *supra* note 397, at 267.

⁶⁰⁶ Derek Summerfield, *Effects of War: Moral Knowledge, Revenge, Reconciliation, and Medicalised Concepts of “Recovery,”* 325 J. OF PSYCHIATRY 1005 (2002), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1124587> (last visited July 7, 2007) (suggesting that Nuremberg trials may have had a cathartic function by showing “justice in action” in order “to make sense of a man made catastrophe”).

policy.”⁶⁰⁷ A fair assessment of the MCA and the procedures developed since its enactment show that they offer more than the “forms of judicial proceedings.” They have evolved to a point that they resemble courts-martial proceedings. The Tables attached at the end of this article⁶⁰⁸, though not a complete comparison in every respect, offer a summary of the ways in which military commissions compare not only with courts-martial procedures, but with the previous Military Order now supplanted by the MCA and its attendant rules and procedures. Although military commissions do not duplicate courts-martial, the MCA version of these commissions offers many procedural guarantees not originally available. One change to the MCA procedures that I have recommended in another article relates to the composition of the tribunals, especially in capital cases.⁶⁰⁹ Perhaps other modifications to the MCA need to be made. Yet one key difference between military commissions and courts martial and civilian trials is their ability to protect classified information, and especially the sources for such information. Here the MCA and its procedures strike a correct balance among competing interests and, in so doing, may allow for prosecutions that otherwise would not be possible.

V. CONCLUSION

The Military Commissions Act of 2006, by anyone’s measure, is an extraordinary development in the American legal system. Until this Act, the prosecution of those accused of crimes took one of two paths – civilian prosecutions under a highly developed constitutional and statutory procedural system, or courts martial under the well-developed Uniform Code of Military Justice. From time to time, during armed conflict, persons accused of violating the international laws of war have been prosecuted before military commissions under ad hoc procedures adopted by the military authority holding the accused. The procedures in these ad hoc military commissions were meager.

⁶⁰⁷ Associate Justice Robert H. Jackson, Address at the Washington Meeting of the American Society of International Law (Apr. 13, 1945), in 39 AM. SOC. INT’L L. PROC. 10, 15 (1945). For a discussion of Justice Jackson’s crucial role in both the creation of the Nuremberg tribunals and the trials that followed, see Henry T. King, Jr., *Robert Jackson’s Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421 (2000) (book review).

⁶⁰⁸ The author acknowledges the excellent work of Jennifer K. Elsea, Legislative Attorney, American Law Division, whose Congressional Research Report entitled *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison of Previous DOD Rules and the Uniform Code of Military Justice*, included in the report columns such as the first two in the two Tables at the end of this Article. Used with Ms. Elsea’s permission, those columns were changed only slightly. The third column was prepared by the author based on the Manual for Military Commissions published in 2007. Needless to say, the author accepts full responsibility for any errors or omissions in any of the Tables. The Tables are, however, meant to be solely a summary form by which to compare general courts-martial procedures, procedures under the Military Commissions Order No. 1, and the Military Commission Act of 2006 along with its Manual for Military Commissions.

⁶⁰⁹ See Madison, *supra* note 23, at 347.

Unlike the procedures in the ad hoc military commissions of the past, the current Act offers a thorough set of procedures that rival the Uniform Code of Military Justice – a system of military justice widely considered to be among the fairest of such systems in the world. The question that many have raised is an understandable one: with two systems designed to produce fair trials – the civilian and the court martial system – why add a third system? This Article has offered one reason that the Military Commissions Act of 2006 is a necessary addition. The ability to protect classified information and national security is greater in the new Act than in the civilian system or even under the Uniform Code of Military Justice. The Act offers an avenue in which to prosecute persons accused of perpetrating attacks such as the 9/11 attacks by using classified information in a manner that will limit damaging consequences from such use. In a civilian prosecution or a court martial the current precedent would often put the government in a Catch 22 – bring the perpetrator of heinous acts to justice but compromise national security by having to make classified information public, on the one hand, or let the perpetrator go without being held accountable for the consequences of the perpetrators actions while protecting classified information from disclosure, on the other hand.

This Article has contended that, in weighing justice, we must consider more than the principle that we are so committed to fair trials that we are willing to allow guilty persons to go free so that an innocent person will not be convicted. We must also consider whether principles of justice urge us to hold persons accountable for their actions – for the benefit of society and even the person accused of the illegal acts. The Article does not contend that this accountability principle means that we emasculate the system in which a person is prosecuted. Instead, the Article contends that the combination of the principle of insisting on procedures designed to produce a fair result and the accountability principle can produce a system different from the two traditional systems. With some modification, the MCA can serve as a system that balances the competing goals in a way that is just. In other words, the MCA provides a third system that is necessary now in a world in which more prosecutions of persons accused of violating the laws of war is likely to occur.

Table 1: Comparison of Courts-Martial and Military Commission Rules

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
Authority	U.S. Constitution, Article I, § 8.	U.S. Constitution, Article II; Presidential Military Order of Nov. 13, 2001 (M.O).	U.S. Constitution, Article I, § 8.
Procedure	Rules are provided by the Uniform Code of Military Justice (UCMJ), chapter 47, title 10, and the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.), issued by the President pursuant to art. 36, UCMJ. 10 U.S.C. § 836.	Rules are issued by the Secretary of Defense pursuant to the M.O. No other rules apply (presumably excluding the UCMJ). § 1. The President declared it “impracticable” to employ procedures used in federal court, pursuant to 10 U.S.C. § 836.	Rules are provided by the Military Commissions Act of 2006 (MCA), the Rules for Military Commissions (R.M.C.), and the Military Commission Rules of Evidence (Mil. Comm. R. Evid.), issued by the Secretary of Defense pursuant to MCA. 10 U.S.C. § 948.
Jurisdiction over Persons	Members of the armed forces, cadets, midshipmen, reservists while on inactive-duty training, members of the National Guard or Air National Guard when in federal service, prisoners of war in custody of the armed forces, civilian employees accompanying the armed forces in time of declared war, and certain others, including “persons within an area leased by or otherwise reserved or acquired for the use of the United States.” 10 U.S.C. § 802; United States v. Averette, 17 USCMA	Individual subject to M.O., determined by President to be: <ol style="list-style-type: none"> 1. a non-citizen, and 2. a member of Al Qaeda or person who has engaged in acts related to terrorism against the United States, or who has harbored one or more such individuals and is referred to the commission by the Appointing Authority. § 3(A). 	Any “alien unlawful enemy combatant” or person determined to be an “unlawful enemy combatant” by a Combatant Status Review Tribunal (CSRT) or other competent tribunal established under the authority of the President or the Secretary of Defense is subject to trial by military commission. R.M.C. 101, 202

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Jurisdiction over Offenses	<p>363 (1968) (holding “in time of war” to mean only wars declared by Congress. Individuals who are subject to military tribunal jurisdiction under the law of war may also be tried by general court martial. 10 U.S.C. § 818.</p> <p>Any offenses made punishable by the UCMJ; offenses subject to trial by military tribunal under the law of war. 10 U.S.C. § 818.</p>	<p>Offenses in violation of the laws of war and all other offenses triable by military commission. § 3(B). M.C.I. No. 2 clarifies that terrorism and related crimes are “crimes triable by military commission.” These include (but are not limited to): willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; torture; causing serious injury; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; and rape; hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged</p>	<p>“Military commissions may try any offense under the MCA or law of war.” R.M.C. 203. Specifically, any offenses made punishable by the MMC (see Part IV: Crimes and Elements).</p>

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Composition	A military judge and not less than five members, or if requested, except in capital cases, a military judge alone. R.C.M. 501.	belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice; aiding or abetting; solicitation; command/superior responsibility - perpetrating; command/superior responsibility - misprision; accessory after the fact; conspiracy; and attempt.	<p>“A non-capital military commission shall consist of a military judge and at least five members.” R.M.C. 501(a)(1).</p> <p>“A capital military commission shall consist of a military judge and at least twelve members”, unless “twelve members are not reasonably available because of physical conditions or military exigencies”, then no fewer than nine members. R.M.C. 501(a)(2),(3); 10 U.S.C. § 949m(c)(1),(2).</p>
	* CRS Report 2007	*CRS Report 2007	**According to the Manual for Military Commissions, published 2007

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Table 2: Comparison of Procedural Safeguards

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
Presumption of Innocence	<p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b).</p> <p>Members of court martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.” R.C.M. 920(e).</p> <p>The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.</p>	<p>The accused shall be presumed innocent until proven guilty. § 5(B).</p> <p>Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F).</p> <p>The Commission must determine the voluntary and informed nature of any plea agreement submitted by the accused and approved by the Appointing Authority before admitting it as stipulation into evidence. § 6(B).</p>	<p>“If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.” R.M.C. 910(b).</p> <p>Members of a military commission must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond reasonable doubt.” R.M.C. 920(e)</p> <p>“The accused shall be properly attired in the uniform or dress prescribed by the military judge.” “Physical restraints shall not be imposed on the accused during open sessions of the commission unless prescribed by the military judge.” R.M.C. 804(d).</p>
Right to Remain Silent	<p>Coerced confessions or confessions made in custody without statutory equivalent of Miranda warning are not admissible as evidence, unless a narrow “public safety” exception applies. Art. 31, UCMJ, 10 U.S.C. § 831.</p>	<p>Not provided. Neither the M.O. nor M.C.O. requires a warning or bars the use of statements made during military interrogation, or any coerced statement, from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual to</p>	<p>A “person shall not be required to testify against himself at a proceeding of a military commission” unless: “(1) facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness, or (2) the witness has, with respect to the</p>

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	<p>Once a suspect is in custody or charges have been preferred, the suspect or accused has the right to have counsel present for questioning. Once the right to counsel is invoked, questioning material to the allegations or charges must stop. Mil. R. Evid. 305(d)(1).</p> <p>The prosecutor must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304.</p> <p>Interrogations conducted by foreign officials do not require warnings or presence of counsel unless the interrogation is instigated or conducted by U.S. military personnel. Mil. R. Evid. 305.</p>	<p>make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.</p>	<p>question, waived the privilege against self-incrimination, or (3) the relevant privilege against self-incrimination does not apply.” Mil. Comm. R. Evid. 301.</p> <p>Confessions and self-incriminating statements (admissions) made on or after December 30, 2005 while in custody and “obtained by the use of torture shall not be admitted into evidence” “unless the judge determines that the statement is reliable and possessing sufficient probative value, that the interests of justice would best be served by admitting the statement, and that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment prohibited by the” Detainee Treatment Act (DTA). Such statement made prior to December 30, 2005 may be admitted “if the [military] judge determines that the statement is reliable and possessing sufficient probative value, and that the interests of justice would be best served by admitting the statement” Subject to the requirements of Mil. Comm. R. Evid. 505, the prosecutor, prior to the arraignment, must disclose</p>

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Freedom from Unreasonable Searches & Seizures	<p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply. Mil. R. Evid. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i> Mil. R. Evid. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.” Mil. R. Evid. 311(c).</p>		to the defense the contents of all relevant statements made or adopted by the accused. Mil. Comm. R. Evid. 304.
		<p>Not provided; no exclusionary rule appears to be available.</p> <p>However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial. M.C.O. No. 3.</p> <p>No provisions for determining probable cause or issuance of search warrants are included.</p> <p>Insofar as searches and seizures take place outside of the United States against non U.S. persons, the Fourth Amendment may not apply. United States v. Verdugo Urquidez, 494 U.S. 259 (1990).</p>	<p>Not provided. “All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules,” the MMC, “or any Act of Congress applicable to trials by military commissions.”</p> <p>“Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.” 10 U.S.C. § 949a(b)(2)(B).</p>

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<p>Assistance of Effective Counsel</p>	<p>The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant. Art. 27, UCMJ, 10 U.S.C. § 827.</p> <p>In espionage cases or other cases in which classified information may be necessary to prove a charge or defense, the defense is permitted to request the information and to have the military judge review <i>in camera</i> information for which the government asserts a privilege. The accused and the defense attorney are entitled to be present for such <i>in camera</i> hearings, and although the government is not generally required to give them access to the classified information itself, the military judge may disapprove of any summary the government provides for the purpose of permitting the defense</p>	<p>M.C.O. 1 provides that the accused must be represented “at all relevant times” (presumably, once charges are approved until findings are final — but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4).</p> <p>The accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment the detailed counsel with a specific officer, if that person is available. § 4(C)(3)(a).</p> <p>The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not guaranteed access to classified evidence or closed hearings. § 4(C)(3)(b).</p> <p>Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution. § 5(1).</p> <p>The Appointing Authority must order</p>	<p>At least one qualifying military defense counsel is to be detailed “as soon as practicable after the swearing of charges” 10 U.S.C. § 948k.</p> <p>The accused may also be represented by a qualified civilian defense counsel if provided at no expense to the Government. R.M.C. 506(a).</p> <p>“Defense counsel must guard the interests of the accused zealously within the bounds of law ...; represent the accused with undivided fidelity and may not disclose the accused’s secrets or confidences except as the accused may authorize.” R.M.C. 502(d)(6)</p> <p>The lawyer-client privilege exists in military commissions. “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client” Mil. Comm. R. Evid. 502.</p> <p>Adverse personnel actions may not be taken against defense attorneys “because of the zeal with which such</p>

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	<p>to prepare adequately for the hearing, and may subject the government to sanctions if it declines to make the necessary information available. Mil. R. Evid. 505.</p> <p>The military judge may order all persons requiring security clearances to cooperate with investigatory personnel in any investigations which are necessary to obtain the security clearance necessary to participate in the proceedings. Mil. R. Evid. 505(g).</p> <p>The attorney-client privilege is honored. Mil. R. Evid. 502.</p>	<p>such resources be provided to the defense as he deems necessary for a full and fair trial.” § 5(H).</p> <p>Communications between defense counsel and the accused are subject to monitoring by the government. Although information obtained through such monitoring may not be used as evidence against the accused, M.C.I. No. 3, the monitoring could arguably have a chilling effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.</p>	<p>officer, in acting as counsel, represented any accused before a military commission” 10 U.S.C. § 949b.</p> <p>Convening authority may not censure, reprimand, or admonish counsel. R.M.C. 104(a)(1).</p>
<p>Right to Indictment and Presentment</p>	<p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.” Amendment V.</p> <p>However, a process similar to a grand jury is required by article 32, UCMJ. 10 U.S.C. § 832.</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.</p>	<p>Probably not applicable to military commissions provided the accused is an enemy belligerent. <i>See Ex parte Quirin</i>, 317 U.S. 1 (1942).</p> <p>The Office of the Chief Prosecutor prepares charges for referral by the Appointing Authority. § 4(B).</p> <p>There is no requirement for an impartial investigation prior to a referral of charges. The Commission may adjust a charged offense in a manner that does not change the nature</p>	<p>Article 32, UCMJ (10 U.S.C. § 832), hearings are expressly made inapplicable. 10 U.S.C. § 948b(d)(1)(C).</p> <p>Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has “personal knowledge of, or reason to believe, the matters set forth therein; and that they are true in fact to the best of his knowledge and belief.” R.M.C. 307(b).</p>

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	The accused must be informed of the charges as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	or increase the seriousness of the charge. § 6(F).	“Upon the swearing of the charges and specifications, the accused shall be informed of the charges against him as soon as practicable. Such charges shall be in English and, if appropriate, in another language that the accused understands. R.M.C. 308.
Right to Written Statement of Charges	Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	Copies of approved charges are provided to the accused and Defense Counsel in English and another language the accused understands, if appropriate. § 5(A).	“The trial counsel assigned to a case before a military commission shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.” R.M.C. 602.
Right to be Present at Trial	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.	The accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the accused because of disruptive conduct or for security reasons, or “any other reason necessary for the conduct of a full and fair trial.” §§ 4(A)(5)(a); 5(K); 6B(3).	The accused has the right to be present at all sessions of the military commission except as provided for in R.M.C. 701-703 and Mil. Comm. R. Evid. 505. The accused does not, however, have the right to be absent, and may be required by the military judge to be present. If the accused persists, after a warning by the military judge, in disruptive conduct, “the accused shall be considered to have

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	The government may introduce redacted or summarized versions of evidence to be substituted for classified information properly claimed under privilege, but there is no provision that would allow court-martial members (other than the non-voting military judge) to view evidence that is not seen by the accused. Mil. R. Evid. 505.		waived the right to be present.” R.M.C. 804.
Prohibition against Ex Post Facto Crimes	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. United States v. Gorki, 47 M.J. 370 (1997).	Not provided, but may be implicit in restrictions on jurisdiction over offenses. See § 3(B). M.C.I. No. 2 § 3(A) provides that “no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.”	MCA declares that it codifies “offenses that have traditionally been triable by military commissions,” it therefore does not “preclude trial for crimes that occurred before the date of enactment.” 10 U.S.C. § 950p. “A military commission shall have jurisdiction to try any offense made punishable by the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. R.M.C. 201(b)(1).
Protection against Double Jeopardy	Double jeopardy clause applies. See Wade v. Hunter, 336 US 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence.	The accused may not be tried again by any Commission for a charge once a Commission’s finding becomes final. (Jeopardy appears to attach when the finding becomes final, at least with respect to subsequent U.S. military commissions.) § 5(P).	Double Jeopardy applies in a military commission where “the accused has previously been tried by military commission or federal civilian court for the same offense,” except when terminated under R.M.C. 604(b) or R.M.C. 915. A military commission is

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	<p>10 U.S.C. § 844.</p> <p>General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. <i>U. S. v. Stokes</i>, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. <i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.</p>	<p>However, although a finding of Not Guilty by the Commission may not be changed to Guilty, either the reviewing panel, the Appointing Authority, the Secretary of Defense, or the President may return the case for “further proceedings” prior to the findings’ becoming final. If a finding of Not Guilty is vacated and retried, double jeopardy may be implicated.</p> <p>The order does not specify whether a person already tried by any other court or tribunal may be tried by a military commission under the M.O. The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be read to authorize prosecution by federal authorities after the individual was subject to trial by military commission, although a federal court would likely dismiss such a case on double jeopardy grounds. M.O. § 7(e).</p>	<p>not a trial in the sense of this rule if no “presentation of evidence on the general issue of guilt has begun”, or “until the finding of guilty has become final after review of the case has been fully completed,” or “which lacked jurisdiction to try the accused for the offense.” R.M.C. 907(b)(2).</p>

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Speedy & Public Trial	<p>In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806.</p> <p>The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977); Mil. R. Evid. 505(j).</p>	<p>The Commission is required to proceed expeditiously, “preventing any unnecessary interference or delay.” § 6(B)(2).</p> <p>Failure to meet a specified deadline does not create a right to relief. § 10.</p> <p>The rules do not prohibit detention without charge, or require charges to be brought within a specific time period. Proceedings “should be open to the maximum extent possible,” but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings. § 6(B)(3).</p>	<p>There is no right to a speedy trial. Article 10, UCMJ (10 U.S.C. § 810), is expressly made inapplicable to military commissions. 10 U.S.C. § 948b(c).</p> <p>“No session of a military commission shall be closed to the public unless the military judge specifically finds such closure necessary to ... [protect] information the disclosure of which could reasonably be expected to damage national security, ... or ... [ensure] the physical safety of individuals.” R.M.C. 806(b)(2).</p>
Burden & Standard of Proof	<p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).</p>	<p>Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the accused is guilty. §§ 5(C); 6(F).</p> <p>The burden of proof of guilt is on the prosecution, § 5(C); however, M.C.I. No. 2 states that element of wrongfulness of an offense is to be inferred absent evidence to the</p>	<p>The burden of proof, unless specifically otherwise provided, on any factual issue, the resolution of which is necessary to decide a motion, “shall be by a preponderance of the evidence.” R.M.C. 905(c).</p> <p>Members of military commissions must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
		contrary. M.C.I. No. 2 § 4(B).	<p>doubt must be resolved in favor of the defendant. R.M.C. 920(e).</p> <p>“If fewer than two-thirds of the members present vote for a finding of guilty – or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty – a finding of not guilty has resulted as to the charge or specification on which the vote was taken.” R.M.C. 921(c)(3).</p> <p>“The military judge shall exclude any evidence the probative value of which is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (2) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Mil. Comm. R. Evid. 403.</p>
Privilege Against Self-Incrimination	<p>No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c),</p>	<p>The accused is not required to testify, and the commission may draw no adverse inference from, a refusal to testify. § 5(F).</p> <p>However, there is no rule against the use of coerced statements as evidence.</p>	<p>“Alien unlawful enemy combatants have a statutory privilege against self incrimination under 10 U.S.C. § 948r. Other witnesses, such as United States citizens, may invoke privileges under the U.S. Constitution or Article 31 of the U.C.M.J., to the extent they apply.” Mil. Comm. R. Evid. 301.</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
	<p>UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.</p>	<p>There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding; however, under 18 U.S.C. §§ 6001 <i>et seq.</i>, a witness required by a military tribunal to give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements, or otherwise failing to comply with the order. 18 U.S.C. §§6002; 6004.</p>	<p>A "person shall not be required to testify against himself at a proceeding of a military commission" unless: "(1) facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness, or (2) the witness has, with respect to the question, waived the privilege against self-incrimination, or (3) the relevant privilege against self-incrimination does not apply." Mil. Comm. R. Evid. 301.</p>
<p>Right to Examine or Have Examined Adverse Witnesses</p>	<p>Hearsay rules apply as in federal court. Mil. R. Evid. 801 <i>et seq.</i> In capital cases, sworn depositions may not be used in lieu of witness, unless court martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.</p> <p>The government may claim a privilege not to disclose classified evidence to the accused, and the military judge may authorize the deletion of specified items of classified information, substitute a portion or summary, or statement admitting relevant facts that the evidence would tend to prove, unless the military judge determines</p>	<p>Defense Counsel may cross-examine the prosecution's witnesses who appear before the Commission. § 5(I).</p> <p>However, the Commission may also permit witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross examination may be impossible. § 6(D)(2).</p> <p>In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative</p>	<p>"Hearsay may be admitted on the same terms as any other form of evidence ... if it would be admitted under the rules of evidence applicable in trial by general courts-martial," or "if the proponent of the evidence makes known to the adverse party" the intention to offer, and the particulars of, the evidence. Mil. Comm. R. Evid. 802, 803.</p> <p>"At oral deposition, the accused shall have the right to be represented by counsel who will examine, cross-examine and make objections on behalf of the accused." R.M.C. 702(g).</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
	<p>that disclosure of classified information itself is necessary to enable the accused to prepare for trial. Mil. R. Evid. 505(g).</p>	<p>value to a reasonable person. § 6(D)(1). The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C. § 849. § 6(D)(3).</p>	<p>“Defense counsel may cross-examine each witness for the prosecution who testifies before the commission.” 10 U.S.C. § 949c. At the request of the government, in consideration of national security, the military judge shall enter protective orders limiting the scope of direct examination and the cross examination of witnesses. Mil. Comm. R. Evid. 505(e)(2). “In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording or photograph or may order admission into evidence of the whole, writing, recording or photograph with the excision of some or all of the classified information contained therein. Mil. Comm. R. Evid. 505(f)(3).</p>
<p>Right to Compulsory Process to Obtain Witnesses</p>	<p>Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in court</p>	<p>The accused may obtain witnesses and documents “to the extent necessary and reasonably available as determined by the Presiding Officer.” § 5(H). The Commission has the power to</p>	<p>“The defense shall have reasonable opportunity to obtain witnesses” who have not been deemed “unavailable” by the military judge according to Mil. Comm. R. Evid. 804(a). R.M.C. 703(a),(b).</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
	<p>martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.</p>	<p>summon witnesses as requested by the defense. § 6(A)(5).</p> <p>The power to issue subpoenas is exercised by the Chief Prosecutor; the Chief Defense Counsel has no such authority. M.C.I. Nos. 3- 4.</p>	<p>“The defense shall submit a written list of witnesses whose production by the Government the defense requests.” The judge may grant the production of the witnesses in light of the requirements of justice. R.M.C. 703(c).</p>
<p>Right to Trial by Impartial Judge</p>	<p>A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Art. 37, UCMJ, 10 U.S.C. § 837.</p>	<p>The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted. § 4(A)(4).</p> <p>The presiding judge, who decides issues of admissibility of evidence, does not vote as part of the commission on the finding of guilt or innocence.</p> <p>Article 37, UCMJ, provides that no person subject to the UCMJ “may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any member thereof, in reaching the findings or sentence in any case, or the action of</p>	<p>Military judges must take an oath to “faithfully and impartially” perform their duties. R.M.C. 807(b).</p> <p>A military judge may not be assigned to a case “if he is the accuser or a witness or has acted as investigator or a counsel in the same case.” R.M.C. 502(c)(1).</p> <p>“[A] military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” R.M.C. 902(a).</p> <p>“A military judge ... may not consult with the members of the commission except in the presence of: the accused ..., trial counsel, and defense counsel, nor may he vote with the members of the commission.” R.M.C. 502(c)(2).</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
		<p>any convening, approving, or reviewing authority with respect to his judicial acts.” 10 U.S.C. § 837.</p> <p>M.C.I. No. 9 clarifies that Art. 37 applies with respect to members of the review panel. M.C.I No. 9 § 4(F).</p>	<p>The convening authority is prohibited from preparing or reviewing “any report concerning the effectiveness, fitness, or efficiency of a military judge ... which relates to his performance of duty as a military judge on the military commission. R.M.C. 502(c)(4).</p> <p>Convening authority may not censure, reprimand, or admonish the military judge. R.M.C. 104(a)(1).</p> <p>“No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission ...” R.M.C. 104(a)(2).</p>
<p>Right to Trial by Impartial Jury</p>	<p>A military accused has no Sixth Amendment right to a trial by petit jury. <i>Ex Parte Quirin</i>, 317 U.S. 1, 39 40 (1942) (<i>dicta</i>).</p> <p>However, “Congress has provided for trial by members at a court-martial.” <i>United States v. Witham</i>, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and</p>	<p>The commission members are appointed directly by the Appointing Authority. While the Commission is bound to proceed impartially, there do not appear to be any special procedural safeguards designed to ensure their impartiality. However, defendants have successfully challenged members for cause. § 6(B).</p>	<p>Military commission members must take an oath to “faithfully and impartially” perform their duties. R.M.C. 807(b).</p> <p>“Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in [the R.M.C.], members should not discuss any part of</p>

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	<p>covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. <i>United States v. Lambert</i>, 55 M.J. 293 (2001). The absence of a right to trial by jury precludes criminal trial of civilians by court-martial. <i>Reid v. Covert</i>, 354 U.S. 1 (1957); <i>Kinsella v. United States ex rel. Singleton</i>, 361 U.S. 234 (1960).</p>		<p>a case with anyone until the matter is submitted to them for determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion of any matter in connection with the case until that matter has been submitted to them for determination. R.M.C. 502(a).</p> <p>The accused may challenge one member peremptorily, and may challenge other members for cause. R.M.C. 912(g).</p> <p>Convening authority may not censure, reprimand, or admonish the military commission, or any member with respect to the findings or sentence or any other exercise of its or his function in the conduct or the proceedings. R.M.C. 104(a)(1).</p> <p>“No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission ...” R.M.C. 104(a)(2).</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
<p>Right to Appeal to Independent Reviewing Authority</p>	<p>Those convicted by court-martial have an automatic appeal to their respective service courts of appeal, depending on the severity of the punishment. Art. 66, UCMJ; 10 U.S.C. § 866.</p> <p>Decisions by service appellate courts are reviewable on a discretionary basis by the Court of Appeals for the Armed Forces (CAAF), a civilian court composed of five civilian judges appointed by the President. Art. 67, UCMJ; 10 U.S.C. § 867. CAAF decisions are subject to Supreme Court review by writ of certiorari. 28 U.S.C. § 1259.</p> <p>The writ of <i>habeas corpus</i> provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower than in challenges of federal or state convictions. <i>Burns v. Wilson</i>, 346 U.S. 137 (1953).</p>	<p>A review panel appointed by the Secretary of Defense reviews the record of the trial in a closed conference, disregarding any procedural variances that would not materially affect the outcome of the trial, and recommends its disposition to the Secretary of Defense. Although the Defense Counsel has the duty of representing the interests of the accused during any review process, the review panel need not consider written submissions from the defense, nor does there appear to be an opportunity to rebut the submissions of the prosecution. If the majority of the review panel forms a “definite and firm conviction that a material error of law occurred,” it may return the case to the Appointing Authority for further proceedings. § 6(H)(4).</p> <p>The review panel recommendation does not appear to be binding. The Secretary of Defense may serve as Appointing Authority and as the final reviewing authority, as designated by the President.</p> <p>Although the M.O specifies that the individual is not privileged to seek any</p>	<p>Prior to taking action, the convening authority must consider timely written submissions by the accused concerning “(1) Allegations of errors affecting the legality of the findings or sentence; (2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial; (3) Matters in mitigation which were not available for consideration at the military commission; and (4) Clemency recommendations by any member, the military judge, or any other person.” R.M.C. 1105</p> <p>After any military commission in which the approved sentence includes death, the accused may not waive or withdraw appellate review. R.M.C. 1110.</p> <p>In cases which appellate review has not been waived, the findings and sentence shall be reviewed by the Court of Military Commission Review for errors of law. Relief may be granted if the “error of law prejudiced a substantial trial right of the accused.” R.M.C. 1201(d).</p> <p>Upon receiving notification of decision</p>

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<p>Protection against Excessive Penalties</p>	<p>The right to appeal a conviction resulting in a death sentence may not be waived. R.C.M. 1110.</p> <p>Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004.</p> <p>A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.</p>	<p>remedy in any U.S. court or state court, the court of any foreign nation, or any international tribunal, M.O. § 7(b), Congress established jurisdiction in the Court of Appeals for the D.C. Circuit to hear challenges to final decisions of military commissions. Detainee Treatment Act of 2005.</p>	<p>by the Court of Military Commission Review, the accused may, within twenty days, petition the United States Court of Appeals for the District of Columbia for a review of the case. R.M.C. 1205(a).</p> <p>“[D]ecisions of the United States Court of Appeals for the District of Columbia may be reviewed by the Supreme Court by writ of certiorari.” R.M.C. 1205(b).</p>
		<p>The accused is permitted to make a statement during sentencing procedures. § 5(M).</p> <p>The death sentence may be imposed only on the unanimous vote of a seven-member panel. § 6(F).</p> <p>The commission may only impose a sentence that is appropriate to the offense for which there was a finding of guilty, including death, imprisonment, fine or restitution, or “other such lawful punishment or condition of punishment as the commission shall determine to be proper.” § 6(G).</p>	<p>Subject to national security privilege, “the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to ... reduce the punishment.” R.M.C. 701(e).</p> <p>The right to appeal a conviction resulting in a death sentence may not be waived nor withdrawn. R.M.C. 1110.</p> <p>The convening authority may, if the accused is found guilty, reduce the charge to a lesser included offense, order a rehearing, or set aside the finding of guilt and dismiss the charge.</p>

	General Courts Martial*	M.C. Order No. 1 (M.C.O.)*	Military Commissions**
		<p>If the Secretary of Defense has the authority to conduct the final review of a conviction and sentence, he may mitigate, commute, defer, or suspend, but not increase, the sentence. However, he may disapprove the findings and return them for further action by the military commission. § 6(H).</p>	<p>R.M.C. 1107(c).</p> <p>A sentence of up to ten years requires a two-thirds vote of members present. A sentence of more than ten years requires a three-fourths vote. A sentence which includes death requires a unanimous vote. R.M.C. 1006(d)(4).</p> <p>“No part of a military commission sentence extending to death may be executed until approved by the President.” R.M.C. 1207(a).</p>
* CRS Report 2007		*CRS Report 2007	**According to the Manual for Military Commissions, published 2007

THE NEGLECTED DEBATE OVER SEXUAL ASSAULT POLICY IN THE DEPARTMENT OF DEFENSE

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Recent amendments to Uniform Code of Military Justice, Article 120, and other policy reforms have significantly changed how allegations of sexual assault and harassment are addressed within the Department of Defense. As significant as the statutory and policy changes is how these changes are a reflection of certain political and social agendas seeking changes in the law in order to effect broader attitudinal shifts. In this sense, these policy changes reflect doctrinal beliefs in how sexual assaults should be treated by the criminal law. On another level, these changes reflect a critique of the current statutory and regulatory mechanisms for addressing allegations of sexual misconduct within the military.

While these efforts to reform how allegations of sexual misconduct are handled in the military may be rooted in a genuine, good-faith desire to enhance good order and discipline in the ranks, proponents of these efforts are advocating legal reforms based on ill-conceived or baseless assumptions and promoting policies which are ill-suited to achieve their desired ends. Unfortunately, unless policy makers examine the fundamental assumption upon which they are basing their decisions, then sexual assault policy in the Department of Defense will continue to imperfectly reflect the desired ends of the policy makers and imperfectly protect the guarantees of procedural and substantive fairness fundamental to our criminal justice system.

I. INTRODUCTION

“ . . .for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”

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--Oliver Wendell Holmes¹

On October 1, 2007, amendments to Uniform Code of Military Justice (UCMJ) Article 120 took effect.² These amendments present a seismic change in the way that allegations of sexual misconduct may be punished under the UCMJ. What is disquieting about these changes is that they relieve the Government of its burden to prove a sexual assault occurred and shift the burden onto the accused to prove that an assault did not occur. Even more troubling is that this shift in the law is largely a result of bad social science and worse policy assumptions flowing from that poor science--all under the guise of deterring and punishing sexual assaults.

In the 15 years since the Tailhook scandal,³ the Department of Defense (DoD) has struggled to develop more effective means to deter, investigate, and punish allegations of sexual harassment and sexual assault.⁴ In particular, the past few years have seen significant revisions to Department of Defense policies regarding sexual harassment and sexual assault cases. Arguably, many of these policies advance legitimate and laudable goals of enhancing the ability of military commanders to effectively deter, investigate and punish sexual harassment and assault, and increasing the confidence that potential victims place in the military justice system when reporting such allegations. However legitimate those goals may be, current DoD policies regarding sexual misconduct increasingly skew towards certain normative assumptions about the

¹ *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting).

² The amendments to the statute are contained in the National Defense Authorization Act (NDAA) for Fiscal Year 2006, H.R. 1815, 108th Cong. (1998) P.L. 109-163.

³ See, e.g. Michael R. Gordon, *Pentagon Report Tells of Aviators' 'Debauchery,'* N.Y. TIMES, April 24, 1993, at 1; Richard Serrano, *33 Top Officers Disciplined in Tailhook Case,* L.A. TIMES, October 16, 1993, at A1.

⁴ The terms "sexual harassment" and "sexual violence" are defined in, U.S. DEPT OF DEFENSE, DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (30 Jun. 30, 2005), at 1 [hereinafter DTF Report]. The DTF Report generally adopts the common legal definition of sexual harassment—i.e. "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* Conversely, sexual violence is a term without a specific legal definition that is commonly used by civilian advocates and usually denotes forcible sexual acts against the will of the victim. *Id.*

In lieu of "sexual violence," this note will use the term "sexual assault" to describe the range of conduct currently proscribed under the Uniform Code of Military Justice (UCMJ).

general nature of sex offenses and against legal and normative protections for those accused of criminal offenses that are fundamental to our system of justice.

A fundamental doctrine at the foundation of these policies is the belief that remedying the physical, psychological, and social damage done to victims of sexual assault is, and should be, the penultimate goal of the criminal justice system. The resulting policies, however, place little to no value upon the substantive or procedural rights of an accused, or to the fundamental fairness implicit in the guarantees of due process.⁵ This is not to suggest that sexual assaults are not serious offenses that merit severe punishment or that the effects of such assaults upon victims—and society at large—should be given short shrift. Yet, recent developments in military law demonstrate that any doctrinal framework that places primacy upon remedying the physical, psychological, and social harms done to victims of sexual assault and harassment—while wholly appropriate for the victim advocacy and counseling settings—is of limited utility in terms of balancing the competing interests of the victim, accused and the government in our criminal justice system.

II. A LONG WINDING ROAD TO HERE

A. Effects of Sexual Assault Generally

Numerous statistical surveys indicate that sexual assaults—like most crimes—are underreported to authorities.⁶ In addition to the obvious physical impact of the crime itself, many sexual assault victims experience chronic, long-term issues, including post-traumatic stress, loss of self-esteem, and anxiety disorders.⁷ Besides the obvious physical impact of sexual assault, these surveys suggest that aspects of military life can exacerbate the long-term harms that

⁵ See U.S. CONST. amend. V, VI and XIV, § 1.

⁶ Callie Marie Rennison, *Bureau of Justice Statistics Selected Findings, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, August 2002, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf> (last visited May 5, 2007). "Sixty-three percent of completed rapes, 65% of attempted rapes, and 74% of completed and attempted sexual assaults against females were not reported to the police." *Id.* However, statistics compiled by the Department of Justice since 1996 also indicate that similar significant percentages of all measured criminal offenses—both crimes against persons and property offenses—were not reported to the police for various reasons. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Criminal Victimization in the United States—Statistical Tables 1996-2005* available at <http://www.ojp.usdoj.gov/bjs/abstract/cvusst.htm> (last visited May 5, 2007).

⁷ Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 152 (2005) (citing Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 225 (1993)).

victims face.⁸

Although Department of Defense data on the prevalence of sexual harassment and sexual assault is limited, multiple studies have shown a high prevalence of sexual assault in the military. According to data from the Department of Veterans Affairs, of almost 3 million veterans surveyed between March 2002 and October 2003, approximately 20.7% of females and 1.2% of male veterans indicated a history of sexual trauma that occurred during their military service.⁹ An older Veterans Affairs study of female hospital patients between 1994 and 1995 indicated that 55% reported that they had been the victim of sexual harassment during their military careers and 23% reported that they had been a victim of sexual assault sometime during their military careers.¹⁰ While noting that the definitions of sexual harassment and sexual assault used in these studies is extremely broad,¹¹ one does not need to parse numbers or speculate about the prevalence of sexual misconduct in the military relative to society at-large, or its impact upon victims, to accept the premise that sexual harassment and sexual assault is at least as significant a problem in the armed forces as it is within society.

B. A Brief, Modern History of Sexual Assault in the Armed Forces

1. Tailhook to OEF/OIF

A modern history of the military's efforts to deal with issues of sexual misconduct within the ranks can be traced back to the 1991 Tailhook Convention.¹² Tailhook first raised the issue to one of national prominence. In response, Congress has held hearings exploring harassment and gender discrimination within the military on nearly an annual basis since 1992.¹³

⁸ See e.g., U.S. DEPT OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 63 (Apr. 2004) [hereinafter DOD TASK FORCE REP.]:

Sexual Assault can have a powerful and potentially long term effect on a victim's ability to cope. It often destabilizes a victim's sense of control, safety and well being, particularly if the victim lives in the same building, is assigned within the same command, and frequents the same base support and recreation facilities as the offender.

⁹ *Id.* at 58.

¹⁰ *Id.* These surveys, however, did not address whether the alleged sexual assault complaints reported were true. See generally, *infra* notes 84 and 85.

¹¹ In the cited Veterans Affairs' studies: "Sexual harassment is defined as any repeated, unwelcome sexual behavior such as offensive sexual remarks, unwanted sexual advances, or pressure for sexual favors occurring in the workplace. Sexual assault is defined as any sort of sexual activity in which one person is involved against his or her will, with or without physical force." *Id.*

¹² *Id.* at 93. See, e.g. Michael R. Gordon, *Pentagon Report Tells of Aviators' 'Debauchery.'* N.Y. TIMES, April 24, 1993, at 1; J.E. Mitchell, *Surviving the Tarnish of Tailhook*, L.A. TIMES, October 31, 1993, at B13.

¹³ DOD TASK FORCE REP., *supra* note 8, at 93.

These issues next came to public attention in 1997 when service members at Aberdeen Proving Ground, Maryland were court-martialed and convicted of charges ranging from rape to sexual harassment.¹⁴ Further congressional inquiries were prompted in 2003 when allegations of widespread sexual assaults at the Air Force Academy were published in the Denver Post.¹⁵ The Denver Post published a series of articles detailing allegations of sexual assaults against female service members in the Iraq and Afghanistan theatres.¹⁶ In February 2004, Secretary of Defense Donald Rumsfeld ordered a task force to investigate sexual assaults against service members in the Iraqi combat theater.¹⁷ The task force subsequently expanded its scope to a DOD-wide review.¹⁸ This task force issued a report in April 2004.¹⁹ The task force recommended that the DOD overhaul its sexual assault policies including establishing mechanisms to provide greater privacy to sexual assault victims.²⁰ Congress reacted to the report by ordering the DOD to undertake a comprehensive review of its sexual assault policies.²¹

2. Military Service Academies—the New Political Battleground

As part of this comprehensive review, Congress mandated the creation of The Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (DTF) in September 2004.²² Congress directed the DTF to assess and make recommendations concerning how the Departments of the Army and the Navy could more effectively address sexual harassment and assault at the U.S. Military Academy (USMA) and the U.S. Naval Academy

¹⁴ *Id.* at 94-95.

¹⁵ Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, § 501-503, 117 Stat. 559, 609-10 (2003); DOD TASK FORCE REP, *supra* note 8, at 96.

¹⁶ See, e.g. Miles Moffeit & Amy Herdy, *For Crime Victims, Punishment*, DENVER POST, November 16, 2003, at B-01; Miles Moffeit & Amy Herdy, *Military's Response to Rapes*, DENVER POST, November 18, 2003, at A-01; Miles Moffeit, *Legislators Want Data on Assaults in Military*, DENVER POST, April 1, 2004, at A-01.

¹⁷ See DOD TASK FORCE REP, *supra* note 8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Daniel Pulliam, *Congress Orders Pentagon to Review Sexual Misconduct Policies*, GOVERNMENT EXECUTIVE, Oct. 12, 2004, available at

<http://www.govexec.com/dailyfed/1004/101204dp1.htm> ("According to a congressional aide, if the Defense Department is not able to come up with a better means of providing aid to soldiers who have been sexually assaulted . . . then the [Congressional Caucus for Women's Issues] will work to get Congress to rewrite the Pentagon's policy.") (last visited May 7, 2007).

²² The Defense Task Force on Sexual Harassment and Violence at the Military Service Academies was established pursuant to Section 526 of Public Law 108-136, the National Defense Authorization Act for Fiscal Year 2004.

(USNA).²³ On August 25, 2005, DoD released the DTF's report assessing the policies, practices, and procedures for dealing with sexual harassment and related misconduct at the USMA and the USNA.

The DTF gathered information from numerous anecdotal sources, including site visits to the USMA and USNA, consultation with various subject-matter experts²⁴, interviews with various individuals, and the review of DoD survey data obtained from cadets and midshipmen.²⁵ The DTF also examined other information provided by the Department of the Army and Department of the Navy pertaining to policies, reports, and practices relating to the service academies' response to sexual assault and harassment at the academies.²⁶ Based on this research, the DTF made various recommendations designed to prevent such violence and harassment as the academies such as providing expanded training and education on sexual harassment and assault, and improving the existing support mechanisms for victims of sexual violence or harassment.²⁷

The goals of deterring and effectively punishing sexual violence in the ranks, and society generally, are shared by the various advocacy groups that provided support and advice to the DTF and also by the criminal justice system.²⁸ However, the recommendations and rationale of the DTF illustrate why viewing criminal law enforcement exclusively through the prism of victim advocacy will typically yield proposals or legislation that are skewed against any conception that the rights of an accused are worthy of protection.

C. The Victim Advocate Privilege

Among the DTF's recommendations for reforming the criminal enforcement of sexual assault laws was that Congress should create a statutory privilege protecting communications made by victims of sexual assault to health care providers and victim advocates.²⁹ The proposed privilege would provide victims the right to refuse to disclose or report sexual assault and to prevent any other person from disclosing communications made in confidence to a health

²³ U.S. DEP'T OF DEFENSE, DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES REPORT (2006) [hereinafter DTF REPORT] at ES-1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at A-20-21. The DTF Report specifically acknowledged the contributions of the Colorado Coalition Against Sexual Assault, Indiana Coalition Against Sexual Assault, North Carolina Against Sexual Assault, and the Pennsylvania Coalition Against Rape, among the victims-advocacy organizations cited as resources for the report.

²⁹ *Id.* at 26.

care provider or victim advocate for the purpose of enabling that provider's services and care.³⁰ The DTF's rationale for a patient-victim advocate or counselor privilege was rooted in the belief that such a privilege would ensure victims would receive "immediate and comprehensive personal support," thereby encouraging victims to report allegations of assault.³¹

However, the DTF neither offered evidence in its report that the Military Rules of Evidence (MRE) are inadequate to protect a testifying victim's interests under appropriate circumstances, nor did the DTF cite any similar evidentiary rule under Federal law or practice. A unique aspect of the DTF's proposed statutory privilege is that the proposed privilege would only benefit of a specific category of crime victims. By way of contrast, most other MRE privileges protect the content of communications made in the context of certain relationships and are not tied to a particular category of crime, or crime victims.³²

Although neither the Federal Rules of Evidence (Fed. R. Evid.) nor the MRE expressly recognize a victim advocate privilege, in *Jaffee v. Redmond*³³, the United States Supreme Court interpreted Fed. R. Evid. 501 to include a federal psychotherapist-patient privilege in civil proceedings. That Federal rule is a general rule about testimonial privileges that allows courts to apply existing common law principles to evaluate novel claims of privilege. Accordingly, a privilege can be recognized by the federal courts under Fed. R. Evid. 501,

³⁰ The DTF recommended an exception to the privilege to permit disclosure when necessary to prevent serious bodily harm or death of the victim or another person. *Id.*

³¹ At Recommendation 9A of the DTF report, the Task Force advanced seven specific goals of the privilege:

- Provide victims immediate and comprehensive personal support
- Provide multiple channels to encourage reporting
- Protect victims' identities until they choose to report
- Protect communications between victims and newly established confidential sources throughout the criminal justice process
- Provide for collection and preservation of forensic evidence to support investigation of cases that victims choose to report
- Provide for the safeguarding of the forensic exam kit until the victim decides to report
- Provide for extended privileged care of victims with professional psychotherapists

The Task Force also recognized that: "the granting of a statutory privilege is a serious and significant legal protection, but we believe privileged communication is imperative. Commanders have an obligation to ensure the welfare of individuals entrusted to their care, yet the lack of confidentiality has prevented many victims from seeking care they needed and wanted. The Task Force believes that establishing this privilege will not only serve to ensure that victims receive the care they need, but will also, in the long run, stimulate higher victim reporting rates." *Id.*

³² See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 502 (lawyer-client privilege), MIL R. EVID. 503 (clergy-penitent privilege), and MIL R. EVID. 513 (psychotherapist-patient privilege) (2005)[hereinafter MCM].

³³ *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996).

although the privilege does not explicitly appear in the Federal Rules of Evidence. MRE 501 incorporates Fed. R. Evid. 501 into the military evidentiary code.³⁴ The framework for recognizing new evidentiary privileges in *Jaffee*, when read with MRE 501, suggests that military courts can recognize a victim advocate privilege where the Federal courts have recognized such a privilege and there is a sufficiently compelling public interest in recognizing the privilege that outweighs the evidentiary benefits of rejecting the privilege.³⁵ Currently, the Federal Rules of Evidence do not expressly recognize a victim advocate privilege, nor do the Federal courts recognize a common law victim advocate privilege.³⁶

Given the paucity of reliable statistical data supporting a conclusion that sexual violence is underreported to a greater extent than other forms of violent crime,³⁷ such a statutory privilege for communications to a victim advocate would tend to infantilize sexual assault victims by treating them as a *de jure* protected class of crime victims. Considering further that Congress has not codified such a privilege, nor have the Federal courts recognized the existence

³⁴ MRE 501(a) also recognizes privileges “generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.” MCM, *supra*, note 32, MIL R. EVID. 501.

³⁵ See, e.g. Schimpf, *supra* note 7.

³⁶ However, 33 states recognize some form of crime victim advocate or victim counselor privilege that protects the disclosure of communications between that advocate and a person seeking treatment. See ALA. CODE §§ 15-23-41 TO 46 (2006); ALASKA STAT. § 18.66.200 - 250 (2007); ARIZ. REV. STAT. § 13-4430 (2006); ARKANSAS CODE 16-41-101; CAL. EVID. CODE § 1035 – 1036.2 (2006); COLO. REV. STAT. § 13-90-107 1(K)(I) (2006); CONN. GEN. STAT. § 52-146k (2006); FLA. STAT. § 90.5035 - 90.5036 (2006); HAW. REV. STAT. § 505.5 (2006); 735 ILL. COMP. STAT. 5/8-802.1 (2006); IND. CODE ANN. § 35-37-6-9 (2006); IOWA CODE § 915.20A (2005); KY. RULES OF EVIDENCE 506 (2006); LA. CODE. EVID. ANN. ART. 510 & 518 (2006); 16 ME. REV. STAT. ANN. § 53-A, B & C (2006); MASS. GEN. LAWS CH. 233 § 20J (2006); MICH. COMP. LAWS § 600.2157A (2006); MINN. STAT. § 595.02 (2006); MONT. CODE ANN. § 26-1-812 (2006); NEV. REV. STAT. § 49.2547 (2006); N.H. REV. STAT. ANN. § 173-C:1 (2006); N.J. STAT. ANN. § 2A:84A-22.14 (2007); N.M. STAT. ANN. § 31-25-3 (2007); N.Y. C.P.L.R. § 4510 (2006); N.C. GEN. STAT. § 8-53.8 (2006); N.C. GEN. STAT. § 8-53.12 (2006); N.D. CENT. CODE, § 14-07.1-18 (2006); 42 PA. C. S. § 5945.1 (2006); UTAH CODE ANN. § 78-3C-3 (2006); 12 V.S.A. § 1614 (2006); VA. CODE ANN. § 8.01-400.2 (2006); REV. CODE WASH. (ARCW) 5.60.060 (2006); W. VA. CODE § 30-31-13 (2006); WISC. STAT. ANN § 905.04 (2006); WYO. STAT. § 1-12-116 (2006). Additionally, several other states recognize a form of physician or psychotherapist privilege that might protect the disclosure of such communications under certain circumstances. See, e.g. ARK. CODE ANN. § 16-41-101; MISS.CODE ANN. § 13-1-21 (2006); MO.REV.STAT. § 491.060 (5) (2006); NEB.REV.STAT. § 27-504 (2006); ORC ANN. 2317.02(B)(1) (2007); 12 OKL.ST. §2503 (2006); ORS § 40.230 (2006); R.I. GEN. LAWS § 9-17-24 (2007); S.D. CODIFIED LAWS § 19-13-6 (2006); TEX.HEALTH SAFETY CODE § 773.091 (2007).

³⁷ See BUREAU OF JUSTICE STATISTICS, *Criminal Victimization in the United States—Statistical Tables 1996-2005*, *supra* note 6.

of such a privilege under the common law, the premise that a victim advocate privilege should be recognized under military law is tenuous.

1. Constitutional Flaws

Some commentators have argued that the proposed victim-advocate privilege could be justified based on such a utilitarian balancing between the notional public good associated with the privilege and the costs of excluding evidence. However, those arguments are premised on the same skewed balancing of the competing interests that the DTF's report demonstrated.³⁸ That balancing—or rather lack of balancing—presumes that the accused's Sixth Amendment rights should yield to the proposed privilege.

The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." ³⁹ Commonly referred to as the Confrontation Clause, the Supreme Court has stated that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination" ⁴⁰ "[T]he exposure of a witness' motivation [or bias] in testifying is a proper and important function of the constitutionally protected right of cross-examination." ⁴¹ The Supreme Court has also recognized that cross-examination "is an effective tool for revealing inconsistencies." ⁴² In *Crawford v. Washington*,⁴³ the Court examined the history of the Confrontation Clause⁴⁴ and observed:

³⁸ See Schimpf *supra* note 7.

³⁹ U.S. CONST. amend. VI.

⁴⁰ Douglas v. Alabama, 380 U.S. 415, 418 (1965); see, e.g., Crawford v. Washington, 541 U.S. 36 (2004).

⁴¹ Davis v. Alaska, 415 U.S. 308, 316-17 (1974) (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)).

In Davis, the Supreme Court allowed evidence of a prior juvenile adjudication, otherwise barred by a state privilege against disclosure of such adjudications, to show "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 316. The Supreme Court held that the state-recognized interest in preserving the anonymity of a juvenile offender "cannot require [the] yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness... . The State cannot, consistent with the right of confrontation, require the [defendant] to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." *Id.* at 320. Further, the Court stated:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested... . The cross-examiner is not only permitted to delve into the witness[s] story to test the witness[s] perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Id.* at 316.

⁴² Rock v. Arkansas, 483 U.S. 44, 61 (1987).

the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.⁴⁵

Some commentators blithely dismiss the Sixth Amendment implications of the proposed privilege by asserting that an accused's Confrontation Clause rights only attach at trial, and are therefore inapplicable to discovery matters such as barring access to communications between a victim advocate and alleged victim.⁴⁶ This argument, however, ignores that the proposed victim advocate privilege introduces both a procedural and substantive bias against the accused precisely because of its bias against the discovery, and subsequent admission, of potentially relevant evidence. Under the proposed statutory privilege, an accused is *de facto* barred from admitting extrinsic evidence of prior statements made to a victim advocate, including potentially exculpatory statements, because the court and the accused presumably will never have access to those statements.

A statutory privilege would also raise troubling questions regarding due process and fundamental fairness in the criminal justice system. A basic principle of our criminal justice system is that an accused is entitled to have access to evidence favorable to his or her case.⁴⁷ Inherent in recognizing certain privileged communications is accepting limitations on an accused's access to certain evidence. However, the proposed victim advocate privilege presupposes

⁴³ The Court determined that the admission of an out-of-court statements to police officers that the defendant had not stabbed the victim in self-defense violated the Confrontation Clause. *Crawford*, 541 U.S. at 38-43, 68.

⁴⁴ The Supreme Court noted that the "right to confront one's accusers is a concept that dates back to Roman times." *Id.* at 43. However, the Court acknowledged that the clause was rooted in the English common law. *Id.* "The common-law tradition is one of live testimony in court subject to adversarial testing" *Id.* The Court observed that there were some exceptions to this preference, for example, pre-trial examinations of suspects and witnesses by justices of the peace or other officials "were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his "accusers," i.e. the witnesses against him, brought before him face to face." *Crawford*, 541 U.S. at 43. However, "in some cases, these demands were refused." *Id.* "The First Congress [included] the Confrontation Clause in the proposal that became the Sixth Amendment." *Id.* at 49.

⁴⁵ *Id.* at 61.

⁴⁶ See Schimpf *supra* note 7.

⁴⁷ See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution).

that sexual assault victims, as a class, are entitled to greater legal protection than other crime victims in the form of a testimonial privilege.⁴⁸ That premise may be debatable as a matter of public policy, but neither the DTF Report, nor the available data presents a compelling argument in support of such a policy.

2. Practical Flaws

Contrary to the recommendations in the DTF Report a statutory privilege is not necessary to protect the identity of a victim,. That aim of the proposed privilege has already been implemented by various DoD Sexual Assault Prevention and Response policies. Beginning in November 2004, the DoD began implementing a series of directive-type memorandums encompassing sweeping new sexual assault policies.⁴⁹ The new policy

⁴⁸ See, e.g. BUREAU OF JUSTICE STATISTICS, *Criminal Victimization in the United States—Statistical Tables 1996-2005*, *supra* note 6.

⁴⁹ Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collateral Misconduct in Sexual Assault Cases (JTF-SAPR-001) (12 Nov. 2004) [hereinafter JTF-SAPR-001]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov. 2004) [hereinafter JTF-SAPR-002]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Data Call for CY04 Sexual Assaults (JTF-SAPR-003) (22 Nov. 2004) [hereinafter JTF-SAPR-003]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Review of Administrative Separation Action Involving Victims of Sexual Assault (JTF-SAPR-004) (22 Nov. 2004) [hereinafter JTF-SAPR-004]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Commander Checklist for Responding to Allegations of Sexual Assault (JTF-SAPR-005) (15 Dec. 2004) [hereinafter JTF-SAPR-005]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Department of Defense (DOD) Definition of Sexual Assault (JTF-SAPR-006) (13 Dec. 2004) [hereinafter JTF-SAPR-006]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for DoD Personnel on Sexual Assault Prevention and Response (JTF-SAPR-007) (13 Dec. 2004) [hereinafter JTF-SAPR-007]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Response Capability for Sexual Assault (JTF-SAPR-008) (17 Dec. 2004) [hereinafter JTF-SAPR-008]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009) (16 Mar. 2005) [hereinafter JTF-SAPR-009]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collaboration with Civilian Authorities for Sexual Assault Victim Support (JTF-SAPR-010) (17 Dec. 2004) [hereinafter JTF-SAPR-010]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Sexual Assault Response Training (JTF-SAPR-011) (17 Dec. 2004) [hereinafter JTF-SAPR-011]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Pre-Deployment Information on Sexual Assault and Response Training (JTF-SAPR-012) (undated) [hereinafter JTF-SAPR-012]. Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Essential Training Tasks for a Sexual Assault Response Capability (JTF-SAPR-013) (26 Apr. 2005) [hereinafter JTF-SAPR-013]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Sexual Assault

guidelines constitute a significant overhaul of how the DoD responds to allegations of sexual assault. Among the significant changes, the revised DoD policies distinguish sexual assault from sexual harassment and provide a definition for sexual assault.⁵⁰ The new policies encourage commanders to defer adjudicating collateral misconduct on the part of the sexual assault victim until after the conclusion of the criminal case against the alleged offender.⁵¹ The new policies direct that each military service establish a system for reviewing the administrative discharge of all sexual assault victims.⁵² The policies also impose new response protocols upon the services designed to ensure that sexual assault allegations are investigated and adjudicated.⁵³ These guidelines enjoin the commander to "strictly limit the fact or details regarding the incident to only those personnel who have a legitimate need to know"⁵⁴ and "ensure the victim understands the role and availability of a Victim Advocate."⁵⁵ The policies also require the services to implement yearly, accession, and pre-deployment training on sexual assault prevention and response.⁵⁶ Finally, the last policy memorandum purports to create a mechanism for confidential, "restricted" reporting of sexual assault allegations.⁵⁷ The DoD-wide confidentiality program, as currently implemented through the restricted reporting option, is

Evidence Collection and Preservation Under Restricted Reporting (JTF-SAPR-014) (30 Jun. 2005) [hereinafter JTF-SAPR-014].

The policies in these directive-type memorandums were incorporated into U.S. DEP'T OF DEFENSE, INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (23 Jun. 2006) [hereinafter DoDI 6495.02].

⁵⁰ JTF-SAPR-006 *supra* note 49 ("Sexual assault is a crime. Sexual assault is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent.")

⁵¹ JTF-SAPR-001 *supra* note 49.

⁵² JTF-SAPR-004 *supra* note 49.

⁵³ JTF-SAPR-005 *supra* note 49.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See, e.g.* JTF-SAPR-007 *supra* note 49; JTF-SAPR-011, *supra* note 49; JTF-SAPR-012 *supra* note 49. Additionally, the revised DoD policies mandate that pre-deployment training must identify victim advocates as a resource that will be available to victims of sexual assault. *See* JTF-SAPR-012 *supra* note 49.

⁵⁷ *See* DoDI 6495.02 and JTF-SAPR-009 *supra* note 49. "This reporting option gives the member access to medical care, counseling and victim advocacy, without initiating the investigative process." *Id.* The memorandum states that improper disclosure of confidential communications may result in discipline under the UCMJ. *Id.*

The Navy has substantively addressed many of the DTF's concerns regarding the confidentiality of communications between victims and counselors with recent policy changes. Message 161952Z JUN 05, Chief of Naval Operations, subject: Changes to Navy Policy Regarding Confidentiality for Victims of Sexual Assault [hereinafter "NAVADMIN 128/05"], revised then-existing policy in U.S. DEP'T OF NAVY INSTR. 1752.1A, Sexual Assault Victim Intervention (30 May 2000) to permit confidential, restricted reporting for victims of sexual assault. This confidential reporting option allows victims of sexual assault to report assault to specified medical providers, counselors and victims' advocates without triggering an investigation of the incident. The instruction was updated in December 2006 to incorporate these changes.

largely coextensive with the stated goals of the DTF's proposed statutory privilege.

The DoD policy reforms also avoid a problem presented by the limited ability to pierce the proposed statutory privilege. The Task Force's recommended statutory privilege may be pierced, and thereby permit disclosure, for only one purpose - when necessary to prevent serious bodily harm or death of the victim or another person.⁵⁸ Such a limited exception to the privilege places the proposed statutory privilege closer to the absolute privilege afforded clergy-penitents under the Military Rules of Evidence than any other privilege under the military rules.⁵⁹

The proposed statutory privilege would also provide greater restrictions on the use of communications between a healthcare provider--or victim advocate--and the victim than are placed on the potential admissibility of attorney-client communications.⁶⁰ Aside from failing to demonstrate that the existing rules of evidence are ineffective, the DTF report does not provide a specific justification why the privilege should not provide exceptions consistent with the current DoD confidentiality policy for restricted reports of sexual assault.⁶¹

D. UCMJ Article 32

The second significant military justice reform that the DTF recommended was for Congress to amend UCMJ Article 32 to explicitly permit commanders to close the hearings in cases of sexual assault.⁶² Again, the DTF

⁵⁸ See DTF REPORT *supra* note 23.

⁵⁹ See MCM, *supra*, note 32, MIL. R. EVID. 513(a).

⁶⁰ See MCM, *supra*, note 32, MIL. R. EVID. 502(d)(1)(allowing the attorney-client privilege to be pierced where "the communication clearly contemplated the future commission of a fraud or crime . . ." or "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan . . . a crime or fraud.").

⁶¹ In addition, the DTF report does not provide any indication as to whether its proposed victim-advocate privilege would recognize circumstances under which the privilege was constitutionally required to be pierced. By way of contrast, MRE 412(b)(1), the military "rape-shield" rule, recognizes that there are circumstances under which evidence of an alleged victim's past sexual behavior may be constitutionally required to be admitted.

⁶² See DTF REPORT *supra* note 23, at 33. More instructive though is the DTF rationale for the recommendation in Finding 18 of the DTF report:

Article 32 hearings, which are open to the public, expose both the victim and the accused to unnecessary public scrutiny and may be detrimental to the interests of both parties.

The Manual for Courts-Martial states that Article 32 hearings should normally be open to the public, but it grants commanders the discretion to close them. [footnote omitted]. Because this discretion is granted in the Manual for Courts-Martial, but not in the law, courts have been able to prohibit

proffered no evidence supporting the position that codifying the current discretionary ability to limit access to an Article 32 hearing under the Rules for Courts-Martial would either advance the interest in encouraging victims to report allegations or appropriately balance the competing constitutional interests of victims, the accused, and the public implicated by the proposed statutory change.

As a threshold matter, commanders and investigating officers have the authority under the current Manual for Courts-Martial (MCM) to close Article 32 hearings under certain circumstances, contrary to the assertion implicit in the DTF Report's recommendation.⁶³ Rule for Courts-Martial (R.C.M.) 405(h)(3) states:

Access by spectators to all or part of the [Article 32] proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. The discussion under the rule further explains, "[c]losure may encourage complete testimony by an embarrassed or timid witness. Ordinarily the proceedings of a pretrial investigation should be open to spectators."

The analysis to R.C.M. 405(h)(3)⁶⁴ also references R.C.M. 806 for examples of some reasons why a pretrial investigation hearing might be closed. R.C.M. 806(b)(2) articulates a general analytical framework for closing courts-martial proceedings:

Courts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure.⁶⁵

commanders from closing hearings. The hearings afford the defense an opportunity to gather information about the government's case and cross-examine the victim and other witnesses. Because the Military Rules of Evidence are generally not in effect at the hearing, attorneys have few restrictions on the nature and scope of questions they can ask. Even when the attorneys do object to questions, the investigating officer presiding over the hearing generally just notes the objection and allows the question. This unrestricted questioning may result in private and embarrassing information about the victim being disclosed in the public hearing, even if it is not relevant to the charges and even if it might be inadmissible at trial. Media representatives often attend high-profile cases at the Academies and report what they observe in the local papers. Even if these cases do not proceed to trial, both the accused and the victim may be publicly stigmatized. This type of public exposure often discourages victims from reporting and/or participating in the judicial process. *Id.*

⁶³ See MCM, *supra* note 32, R.C.M. 405(h)(3).

⁶⁴ MCM, *supra* note 32, Appendix 21.

⁶⁵ MCM, *supra* note 32, R.C.M. 806(b)(2).

The analytical framework in R.C.M. 806(b)(2) is in accord with the United States Supreme Court's jurisprudence regarding the Sixth Amendment right of a criminal accused to an open trial. The Court has consistently held that the public, including the press, has a derivative right under the Sixth Amendment to attend criminal proceedings, including pretrial proceedings.⁶⁶ The service appellate courts' rulings on the scope of a military accused's Sixth Amendment right to a public Article 32 hearing have uniformly followed the Supreme Court's precedent.

For instance, in *ABC, Inc. v. Powell*,⁶⁷ the Court of Appeals for the Armed Forces (C.A.A.F.) extended the Sixth Amendment right to a public trial to pretrial Article 32 investigations. While the court in *Powell* rejected the press' expansive argument that requiring a witness to testify about their personal sexual history "'plainly did not qualify' as a basis to close a pretrial hearing or court martial,"⁶⁸ the court also rejected the convening authority's rationale for ordering a blanket closure of the Article 32 hearing at issue, which, as is the DTF's rationale, was premised upon protecting the victim's privacy. Rather than identifying a set of justifications that might survive judicial scrutiny, the C.A.A.F. provided the following general advice on the closing of an Article 32 hearing:

. . . access to the hearing may be limited "for some immediate valid reason"; "the determination must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary . . ."; and "the scope of the closure must be tailored to achieve the stated purposes and should be 'reasoned,' not 'reflexive.'"⁶⁹

Recent cases in the military's intermediate appellate courts have all applied the C.A.A.F.'s doctrine in *Powell* and held that Article 32 hearings are presumptively open, absent good cause shown for limiting public access to the hearing.⁷⁰ Military case law recognizes the need to close pretrial hearings under

⁶⁶ See, e.g. *Press Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982) (asserting the accused in a criminal trial enjoys a qualified right to a public hearing, and finding the press enjoyed the same right as an accused to complain when denied access to criminal hearings); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

⁶⁷ 47 M.J. 363 (C.A.A.F. 1997)

⁶⁸ *Powell*, 47 M.J. at 365.

⁶⁹ *Id.* (citing *San Antonio Express-News v. Morrow*, 44 M.J. 706, 710 (A.F.C.C.A. 1996)).

⁷⁰ See *United States v. Davis*, 62 M.J. 645 (A.F.C.C.A. 2006), (finding error for an Investigating Officer (IO) to close portions of an Article 32 hearing in a case involving rape, indecent assault and battery. The IO decided to close the hearing during the alleged victims' testimony without

some circumstances, but requires that commanders or investigating officers balance the Constitutional rights of the accused, the public, and the press. The commander or investigating officer must develop evidence on the record establishing a factual basis for the closure; parties who object to the closure must be given an opportunity to present their views for the record; and, the closure must be tailored to restrict public access only to the testimony specifically related to the commander or investigating officer's original concerns.⁷¹

The contrast between the careful balancing of interests in *Powell* and the DTF Report's recommendations for closing Article 32 hearings in cases involving sexual misconduct reveals the Task Force's fundamental doctrinal bias towards alleged victims of assaults—to the exclusion of all other competing interests. The DTF's underlying rationale appears based on a series of assumptions that the statistical data cited by the Task Force satisfies the fact-specific inquiry mandated by *Powell*. The DTF report cites several statistical surveys and anecdotal sources that indicate that reporting rates for sexual misconduct at the service academies is low in relation to the number of actual incidents.⁷² The Task Force's apparent logic is that the underreporting of these offenses is nearly irrefutable evidence that the existing statutory and regulatory framework is insufficient to encourage victims to report allegations of sexual misconduct. If that logic is accepted, and we further accept that the Government has a sufficiently compelling interest in encouraging reports of sexual misconduct, then these assumptions would be policy rationale for the DTF's

establishing on the record the required factual basis for the closure. The trial court found that appellant's rights were violated, but granted no relief. The appellate court agreed that the IO acted improperly, but held that the error was harmless.); *Stars and Stripes v. United States*, No. 200501631 2005 CCA LEXIS 406 (December 22, 2005) (unpublished) (the IO closed the Article 32 hearing in a case involving allegations of indecent acts with a child. The press objected and requested a Writ of Mandamus and Prohibition. Prior to the appellate court's review, the appointing officer nullified the Article 32 investigation. Although the nullification mooted the issue before the court, the court noted that "closing the hearing 'even before [the newspaper's] counsel was allowed to address the matter on the record' is an error obvious on its face."); *Denver Post v. United States, Army Misc.* 20041215, (A.C.C.A. February 23, 2005) (the government closed the entire Article 32 hearing due to concerns regarding the disclosure of classified information. The press objected and was given an opportunity to address the issue on the record. An application for extraordinary relief was then filed with the Army Court of Criminal Appeals. The court found that the IO "failed to narrowly tailor the appropriate remedy to protect classified matters from being revealed." The IO's blanket exclusion of the press and the public was made "too quickly, it was ill-considered, overbroad, and clearly erroneous.").

⁷¹ *Powell*, 47 M.J. at 365.

⁷² *See, e.g.* Office of the Inspector General of the Department of Defense Report on the Service Academy Sexual Assault and Leadership Survey, 2005 (cited at DTF REPORT, *supra* note 23, at footnote 63); Department of Justice, Bureau of Justice Statistics, "Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000," August 2002 (cited at DTF REPORT, *supra* note 23, at footnote 20).

conclusion that mandating closure of Article 32 hearings in sexual assault cases is a means narrowly tailored to further that compelling interest.

Since *Powell* and its progeny did not specify an all-inclusive set of justifications for closing an Article 32 hearing that would survive judicial scrutiny, defining those justifications is an open question of law. Given the courts' traditional acknowledgment of the uniqueness of military society,⁷³ the courts might be amenable to an argument that the data cited in the DTF Report indicates that the ability of commanders to deter and punish sexual misconduct is critically impaired, and that closing Article 32 hearings in cases involving sexual misconduct is a sufficiently-tailored means to further the military's interest in the deterrence and punishment of such offenses.

An obvious limitation to this approach is the extent to which generalizations based upon statistical survey data can satisfy the constitutional balancing test required by *Powell*. This approach may permit a commander or investigating officer to argue that closure of a pretrial hearing is justified in most alleged sexual assault cases by the Government's compelling interest in encouraging victims to report allegations, but that argument may not obviate the requirement under current law of establishing a factual record as to why closure is justified in a particular case. Another obvious limitation is that any argument based upon these types of statistical generalizations is premised on the validity of the methodology used to collect the data, the data collected, and the conclusions based on that data.⁷⁴ Even a cursory examination of the Task Force's charter, or the nearly exclusive reliance of the Task Force upon victim advocacy organizations as consultants⁷⁵ suggests, at a minimum, that the Task Force's conclusions were colored by a certain victim-centric bias--consider for example the use of the label "offender" in reference to those accused of sexual misconduct and repeated emphasis on "offender accountability" throughout the

⁷³ See *Parker v. Levy*, 417 U.S. 733, 781; 94 S. Ct. 2547, 2574; 41 L. Ed. 2d 439, 472 (1974).

⁷⁴ The Executive Summary of the DTF Report states:

In creating this report the Task Force gathered information by conducting site visits; communicating with numerous individuals, including victims; reviewing the Department of Defense survey data; reviewing Academy and Service policies, reports, and data; consulting with subject matter experts; and communicating with related committees and task forces. The report was generated through a series of subcommittee and full Task Force meetings, a reference to the ecological model of public health, and a thorough review of reports, studies, and articles related to sexual harassment and assault.

The ecological model of public health "supports a complete public health approach that addresses individual risk factors and behaviors, norms, beliefs, and social and economic systems that affect individuals, family, community and society." DTF REPORT, *supra* note 23, at footnote 11.

⁷⁵ *Id.* at Appendix F.

report.⁷⁶ That bias is reflected in the report's apparent presupposition that an alleged victim's privacy rights outweigh other societal interests, such as the ones reflected in the Sixth Amendment, in ensuring the procedural and substantive rights of the accused are protected in any criminal proceeding. The victim-advocate bias that can be fairly read into the DTF's conclusions begs a thorough analysis of the report's utility as a legal rationale for limiting the Constitutional guarantee to an open trial.

E. UCMJ Article 120. . .The Bitter Fruits of Bad Policy

Perhaps nowhere else in the DTF Report are the Task Force's policy presumptions more clearly revealed than in their recommendation that the UCMJ be revised "to more clearly and comprehensively address contemporary sexual misconduct."⁷⁷ The Task Force based this recommendation on its conclusions that alleged offenders were not effectively held accountable through the criminal justice system.⁷⁸ However, a close reading of the DTF report suggests that these conclusions were based largely on an outcome-presumptive view that any allegation of sexual assault that does not result in punitive action against the alleged offender *ipso facto* indicates flaws in the criminal justice process.

The DTF Report cited to several DoD surveys and observed that there were relatively few prosecutions for sexual misconduct in relation to the number of alleged incidents.⁷⁹ The Task Force in fact documents the disposition of a

⁷⁶ *Id.* at 14-16, 31-35.

⁷⁷ Recommendation 16 of the DTF Report contained the following specific recommendations for any revised sexual assault statute:

- The revised statute should clearly identify specific crimes and their maximum penalties. By outlining criminal acts and their corresponding punishments in a format that people can understand, service members will know that such behavior is criminal.
- The revised statute should include varying degrees of sexual misconduct, while maintaining the label "rape" for the most forceful acts of sexual penetration. [footnote omitted]
- The statute should include a provision for the criminal act of sexual penetration or assault where no force is involved. If a person has intercourse or other sexual contact with someone when they know or should know that there is no consent, the person should be held criminally accountable.
- The statute should also include specific provisions for stalking, abuse of authority and senior-subordinate sexual activity, and incapacity to consent, including voluntary intoxication of the victim.

Id. at 31.

⁷⁸ *Id.* at Finding 16A.

⁷⁹ In U.S. DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE'S REPORT ON THE SERVICE ACADEMY SEXUAL ASSAULT AND LEADERSHIP SURVEY (2005), 248 of 357 allegations of sexual assault made by midshipmen and cadets were not reported to authorities. *See id.* at n. 63.

handful of specific allegations of sexual assault at both the USMA and USNA since 1997 in support of its conclusion that the UCMJ was, and is, generally inadequate to appropriately respond to these allegations.⁸⁰ In forming their recommendations, the DTF Report presupposes the veracity of each of those allegations and concludes, based on that premise, that the criminal law is inadequate because each allegation did not result in some criminal sanction against the accused.

Aside from the logical flaws in that type of inductive reasoning, there is no evidence supporting the proposition that the current panoply of sex offenses within the UCMJ or the regulatory framework within the Rules for Court-Martial prevents or limits prosecutions in the military for sex offenses. The DTF Report is instructive because the report avoids any specific finding that the current Code, regulations, and/or service-level policies prevent commanders from charging any sexual offense necessary to promote the interests of the armed services in good order and discipline.⁸¹ Rather, the report relies upon the assertion that alleged victims of sexual assault generally do not receive access to “immediate and comprehensive personal support” when they come forward in order to buttress a claim that the lack of such support is due to structural defects in the criminal law.⁸²

What seems clear from the DTF Report is that the Task Force merges the issues of appropriate responses to allegations of sexual assault from a treatment perspective with those of appropriate responses of allegations from a legal perspective. The primary focus of the recent DoD policy revisions issued by the Under Secretary of Defense for Personnel and Readiness have been concentrated on DoD’s treatment and immediate response to victims of sexual assault.⁸³ For instance, DoD has placed greater emphasis on informing victims of ongoing investigative, medical or legal proceedings regarding the allegations,⁸⁴ on scrutinizing any administrative separation actions involving alleged victims,⁸⁵ and on promulgating guidance for appropriate command responses to allegations.⁸⁶ The policy presumption fairly implicit throughout the DoD policy is that the focus of the immediate response to an allegation of sexual assault should be upon the “support, advocacy, and care” of the victim, with a subsequent prosecution of the alleged perpetrator being ancillary to the care and

⁸⁰ See DTF REPORT, *supra* note 23, at footnotes 65 and 66.

⁸¹ *Id.*

⁸² *Id.* at 26.

⁸³ See *supra* note 44.

⁸⁴ JTF-SAPR-002, *supra* note 49.

⁸⁵ JTF-SAPR-004, *supra* note 49.

⁸⁶ JTF-SAPR-005, *supra* note 49.

support of the victim.⁸⁷

That focus seems wholly appropriate when considering the treatment of an alleged victim and a command's immediate response to an allegation, as society's interests at that point are principally in addressing the traumatic impact of the assault.⁸⁸ However, society's interests in the criminal justice system extend beyond vindicating the interests of victims of crime by punishing the perpetrator; society's interests also involve ensuring that the prosecution of an alleged perpetrator is a fundamentally fair process. Any notion of a fundamentally fair process necessarily excludes the presumptions of the DTF and of current DoD policy that the universe of sexual assault cases is reducible to "victims" and "offenders."⁸⁹ Such a set of presumptions presupposes the relative position of the parties that is precisely the point of a criminal investigation and trial.

In a universe bifurcated between "victims" and "offenders," the failure of an allegation to result in a criminal conviction may be viewed as a failure of the legal system.⁹⁰ Moreover, the world view that all allegations of sexual assault are true, and therefore should result in a criminal conviction, belies human experience and data that a significant number of allegations of sexual assaults may not be true.⁹¹ For military practitioners, recognizing that world view is largely defining DoD policies regarding sexual misconduct is more than a mere academic exercise. Effective on October 1, 2007, revisions to UCMJ

⁸⁷ The rationale for the DoD policy regarding the revised confidentiality policy for victims of sexual assault was expressed as follows in JTF-SAPR-009:

"The DoD is committed to ensuring victims of sexual assaults are protected, treated with dignity and respect, and provided support, advocacy and care. DoD policy also strongly supports effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators. . ."

⁸⁸ See, e.g. Schimpf *supra* note 7.

⁸⁹ See, e.g. DTF REPORT, *supra* note 23, at 11-14, 25-35.

⁹⁰ See Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947 (2000) (arguing that an axiomatic belief in the veracity of all rape claims leads some feminist legal scholars to a presumption that any conviction rate that does not approach 100% is radically insufficient to achieve justice for women within the legal system. That belief leads some to advocate for legal reforms that make *mens rea* irrelevant to the crime, thereby redefining rape as a new breed of strict liability offense and theoretically making conviction at trial easier to accomplish.)

⁹¹ See, e.g. Eugene J. Kanin, *An Alarming National Trend: False Rape Allegations*, 23 PLENUM PUBLISHING CORPORATION ARCHIVES OF SEXUAL BEHAVIOR 81 (1994) (study of disposed rape cases over a 9 year period in a small, Midwestern, metropolitan area concluded that 41% of forcible rape claims were declared false due to the alleged victim recanting. The study cited three major reasons why the complainants lodged the false reports: providing an alibi, gaining revenge, and seeking attention and/or sympathy); Wendy McElroy, *Bad Research Leads to Bad Law*, iFeminists.com (July 20, 2005) editorial, available at <http://www.ifeminists.net/introduction/editorials/2005/0720.html> (last visited April 28, 2006).

Article 120 effectively codifies many of the policy presumptions that formed the foundation of the DTF Report.⁹²

At least seven separate offenses under previous editions of the UCMJ proscribe conduct that would fall within the definition of sexual assault under current DoD policy:⁹³ rape and carnal knowledge under Article 120;⁹⁴ forcible sodomy and sodomy with a child under Article 125;⁹⁵ indecent assault,⁹⁶ assault with the intent to commit rape,⁹⁷ and indecent acts or liberties with a child under Article 134;⁹⁸ in addition to attempts to commit those offenses.⁹⁹ DoD policy also defines “other sex-related offenses” as “all other sexual acts or acts in violation of the Uniform Code of Military Justice that do not meet the . . . definition of sexual assault, or the definition of sexual harassment. . . .”¹⁰⁰ Consensual sodomy,¹⁰¹ adultery,¹⁰² indecent exposure,¹⁰³ indecent acts with another,¹⁰⁴ and pandering and prostitution, are all offenses under the current Code that proscribe “other sex-related offenses” under the DoD policy.

Whatever deficiencies may have existed in the previous UCMJ, a paucity of proscribed sex offenses cannot plausibly be asserted as one of those deficiencies. The amended Article 120 does little to expand the range of proscribed sexual misconduct under the UCMJ. Rather, the amended statute attempts to parallel the structure of certain analogous sexual offenses in Title 18 of the U.S. Code¹⁰⁵ and creates gradations of proscribed sexual misconduct based on the nature of the sexual contact and the quantum of force used by the alleged perpetrator.¹⁰⁶ Additionally, the amended Article 120 consolidates into the new rape statute certain acts that were formerly proscribed under Article 134. The previous Article 134 offenses of indecent acts or liberties with a child,¹⁰⁷ indecent exposure,¹⁰⁸ and pandering and prostitution,¹⁰⁹ are all

⁹² The amendments to UCMJ Article 120 were passed in Div. A, Title V, Subtitle E, section 552(a)(1) of the National Defense Authorization Act for Fiscal Year 2006 [hereinafter “FY 2006 NDAA”], P.L. 109-163, 119 Stat. 3257 (2006). See Appendix A *infra* for the full text of the revised statute.

⁹³ See JTF-SAPR-006, *supra* note 49.

⁹⁴ 10 U.S.C. § 920; see also MCM *supra* note 32, Part IV, para. 45.

⁹⁵ 10 U.S.C. § 925; see also MCM *supra* note 32, Part IV, para. 51.

⁹⁶ 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 63.

⁹⁷ 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 64.

⁹⁸ 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 87.

⁹⁹ 10 U.S.C. § 880.

¹⁰⁰ JTF-SAPR-006, *supra* note 49.

¹⁰¹ See *supra* note 95.

¹⁰² 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 62.

¹⁰³ 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 88.

¹⁰⁴ 10 U.S.C. § 934; see also MCM *supra* note 32, Part IV, para. 90.

¹⁰⁵ See 18 U.S.C. §§ 2241-2244.

¹⁰⁶ See FY 2006 NDAA at subsections (a) through (i), *supra* note 92.

¹⁰⁷ 10 U.S.C. § 934; see MCM *supra* note 32, Part IV, para. 87.

subsumed by offenses under the amended Article 120.¹¹⁰

Although the structure of the amended Article 120 inaptly attempts to meld disparate types of sexual misconduct into a single statute, the structure of the statute does elegantly lay bare the apparent assumptions of the statute's drafters. The previous Article 120 contained what could be characterized as a traditional formulation of the offense of rape—an act of sexual intercourse committed by force and without the consent of the victim.¹¹¹ The statute did not expressly define either force or consent, but those elements of the offense were explained in the Manual for Courts-Martial:

Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape.¹¹²

The amendment to Article 120 fundamentally alters the traditional formulation of rape by removing consent as an element of the offense. The amended statute has essentially redefined rape to only include causing a person to engage in a sexual act by using force or some other specified form of coercion.¹¹³ Under the amended Article 120, consent and mistake of fact as to

¹⁰⁸ 10 U.S.C. § 934; *see* MCM *supra* note 32, Part IV, para. 88.

¹⁰⁹ 10 U.S.C. § 934; *see* MCM *supra* note 32, Part IV, para. 97.

¹¹⁰ *See* FY 2006 NDAA at subsections (j), (l) and (n), *supra* note 92.

¹¹¹ 10 U.S.C. § 920.

¹¹² MCM, *supra* note 32, Part IV, para. 45.c.(1)(b).

¹¹³ The amended statute defines rape as:

(a) Rape. Any person subject to this chapter [10 USCS §§ 801 et seq.] who causes another person of any age to engage in a sexual act by--

consent become affirmative defenses to prosecutions for rape,¹¹⁴ and the new offenses of aggravated sexual assault,¹¹⁵ aggravated sexual contact,¹¹⁶ and abusive sexual contact.¹¹⁷ In other words, the amended statute removes the Government's burden of proving the victim's lack of consent and shifts the initial burden of production of evidence on the issue of consent onto the accused.¹¹⁸ Only after the accused has met his or her burden of production on the issue of whether the alleged victim consented to the alleged sexual act would the burden shift back to the prosecution to prove lack of consent beyond a reasonable doubt.¹¹⁹

On its face, this statute is a step towards reforming the legal definition of "consent" in sexual assault settings to one that essentially codifies the axiomatic belief in the veracity of rape claims and shifts the burden of proving consent onto the accused.¹²⁰ If one proceeds from the premise that all rape

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- (1) using force against that other person;
 - (2) causing grievous bodily harm to any person;
 - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (4) rendering another person unconscious; or
 - (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct. . .

See FY 2006 NDAA at subsection (a) , *supra* note 92.

¹¹⁴ *Id.*

¹¹⁵ See *Id.* at subsection (c).

¹¹⁶ See *Id.* at subsection (e).

¹¹⁷ See *Id.* at subsection (h).

¹¹⁸ The amended statute states regarding the issue of consent:

Consent and mistake of fact as to consent. Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

See *id.* at subsection (r).

¹¹⁹ See MCM, *supra*, note 32, R.C.M. 916.

¹²⁰ In floor remarks on the introduction of these amendments to Article 120, Representative Loretta Sanchez (D-CA) proffered the following rationale, in part, for the legislation:

. . . This legislation would help prosecutors, protect victims, and promote good order and discipline in the Armed Forces. It offers a graduated array of offenses that more precisely define nonconsensual sex crimes. The proposed provisions expand the scope of sex acts that can constitute sexual abuse. They afford increased protection for victims by emphasizing acts of the perpetrator rather than the reaction of the victim during an assault. . . 151 CONG. REC. 199 (2005).

claims are *ab initio* accurate, then there is a logical, doctrinal corollary that the Government *ought* not carry the burden of production on the issue of consent since lack of consent, and presumably the guilt of the accused, is assumed from the fact that an allegation of rape has been made. In other words, consent *ought* not be an element of rape since the gravamen of the offense is the amount of force used by the accused to coerce the victim into the sexual act.

III. WHERE DO WE GO FROM HERE

The practical consequences of having criminal law based on such tendentious policy assumptions are manifestly clear. Bad policy assumptions inevitably lead to worse laws. Those laws inevitably lead to some of the worst possible outcomes for the legal system—either laws that do not, or cannot, achieve the societal benefits they are designed to vindicate, or laws that tend to undermine confidence in the criminal justice system in their application. Recent courts-martial have demonstrated the impact upon confidence in the military justice system when commanders pursue, or are perceived to be pursuing, criminal prosecution of alleged sexual misconduct based on the assumptions that lie at the foundation of the amended Article 120.¹²¹ Yet, some policy-makers have not internalized these recent lessons and continue to advocate closure of Article 32 hearings and the creation of a military victim-advocate privilege notwithstanding significant questions about whether such “reforms” would, or could, improve the effectiveness of the military justice system.¹²²

Among the notable aspects of Representative Sanchez’s remarks is that it suggests that the statute was drafted with a view that the consent of the victim is largely irrelevant, or should be irrelevant, to the question of whether an accused engaged in sexual misconduct.

¹²¹ Illustrative is the Naval Academy’s handling of the court-martial of Midshipman Lamar S. Owens Jr. Midshipman Owens was tried in 2006 on charges of rape, indecent assault, and conduct unbecoming an officer based on allegations that he raped a female midshipman in her dorm room. Ultimately, Midshipman Owens was acquitted of the rape charge, but convicted for conduct unbecoming an officer for having sex with the woman in her dorm room and disobeying an order to avoid contact with her. Among the numerous controversial aspects of the court-martial were claims from some Naval Academy alumni that the school had adopted an overzealous approach to prosecuting sexual assault cases due to political pressure from Congress and victims’ advocacy groups. See, e.g. *Our View: Superintendent’s Decision on Owens is Questionable*, THE CAPITAL, February 18, 2007, at A10; Bradley Olson, *Owens, Alumni Plead for Support*, BALTIMORE SUN, February 17, 2007, at 1A; Raymond McCaffrey, *Memo Urges Ex-Quarterback Not Be Commissioned*, WASHINGTON POST, February 14, 2007, at B4; Steve Vogel, *Superintendent Faulted Over Rape Case E-Mails*, WASHINGTON POST, July 7, 2006, at B4.

¹²² The House Armed Services Committee (HASC) Report on the National Defense Authorization Act for Fiscal Year 2007 directed the Department of Defense to review Article 32 for the purpose of identifying reforms to the statute that would better guide commanders and investigating officers when Article 32 hearings should be closed to spectators in cases of sexual assault and domestic violence. The HASC mandated that the DoD review “shall be conducted with the particular interests in mind for victims of sexual assault and domestic violence and the unique concerns that may be associated with or accompany their testimony in a public forum. . .” See H.R. REP. NO. 109-452, at 312-313.

What is clear from the amendments to Article 120 and the policy recommendations in the DTF Report is that they reflect certain social and political agendas which seek changes in the law to generate broader societal attitudinal shifts. The amended Article 120 is certainly not *sui generis* in this regard. On one hand, the amended Article 120 is a step towards the treatment of rape as a strict-liability offense—with the mere allegation of misconduct triggering a near-presumption of guilt. In this sense, the statute reflects certain doctrinal beliefs in how rape should be treated within the criminal law. At another level, the statute reflects a specific critique that the current statutory and regulatory mechanisms for addressing allegations of sexual misconduct are generally inadequate to that task. What these critiques reflect are certain logical fallacies of proponents of reforming how sexual misconduct is addressed within the military.

While the movement to reform how allegations of sexual misconduct are handled in the military may be rooted in a genuine, good faith desire to enhance good order and discipline in the ranks, proponents of that movement are advocating legal reforms based on ill-conceived, or baseless, assumptions, which are ill-suited to achieve their ends. Unfortunately, unless policy-makers take a moment to ask some politically-inconvenient questions about whether these reforms will, or can, achieve the desired ends, then sexual assault policy in the Department of Defense will continue down a winding road towards a place that ultimately will not bring the military any closer to addressing the issues of sexual misconduct.

The HASC also directed the DoD to review whether the Manual for Courts-Martial should be amended to extend an evidentiary privilege for privileged or protected communications made by victims of sexual assaults to health care providers and victim advocates. *See id.* at 317-318.

FEDERAL COURT DEVELOPMENTS IN MILITARY PERSONNEL LAW: PROTECTING SERVICE MEMBERS

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In 2005 and 2006, several decisions from U.S. District Courts, and the U.S. Court of Federal Claims have modified, clarified, or established federal legal precedent which upholds the efforts of current or separated service members who have filed suit to challenge military decisions refusing to set aside their unfavorable discharges and derogatory records. Such agency denials often affect back pay, promotions, and disability awards. The new cases affect records correction claims under both the Administrative Procedure Act and the Tucker Act, the latter mandating back pay.¹ None of the cases were appealed.

One case, *Wisotsky v. United States*, included a due process enhancement to the harmless error doctrine to prevent service end runs around fundamental procedural defects in adversarial discharge cases.² Another case, *Calloway v. Brownlee, Sec'y of the Army*, solidifies a plaintiff defense to the government's incessant Tucker Act objections that muddle jurisdictional issues and frustrate genuine equitable suits to correct records.³ That case also safeguards fair treatment to service members' challenges from their pro se agency appeals. This is vital because military correction board appeals have become increasingly complex under legalese regulations—they are no longer the soldier-friendly fora intended when these appellate administrative boards were initially established after World War II.

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¹ Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006); Tucker Act, 28 U.S.C. §§ 1491-1509 (2006).

² 69 Fed. Cl. 299 (2006).

³ 366 F.Supp.2d 43 (D.D.C.2005).

A third case, *Wielkoszewski v Harvey, Sec'y of the Army*, resolved unsettled judicial standards applicable to the military correction boards' three-year statute of limitations in disability claims.⁴ This case now assumes increased importance after subsequent precedent in the United States Court of Appeals for the District of Columbia Circuit. Consistent with *Calloway*, the appeals court in *Tootle v. Sec'y of the Navy* held that the district courts have broader jurisdiction to address the merits of military disability claims apart from any monetary award.⁵

The aim of this Article is to inform attorneys of these significant case developments to better represent their clients, particularly those representing current or former service members. A practice in military personnel law before the federal courts is often a minefield for the unwary lawyer, particularly when confronting claims involving derogatory records corrections, discharges, disability, and back pay.

I. STRENGTHENING THE HARMLESS ERROR DOCTRINE FOR ADVERSARIAL MILITARY DISCHARGE OR RETENTION PROCEEDINGS: *WISOTSKY v. UNITED STATES*

The court in *Wisotsky* brought needed clarity to the harmless error doctrine on several fronts. It provided standards to distinguish when certain procedural errors make testing for prejudice inapplicable to military proceedings. After recent congressional legislation rendered suspect the continued use of this judicial doctrine, *Wisotsky* proves the vitality of its doctrinal analysis in the context of administrative discharge or retention proceedings that affect constitutional liberty interests. Finally, the court at first impression relied on the doctrinal analysis to find testing for harmless error inappropriate to cure a fundamental defect in a discharge Board of Inquiry (BOI) proceeding, voiding the separation.⁶

⁴ 398 F.Supp.2d 102 (D.D.C. 2005).

⁵ 446 F.3d 167 (D.C.Cir. 2006).

⁶ *Wisotsky*, 69 Fed. Cl. at 305, 310. The term "Board of Inquiry" derives from 10 U.S.C. §§ 1182, 14903 (discharge of regular and reserve officers); U.S. DEP'T OF DEFENSE, INSTR. 1332.40 (1997) [hereinafter DODI 1332.40] (Paragraph E3.3.3 directs that a BOI must provide a "full and impartial hearing to a respondent"); see also U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1920.6C (2005), [hereinafter SECNAVINSTR 1920.6C] (Enclosure (8) addresses the BOI process); U.S. DEP'T OF ARMY, REG. 600-8-24 (2006), [hereinafter AR 600-8-24] Paragraphs 4-2, 4-6 (officers will be eliminated with BOI); U.S. DEP'T OF AIR FORCE INSTR. 36-3206 (2004), Paragraph 7.1 (administrative discharge of officers with BOI).

A. The Impact of *Wisotsky v. United States*

After 16 years in the Marine Corps, the Secretary of the Navy in 1998 discharged Warrant Officer Wisotsky after adopting the BOI findings of misconduct and substandard performance of duty in his specialty (i.e. competitive category) of Administrative Officer. His discharge certificate stated that the reason for separation was “Involuntary Discharge (Unacceptable Conduct) with Board.”⁷ His service characterization was “Under Other Than Honorable Conditions (UOTHC),” the most severe available under the Department of the Navy’s administrative separation regulations.⁸

Wisotsky’s BOI however, had ignored a Navy rule that at least one board member be in the respondent’s competitive category, or specialty, (i.e. Administrative Officer). The stated purpose of the rule was “to increase the knowledge and experience of the Board as a whole.” The subsequent 1999 version of the rule added that this member composition rule “is especially important when considering an officer for substandard performance.”⁹ The court found this later language “similar and not inconsistent with the 1993 version.”¹⁰

On Wisotsky’s 2001 agency appeal of the discharge, the Board for Correction of Naval Records (BCNR) agreed that the rule was violated. The BCNR also did not dispute that the BOI included both misconduct and duty performance as a basis for its discharge recommendation to the Secretary.¹¹ But the BCNR upheld the discharge anyway, finding the rule violation harmless by asserting that “misconduct eventually was designated as the reason for [his] discharge and not [his] deficiencies in his performance.”¹²

⁷ *Wisotsky* 69 Fed. Cl. at 302.

⁸ See *Wisotsky*, 69 Ct. Fed Cl. at 301-02. The discharge certificate is DD Form 214 “Certificate of Discharge and Release from Active Duty.” See *Id.* at 310 (administrative discharges will also characterize service as Honorable, General (under Honorable Conditions), or Under Other Than Honorable Conditions). See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(b)(2005)[hereinafter MCM] (court-martial may sentence enlisted personnel to a Bad Conduct Discharge or Dishonorable Discharge, and may award a Dismissal for officers. Sentences may include death, confinement, reduction in pay grade, fine, forfeiture of pay, or a reprimand).

⁹ *Wisotsky* at 305, n.6.

¹⁰ *Id.*

¹¹ See generally, 10 U.S.C. § 1552 (military correction boards are authorized to correct records or injustice).

¹² *Wisotsky* at 308-309.

The court determined that the BCNR's narrow reliance on the single entry in Wisotsky's discharge certificate was unreasonable because it elevated "form over substance." Finding the BCNR's actions arbitrary and capricious, the court relied on two facts: the pervasive inclusion of duty performance as a foundation of the discharge that was endorsed and adopted without exception by the Secretary, and the Navy's procedure mandating that when two or more bases for separation are approved, the separation authority indicates the primary single basis on the DD Form 214.¹³

Having concluded that duty performance was "part and parcel of Wisotsky's discharge,"¹⁴ the court next extended and clarified the 2004 harmless error analysis of the U.S. Court of Appeals for the Federal Circuit in *Wagner v. United States*.¹⁵ *Wagner* found that the Army's release of an officer violated its regulation by failing to obtain pre-approval of the Army Secretary after Wagner met the threshold of more than 18 years of service. Finding that both the court and correction board were unable to assess the magnitude of this procedural defect, testing for harmless error was inapplicable.¹⁶

However, the situation in *Wagner* did not involve the *situs* for the military's administrative discharge system (i.e. the adversarial BOI discharge hearing), as in *Wisotsky*. Rather, the Army separated Wagner using a *sui generis* process unique to the Army that summarily releases reserve officers from active duty. Although here, Wagner was still issued an Other Than Honorable (OTH) service characterization.¹⁷ The summarized release process is called the Department of the Army Active Duty Board (DAADB). That Board simply releases reserve officers from active duty without affecting their underlying reserve commission. In response to the reasons initiating involuntary separation, the DAADB considers only written rebuttals without a personnel appearance.¹⁸ The importance of *Wisotsky* is that it extended the harmless error doctrinal analysis to the traditional *corpus* of the military's discharge process.

B. Standards When Procedural Violations Make Testing for Harmless Error Inapplicable

The *Wisotsky* decision clarified the proper application of the harmless error doctrine on several counts. First, the harmless error doctrine generally does not apply if there are merely "structural defects of the trial mechanism."

¹³ *Id.* at 309, (citing U.S. MARINE CORPS, ORDER 1900.16F (Marine Corps Separation and Retirement Manual), section 6303.2(f), 10 Apr 2000 [hereinafter MCO 1900.16F]).

¹⁴ *Id.* at 309

¹⁵ 365 F.3d 1358 (Fed. Cir. 2004).

¹⁶ *Id.* at 1363, (citing *Arizona v. Fulminate*, 499 U.S. 279, *reh'g denied* (1991)).

¹⁷ *Id.* at 635.

¹⁸ AR. 600-8-24, *supra* note 6, para. 2-28.

Errors which are more substantive, such as those present in the accused's military personnel records presented before the trial or board, should undergo the harmless error test.¹⁹ Second, the harmless error doctrine may be applied if the structural defect relates to an "essential component of a fair trial."²⁰ Third, the error must prevent the "inability of a reviewing body of assessing the magnitude of the error."²¹ Under *Wisotsky's* circumstances, the BOI's violation of the board member composition rule qualified as a structural defect that was particularly important to a fair hearing by considering discharge for substandard performance.²²

C. After the Selection Board Act of 2001: Preserving Judicial Remedies That Safeguard Due Process in Retention Boards Affecting Constitutional Liberty Interests

The need to bring clarification to the harmless error doctrine in military personnel cases is overdue. Recent congressional authority dramatically threatens to gouge members' rights by directing courts to apply the doctrine and award complete, immediate relief. This sweeping legislation can affect nearly every type of military personnel selection board or adverse proceeding.²³

This legislation was an unnecessary and ill-considered Congressional blank check to the military bureaucratic machine to avoid financial liability in an *ad hoc* situation. It was a hasty reaction to two pending class action lawsuits by former officers selected for early retirement.²⁴ The result was an overdose of new and amended statutes in 2001 that disembowel years of careful judicial application of the harmless error doctrine. Because both lower court decisions were promptly reversed on appeal, the legislation has proven premature. The appeals court predictably found the harmless error test applicable in this type of

¹⁹ *Wisotsky*, at 307.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 305, n. 6.

²³ See John Wickham, *Federal Courts in the District of Columbia Resurrect Service Members' Rights to Direct Judicial Review of Personnel Actions*, 55 *Administrative Law Review* (Vol.1) 23, 29-33 (2003). The legislation, called the Selection Board Act of 2001, amended 10 U.S.C. § 628 by adding subsections (g)-(j), amended 10 U.S.C. § 14502 by adding subsections (g)-(j), and created 10 U.S.C. § 1558. These provisions deprive court jurisdiction to apply harmless error to any military "selection board", defined as any board convened to consider appointment, enlistment, reenlistment, assignment, promotion, retention, separation, retirement, or transfer to a reserve inactive status.

²⁴ See *Christensen v. United States*, 49 Fed. Cl. 165 (2001) (stayed, pending appeal in companion case); *Christian v. United States*, 49 Fed. Cl. 720 (2001) (rejected government argument to apply harmless error test after retirement boards used constitutionally impermissible selection criterion).

case, then issued remand instructions to the services to convene reconstituted boards.²⁵

The 2001 legislation granted the services absolute discretion to implement regulations to let them alone test for harmless error in any prior “selection board” involving error, with that term applying wholesale to every conceivable procedural and substantive error. The statutes deprive the courts of jurisdiction by either compelling prior exhaustion before a “special board” or a “special selection board” or, in other circumstances, remanding back to the agency when the service refuses to convene such boards. The result is that a prompt judicial check and deterrent to abuse by an executive branch agency is diluted. The service committing the error is allowed to cure the defect, and then test for prejudice in secret, immune to public scrutiny and undue judicial meddling.

Fully implementing this legislation for every conceivable board would be a huge mistake and an insult to service members as equal beneficiaries of basic constitutional rights. The availability of the harmless error doctrine as a judicial tool must remain a bulwark of last resort to protect due process where violations occur in the most serious of administrative discharge proceedings, which include adversarial hearings and other retention proceedings with the power to stigmatize members for life by issuing misconduct discharges or unfavorable service characterizations that rob the service member’s liberty interests. Although not as severe as a criminal conviction by a court-martial, the powerful stain to reputation through administrative discharge still imposes permanent barriers to civilian and government employment, tuition assistance, veterans benefits, and good standing in professional and licensing organizations.

Wisely, the services have so far limited implementation of their “special board” congressional largesse. The Air Force and Army have amended regulations that affect only those non-adversarial selection boards whose function is not to issue stigmatizing discharges with adverse service characterizations. In other words, it has not applied the statutory authority to eliminate the harmless error doctrine to boards that can potentially affect constitutionally protected liberty interests.

²⁵ *Christensen v. U.S.*, 60 Fed. Cl. 19, 25-28 (2004) (after reversal in companion case, government can rely on harmless error to show on service remand no injury for using impermissible criterion in selection boards, *citing* *Christian v. United States*, 337 F.3d 1338 (Fed Cir. 2003) (harmless error applicable)).

Air Force implementation has gone beyond the other services;²⁶ however, even the Air Force's implementation may be considered de minimis by not crossing the line to compromise proceedings that may jeopardize constitutional liberty interests. The Air Force has merely guarded from undue judicial interference the time-honored deference to the military's exercise of discretionary internal personnel decisions, most notably the means which it measures the relative merits of officers' duty performance against their peers for purposes of advancement. But this insurance policy is hardly new to the courts.²⁷

Although the Army's initial guidance was tentatively broad, it was later limited to errors concerning promotions.²⁸ Left untouched were other regulatory boards whose function can jeopardize constitutional interests. These include the non-adversarial or summary retention boards for officers and enlisted personnel that separate for misconduct, substandard performance, or similar adverse reasons. As an example, officer boards include the DAADB, and enlisted boards include the Qualitative Management Program selection boards (QMP).²⁹

The Navy, unbothered with class action lawsuits, relies on established case law. The Navy maintained its preexisting regimen to require special selection boards involving only promotion issues. Like the Army, the Navy currently does not require "special boards" to reconsider officers selected for either involuntary early retirement or removal from the reserve active status list.³⁰

The danger in Congress's blanket authority granted in 2001 is that it contains no implementation standards to exempt certain types of selection

²⁶ U.S. DEP'T OF AIR FORCE INSTR. 36-2501 (Officer Promotions and Selective Continuation), Chapter 6, (16 Jul 2004) provides guidance to special selection boards to reconsider promotion non-selections. Attachment 13 governs special boards to reconsider selective early retirements, terminating or denying a period of continuation.

²⁷ See *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993). This case involved a claim to set aside officer's board selection based upon erroneous records was non-justiciable because "a court lacks the special expertise needed to review reserve officers' records and rank them on the basis of relative merit" (*citing Sarigisson v. U.S.*, 913 F.2d 918, 922 (Fed. Cir. 1990)).

²⁸ U.S. DEP'T OF ARMY MILPER MESSAGE 03-170, Applications for Special Boards And Special Selection Boards" (May 12, 2003), & 4E (existing regulations require promotion reconsideration by special selection board; in all other cases, special boards required pending inclusion in the "next revision" of relevant regulations). However, subsequent and multiple revisions in officer and enlisted regulations governing transfers, retirements, and discharges, did not include "special board" provisions. MILPER Messages are available at www.army.mil (Army Knowledge Online; AKO access accounts open to all military personnel, retirees, service civilian employees).

²⁹ U.S. DEP'T OF ARMY REG. 635-200 (Active Duty Enlisted Administrative Separations) Chapter 19 (5 Jun 2005).

³⁰ U.S. DEP'T OF NAVY, SECNAVINST. 1420.1B, p. 24 (28 Mar. 2006).

boards. But so far, it appears the services have prudently drawn the line by respecting the judicial axiom that “one does not surrender his or her constitutional rights upon entering the military.”³¹ Nor in future implementation can protecting a member’s liberty interests be swept under the rubric of “special circumstances of military necessity” (e.g. matters best left to the services’ internal discretion or command prerogative).³² The courts are well suited to apply the traditional standards to test whether a violation of a service member’s fundamental constitutional due process impairs liberty interests.³³

The *Wisotsky* clarification of the harmless error doctrine is also overdue for another reason. Unshackled judicial use of the doctrine provides the availability of enforcing prompt remedies, such as voiding the discharge, constructive reinstatement, and back pay. These send a powerful message to discourage service abuse or inadvertent neglect of basic procedural rights, whether in adversarial discharge hearings or other proceedings that can curtail liberty interests.

Recent cases have identified disturbing situations involving fundamental procedural defects and stigmatizing discharges that were curiously sustained by the service’s records correction board. These correction boards in effect made end runs around the harmless error analysis to maintain the status quo, or because it was impractical to reinstate the member and properly reconvene a discharge board. In *Wisotsky*, when it was untimely for a new BOI after nearly five years, the BCNR decided for itself that the board defect was harmless by unreasonably ignoring facts of “what actually happened.” In *Wagner*, when it was discovered the officer was separated with over 18 years without prior Secretarial approval, the Army Board of Corrections of Military Records (BCMR) four years later found it harmless since the Secretary had

³¹ *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980).

³² *Id.* (exercise of constitutional rights “must be viewed in light of the special circumstances and needs of the armed forces”), (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974), opining that the military is by necessity, a specialized society separate from civilian society and must insist upon a respect for duty and a discipline without counterpart in civilian life).

³³ *Sutton v. United States*, 65 Fed. Cl. 800, 800, 807-09 (2005) (DAADB’s summary discharge process did not violate constitutional due process right to hearing when officer admitted guilt in prior punishment; prior remand to DAADB was appropriate to reconsider separation on corrected record of punishment); *Gonzalez v. United States*, 44 Fed. Cl. 764, 770 (1999) (when officer contested his guilt, DAADB procedure without adversarial hearing “grossly underappreciated plaintiff’s liberty interest at stake”); *Meinhold v. Department of the Navy*, 808 F.Supp. 1455 (C.D.Cal.1993) (unconstitutional discharge enjoined where separation would cause irreparable harm to maintaining specialized Navy career), *aff’d* 34 F.3d 1469, *stay denied* 114 S.Ct. 374 (1993); *Cammermeyer v. Aspin*, 850 F.Supp 910, 929-30 (W.D.Wash.1994) (withdrawal of federal recognition violated constitutional equal protection and due process clauses); *Nishitani v. United States*, 42 Fed. Cl. 733 (1999) (member allowed to bring direct challenge to revocation of credentials where revocation would infringe constitutional liberty interest to practice medicine).

endorsed the separation ex post facto.³⁴ In *Gonzales*, after the reservist was separated for misconduct without a BOI, the Army BCMR found this harmless three years later. There, the Army BCMR had unreasonably appointed a pre-discharge Article 32 hearing that was convened to investigate court-martial charges covering the same misconduct, although later dismissed.³⁵

Because the overbroad Selection Board Act of 2001 has proven premature, virtually unused, and legally unwise, it must be repealed or substantially amended. Otherwise, the laws are a slap to those millions of service members who since 2001 have faithfully fought on two war fronts to protect the same bedrock values embodied in our Constitution. One appeals court agreed. It found that implementing the “special boards” provision of the Act has the untoward effect of creating an administrative exhaustion requirement prior to judicial review. The court found that “significant competing policy reasons counsel against imposing a rigid board exhaustion requirement.”³⁶ For example, the practical effects of extending the various statutes of limitations include stale claims difficult to prove or defend, while increasing the financial liability of the government over a longer term. Overall, permitting “immediate judicial access favors service members.”³⁷

II. DISTRICT COURTS RETAIN APA JURISDICTION TO CORRECT MILITARY RECORDS EVEN IF SUCCESS MIGHT LEAD TO MONETARY RELIEF: *CALLOWAY V. BROWNLEE*

Several cases have recently emboldened the government to renew its jurisdictional attacks to frustrate service members’ APA equitable suits to correct adverse records that do not trigger payment of money. Towards this goal, the government has repeatedly invoked the Tucker Act with the ulterior motive that upon transfer to the U.S. Court of Federal Claims, the claim would be dismissed for lack of a statute mandating payment of a presently sum due.³⁸ In other words, the design is to deprive members of any forum to remedy their present injuries.³⁹ However, the cases relied upon by the military, *Bliss v.*

³⁴ *Wagner* at 1360.

³⁵ *Gonzales*. at 766; see 10 U.S.C. § 832 (Art. 32 is a preliminary probable cause hearing on a local commander’s preferred charges to determine to whether to proceed to court-martial).

³⁶ *Martinez v. United States*, 333 F.3d 1295, 1309 (Fed. Cir. 2003).

³⁷ *Id.*

³⁸ The Tucker Act is a jurisdictional statute only. Consent to suit is for claims founded on another source of law that can be fairly interpreted as mandating compensation. For active duty military the primary source is the basic pay statute, 37 U.S.C. § 204 (1988). A Tucker Act claim cannot seek purely equitable relief but demand actual, presently due sum of money. See *United States v. Testan*, 424 U.S. 392, 398 (1976).

³⁹ *Tootle v. Sec’y of Navy*, 446 F.3d 167, 169 (D.C.Cir.2006) (after dismissal from Court of Federal Claims, and later District Court’s dismissal and transfer back to that court, government continued to

England and *Bublitz v. Brownlee*, have been distinguished to preserve the demarcation between non-monetary APA declaratory actions and Tucker money claims.⁴⁰ The court in *Calloway* settled the question to cease the government's further attempts to stymie their own service members' suits that merely seek to correct their personnel records.

In *Calloway*, a retired soldier challenged the Army BCMR's refusal to remove two unfavorable performance evaluations. Before the BCMR he had also asked to convene a special selection board to reconsider his promotion non-selection and his mandatory retirement. Calloway argued before the agency that these two evaluations caused his promotion non-selection and retirement; however, because Calloway had no legal right or entitlement to promotion but only an opportunity to re-compete on a clean record, his APA suit limited his request to remove the two adverse evaluations. He further stated in the complaint he "was not seeking monetary relief."⁴¹ The Army at litigation moved to dismiss or to transfer to the Court of Federal Claims. It argued that Calloway's claim was in essence a Tucker Act money judgment that was dressed up as an equitable APA declaratory action. The government added that the complaint's implied waiver of monetary relief was insufficient. Because Calloway's real motive was promotion and higher retirement pension with back pay, correction to his records had no "independent valuable interest" to stay in district court.⁴²

The court soundly rejected the Army's argument, denying the motion to dismiss and transfer, and finding without merit its attempt to extend *Bliss* and *Bublitz*.⁴³ The *Calloway* decision pulled together disparate cases and circumstances to distill three objective criteria so future plaintiffs can choose the right forum to pursue their records correction or back pay claim. To acquire U.S. District Court jurisdiction, Calloway must first avoid Tucker Act jurisdiction by expressly waiving any claim to monetary relief over \$10,000. Second, the government must not dispute that any money damages to which the member may be entitled was "certainly not automatic and would not flow

maintain that service member "can obtain jurisdiction in neither court" to entertain his records correction claim).

⁴⁰ *Bliss v. England*, 208 F.Supp.2d 2,8 n.2 (D.D.C. 2002) (prestige value to equitably advance officer's retirement rank did not have significant value independent of financial windfall in back pay and future pension); *Bublitz v. Brownlee*, 309 F.Supp.2d 1, 6-7 (D.D.C. 2004) (although some dignity in correcting promotion to an earlier date, claim was essentially for money since correction would trigger substantial back pay award); *see also* *Tootle*, 446 F.3d at 172 (discussing prior history of district court granting government's transfer motion to Court of Federal Claims because APA records correction claim was "in substance" for money, quoting *Tootle v. Sec'y of the Navy*, CA No. 02-2508, Mem.Op. (D.D.C. Sept. 15, 2004)).

⁴¹ *Calloway* at 51-52.

⁴² *Id.*

⁴³ *Id.* at 52.

directly from the outcome of this litigation,” but from later proceedings before various Army boards whose outcome was uncertain.⁴⁴ Third, although removal of two negative evaluations, “adverse to his extensive and otherwise outstanding military career did not rise to the level of removing a dishonorable or general discharge, there was clearly a stigma associated with leaving the Armed Forces with two allegedly negative [evaluation reports].”⁴⁵

In sum, express waiver without triggering payment of money along with stigmatizing records, was adequate to preserve APA jurisdiction by U.S. District Courts. In other words, the “court’s jurisdiction was even clearer” than the prior ambiguous precedents where money payment was triggered but the equitable relief had significant subjective value to the plaintiffs.⁴⁶

Calloway has already borne fruit. It has fended off the government’s subsequent attempts to argue service members’ suits are disguised Tucker Act money claims. The first was an Air Force officer seeking APA review of a BCMR’s refusal to remove an adverse performance evaluation. Before the BCMR, the officer claimed the evaluation caused his later promotion non-selection reconsideration. Once again the Air Force defendant argued that because the officer’s motive was back pay at a higher rank, this deprived the U.S. District Court of APA jurisdiction. Therefore, dismissal or transfer to the Court of Federal Claims under the Tucker Act was necessary. In *Delano v. Roche*, the court quoted *Calloway* to reject defendant’s motion. “By waiving money reimbursement, the plaintiff’s prayer for relief becomes purely injunctive aimed solely at ‘correcting’ his service record. . . . [and in] *Calloway v. Brownlee*. . . any money damages would not flow from the case but rather from proceedings before Army boards of review.”⁴⁷

Several other APA cases and trial memoranda have also successfully cited *Calloway* to overrule the military defendant’s motion to dismiss alleging the complaints were “dressed-up Tucker Act money claims.”

III. PROTECTING THE RIGHTS OF PRO SE APPLICANTS TO A FULL AND FAIR HEARING OF THEIR CLAIMS BEFORE THE SERVICE CORRECTION BOARD: *CALLOWAY v. BROWNLEE*

⁴⁴ *Id.*

⁴⁵ *Id. At n.8.*

⁴⁶ *Id.* at 53, (citing *Vietnam Veterans of America v. Sec’y of the Navy*, 843 F.2d 528, 534 (D.C. Cir. 1988) which determined that APA jurisdiction was not divested although upgraded drug abuse discharges would trigger payment for forfeiture of accrued leave).

⁴⁷ *Delano v. Roche*, 391 F.Supp.2d 79, 85-86 (D.D.C. 2005).

The *Calloway* decision also addressed whether a court could entertain a new allegation of error against the two evaluation reports that was not raised by the soldier before the Army BCMR. Established practice limits review to those issues in the administrative record that were before the correction board.⁴⁸ However, the court pointed out that “this Court and the agency must take great pains to protect the rights of *pro se* parties against the consequences of technical errors.”⁴⁹ Part of the court’s rationale was that the record was ambiguous whether *Calloway* raised the procedural defect issue before the Army BCMR. In addition, because this allegedly new procedural violation “did not appear frivolous on its face, the A[rmy] BCMR’s failure to address it was arbitrary and capricious and the case must be remanded to review the argument in the first instance.”⁵⁰ The action was remanded with instructions for the BCMR to address the argument, now with the imprimatur of the court that the procedural error was not frivolous.

This admonition to protect *pro se* board appellants also bore fruit in *Roberts v. Harvey*.⁵¹ To protect the *pro se* service-member and preserve his APA suit, the court cited *Calloway* to allow a remand to the BCMR to reopen agency proceedings.

The *Calloway* warning is also timely to protect *pro se* applicants with a full and fair BCMR adjudication without rigid insistence on technical errors of pleading. Shortly after World War II, Congress designed the correction boards to replace the onerous process of congressional private bills, and to be soldier-friendly without provision for legal counsel.⁵²

However, the myriad of military personnel statutes and their complex interplay between the correction board appeals and judicial review, have become a legal minefield to negotiate, even for attorneys. For example, correction board standards permitting the reopening of cases on reconsideration vary dramatically. The Army BCMR’s operating regulation before 2000 had no restrictions on the number of reconsiderations. The 2000 revision added an arcane legal formula to regulate reconsiderations after one year.⁵³ The 2006

⁴⁸ Gallucci v. United States, 41 Fed. Cl. 631, 644-45 (1998).

⁴⁹ *Calloway* at 55 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

⁵⁰ *Id.*

⁵¹ *Roberts v. Harvey*, 441 F.Supp.2d 111 (D.D.C. 2006)

⁵² See generally *Martinez v. United States*, 333 F.3d at 1306-07 (1946 correction board enabling statute, to relieve Congress of private bills, was amended to allow boards to pay on claims). The services’ internal board regulations prohibit award of attorney fees (see U.S. DEPT OF ARMY REG. 15-185 (Army Board for Correction of Military Records), para. 3-3 (31 Mar 2006) [hereinafter AR 15-185] or representation written approval of the Judge Advocate General.

⁵³ AR 15-185, para. 2-15b [date of old instruction] (before submitting to full board a “staff member will examine requests for reconsideration that contain “substantial new evidence showing fraud,

revision in the same section cites a court case as the new basis to allow one reconsideration within a year of the original decision but only if the new evidence was not previously heard. There are no reconsiderations permitted thereafter.⁵⁴ The Navy and Air Force boards have no limit on time or number of reconsiderations; however, these two boards define the term “new evidence” differently.⁵⁵

Other changes in BCMR operation and practices show increasing complexity and demand for precision in pleading. First, in 1998 Congress compelled the boards to hire a full-time attorney and physician, and then barred any decrease in the boards’ professional staff.⁵⁶ Another confusing area is the BCMR’s statute of limitations that restricts appeals to those filed within three years “from discovery of the error or injustice.”⁵⁷ The myriad of exceptions and caveats for different types of cases make it impossible for a layperson to even grasp.⁵⁸ Finally, for years courts made the exhaustion of the BCMR remedy prior to judicial review for equitable actions mandatory, although not for back pay claims. But this doctrine was discarded for APA claims in 1993.⁵⁹ Then Congress, with the Selection Board Act of 2001, resurrected the doctrine for certain cases, albeit with haphazard implementation among the services.⁶⁰

mistake of law, mathematical miscalculation, manifest error or existence of substantial relevant new evidence discovered contemporaneously or a short time of the BCMR original decision”).

⁵⁴ AR 15-185, *supra* note 52, para 2-15.

⁵⁵ U.S. DEPT OF AIR FORCE INSTRUCTION 36-2603 (Air Force Board of Military Corrections) (1 Mar. 1996), para. 6 (upon “newly discovered relevant evidence” if resubmitted in timely manner and if evidence was not reasonably available in original appeal); U.S. DEPT OF THE NAVY INSTRUCTION 5420.193 (Board for Correction of Naval Records) enclosures 1 & 9 (19 Nov. 1997) (upon “new and material evidence” defined as “likely to have a substantial effect on the outcome” of prior proceedings).

⁵⁶ 10 U.S.C. §§ 1555, 1559.

⁵⁷ 10 U.S.C. § 1552(b).

⁵⁸ *See e.g.*, *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. 1994) (although laches doctrine may still apply, BCMR limitations period is tolled during periods of active duty under Soldiers’ and Sailors’ Civil Relief Act, 50 App.U.S.C. § 525); *Dickson v. Sec’y of Defense*, 68 F.3d 1396, 1405 (D.C.1995) (discovery of injustice may not begin upon discharge but on date military changed standards which may have precluded service member’s adverse characterization of discharge); *Ortiz v. Sec’y of Defense*, 41 F.3d 738, 745 (D.C. Cir. 1994) (limitations period does not start until decision of lower agency appeal); *McFarlane v. Sec’y of Air Force*, 867 F.Supp. 405, 411 (E.D.Va.1994) (date of discovery not based on objective “reasonable person standard” but when applicant actually discovers error); *Wielkoszewski*, 398 F.Supp.2d at 107, 109 (in disability appeals, date of discovery is upon discharge unless member misled as to medical condition (except when later Veterans Administrating rating is awarded post-discharge); or discovery from final action of first competent board to pass on eligibility of disability benefits, which could be a medical evaluation board, physical evaluation board or, if neither, then the BCMR., Discovery date restarts if military itself later reopens a disability proceeding).

⁵⁹ *Darby v. Cisneros*, 509 U.S. 137 (1993) (plaintiffs not required to pursue any further administrative remedies prior to seeking judicial review under the APA when neither statute nor agency rules specifically mandate exhaustion as a prerequisite).

⁶⁰ *See supra* note 24.

IV. CLARIFYING THE CORRECTION BOARDS' DISCRETIONARY STATUTE OF LIMITATIONS IN DISABILITY CASES: *WIELKOSZEWSKI v. HARVEY*

Another case settled judicial standards applicable to the complex issues affecting disability claims and the correction boards' three-year statute of limitations: *Wielkoszewski v Harvey*, 398 F.Supp.2d 102 (D.D.C. 2005).

A. Background

Seeking declaratory action under the APA was Captain Wielkoszewski, a former Army pilot. He challenged the Army BCMR's rejection of his disability petition for failure to file within the board's three-year statute of limitations. In 1988 he first requested the BCMR to correct his records to reflect separation from the Army due to disability after a 1977 aircraft crash fractured his spine. He asked the BCMR to assign a disability rating and retire him medically or award severance pay.⁶¹ Before the court, he argued that the limitations period did not begin from the date of his 1978 discharge. Rather, the period was tolled when active duty Army officials in 1978 misled him with an inaccurate diagnosis as "fit for duty" without any restrictions. The diagnosis was through a Medical Evaluation Board [MEB]. Alternatively, he argued that the limitations period did not begin until the "first competent board" acted on his case, a 1986 Army Reserve Physical Evaluation Board [PEB] that declined to adjudicate his disability.⁶² Under this alternative argument, the limitations period was re-started when the Army Reserve in 1986 itself reopened and contradicted the prior 1978 medical determination by finding him unfit on the same medical condition.

In 1982 while still in the Army Reserve, the Veterans Administration awarded Wielkoszewski a 20% disability rating for his injury. From 1982 to 1984 the Army Reserve evaluation process then made inconsistent diagnoses: unfit for duty, then unfit for flying duty only, then unfit for all duty. Uncertain about his status, the Army Reserve Command Surgeon personally reopened his case, convening an MEB in 1986.

⁶¹ See 10 U.S.C. §§ 1201-1203 (these statutes govern permanent disability, temporary disability, and separation, respectively).

⁶² *Wielkoszewski*, 398 F.Supp.2d at 109-110.

The March 1986 MEB found Wielkoszewski unfit for all duty, referring him to the next board in the process, with the PEB to assign a disability rating percentage, retire or award pay. Although the PEB in October 1986 agreed with the MEB unfitness finding for all duty, it oddly refused to award disability rating. The PEB returned the case, contending that because the injury was sustained prior to reserve duty while on active duty in 1977, this barred the reserve component from hearing the claim. It referred him to the BCMR. Continuing this odyssey, the reserves went ahead and involuntarily discharged him as unfit without any rating or severance pay. Nor had he reached 20 years for retirement.

Consequently, Wielkoszewski, before the BCMR in January 1988, argued that the statute of limitations did not start until 1986 (the MEB) when he was no longer misled about his diagnosis, or in October 1986 when the PEB refused to hear his claim. This made his 1988 BCMR filing timely. Furthermore, he argued that even if the application was untimely in 1988, the BCMR should excuse the untimely filing, as it would have been within the "interest of justice" to do so.⁶³ His rationale was the Army's repeated mistakes concerning his medical status were not resolved until April 1986 when the Army Reserve MEB finally found him unfit for duty due to the crash injury, although the PEB was procedurally handicapped from processing his case. The Reserves then referred him to the BCMR.

In cursory form, the BCMR in 1989 summarily denied his application without reaching the merits. After briefly reciting the facts, it stated that the "alleged error or injustice was, or with reasonable diligence should have been discovered on 2 September 1978, the date of applicant's discharge. The time for the applicant to file a request for correction of any error or injustice expired on 2 September 1981."⁶³ The Board concluded that the filing was untimely and that it would not be in the interests of justice to excuse the untimely filing.⁶⁴

In 1992 Wielkoszewski's request for BCMR reconsideration was denied. In 1998 the Army invited him to refile his case as part of a "reconsideration project" undertaken in response to a review of negative Army BCMR determinations that were improperly processed. In 1999 the Army BCMR recited the same facts of his case and again found the claim untimely.⁶⁵ Wielkoszewski filed his APA lawsuit in 2001.

⁶³ *Wielkoszewski*, 398 F.Supp.2d at 104; see 10 U.S.C. § 1552(b) (waives limitations period in the interests of justice).

⁶³ *Id.* at 106.

⁶⁴ *Id.*

⁶⁵ *Id.*

B. The Test for Timeliness in Submitting BCMR Petitions

In 2005 the court granted in part Wielkoszewski's cross-motion for summary judgment, ordering a remand for the BCMR to reconsider the case. The court provided a road map for the BCMR that is likewise instructive to other plaintiffs and BCMR applicants. First, the court clarified confusing case treatment of the varied discovery doctrines in disability cases. Second, although the court still found his January 1988 application untimely, it favorably moved discovery from the 1978 discharge to as late as 1984 when he was no longer misled about his medical condition. Third, settling varying judicial standards, the court reviewed the factual determination of this correction board to not waive an untimely filing under the traditional APA scope of review. Fourth, the court suggested that the Army's lack of clarity in resolving his medical status was cause to waive the untimely application "in the interests of justice;" Lastly, in any event, the BCMR's determination not to waive the untimely filing was arbitrary and capricious by relying on findings of facts wholly unsupported by the record.⁶⁶

On remand, the BCMR in November 2005 reversed itself and waived the untimely application in the interests of justice. It found the date of discovery was September 1984. It rejected the 1981 Veterans Administration (VA) civilian-based rating date as the discovery date contending it was not analogous to Army duty fitness standards. However, there are court and agency decisions showing that in certain circumstances VA and even Social Security Administration disability ratings are highly relevant to discredit the military's findings of fitness. These cases occur when the civilian agency awarded disability ratings for "military service-connected injuries" and the civilian award was contemporaneous with the military's finding of fitness.⁶⁷ Wielkoszewski was discharged in September 1978, applied for VA benefits in January, and the claim adjudicated in March 1981.

In any event, when the BCMR accepted the September 1984 date of discovery, this made the January 1988 application four months short of meeting the three-year limitations period. Then, conceding that the Army made errors

⁶⁶ *Id.* at 112-113.

⁶⁷ *Ferrell v. United States*, 23 Cl. Ct. 562, 571-72, n.8 (1991) (VA ratings and examinations entitled to great weight when assigned shortly after military discharge, but are of little weight when assigned long after); *Istivan v. United States*, 231 Ct. Cl. 671, 675-76, n. 7 (1982) (VA 30% rating contemporaneous with conflicting Army 10% rating, and based upon exactly same medical evidence, was highly persuasive in light of BCMR's conclusory determination); *Jordan v. United States*, 205 Ct. Cl. 65, 83 (1974) (contemporaneous VA ratings may be relevant); *see Army BCMR Decision Docket.No. AR2002076652 at 10 & 7* (DoD Boards Reading Room), December 16, 2003), available at <http://boards.law.af.mil/ARMY/BCMR/CY2002/2002076652C070215.rtf> (accepts VA 30% rating for military disability rating since same time as discharge).

that misled Wielkoszewski about his fitness status, the board proceeded to fully adjudicate his disability case on the merits, albeit 17 years overdue. The board agreed with the 1985 MEB finding that Wielkoszewski was unfit for all military duties from his 1977 crash injury. However, the board declined to award disability pay.⁶⁸

C. *Wielkoszewski v. Harvey*: Determining the “Date of Discovery” in Disability Cases

The situation in *Wielkoszewski* is not unlike that facing many reservists today amid extended wars in Iraq and Afghanistan with activations for months or years. They go through a medical clearance process for release back to their part-time status. Wielkoszewski was released from active duty in 1978 after an MEB finding of “fit for all duty.” And yet thereafter, the VA and Army Reserve offered their own contradictory diagnoses of unfitness and disability ratings for the exact same medical condition.

The ABCMR is bound by a statute of limitations under 10 U.S.C. § 1552(b). The relevant section states:

No correction may be made [under this statute] unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established [under this statute] may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

1. Discovery at the Time of Discharge if an Appropriate Board Heard the Member's Claim or Refused to Hear It

The BCMR's determination in 1989, *sub silentio*, incorrectly applied several discovery doctrines. First, it presumed that Wielkoszewski discovered a disability claim upon receiving his 1978 discharge. This derived from his disagreement with the fitness findings of both an alleged PEB and then being refused an MEB at his separation exam. This discovery rule is premised upon

⁶⁸ ABCMR Docket No. 20050009808 (DoD Boards Reading Room), November 8, 2005; available at <http://board.law.af.mil/army/BCMR/CY2005/20050009808>. The Board admitted the Army made multiple errors that misled him about his fitness. The Board did not award disability pay but speculated (in perfect *post hoc* hindsight) what the military should have done: in 1978 transfer him out his Armor/Aviation branches and all other specialties; branch transfer him into administrative duties within the Adjutant General's Corps branch. The BCMR said that when the Army Reserve figured out his medical status in 1986 it decided, although nowhere in their proceedings, that it was too late to retrain him in this administrative branch. So, the Reserve discharged him as unfit for any duties. However, the record shows the PEB returned his case on the narrow grounds that because the disabling injury occurred on active duty, it was non-compensable in the Reserve medical system.

the final action “by the first board that is competent to pass on the eligibility for disability retirements, or refuses to act on the claim.”⁶⁹ Generally, the courts have found this first board to be a PEB, although in the absence of any such board or request, the first board can be the service’s correction board.⁷⁰ However, in this case, the court determined that this was erroneous since there was never a PEB, and the separation exam did not find him fully fit for all duties but assigned a profile limiting duty activities.⁷¹

With respect to the PEB being the first competent board, the court clarified the law concluding that the MEB cannot be substantively distinguished from a PEB. Therefore, “it would appear that an MEB is a competent board and its refusing a request to convene is sufficient to start the clock on the statute of limitations.”⁷² Because an MEB was refused upon his 1978 discharge, this might trip the rule of “the first competent board.”

2. Discovery Tolloed if the Member Was Mised or the First Competent Board’s Misdiagnosis Interfered With his Appreciation of His Medical Status

The court accepted this discovery doctrine to toll the limitations period until Wielkoszewski was no longer misled and fully appreciated that his medical status raised a disability claim. As set forth earlier, this revised date was as early as 1981 or as late as September 1984. This exception to the “first board rule” in effect equitably tolled the limitations period by rendering “non-final” any original board action (MEB or PEB).⁷⁴ The court clarified the law by agreeing that the hypothetical “reasonable person” test should not apply to the discovery date for disability claims. Instead it should be the actual date of discovery based upon the facts where a plaintiff understood his injuries to be disabling.⁷⁵

⁶⁹ *Id.* at 107.

⁷⁰ *Id.* See also *Friedman v. United States*, 310 F.2d 381, 391-92, 396 (Ct. Cl. 1962) (BCMR can be the first board if the member neither requests nor receives consideration by a MEB and was not aware or misled of a disability claim).

⁷¹ *Id.* at 114.

⁷² *Id.* at 108, n.3.

⁷⁴ See *Coon v. United States*, 30 Fed. Cl. 531, 537 (1994).

⁷⁵ *Wielkoszewski*, 398 F.Supp.2d. at 109 (where non-disability BCMR application rejected as untimely, date of discovery should be actual date and not when the hypothetical “reasonable person” would have discovered the error, (citing *McFarlane v. Sec’y of the Air Force*, 867 F.Supp. 405, 412 (E.D. Va. 1994)).

3. Date of Discovery is Restarted if the Military Itself Reopens the Case After a Prior Regulation is Overturned That Had Barred an Ineligible Class of Members

In an area with “little available case law on the issue,” the court clarified that the reopening doctrine applies in very narrow circumstances.⁷⁶ It found that the “first competent board rule” was not made inoperative unless the reopening for disability benefits was prompted by an overturned regulation or statute of a prior ineligible class of service members. This was still premised on the discovery doctrine of misleading the member because “until the regulations were changed, there was no error or injustice to discover.”⁷⁷

The court was forced to address this exception to distinguish the odd situation in *Wielkoszewski* where two MEBs disagreed on the same diagnosis: the Regular Army in 1978 found him fit, but the Reserve Army in March 1986 found him unfit on the same medical diagnosis without intervening re-injury or deterioration. First, the court found the Regular and Reserve components to be the same service, while no overturned regulation had deprived him of applying for benefits in the past.⁷⁸ The court appeared to mitigate the harshness of drawing this fine technical point by recalling that it had otherwise suspended the limitations period until September 1984 when he was no longer misled about his military unfitness.⁷⁹

This clarification to the reopening doctrine should place on guard those reservists leaving active duty. Because the regular force was downsized after the Cold War, our nation’s unending overseas military campaigns rely on activating many reservists to supplement regular forces. Returning reservists with an injury upon deactivation will go through medical clearance. If they disagree with a “fit for duty” determination, they cannot wait or hope for a subsequent contrary Reserve medical finding that a member was disabled from an active duty injury. Unfortunately, *Wielkoszewski* means the Reserve’s action will not restart the statute of limitations, and will likely be ignored by a BCMR.

⁷⁶ *Id.* at 110.

⁷⁷ *Id.* at 111-112.

⁷⁸ *Id.* at 111.

⁷⁹ *Id.* at 112. After an Army Reserve physical exam declared him unfit in 1982, but no action was taken, *Wielkoszewski* in September 1984 made formal inquires to various agencies to act upon this finding.

D. The APA Standard of Review for BCMR Decisions That Refuse, In the Interests of Justice, to Waive its Statute of Limitations: Establishing the Parameters that the BCMRs Must Follow When Determining Whether to Waive the Statute of Limitations in the Interests of Justice

The courts have not uniformly determined how the corrections boards apply their “interests of the justice” standard to untimely cases—whether disability cases or otherwise. This was left unsettled in *Dickson*, as noted in *dictum*:

Although we do not decide here the parameters of the “interest of justice” standard, we note that the Army Board has, at least in the past, considered the merits of an applicant’s request as well as the reasons for delay in making waiver determinations Under such a practice, an applicant with a worthy case on the merits might meet the conditions for a waiver even without a showing of a compelling reason for delay.⁸⁰

That court’s holding was merely a remand because the Army BCMR violated the APA by not adequately explaining how it reached the result.⁸¹

The court in *Wielkoszewski* defined the parameters of the interests of justice standard. The court rejected the contentions of the agency and defendant-government that the BCMR always fully reviews and denies the merits in waiver cases. Instead, the court’s standard required a two-part analysis. First, the board makes only a “cursory review” of the merits in order to determine if the gravity of the harm alleged justifies overlooking the untimely filing. Any apparent review beyond that appearing in the record converts the judicial claim to a review of agency final action after denial on the merits.⁸²

Second, the court found that the reasons proffered by an applicant for the delay must be considered. Here, they were based upon wholly erroneous facts (i.e. the discovery date was the fictitious PEB at his 1978 discharge). Moreover, earlier the court indicated discovery was suspended because *Wielkoszewski* was misled of his claim until as late as September 1984.

⁸⁰ *Dickson*, 68 F.3d at 1405, n.14.

⁸¹ *Id.* at 1405, (“The Board’s decisions here do not reflect whether it even considered this argument, much less what weight it deserved.”).

⁸² *Id.* at 112-114. The government’s argument that untimely cases are always reviewed on the merits would mean jurisdiction would shift to the Tucker Act as a money claim under a six-year statute of limitations.

Third, the court concluded that the BCMR did not reasonably implement the *Dickson* guidance. The board's boilerplate language along with the brevity and mistaken review of the facts, indicated an odd scenario—a cursory review of the merits, a full denial on the merits, and a refusal to waive the untimely filing. The court in strong language chided the correction board that if this was true,

the statute of limitations would be rendered a nullity . . . incompatible with the purpose and nature of [the] . . . interests of justice analysis. The statute of limitations has a purpose and a function of its own; it does not merely function as a pretext or convenient excuse for the ABCMR when it concludes a claim has no substantive merit. Likewise, if the ABCMR is to find that the [analysis] does not require a waiver, it must state its basis for so finding.⁸³

E. Interaction Between the BCMR and Judicial Statutes of Limitations in Disability Cases

The discovery doctrines applied by *Wielkoszewski* were to address the correction boards' own three-year limitations period in disability claims. Generally, these same standards apply when judicial review must be brought on disability claims to avoid the six-year limitations period. There are some established exceptions such as incompetency.

Most judicial challenges of military personnel actions, unlawful discharge, reinstatement, consideration for promotion, and back pay, must be brought within six years from the date of discharge. Unless the services fully implement the aforementioned "special board" statutes, correction board appeals remain permissive and not mandatory remedies. BCMR recourse does not toll the six-year limitations period. The rule requiring final action of a competent board or tolling for misleading diagnoses are unique to disability retirement pay claims.⁸⁴

In *Wielkoszewski* there was not yet a back pay claim. Rather, he sought a declaration under the APA to force the BCMR to reopen the case to reach the full merits of his disability claim. That APA claim was timely because it was within six years of the Board's denial in 1999 that had reopened his original 1990 decision.⁸⁵

⁸³ *Id.* at 113.

⁸⁴ *Cook v. United States* 32 Fed. Cl. 783, 785-86 (1995) (comparing back pay and disability claims).

⁸⁵ 28 U.S.C. § 2401.

Wielkoszewski retained the right to appeal the BCMR's 2005 denial in light of *Tootle*. Wielkoszewski and other similar plaintiffs can bring a limited equitable review of the administrative correctness of a denied claim because placement on the disabled list offers "significant value" apart from any disability pay.⁸⁶ But the suit requires not only waiving any money claim, but that the disability award be speculative and contingent: proof that the courts' action would not trigger immediate payment, but rely on ancillary agency proceedings where an award is "at best unclear."⁸⁷

Tootle on the surface appears limited to the unique facts where the member's disability claim was contingent on a pending court-martial appeal "yet to be finalized."⁸⁸ Prudence dictates that plaintiffs already honorably separated can rely on the precedent by narrowly tailoring their APA challenge to whether the correction board's decision-making process had neglected to follow regulation and procedures. In such a case the plaintiff may request only an agency remand for a rehearing to follow the neglected procedure. Yet, this collateral attack on a correction board decision is an additional vehicle to challenge arbitrariness, analogous to *Wielkoszewski*.

V. CONCLUSION

This article brings to light new federal developments to assist practitioners in the field of military law in appeals of discharges, adverse performance evaluations, and disability cases. It offers some legal and practical considerations when advising current or separated service in this complex area of administrative law.

Ironically, members trying to appeal adverse final agency actions are ruthlessly treated as the military's new enemy on the legal battlefield—they face the uphill fight against the presumption of administrative regularity and the high wall of judicial deference to the military's slogan banner of "internal, discretionary personnel affairs." However, these case developments show that enforcement of service members' basic rights to due process and judicial access will be and *should remain* protected within the agency appellate system and before the courts.

⁸⁶ *Id.* at 175, (treatment for serious health concerns has non-negligible value apart from future money award).

⁸⁷ *Id.*

⁸⁸ *Id.*

LIGHTNING BUT NO THUNDER: THE NEED FOR CLARITY IN MILITARY COURTS REGARDING THE DEFINITION OF MENTAL RETARDATION IN CAPITAL CASES AND FOR PROCEDURES IN IMPLEMENTING *ATKINS* v. *VIRGINIA*

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I. INTRODUCTION

The rights of the mentally retarded have long been dependent upon the legal system for definition and scope. The judiciary, however, has not always been sympathetic to their plight. In endorsing the eugenic sterilization movement of the 1920's, Justice Holmes stated in *Buck v. Bell*, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind ... [t]hree generations of imbeciles are enough."¹ Thankfully, in many ways the United States judicial system has

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¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927). Though *Buck* has since been overturned, the decision represents the epitome of the Court's historical denial of constitutional rights to the mentally impaired.

are enough.”¹ Thankfully, in many ways the United States judicial system has come a long way since the days of *Buck*. Modern era court decisions and statutes have been woven together to form a jurisprudence that is designed to protect the constitutional rights of the mentally retarded, not to protect society from the mentally retarded as in the days of *Buck*.²

One issue in particular that has confounded the judicial process is the availability of the death penalty for mentally retarded individuals convicted of a capital offense. In *Penry v. Lynaugh* the Supreme Court held that executing an individual with mental retardation was not a violation of the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment.³ Central to the Court’s holding was that the execution of the mentally retarded was not cruel and unusual *per se* because a national consensus toward banning the practice did not exist at the time.⁴

Little more than a decade later in *Atkins v. Virginia*, however, the Supreme Court reversed *Penry*, finding that a national consensus in the prohibition of the execution of mentally retarded defendants did exist and holding that execution of the mentally retarded therefore had become “unusual” within the meaning of the Eighth Amendment.⁵ As such, execution of the mentally retarded was prohibited by the United States Constitution.⁶ In rendering its decision, the Court did not adopt a definition of mental retardation, but specifically left that task to the individual states.⁷ Most states that have a death penalty have codified their own working definitions of mental retardation,⁸ however, the federal government has not codified a working

¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927). Though *Buck* has since been overturned, the decision represents the epitome of the Court’s historical denial of constitutional rights to the mentally impaired.

² *See, e.g., City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432, 438 (1985) (holding that mental retardation cannot be openly discriminated against because it is an immutable characteristic); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, tit. 1, 4 (codified as amended in scattered sections of Title 42 of the U.S. Code, protecting individuals with mental retardation from being discriminated against in employment, education and government services).

³ *Penry v. Lynaugh*, 492 U.S. 302 (1989); U.S. CONST., amend. VIII.

⁴ *Penry*, 492 U.S. at 335.

⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁶ *Id.*

⁷ *Id.* at 317 (noting that states are “left the task of developing appropriate ways to enforce the constitutional restriction upon execution of sentences”); *See also Schriro v. Smith*, 546 U.S. 6 (2005) (reaffirming *Atkins* by holding that states must develop their own legal definition of mental retardation).

⁸ *See Ala. Code* § 15-24-2 (2005); *Ariz. Rev. Stat. Ann.* § 13-703.02 (2007); *Ark. Code Ann.* § 5-4-618 (Michie 2006); *Cal. Penal Code* § 1376 (West 2007); *Colo. Rev. Stat. Ann.* 18-1.3-1101 (West 2007); *Conn. Gen. Stat. Ann.* § 1-1g(a) (West 2007); *Del. Code Ann.* tit. 11 § 4209(a) (2007); *Idaho Code Ann.* § 19-2515A (2007); 725 *Ill. Comp. Stat.* 5/114-15(d) Ann. (West 2007); *Ind. Code* § 35-36-9-2 (2007); *Ky. Rev. Stat. Ann.* § 532.130 (Michie 2006); *La. Code Crim. Proc. Ann.* art.

definition to be used in the military justice system.⁹ Furthermore, there is no legislative or executive provision addressing how the military justice system

905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

⁹See Death Penalty Reform Act of 2007, H.R. 851, 110th Cong. (2007), which was introduced in the House of Representatives on February 6, 2007 by Rep. Louie Gohmert (TX) and was subsequently referred to the Committee on the Judiciary. The bill, as proposed, would not be binding on military courts as it would only amend Title 18 of the United States Code. Nonetheless, the bill would provide a useful guidepost to the regulatory and judicial authorities in the military justice system who will no doubt be implementing many of the same changes in the future. The bill attempts to codify a federal definition of mental retardation. If passed, Section 4 of the bill would modify Section 3593 of title 18, United States Code, in the following manner:

‘(1) In subsection (a)--

‘(B) by inserting [*inter alia*] after paragraph (2) the following:

‘The notice must be filed a reasonable time before trial or before acceptance by the court of a plea of guilty. The court shall, where necessary to ensure adequate preparation time for the defense, grant a reasonable continuance of the trial. If the government has not filed a notice of intent to seek the death penalty or informed the court that a notice of intent to seek the death penalty will not be filed, the court shall not accept a plea of guilty to an offense described in section 3591 without the concurrence of the government.’; and

‘(7) by adding after subsection (a) the following:

‘(b) Notice by the Defendant-

‘(1) If, as required under subsection (a), the government has filed notice seeking a sentence of death, the defendant shall, a reasonable time before the trial, sign and file with the court, and serve on the attorney for the government, notice setting forth the mitigating factor or factors that the defendant proposes to prove mitigate against imposition of a sentence of death. In any case in which the defendant intends to raise the issue of mental retardation as precluding a sentence of death, the defendant shall, a reasonable time before trial, sign and file with the court, and serve on the attorney for the government, notice of such intent.

‘(2) When a defendant makes a claim of mental retardation or intends to rely on evidence of mental impairment, or other mental defect or disease as a mitigating factor under this section, the government shall have the right to an independent mental health examination of the defendant. A mental health examination ordered under this subsection shall be conducted by a licensed or certified psychiatrist, psychologist, neurologist, psychopharmacologist, or other allied mental health professional. If the court finds it appropriate, more than one such professional shall perform the examination. To facilitate the examination, the court may commit the person to be examined for a reasonable period, but not to exceed 30 days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in a suitable facility reasonably close to the court. The director of the

should deal with the procedural aspects of mental retardation in a capital murder case.¹⁰

In February 2007, the U.S. Navy-Marine Corps Court of Appeals (NMCCA) addressed the issue of mental retardation in *U.S. v. Parker*.¹¹ In short, the *Parker* decision sparked lightning, but lacked thunder with regards to mental retardation and the death penalty in the military justice system. The court adopted a definition of mental retardation, but, because of the posture of the case, it was unable to address completely some of the more contentious procedural issues surrounding mental retardation and capital murder.¹² While the decision was a step in the right direction, it was only a step and further authoritative action, such as a federal statute, is needed to clarify these issues.¹³

The absence of an authoritative guide poses many problems in relation to how a military trial court should handle an assertion of mental retardation when the accused is charged with a crime that potentially warrants the death penalty. This article will address some of these substantive and procedural issues within the context of the military justice system. The authors first argue in support of

facility may apply for a reasonable extension, but not to exceed 15 days upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

‘(3) Following the filing of a defendant's notice under this subsection, the court shall, where necessary to ensure adequate preparation time for the government, grant a reasonable continuance of the trial.

‘(4) For purposes of this section, a defendant is mentally retarded if, since some point in time prior to age 18, he or she has continuously had an intelligence quotient of 70 or lower and, as a result of that significantly subaverage mental functioning, has since that point in time continuously had a diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others' reactions.’

¹⁰ A review of the relevant case law did not reveal any decisions by the United States Court of Appeals for the Armed Forces regarding procedural matters for mental retardation claims in capital murder cases since the *Atkins* decision was announced.

¹¹ *United States v. Parker*, 65 M.J. 626 (N-M. Ct. Crim. App. 2007).

¹² *Id.* at 629-30 (adopting the definition of mental retardation from the American Association on Intellectual and Development Disabilities (formerly the AAMR): “[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”).

¹³ While there is no question *Parker* is currently binding authority in the Navy and Marine Corps trial courts, it is not binding authority on the remainder of the military. Thus, it is necessary for Congress, the United States Court of Appeals for the Armed Forces, or the President to adopt or clarify this definition such that the law regarding the execution of the mentally retarded is interpreted and applied consistently and constitutionally not only in the Navy and Marine Corps, but throughout the rest of the military as well.

the definition of mental retardation that the NMCCA adopted in *Parker*. Next, the article proposes solutions to some of the procedural issues surrounding an assertion of mental retardation, including: which party carries the burden of proof, what the standard of proof should be, whether a judge or jury should hear the claim, and whether an assessment of mental retardation should take place before or after trial. Finally, the authors conclude with an appeal for authoritative clarification of these issues in the military from either Congress, the Court of Appeals for the Armed Forces, or the President through his regulatory authority.

II. POST-*ATKINS*: THE NEW MENTAL RETARDATION JURISPRUDENCE

A. Defining Mental Retardation

The military justice system should adopt a definition of mental retardation that follows the national consensus¹⁴ as well as reflects the Supreme Court's decision in *Atkins*.¹⁵ While the Court left the task of defining mental retardation to the individual states, it cited with approval the American Association on Mental Retardation's (AAMR) and the American Psychiatric Association's (APA) definitions of mental retardation.¹⁶ Both of these definitions require the existence of three separate factors: (1) significantly sub-average intellectual functioning;¹⁷ (2) significant limitations in two or more adaptive behavioral skills such as communication, self-care, and self-direction;¹⁸ and (3) onset before the age of eighteen.¹⁹

¹⁴ See *Atkins v. Virginia*, 536 U.S. 304, 314-16 (2007) (noting that as of 2002 the Federal Government, as well as eighteen states—Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington—prohibited execution of the mentally retarded).

¹⁵ *Id.* at 315 (stating that the definition must encompass all defendants that “fall within the range of mentally retarded offenders about whom there is a national consensus”).

¹⁶ *Id.* at 309.

¹⁷ The first prong of this test is intellectual functioning. Some states recognize significant sub-average intellectual functioning where the defendant's intelligence quotient is below seventy. See e.g. Ariz. Rev. Stat. Ann. § 13-703.02(F) (2007); Del. Code Ann. tit. 11 § 4209(3)(d)(2) (2007); Ky. Rev. Stat. Ann. § 532.130 (West 2007); Md. Code Ann. Crim. § 2-202(b)(1)(i) (West 2006); Neb. Rev. Stat. § 28-105.01(3) (2006); N.M. Stat. Ann. § 31-20A-2.1 (A) (West 2007); N.C. Gen Stat. § 15A-15-100 (a)(2) (2005); Okla. Stat. tit 10 § 1408(A) (2005); S.D. Codified Laws § 23A-27A-26.2 (2007); Tenn. Code Ann. § 39-13-203(a)(1) (West 2007); and Wash. Rev. Code Ann. § 10.95.030 (2)(c) (West 2007).

¹⁸ As defined by the American Psychiatric Association (APA), adaptive behavioral skills, or adaptive functioning, refers to “how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental

Since *Atkins*, the AAMR released a more concise definition involving the same three-prong test:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.²⁰

The preceding definition is a model of what the military system should adopt as a definition of mental retardation because it represents a national consensus as defined under *Atkins*.²¹ First, at least twenty-one of the thirty-eight states currently permitting the death penalty have adopted this three-prong definition.²² The Supreme Court considered the codification of the three-prong definition in each state as an important step in achieving a national consensus.²³ However, as Justice Stevens alluded to in *Atkins*, it is not so much the number of states that adopted a definition of mental retardation which indicates a national consensus, but more how these definitions correspond in a “uniform manner” to the AAMR definition.²⁴

Retardation.” Am. Psychiatric Ass’n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 42 (4th ed. 2000) [hereinafter “DSM-IV”]. The American Association of Mental Retardation (AAMR) points out that an assessment of adaptive functioning “must be considered within the context of community environments typical of the individual’s age, peers, and culture.” The American Association of Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 1 (10th ed. 2002) [hereinafter “MENTAL RETARDATION”].

¹⁹ DSM-IV, *supra* note 18, at 39; MENTAL RETARDATION, *supra* note 18, at 1.

²⁰ MENTAL RETARDATION, *supra* note 18, at 8.

²¹ See *United States v. Parker*, 65 M.J. 626, 629 (N-M. Ct. Crim. App. 2007) (noting that out of the twenty-six states with statutes defining mental retardation, twenty-four have adopted some variant of the definition); see also *Atkins v. Virginia*, 536 U.S. 304, 315 (2007) (suggesting that the codification of the three prong definition by state legislatures can measure national consensus); *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986) (using the national consensus theory to show that out of forty-one death-penalty states, none allowed the execution of the insane and twenty-six had explicit statutes requiring suspension of the execution of a legally incompetent person).

²² See Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (Michie 2006); Cal. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. Ann. § 1-1g(a) (West 2007); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15(d) (West 2007); Ind. Code § 35-36-9-2 (2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

²³ *Atkins* at 317.

²⁴ *Id.*

Furthermore, in states that have not codified the three-prong definition outright, the courts have adopted similar definitions.²⁵ For example, the Pennsylvania Supreme Court cited the APA and the AAMR definitions in defining mental retardation under the guidelines set forth in *Atkins*.²⁶ The Court recognized that both definitions provided that a low IQ score is not in itself sufficient to classify a person as mentally retarded and therefore took careful note to also include adaptive behavior and onset prior to the age of eighteen in its definition.²⁷ In doing so, the Court ultimately crafted a definition consistent with the APA and AAMR definitions.²⁸ Whether by statute or by judicial opinion, a majority of states have adopted the three-prong formulation for determining whether a defendant is mentally retarded, making this formulation the most widely accepted definition of the disability.²⁹

B. Problems with Defining Mental Retardation

1. Testing: The Need for a Comprehensive Test

Testing for mental retardation presents a host of problems in the context of a capital murder case. One of the most glaring is attempting to use intellectual functioning as a short cut to diagnosing mental retardation.³⁰ The AAMR cautions that determinations of mental retardation cannot be based solely on the results of an IQ test, but must include an evaluation of adaptive behavior³¹ and the onset of the disposition before the age of eighteen.³²

²⁵ See, e.g., *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005).

²⁶ *Id.* at 630.

²⁷ *Id.*

²⁸ See *id.* at 630; MENTAL RETARDATION, *supra* note 18, at 8; DSM-IV, *supra* note 18, at 39.

²⁹ Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001) (showing the construction of a national consensus that includes the three part definition to exempt mentally retarded criminals from capital punishment). *But see* N.M. Stat. Ann. § 31-20A-2.1 (West 2007); and Neb. Rev. Stat. § 28-105.01 (2006). Both New Mexico and Nebraska have adopted definitions that are different from the APA and AAMR definitions and define mental retardation using a two-prong rubric involving intellectual functioning and adaptive behavior with an IQ of 70 or below as creating a presumption of mental retardation. In addition, neither state requires proof of onset of mental retardation prior to age eighteen. These two exceptions aside, however, the national consensus overwhelmingly supports the three-prong definition.

³⁰ Tomoe Kanaya, Matthew H. Scullin, and Stephen J. Ceci, *The Flynn Effect and U.S. Policies: The impact of rising IQ scores on American Society via mental retardation Diagnoses*, 58 AMERICAN PSYCHOLOGIST, 778-790 (2003) (noting some of the problems of using intelligence testing in schools and in the military as a basis to diagnose mental retardation); MENTAL RETARDATION, *supra* note 18, at 59 (noting that there is much disagreement over what the proper intelligence test should be from the many that are available).

³¹ Adaptive behavior describes how effectively individuals cope with the demands of life and how they meet the standards of personal independence expected of someone of similar age, socioeconomic background, and community setting. See MENTAL RETARDATION, *supra* note 18.

According to the AAMR, it is clear that there is no fixed cutoff point intended for diagnosing mental retardation.³³ The definitions promulgated by the AAMR and the DSM-IV both specify consideration of adaptive behavior skills and the use of clinical judgment.³⁴ In fact, the DSM-IV states that “mental retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.”³⁵ The adaptive behavior component is an important part of the three-prong test to ensure that the individual is not just a poor test-taker, but is truly disabled.³⁶ Finally, the third prong, age of onset, distinguishes mental retardation from other forms of brain damage that may have occurred later in life, such as organic brain disorder.³⁷

The notion that the IQ test in isolation should be conclusive as to the determination of the existence of mental retardation is too limited.³⁸ The multi-factor approach is a superior indicator concerning the existence of mental retardation.³⁹ While IQ tests are one of several factors that need to be considered in diagnosing the existence of mental retardation, as the majority of states have determined, IQ tests standing alone are not sufficient to make a final determination concerning the existence of the disability.⁴⁰

2. No Clear Line

There is no clear line as to where mental retardation begins and where it ends.⁴¹ Mental retardation is an incremental disorder that exists on a

³² See MENTAL RETARDATION, *supra* note 18, at 51-52 (stating that “reliance on a general functioning IQ score has been heatedly contested by some researchers”).

³³ MENTAL RETARDATION, *supra* note 18 at 57.

³⁴ See MENTAL RETARDATION, *supra* note 18, at 81; DSM-IV, *supra* note 18 at 41.

³⁵ DSM-IV, *supra* note 18, at 41-42.

³⁶ See James W. Ellis, *Special Feature- Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 14 (2003).

³⁷ *Id.* at 9.

³⁸ See MENTAL RETARDATION, *supra* note 18, at 51.

³⁹ See MENTAL RETARDATION, *supra* note 18, at 10-11 (discussing the five factor model used to diagnose and classify an individual as mentally retarded, and why the five factors are necessary).

⁴⁰ See Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (Michie 2006); Cal. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. § 1-1g(a) (2006); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15(d) (West 2007); Ind. Code Ann. § 35-36-9-2 (2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (Law. Co-op. 2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

⁴¹ See Graham Baker, Note, *Defining and Determining Retardation in Texas Capital Murder*

continuum between being mentally deficient and normal.⁴² Eighty-five percent of mentally retarded individuals are in a middle ground where they have an incremental deficiency below a level that makes them normal, but not so low as to necessarily hinder their participation in society.⁴³ This grey area exists between IQ levels of sixty-five and seventy-five, or generally five points above and below the generally accepted cut-off of seventy.⁴⁴

In addition, among those who work with mentally retarded individuals there could be a conflict to diagnose the disorder before the age of eighteen.⁴⁵ On the one hand, social workers and school officials want to extend the benefits that society will bestow on those diagnosed with mental retardation.⁴⁶ On the other hand, they do not want to prevent students from participating in social or school activities, a likely result of a determination that the student is mentally retarded.⁴⁷

The decision to diagnose an individual before the age of eighteen also becomes more dubious when school testing is involved. Many school districts have a financial interest in keeping the number of mentally retarded students low so as to avoid the costly procedures and requirements under federal law for the

Defendants: A Proposal to the Texas Legislature, 9 SCHOLAR 237, 249 (2007) (discussing the problem of false positive identification of the disorder to assure that any individual who might need assistance will benefit from programs designed to help the mentally retarded).

⁴² DSM-IV, *supra* note 18, at 43. The manual notes that eighty-five percent of those labeled retarded were members of the mildest form of the disorder. These mildly retarded individuals could achieve a sixth-grade level of education by their late teens and have the ability to provide a minimum self-support with assistance from professionals.

⁴³ DSM-IV, *supra* note 18, at 43.

⁴⁴ See Jonathan L. Bing, Note, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 67-68 (1996) (discussing the demarcation of an IQ of seventy as mentally retarded).

⁴⁵ *Id.* at 67 (describing the dilemma facing school psychologists when a student's test results indicate an IQ that hovers just above or just below seventy).

⁴⁶ *Id.*

⁴⁷ *Id.* See e.g. Charles County, Maryland, Public Schools, <http://www2.cboe.com/psychdept/bap.cfm> (last visited Sept. 25, 2007)(providing the two-fold mission statement for the Psychological Services Department's Behavioral Adjustment Program for students with emotional and behavioral disabilities: to "[p]rovide a therapeutic and highly structured self contained setting for students with difficulty accessing the academic curriculum *in the regular education setting* due to emotional/behavior dysregulation" and to "provide opportunities and support to those students who are able to maintain appropriate behavior and *return to the regular education setting.*"(emphasis added); Charles County, Maryland, Public Schools, http://www2.cboe.com/psychdept/learning_disabilities.cfm (last visited Sept. 25, 2007)(addressing what schools can do to help students with learning disabilities, stating that "[t]he student may need small group activities, classroom modifications, and/or a special program."); and see generally Virginia Department of Education, A Parent's Guide to Special Education (2001), http://www.doe.virginia.gov/VDOE/Instruction/Sped/parent_guide.pdf (providing state policies for evaluation of children with various disabilities, including mental retardation, and the special education process for students not likely to be able participate in the regular education setting).

receipt of federal funds.⁴⁸ Moreover, even assuming that the district complies with the federal mandates, the funds received are often inadequate to cover the additional expenses of educating mentally retarded children.⁴⁹ This may prompt school districts to classify students who are only marginally mentally retarded as “learning impaired” or as having some other learning deficiency that does not qualify as a disability under federal law such that the extra costs can be avoided.⁵⁰ Thus, the conflicting interests may very well encumber a proper diagnosis of mental retardation before the age of eighteen in school districts where funding is inadequate to cover the additional cost of educating a mentally retarded child.

3. Problems With Determining Mental Retardation Using Only an Individual’s Intelligence Quotient (IQ)

There are reasons to believe that even if an individual’s IQ is above the minimum threshold to be considered mentally retarded, the individual may nevertheless still be mentally retarded.⁵¹ The “Flynn Effect” and Standard Error of Measurement (SEM) can both cause such false negatives.⁵² The Flynn Effect is explained in research conducted by Dr. James Flynn and indicates that IQ test scores must be adjusted to account for cultural IQ gain that occurs when a particular IQ test has not recently been “normed.”⁵³ Dr. Flynn discovered that across cultures, IQs tend to increase over time as a society, in essence, becomes more intelligent and adept to the testing methods.⁵⁴ In other words, what would not have been considered a mentally retarded IQ score at one time might five or ten years later be considered as such because the mean IQ for the society would have risen in the interim.⁵⁵ Similarly, SEM is a statistical probability that accounts for possible variation in scores that can occur when an individual takes

⁴⁸ See Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; see generally Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975) (also known as the Individuals With Disabilities Education Act) (codified as amended in scattered sections of Title 20 of the U.S. Code).

⁴⁹ See Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; see also EAHCA, *supra* note 48, at 20 U.S.C. §§ 1411-1416 (2007).

⁵⁰ See Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; see also EAHCA, *supra* note 48, at 20 U.S.C. §§ 1401(3), 1414(b) (2007) (providing the definition for “child with a disability” within the meaning of the Act and providing additional evaluation criteria for determining whether a child is “disabled” within the meaning of the Act respectively).

⁵¹ See, e.g., James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12(2) PSYCHOL. PUB. POL’Y & L., 170-189 (2006); cf. Joseph Lee Rodgers, *A critique of the Flynn effect: Massive IQ gains, methodological artifacts, or both?* 26(4) INTELLIGENCE, 337-356 (1998) (questioning the validity of Flynn’s research methods).

⁵² See generally James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 PSYCHIATRIC BULL. 171-191 (1987).

⁵³ *Id.* at 173.

⁵⁴ *Id.* at 175.

⁵⁵ *Id.*

an IQ test multiple times.⁵⁶ The SEM is generally a range of five points above and below the individual's actual IQ score.⁵⁷

Courts that have addressed the Flynn Effect and SEM have held that it is merely to be considered as evidence in determining whether the defendant is mentally retarded.⁵⁸ In doing so, they have wisely declined to create a presumption of mental retardation based on mechanically applying the IQ number alone.⁵⁹ For example, in *Walton v. Johnson*,⁶⁰ the Fourth Circuit Court of Appeals upheld the dismissal of a mental retardation claim where the appellant argued he met Virginia's definition of mentally retardation after the Flynn Effect and SEM were factored into his IQ.⁶¹ Walton had scored a seventy-seven on an IQ test administered a few months before he turned eighteen, but alleged the score should be at most seventy-four as a result of the Flynn Effect and perhaps even lower because of SEM.⁶² The trial court dismissed these arguments finding that Walton had failed to allege sufficient facts demonstrating that his intellectual functioning was seventy or less before he turned eighteen.⁶³ The Fourth Circuit affirmed, opining that Walton was only speculating that the combined influence of the Flynn Effect and SEM would lower his IQ score enough to satisfy Virginia's mental retardation standard.⁶⁴ The Court considered these cultural-statistical phenomena as only one of many factors in assessing whether a defendant is mentally retarded in the eyes of the law.⁶⁵

Another reason to support the use of a multi-factor test for mental retardation in capital cases, as opposed to IQ alone, is the risk of an accused cheating or faking in order to achieve a low IQ score, thereby avoiding the death penalty.⁶⁶ In his dissent in *Atkins*, Justice Scalia expressed a concern that the decision would result in an onslaught of capital defendants faking mental retardation, or "malingering."⁶⁷ However, research suggests that if the three-prong test is used, it is unlikely the defendant can successfully fake symptoms

⁵⁶ *Id.* at 174.

⁵⁷ *Id.*

⁵⁸ *See e.g.* *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006); *see also* *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005).

⁵⁹ *See generally* *Walton*, 440 F.3d 160; *Bowling*, 163 S.W.3d 361.

⁶⁰ *Walton*, 440 F.3d 160.

⁶¹ *Id.* at 177.

⁶² *Id.*

⁶³ *See* *Walton v. Johnson*, 269 F.Supp.2d 692 (W.D.Va. 2003)(dismissing defendant's mental retardation claim without an evidentiary hearing stating defendant failed to allege sufficient evidence of the claim to merit a hearing on the issue).

⁶⁴ *Walton*, 440 F.3d at 178.

⁶⁵ *Id.*

⁶⁶ *Atkins v. Virginia*, 536 U.S. 304, 353 (2002)(J. Scalia dissenting).

⁶⁷ *Id.*

associated with mental retardation.⁶⁸ Indeed, many states which have chosen to define mental retardation using the three-prong test have done so because of the increased effectiveness of the comprehensive approach.⁶⁹

In sum, the military justice system is in need of guidance on how to define mental retardation for purposes of the death penalty. Many states have already addressed this issue and their solutions may prove instructive to the military justice system. An overwhelming number of states, either statutorily or through case law, have adopted a three-prong test for mental retardation developed by the AAMR and suggested by the Supreme Court in *Atkins*. Regardless of which definition is ultimately implemented in the military, however, lawmakers should consider the need for a comprehensive test for mental retardation; the problems associated with inflexible age of onset criteria; and the inexactitudes of IQ testing, namely the Flynn Effect and SEM. Any definition should include thoughtful consideration of these problems.

III. PROCEDURAL PROBLEMS WITH MENTAL RETARDATION IN A CAPITAL CASE: IMPLEMENTING *ATKINS*

In addition to leaving to the states the task of defining mental retardation, the *Atkins* Court also left a number of other questions unresolved for state courts and legislatures.⁷⁰ Chief among these are the procedural requirements of implementing and complying with the Court's holding. For instance, at what point should a claim of mental retardation be decided? Who should consider the claim and make the final determination? What should be the standard of proof and who should bear the burdens of production and

⁶⁸ See Ellis, *supra* note 36, at 9. Indeed, the final prong of the three-prong test ultimately calls for the court to assess information on the accused before their eighteenth birthday. Thus, there would be no way for the accused to manipulate the court's investigation of those records.

⁶⁹ See Bing, *supra* note 44, at 67 (describing state legislative debates in those states that have codified the AAMR three-prong test into state law); see also Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (West 2006); Cal. Pen. Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. § 1-1g(a) (2006); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. 5/114-15(d) Ann. (West 2007); Ind. Code Ann. § 35-36-9-2 (West 2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (Law. Co-op. 2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

⁷⁰ See, e.g., *United States v. Nelson*, 419 F.Supp.2d 891 (E.D.La. 2006); *United States v. Sablan*, 461 F.Supp.2d 1239 (D. Colo. 2006); *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); *Richardson v. State*, 598 A.2d 1 (Md. Ct. Spec. App. 1991), *aff'd*, 620 A.2d 238 (Md. 1993); and *Chase v. State*, 873 So.2d 1013 (Miss. 2004).

persuasion? Of the thirty-eight⁷¹ jurisdictions that currently have the death penalty, no two are exactly alike in their approach to these issues. However, one approach clearly predominates: *Atkins* claims should be considered pretrial by the judge alone and the defendant bears the burden of proving by a preponderance of the evidence that he is mentally retarded as that term is defined under applicable law.⁷² The following section considers the constitutional implications, the pragmatic benefits and current military justice practice to conclude the aforementioned approach should be used in the military justice system in implementing *Atkins*.⁷³

⁷¹ A temporary moratorium on the death penalty has been in place in another state since 2002, but the death penalty statute has yet to be repealed although proposals to do so are currently pending. See *People v. LaValle*, 783 N.Y.S.2d 485 (N.Y. 2002); A.B. 542, 230th Leg., 2007 Reg. Sess. (N.Y. 2007)(proposal to eliminate the death penalty).

⁷² See *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004); Ark. Code Ann. § 5-4-618 (West 2006); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); *Bowling v. Commonwealth*, 163 S.W.2d 361, 381 (Ky. 2005)(holding defendant bears the burden of proving mental retardation by a preponderance of the evidence); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); *Chase v. State*, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. § 28-105.01 (2006); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); *State v. Flores*, 93 P.3d 1264 (N.M. 2004)(holding that a defendant raising an issue of mental retardation may do so by pretrial motion); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2007); *State v. Smith*, 893 S.W.2d 908, 916 (Tenn. 1994)(holding that it would be in the interest of the defendant, the state, and the court for the mental retardation issue to be raised pretrial); Utah Code Ann. § 77-15a-104 (West 2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007); and Va. Code Ann. § 19.2-264.3:1.2 (West 2007)(requiring pretrial motion by defense to raise mental retardation issue).

⁷³ In *United States v. Parker*, 65 M.J. 626, 630 (N-M. Ct. Crim. App. 2007), The Navy-Marine Corps Court of Appeals (NMCCA) held that Parker's mental retardation claim should be considered by the military judge in a limited post-trial evidentiary proceeding called a *Dubay* hearing. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).((*recommend citation to Dubay so that the reader understands the origin of Dubay hearings as well*)) The court also held that an offender raising an *Atkins* claim had the burden of proving his mental retardation by a preponderance of the evidence. Thus, in the Navy and Marine Corps military justice system, these issues have been partly resolved by *Parker*. The only issue not addressed by the court was when an *Atkins* hearing should be held. The court could not have addressed this question, however, because of the procedural posture of Parker's case. Parker had been found guilty and sentenced to death years before *Atkins* was announced. As a result, pretrial determination would not have been possible. Had the court prospectively held *Atkins* claims were going to be held pretrial, such a holding arguably would have been *dicta* and its authority as precedent would have been questionable. Moreover, as discussed *supra* at note 13, *Parker* is not binding authority on the remainder of the military justice system. Therefore, while the Navy and Marine Corps trial courts have some limited guidance on these issues, it is incomplete, and the remainder of the military has no guidance. As such, authoritative action from Congress, CAAF, or the President is needed to clarify these issues.

A. At What Point Should A Claim of Mental Retardation be Decided?

The determination of mental retardation should be made before trial. The eligibility of an individual to be executed is a constitutional question.⁷⁴ Waiting until after trial obscures the constitutional import of the resolution of this issue. In addition, significant resources could be saved with a pretrial determination. Procedures unique to capital cases in the military justice system – such as requirements for notice, proof, and findings of aggravating factors – would be avoided.⁷⁵ Additionally, the pleas of the accused could be affected if the death penalty was not available. Finally, while not specifically addressed, existing procedures in the Rules for Courts-Martial (R.C.M.) seem to support pretrial determination of this issue.⁷⁶

Determining whether a capital murder defendant is mentally retarded, and therefore ineligible for the death penalty, is now an issue of constitutional import.⁷⁷ Prior to *Atkins* many state sentencing statutes treated mental retardation as only a possible mitigating factor for the sentencing authority.⁷⁸ A few jurisdictions still do although the continued constitutionality of such statutes is certainly questionable.⁷⁹ Indeed, legislation is pending in most of these jurisdictions that would bring the statutory law in line with *Atkins* either by eliminating the death penalty altogether, eliminating it for the mentally retarded, or adopting procedures more consistent with *Atkins* itself as well as the majority of states.⁸⁰ *Atkins* also made mental retardation a question of constitutional law,

⁷⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁷⁵ See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2005).

⁷⁶ See generally M.C.M. *supra* note 75, R.C.M. 905.

⁷⁷ See Baker, *supra* note 42, at 271 (discussing the constitutional nature of an individual's eligibility for the death penalty).

⁷⁸ See Penry v. Lynaugh, 492 U.S. 302, 337 (1989)(pointing out that at that time virtually all states with a death penalty statute listed mental infirmity of some type as a mitigating factor).

⁷⁹ See Mont. Code Ann. § 46-18-301 (2005); Or. Rev. Stat. Ann. § 163.150 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *invalidated by* Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007), Brewer v. Quarterman, 127 S.Ct. 1706 (2007); 42 Pa. Cons. Stat. Ann. § 9711 (West 2007); and N.H. Rev. Stat. Ann. § 630:5 (2007).

⁸⁰ See S. 447, 110th Cong. § 3 (2007)(proposing the elimination of the death penalty under federal law); Death Penalty Reform Act of 2007, H.R. Res. 851, 110th Cong. (2007)(proposing procedures for determining mental retardation and eligibility for the death penalty); S.B. 306, Mont. 60th Leg. (Mont. 2007)(proposing replacing the death penalty with life imprisonment without the possibility of parole); H.B. 607, 160th Sess. Gen. Ct. (N.H. 2007)(proposal to abolish the death penalty and replace it with life imprisonment without the possibility of parole); H.B. 1094, 66th Gen. Assem., Reg. Sess. (Colo. 2007)(proposing the abolishment of the death penalty); H.B. 2510, 82nd Leg., Reg. Sess. (Kan. 2007)(proposing the abolishment of the death penalty after July, 1 2007), S.B. 222, 82nd Leg., Gen. Sess. (Kan. 2007)(proposing the abolishment of the death penalty after July 1, 2007); S.B. 354, 94th Gen. Assem., Reg. Sess. (Mo. 2007)(proposing the abolishment of the death penalty and replacing it with life in prison without the possibility of parole); S.B. 171, 212th Leg. (N.J. 2007)(abolishing the death penalty and replacing it with life imprisonment without eligibility for parole), A.B. 795, 212th Leg. (N.J. 2007)(proposing the abolishment of the death penalty); A.B. 542,

at least insofar as it relates to the death penalty.⁸¹ As a result, mental retardation is no longer on the same constitutional footing as the ordinary mitigating circumstances still found in the sentencing provisions of nearly all jurisdictions that allow the death penalty.⁸² Accordingly, some state courts now treat mental retardation as a threshold constitutional question when, assuming a conviction, the death penalty would be available.⁸³

230th Leg. Sess. (N.Y. 2007)(proposal to eliminate the death penalty thereby ensuring compliance with *People v. LaValle*, 783 N.Y.S.2d 485 (N.Y. 2004)), S.B. 319, 230th Leg. Sess. (N.Y. 2007)(proposal to amend the unconstitutional death penalty sentencing statute, but coming short of elimination of the death penalty); H.B. 745, 8th Leg. (Tex. 2007)(proposal to eliminate the death penalty); H.B. 1370, 119th Gen. Assem. (Pa. 2007)(prohibiting the death penalty for mentally retarded and outlining procedures for determining mental retardation), S.B. 751, 119th Gen. Assem. (Pa. 2007)(proposing elimination of the death penalty for the mentally retarded and proposing procedures for determining mental retardation); S.B. 2301, 122nd Leg. Sess. (Miss. 2007)(amending the sentencing procedures in capital cases to prohibit the death penalty for the mentally retarded); H.B. 3336, 74th Leg. Assem. (Or. 2007)(proposing the elimination of the death penalty for the mentally retarded and outlining procedures for making the eligibility determination); H.B. 1826, 51st Leg., 1st Reg. Sess. (Okla. 2007)(proposing a decrease in the burden of proof placed on defendant to prove mental retardation); and S.B. 5787, 60th Leg. (Wash. 2007)(proposing procedural changes to require determination of mental retardation issue pretrial and by defense motion), H.B. 1707, 60th Leg. (Wash. 2007)(proposing procedural changes to require determination of mental retardation issue pretrial by defense motion).

⁸¹ See *Penry*, 492 U.S. at 340 (1989)(holding that execution of the mentally retarded was not cruel and unusual punishment within the meaning of the Eighth Amendment at that time).

⁸² See, e.g., *Ariz. Rev. Stat. Ann.* § 13-703.02 (2007)(defense may raise mental retardation as mitigating evidence during sentencing phase); *Ark. Code Ann.* § 5-4-618 (West 2006)(if mental retardation ruling is adverse to defendant, issue may be resubmitted as evidence in mitigation during sentencing); *Ca. Penal Code* § 1376 (West 2007)(defendant may submit mental retardation issue to jury during sentencing); *Conn. Gen. Stat. Ann.* § 53a-46a (West 2007)(mitigating evidence, including mental competency, is presented during sentencing proceeding after conviction); *Del. Code Ann. tit. 11* § 4209 (2007)(mental retardation may be considered as mitigating evidence during sentencing); *Kan. Crim. Code Ann.* § 21-4623 (West 2006); *La. Code Crim. Proc. Ann. art. 905.5.1* (2006)(mental retardation will be considered during post-conviction sentencing proceeding unless defendant and state agree to resolve issue at pretrial phase); *Md. Code Ann., Crim. Proc.* § 4-343 (West 2007)(mental retardation issue considered during post-conviction sentencing proceeding); *Mont. Code Ann.* § 46-18-301, *et. seq.* (2005)(providing that mental retardation should be considered during sentencing and listing mitigating factors to be considered at the same time); *Neb. Rev. Stat.* § 28-105.01 (2006)(permits defendant to present mental retardation as mitigating factor); *N.H. Rev. Stat. Ann.* § 630:5 (2007)(treats mental issues as mitigating factors during sentencing); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006)(permits defendants to submit mental retardation to the sentencing authority as evidence in mitigation); *N.M. Stat. Ann.* § 31-20A-2.1 (West 2007)(permits defendants to submit mental retardation issue as evidence in mitigation); *Or. Rev. Stat. Ann.* § 163.150 (West 2005)(mental capacity is a mitigating factor for consideration by the sentencing authority during sentencing); *Wyo. Stat. Ann.* § 6-2-102 (2007)(mental status is a mitigating factor during sentencing); and 18 U.S.C. § 3592 (2007)(provides that a defendant may submit issue of mental retardation as mitigating evidence during sentencing).

⁸³ See, e.g., *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D.La. 2006); *State v. Laney*, 672 S.E.2d 726, 730 (S.C. 2006)(as a result of *Atkins*, treating mental retardation in capital cases as a threshold question for the judge). *But see State v. Vela*, 721 N.W.2d 631, 638 (Neb. 2006)(reasoning that a claim of mental retardation and ineligibility for the death penalty addresses

Waiting until the post-trial sentencing phase to determine whether an accused is mentally retarded obscures the constitutional import of the issue because it could tend to equate mental retardation with non-constitutional mitigating factors.⁸⁴ Furthermore, the risk of wrongful execution is heightened if the mental retardation claim is considered post-trial because a mentally retarded defendant “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”⁸⁵ This danger is particularly acute in those jurisdictions that allow a jury to consider mental retardation at the same time as other evidence in mitigation.⁸⁶ Some states have protected against this by separating the post-trial *Atkins* hearing from the normal sentencing hearing,⁸⁷ but the surest method to avoid constitutional violations is to have the *Atkins* hearing pretrial and have the judge alone determine whether

the moral culpability of the defendant such that the hearing is not a “special proceeding”; rather, the hearing is part of the merits portion of the sentencing proceeding).

⁸⁴ See e.g. Conn. Gen. Stat. Ann. § 53a-46a (West 2007)(providing a post-conviction hearing in capital cases to “determine the existence of any mitigating factor concerning the defendant’s character, background and history, or the nature and circumstances of the crime, and any aggravating factor,” but providing, *inter alia*, “[t]he court shall not impose the sentence of death [if] at the time of the offense...the defendant was a person with mental retardation.”); Mont. Code Ann. § 46-18-301 (2005)(providing for post-conviction sentencing hearing for consideration of evidence in mitigation when death penalty is possible), Mont. Code Ann. § 46-18-304 (2005)(providing categories of general mitigating evidence that will be considered by the court in the post-conviction hearing); N.H. Rev. Stat. Ann. § 174.098 (2005)(providing general mitigating factors for consideration by the sentencing authority in determining whether a convicted capital defendant will receive the death penalty); Or. Rev. Stat. Ann. § 163.150 (West 2005)(providing for a sentencing hearing following conviction in a capital case such that the court may consider any evidence it “deems relevant” to sentencing); and Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007)(providing a post-conviction hearing in capital murder cases during which “evidence may be presented by the state and the defendant or the defendant’s counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant’s background or character or the circumstances of the offense that mitigates against the imposition of the death penalty.”), *invalidated by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007)(holding the Texas capital murder statute unconstitutional for failing to allow the sentencing authority to give independent mitigating weight to aspects of the defendant’s character that call for a less severe penalty).

⁸⁵ *State v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004)(quoting *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002)).

⁸⁶ See, e.g., Ca. Penal Code § 1376 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); La. Code Crim. Proc. Ann. art. § 905.5.1 (2006); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Va. Code Ann. § 19.2-264.3:1.2 (West 2007); and 18 U.S.C. § 3592 (2007).

⁸⁷ See Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Fla. Stat. Ann. § 921.137 (West 2007); Kan. Crim. Code Ann. § 21-4623 (West 2006); Mo. Ann. Stat. § 565.030 (West 2007), *held unconstitutional on other grounds by State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); Neb. Rev. Stat. § 28-105.01 (2006); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); and N.Y. Crim. Proc. Law § 400.27(12) (McKinney 2007), *invalidated by People v. LaValle*, 783 N.Y.S.2d 485 (N.Y. 2004).

the accused is mentally retarded.⁸⁸ The argument that it is unconstitutional to deny the accused a jury on the mental retardation issue has been roundly rejected as a matter of federal law.⁸⁹ As *Atkins* does not require a jury, the accused's Constitutional rights are adequately observed by having the determination of mental retardation done pretrial by a judge.

In addition to the constitutional import, significant practical and economical considerations also favor resolution of this issue as early in the proceedings as possible. For one, determining whether a trial will proceed as a capital case will have important procedural implications.⁹⁰ Proceeding as a non-capital case also conserves significant resources by reducing litigation expenses and expediting the overall proceedings.⁹¹

The conservation of resources resulting from pretrial determination of mental retardation seen in state courts would also be seen in the military justice system. For example, non-capital proceedings obviate the need for basically all of R.C.M. 1004, the military's rule and procedures for when death may be adjudged in a court-martial.⁹² Specifically, this avoids the extra litigation and procedures required for capital murder trials in the military such as requiring the Government prove at least one aggravating circumstance beyond a reasonable doubt,⁹³ special instructions to the members regarding aggravating and mitigating evidence,⁹⁴ and special voting procedures for the members.⁹⁵ A non-

⁸⁸ See e.g., *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (West 2006); Ca. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. § 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ind. Code Ann. § 35-36-9-3 (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); *Chase v. State*, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. Ann. § 174.098 (West 2005); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); *State v. Flores*, 93 P.3d 1264 (N.M. 2004); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2003); *State v. Smith*, 893 S.W.2d 908, 916 (Tenn. 1994); and Utah Code Ann. § 77-15a-104 (West 2007).

⁸⁹ See *United States v. Ring*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁹⁰ See, e.g., R.C.M., *supra* note 75, Rule 1004.

⁹¹ See *State v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004) (recognizing that a capital murder trial consumes significantly more resources than a non-capital trial and that it would be beneficial to all parties to resolve the question of whether the defendant is eligible for the death penalty as early as possible).

⁹² See generally R.C.M., *supra*, note 75.

⁹³ See R.C.M., *supra* note 75, Rule 1004(b)(2). Rule 1004(b)(2):

“In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.”

⁹⁴ See R.C.M., *supra* note 75, Rule 1004(b)(6). Rule 1004(b)(6):

capital murder trial may also eliminate the possibility of mandatory review by the Court of Appeals for the Armed Forces⁹⁶ as well as the necessity of Presidential approval before the sentence is carried out.⁹⁷ Thus, early determination of eligibility for the death penalty results in less litigation, simplified trial procedures for the court as well as the members, and avoids the possibility of protracted appellate review and sentence execution. This results in conservation of precious judicial, military, and government resources.

Pretrial determination of the availability of the death penalty could also conserve resources by its effect on the pleas of the accused. For instance, if the accused and the prosecuting authority know that the death penalty is not available, pretrial guilty pleas would be more likely in those cases where the guilt of the accused is not seriously in doubt. This is particularly beneficial to the military justice system, since it will not accept a guilty plea from an accused for an offense punishable by death.⁹⁸ Thus, a pretrial determination of mental retardation would then avoid those capital murder trials that proceed only as an opportunity for the accused to avoid the death penalty or, as in the military justice system, because a guilty plea by the accused will not be accepted. This approach would also be consistent with the Rules for Courts-Martial, which require the resolution of certain pretrial motions prior to the entering of pleas.⁹⁹

In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

⁹⁵ See R.C.M., *supra* note 75, Rule 1004(b)(7). Rule 1004(b)(7):

In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

⁹⁶ See R.C.M., *supra* note 75, Rule 1204(a)(1). Rule 1204(a)(1). "Under such rules as it may prescribe, the Court of Appeals for the Armed Forces shall review the record in all cases . . . In which the sentence, as affirmed by the Court of Criminal Appeals, extends to death."

⁹⁷ See R.C.M., *supra* note 75, Rule 1207. Rule 1207. "No part of a court-martial sentence extending to death may be executed until approved by the President."

⁹⁸ See R.C.M., *supra* note 75, Rule 910(a)(1). Rule 910(a)(1):

An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. *A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.* (emphasis added)

⁹⁹ See R.C.M., *supra* note 75, Rule 905(b). Rule 905(b):

Finally, pretrial determination is consistent with current military justice practice. In the military justice system, “[a]ny defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial.”¹⁰⁰ The language of R.C.M. 905(b) is permissive in that an accused *may* bring such a motion during the pretrial phase. However, the permissiveness of the rule is limited by R.C.M. 905(e), which states that failure to bring a pretrial motion before the entering of pleas constitutes waiver on that issue.¹⁰¹ Thus, for all practical purposes, an accused ordinarily must raise by pretrial motion any issues capable of resolution at that stage.¹⁰² Although this rule does not specifically incorporate the mental retardation issue, the issue fits squarely within the language and is congruent with the rule’s overall purpose, which, among other things, is to focus and expedite the trial process.

The question of whether an accused is mentally retarded, and therefore ineligible for the death penalty, is an issue capable of pretrial determination within the meaning of R.C.M. 905.¹⁰³ It does not require any inquiry into the guilt of the accused. Whether an accused was mentally retarded at the time of the alleged acts is not a defense to the crime. Rather, it is a question of status and, ultimately, eligibility for the death penalty. This is a distinct legal concept from insanity or lack of responsibility as a result of mental incompetency, both of which are affirmative defenses to the crime itself and, therefore, necessarily require an inquiry into the guilt or innocence of the accused.¹⁰⁴ As such, it is

The following must be raised before a plea is entered...Defenses or objections based on defects in the charges or specifications...Motions to suppress evidence...Motions for discovery under R.C.M. 701 or for production of witnesses or evidence...Motions for severance of charges or accused or Objections based on denial or request of individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

¹⁰⁰ *Id.*

¹⁰¹ See R.C.M., *supra* note 75, Rule 905(e). Rule 905(e):

Failure by a party to raise defense or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defense, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case, and, unless otherwise provided for in this Manual, failure to do so shall constitute waiver.

¹⁰² See also 10 U.S.C. § 839(a) (2007)(providing that a military judge may conduct hearings pretrial, and at other stages as needed, without members, in order to resolve issues relating to such things as motions, procedure, or pleas).

¹⁰³ R.C.M., *supra* note 75, Rule 905.

¹⁰⁴ See R.C.M., *supra* note 75, Rule 916(k)(1). Rule 916(k)(1):

It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of severe mental disease or defect, was

evident why many courts have drawn parallels between mental competency to stand trial and eligibility for the death penalty when mental retardation is claimed.¹⁰⁵ Both are factual inquiries into the legal status of an accused that are separate and apart from his guilt or innocence for the crimes alleged. Both are constitutionally based: mental competency to stand trial in the Due Process Clause of the Fifth and Fourteenth Amendments¹⁰⁶ and the prohibition of the execution of the mentally retarded in the Eighth Amendment's proscription of cruel and unusual punishment.¹⁰⁷ The resolution of each also has potentially profound impacts on the trial. If the accused is found mentally incompetent, no trial is held.¹⁰⁸ Similarly, but with somewhat less dramatic consequences, if the

unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

¹⁰⁵ See *State v. Flores*, 93 P.3d 1264, 1268-69 (N.M. 2004)(holding that it would be "incongruous" to require separate hearings at separate times for mental competency to stand trial and mental retardation when both issues are triggered by defense motion, involve similar issues of fact, and are governed by the same burden of persuasion); *State v. Williams*, 831 So. 2d 835, 858 (La. 2002)(treating mental retardation the same as mental incompetence and placing the burden of proof by a preponderance of the evidence on the defendant), *overruled on other grounds by* 936 So.2d 89; *Franklin v. Maynard*, 588 S.E. 2d 604, 606 (S.C. 2003)(relying on mental competency precedent in that jurisdiction in setting the standard of proof for mental retardation at preponderance of the evidence and placing that burden on the defendant); *United States v. Sablan*, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006)(citing *Williams* and *Maynard* in setting proof of mental retardation by preponderance of the evidence and placing the burden on the defendant); and *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(noting that mental retardation for purposes of eligibility for the death penalty is a threshold issue somewhat analogous to competency).

¹⁰⁶ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; see also *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)("[w]e have repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process")(quoting *Medina v. California*, 505 U.S. 437, 453 (1992))(internal quotation marks omitted).

¹⁰⁷ U.S. CONST. amend. VIII; see also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)("[c]onstruing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.")(quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))(internal quotation marks omitted).

¹⁰⁸ In *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)(quoting *Dusky v. United States*, 362 U.S. 402 (1960)), the Supreme Court repeated the general test of competence that a criminal defendant must satisfy in order to stand trial: "[a] defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him." (internal quotation marks omitted). See also R.C.M., *supra* note 75, Rule 909(a) ("[n]o person may be brought to trial by court-martial if that person is presently suffering from mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case."); R.C.M., *supra*, note 75, Rule 706 (providing that a mental examination of an accused may be ordered if at any time it appears to counsel for either side, the military judge, a member, any investigating officer or the convening authority, that the accused lacked mental responsibility for the offense charged or lacks capacity to stand trial). While the proposed three-part test for mental retardation, see R.C.M. *supra* note 18 and accompanying text, and the test for mental competence to stand trial share some legal and procedural similarities, they are separate and distinct inquiries. The extent to which a defendant that satisfies the definition of mental retardation thereby also

accused is found to be mentally retarded, the death penalty cannot be sought and the case proceeds as a non-capital murder trial.

In sum, determining whether the accused is ineligible for the death penalty as a result of mental retardation is an issue best suited for pretrial determination. Pretrial determination ensures the accused's constitutional right to be free from cruel and unusual punishment is not confounded with non-constitutional evidence in mitigation. Pretrial determination also encourages procedural and economic conservation of resources by rendering the subsequent trial non-capital and potentially avoiding trial all together in some cases by encouraging pleas. Finally, the military justice system appears to favor early resolution of this issue as well.

B. Burden of Proof

1. Who Should Bear the Burden of Proof: Government or Accused?

The burden of proof should be on the accused to show that they suffer from mental retardation. Such placement is consistent with military and federal law as the accused has better access to the evidence required to prove mental retardation. In addition, there is a clear national consensus in placing this burden on the accused.

First, placing the burden of proving mental retardation on the accused is consistent with the treatment of motions generally and the specific treatment of mental capacity and mental responsibility in the Uniform Code of Military Justice¹⁰⁹ and the Rules for Courts-Martial.¹¹⁰ Moreover, neither *Atkins*¹¹¹ nor

demonstrates a lack of mental capacity to stand trial is a question beyond the scope of the present discussion.

¹⁰⁹ See generally 10 U.S.C § 850(a) (2007)(explaining procedure and requirements for the defense of lack of mental responsibility).

¹¹⁰ See: R.C.M., *supra* note 75, 905(c)(2)(A). Rule 905(c)(2)(A):

Except as otherwise provided for in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party;

R.C.M., *supra* note 75, 909(b). Rule 909(b):

A person is presumed to have the capacity to stand trial unless the contrary is established;

R.C.M., *supra* note 75, Rule 916(k)(3)(A). Rule 916(k)(3)(A):

The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of alleged offense.

¹¹¹ *United States v. Webster*, 421 F.3d 308, 311 (5th Cir. 2005).

the Federal Death Penalty Act¹¹² requires the Government to prove the absence of mental retardation before it seeks the death penalty.

Second, the burden of production should fall on the Defense because the accused has the most knowledge regarding his condition and his medical history is certainly more accessible to the Defense than the Government. By contrast, imposing the burden of production on the Government is impractical and the information may be impossible for the Government to obtain, as it could implicate privacy concerns of the accused. Because the defendant has superior access to the evidence to prove his mental retardation, it is not inappropriate to place the burden on him to do so.¹¹³ In the military system, the Government is in no better position to prove mental retardation than the prosecuting authority in any other jurisdiction.¹¹⁴

For example, one of the three prongs of the definition of mental retardation is onset before a certain age, commonly eighteen.¹¹⁵ The accused has better information regarding the history of his condition and better access to friends and family who knew him before he turned eighteen. Placing the burden on the Government would require an accused to produce for the Government evidence that might otherwise be privileged, an impossible burden for the Government to carry.¹¹⁶

Finally, the assignment of the burden of proof to the accused is consistent with the overwhelming precedent from the states that have statutorily acted to prohibit the execution of mentally retarded persons either prior to or following *Atkins*.¹¹⁷ Even where state legislators have not acted statutorily, the

¹¹² The Federal Death Penalty Act is codified at 18 U.S.C. §§ 3591-3598 (2007). *See generally* 18 U.S.C. § 3593 (2007); *United States v. Webster*, 421 F.3d 308, 311 (5th Cir. 2005).

¹¹³ *See Medina v. California*, 505 U.S. 437, 455 (1992)(O'Connor, J., concurring).

¹¹⁴ *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 302 (2005)(providing the general rule that information obtained regarding the accused during a hearing under R.C.M. 706 cannot be offered into evidence for guilt purposes); and MIL. R. EVID. 513 (granting the accused privileges relating to mental examinations and confidential information shared with a psychotherapist); *but see* National Defense Authorization Act of 1993, Pub. L. 102-484, tit. V, subsec. E, sec. 546, 106 Stat. 2315 (1993)(known as the "Boxer Amendment," which permits a commanding officer to order a mental health evaluation of a service member.) *See also* *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004)(placing the burden on the defense to prove mental retardation); *Ariz. Rev. Stat. Ann. § 13-703.03* (2007)(defense bears the burden of proving mental retardation); *Ill. Comp. Stat. Ann. 5/114-15* (West 2007)(placing the burden of proving mental retardation on the defense); *Bowling v. Commonwealth*, 163 S.W.3d 361, 381 (Ky. 2005)(placing the burden of proving mental retardation on the defendant); and *Nev. Rev. Stat. Ann. § 174.098* (West 2005)(defense bears the burden of proving mental retardation).

¹¹⁵ DSM-IV, *supra* note 18 at 39; MENTAL RETARDATION, *supra* note 18 at 1.

¹¹⁶ *See e.g.* MIL. R. EVID. 513, *supra* note 114.

¹¹⁷ *See* *Ariz. Rev. Stat. § 13-703.02(G)* (2007); *Ark. Code Ann. § 5-4-618(c)* (West 2006); *Cal. Penal Code § 1376(b)(3)* (West 2007); *Colo. Rev. Stat. Ann. 18-1.3-1102* (West 2007); *Del. Code Ann. tit.*

courts have placed this burden on the accused.¹¹⁸ No state places the burden of proving the absence of mental retardation on the Government.¹¹⁹

2. What is the Proper Standard of Proof?

The proper standard of proof required to demonstrate mental retardation in capital cases is preponderance of the evidence. There is no national consensus on this aspect of *Atkins*, but the clear weight of authority is behind a preponderance of the evidence standard. In arriving at this lower standard, many jurisdictions have appropriately analogized to the jurisprudence on mental competency to stand trial for support. The preponderance of the evidence standard is also consistent with the Rules for Courts-Martial, which utilize the lower standard for most pretrial motions.

The majority of states place the burden on capital defendants to prove by a preponderance of the evidence that they are mentally retarded.¹²⁰ Seven

11 § 4209(d)(3)(2007); Fla. Stat. Ann. § 921.137(4) (West 2007); Idaho Code Ann. § 19-2515A(3) (2007); 725 Ill. Comp. Stat. 5/114-15(b) (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1(C) (2006); Mo. Ann. Stat. § 565.030(4)(1)(West 2007), *invalidated by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Neb. Rev. Stat. § 28-105.01(5)(2006); Nev. Rev. Stat. Ann. § 174.098 (5)(b) (West 2005); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); N.Y. Crim. Proc. Law § 400.27(12)(A) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2004); N.C. Gen. Stat. Ann. § 15A-15-100(c) (West 2007); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (2007); Utah Code Ann. § 77-15a-104(12)(a) (West 2007); Va. Code Ann. § 19.2-264.3:1.1(C) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2) (West 2007).

¹¹⁸ See *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004); *United States v. Cobb*, 742 A.2d 1 (Conn. 1999); *Bowling v. Commonwealth*, 163 S.W.3d 361, 381 (Ky. 2005); *Richardson v. State*, 620 A.2d 238, 240 (Md. 1993); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003); *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D.La. 2006); and *United States v. Sablan*, 461 F.Supp.2d 1239, 1243 (D.Colo. 2006).

¹¹⁹ The New Jersey Superior Court, Appellate Division, in *State v. Jimenez*, 880 A.2d 468, 485 (N.J. Super. Ct. App. Div. 2005), placed the burden on the state to prove the absence of mental retardation beyond a reasonable doubt, but this approach was roundly rejected by the New Jersey Supreme Court. *State v. Jimenez*, 980 A.2d 181 (N.J. 2006)(reversing the New Jersey Superior Court, Appellate Division, and placing the burden to prove mental retardation on the defendant and setting that burden at a preponderance of the evidence).

¹²⁰ See Ark. Code Ann. § 5-4-618(c) (West 2006); Cal. Penal Code § 1376(b)(3) (West 2007); Idaho Code Ann. § 19-2515A(3) (2007); 725 Ill. Comp. Stat. 5/114-15(b) (West 2007); La. Code Crim. Proc. Art. 905.5.1(C) (2006); Mo. Rev. Stat. § 565.030(4)(1) (2003); Neb. Rev. Stat. § 28-105.01(5)(2006); Nev. Rev. Stat. Ann. § 174.098 (5)(b) (2005); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); N.Y. Crim. Proc. Law § 400.27(12)(A) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2005)(placing a temporary moratorium on the sentencing or imposition of the death penalty because of an unconstitutional deadlocked jury instruction in the state death penalty statute); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2007); Utah Code Ann. § 77-15a-104(12)(a) (West 2007); Va. Code Ann. § 19.2-264.3:1.1(C) (West

states require proof of mental retardation by clear and convincing evidence,¹²¹ however, the national trend is towards the lower standard. Evincing this trend is a recent decision from the Indiana Supreme Court finding unconstitutional the clear and convincing standard¹²² as well as legislation proposed in Oklahoma that would lower the standard in that state to preponderance of the evidence.¹²³ Congress is also moving in that direction having recently proposed similar legislation.¹²⁴ Even in jurisdictions which still consider mental retardation as only a mitigating factor during sentencing, the majority currently use, or have proposed, the preponderance of the evidence standard.¹²⁵ Only one state requires proof of mental retardation beyond a reasonable doubt.¹²⁶ Finally, where the burden has not been determined by statute, both state¹²⁷ and federal

2007); Wash. Rev. Code Ann. § 10.95.030(2) (West 2007); and 18 U.S.C. §§ 3592-3, 3596(c) (2007).

¹²¹ See Ariz. Rev. Stat. Ann. § 13-703.02(G) (2007); Colo. Rev. Stat. Ann. 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209(d)(3) (2007); Fla. Stat. § 921.137(4) (2007); N.C. Gen. Stat. Ann. § 15A-15-100(c) (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007), *invalidated by* Pruit v. State, 834 N.E.2d 90 (Ind. 2005); and Okla. Stat. Ann. tit. 21 § 701.10b (West 2007).

¹²² See Pruit v. State, 834 N.E.2d 90 (Ind. 2005)(holding Ind. Code Ann. § 35-36-9-4 unconstitutional insofar as it requires the defendant to prove mental retardation by clear and convincing evidence).

¹²³ See H.B. 1826, 51st Leg., 1st Reg. Sess. (Okla. 2007)(proposing a decrease in the burden of proof required to demonstrate mental retardation from clear and convincing to preponderance of the evidence).

¹²⁴ See Death Penalty Reform Act of 2007, H.R. 851, 110th Cong. § 4 (2007)(proposing procedures for determining eligibility for the death penalty including requiring the defendant to prove mental retardation by a preponderance of the “information”).

¹²⁵ See Mo. Ann. Stat. 565.030 (West 2007), *held unconstitutional on other grounds by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); N.H. Rev. Stat. Ann. § 630:5 (2007); and H.B. 1370, 119th Gen. Assem. (Pa. 2007), S.B. 751, 119th Gen. Assem. (Pa. 2007).

¹²⁶ See Ga. Code Ann. § 17-7-131 (West 2006); Burgess v. State, 450 S.E.2d 680, 692 (Ga. 1994)(mental retardation must be found beyond a reasonable doubt for a jury to return a verdict of ‘guilty, but mentally retarded’); King v. State, 539 S.E.2d 783, 798 (Ga. 2000)(approving the evaluation of mental retardation claim during the guilt/innocence phase of trial and finding ‘beyond a reasonable doubt’ standard for proof of mental retardation to be constitutional).

¹²⁷ See Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004)(noting the absence of legislation for procedure implementing Atkins and the necessity of the court to fashion some procedures, including requiring proof of mental retardation by a preponderance of the evidence, until the legislature does so); Pruit v. State, 834 N.E.2d 90 (Ind. 2005)(finding unconstitutional a state statute that required defendant to prove mental retardation by clear and convincing evidence because such a standard was too great); Bowling v. Commonwealth, 163 S.W.3d 361, 381 (Ky. 2005)(holding that the defendant bears the burden of proving mental retardation by a preponderance of the evidence); Richardson v. State, 598 A.2d 1, (Md. Ct. Spec. App. 1991)(holding the burden of proof for mental retardation is preponderance of the evidence), *aff’d* 620 A.2d 238 (Md. 1993); Chase v. State, 873 So.2d 1013 (Miss. 2004); State v. Jimenez, 908 A.2d 181 (N.J. 2006)(pointing out the state legislature has not promulgated rules or procedures for implementing Atkins and in adopting such procedures holding the defendant bears the burden of proving mental retardation by a preponderance of the evidence); State v. Lott, 779 N.E.2d 1011 (Ohio 2002)(noting an absence of statutory framework for implementing Atkins and placing the burden on the defendant to prove mental retardation by a preponderance of the evidence); and Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003).

district courts¹²⁸ have taken the liberty in doing so and overwhelmingly determined the appropriate standard to be preponderance of the evidence. Thus, while not yet amounting to a national consensus, the clear majority of jurisdictions have found preponderance of the evidence is the correct evidentiary standard for evaluating claims of mental retardation in capital cases.

In finding that the defendant bears the burden of proving he is mentally retarded by a preponderance of the evidence, many courts have analogized to the jurisprudence surrounding mental competency to stand trial.¹²⁹ Much of this jurisprudence is based on *Cooper v. Oklahoma*, where the Supreme Court struck down as unconstitutional a state statute that required a defendant prove he was not competent to stand trial by clear and convincing evidence.¹³⁰ The Court stated:

A heightened standard does not decrease the risk of error, but simply reallocates the risk between the parties. In cases in which competence is at issue, we perceive no sound basis for allocating to the criminal defendant the large share of the risk that accompanies a clear and convincing evidence standard.¹³¹

This reasoning applies equally as well to the issue of mental retardation and eligibility for the death penalty. Arguably, the finding in *Atkins* that executing the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment does not share the same “deep roots in our common law heritage”¹³² as the prohibition against subjecting the mentally incompetent to

¹²⁸ See *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(accepting the stipulation by both parties that the burden of proof of mental retardation is preponderance of the evidence); and *United States v. Sablan*, 461 F.Supp.2d 1238, 1243 (D.Colo. 2006)(finding resolution of the mental retardation issue analogous to determination of mental competency to stand trial and therefore applying a preponderance of the evidence standard).

¹²⁹ See *State v. Flores*, 93 P.3d 1264, 1268-69 (N.M. 2004)(analogizing to hearings on mental competency to stand trial in developing procedures for *Atkins* hearings); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002)(“a trial court’s ruling on mental retardation should be conducted in a manner comparable to a ruling on competency [to stand trial]”); *State v. Williams*, 831 So. 2d 835, 858 (La. 2002)(treating mental retardation the same as mental incompetence and placing the burden of proof by a preponderance of the evidence on the defendant), *overruled on other grounds by State v. Turner*, 936 So.2d 89; *Franklin v. Maynard*, 588 S.E. 2d 604, 606 (S.C. 2003)(relying on mental competency precedent in that jurisdiction in setting the standard of proof for mental retardation at preponderance of the evidence and placing that burden on the defendant); *United States v. Sablan*, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006)(citing *Williams* and *Maynard* in setting proof of mental retardation by preponderance of the evidence and placing the burden on the defendant); and *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(noting mental retardation for purposes of eligibility for the death penalty is a threshold issue somewhat analogous to competency).

¹³⁰ *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

¹³¹ *Id.* at 366-67 (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990)).

¹³² *Id.* at 355.

criminal trial.¹³³ Nonetheless, the constitutional implications of the issue as a result of *Atkins*, together with the overwhelming concurrence of the states, suggests the “constitutional interest at stake”¹³⁴ in the execution of the mentally retarded is of the same order of magnitude as the requirement of competency to stand trial. In building upon of the language of the Supreme Court in *Cooper*, the Louisiana Supreme Court reasoned in *State v. Williams*:

Requiring a defendant to prove by clear and convincing evidence he is exempt from capital punishment by reason of mental retardation would significantly increase the risk of an erroneous determination that he is not mentally retarded. Clearly, in the *Atkins* context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded (life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded.¹³⁵

Thus, the procedural and evidentiary aspects of determining mental competency to stand trial prove to be useful guideposts in the implementation of *Atkins*.¹³⁶

Furthermore, this approach is consistent with current military justice practice. For example, the burden of proof on any factual issue necessary to decide a pretrial motion is preponderance of the evidence.¹³⁷ In addition, as required by *Cooper*, the military justice evidentiary standard required to prove an accused is not mentally competent to stand trial is preponderance of the evidence.¹³⁸ Therefore, uniformity in practice would dictate that in the military

¹³³ See *id.* at 353-56 (reviewing the historical roots of the requirement that a defendant be competent to stand trial and the relatively low standard of proof that has traditionally been required of defendants to demonstrate they are not competent to stand trial).

¹³⁴ *Id.* at 356.

¹³⁵ *State v. Williams*, 831 So.2d 835, 860 (La. 2002), *overruled on other grounds by State v. Turner*, 936 So.2d 89 (La. 2006). See also *State v. Jimenez*, 908 A.2d 181, 193 (N.J. 2006) (Albin, J. dissenting) (arguing for a preponderance of the evidence standard because the stakes in a capital case are considerably higher than an ordinary criminal case and errors should be resolved in favor of defendants).

¹³⁶ See, e.g., *State v. Flores*, 93 P.3d 1264, 1268-69 (N.M. 2004) (holding that it would be “incongruous” to require separate hearings at separate times for mental competency to stand trial and mental retardation when both issues are triggered by defense motion, involve similar issues of fact, and are governed by the same burden of persuasion. In addition, “[s]tatutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardships, or injustice.”).

¹³⁷ See R.C.M., *supra* note 75, Rule 905(c)(1). Rule 905(c)(1):

Unless otherwise provided for in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

¹³⁸ See R.C.M., *supra* note 75, Rule 909(e)(2). Rule 909(e)(2):

justice system, proof of mental retardation should be by a preponderance of the evidence.

In sum, the burden of proof should be placed on the accused to prove mental retardation by a preponderance of the evidence. The accused has better access to the evidence required to prove mental retardation, there is a clear national consensus in placing this burden on the accused, and such placement is consistent with similar factual and procedural areas of the law, such as mental competence to stand trial. Finally, this standard is in accord with current military practice and procedure.

C. Judge or Jury: Who Should be the Finder of Fact?

The military judge, and not the members, should decide if the accused is mentally retarded.¹³⁹ The Constitution does not require that a jury hear an accused's mental retardation claim. The majority of state legislators and courts have also determined that whether an accused is mentally retarded is a question best suited for a judge rather than a jury. Moreover, having a judge alone hear the mental retardation claim is more efficient and practical than having a jury hear it. This approach is also consistent with current practice in the military justice system, which requires the military judge to determine certain issues before trial, such as mental competency.

Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

¹³⁹ Generally, expert testimony of some form is required to assist the finder of fact during an *Atkins* hearing. Some states appoint an expert and some require the defendant, the state, or both to present the expert witnesses. *See e.g.* Idaho Code Ann. § 19-2515A(2) (2007)(requiring the defendant to produce an expert to testify as to defendant's mental retardation); 725 Ill. Comp. Stat. Ann 5/114-15(b) (West 2007)(providing that the court may appoint an expert in mental retardation and that the defense and state may also present expert testimony on the issue); La. Code Crim. Proc. Ann. art. 905.5.1 (2006)(defendant may present an expert, but the State may produce its own, independent expert if it so chooses); Nev. Rev. Stat. Ann. § 174.098 (West 2005)(defendant claiming mental retardation must submit to evaluation by an expert of the prosecution's choosing, but at the hearing the defendant may present expert testimony and cross-examine the state's expert); Utah Code Ann. § 77-15a-104 (West 2007)(if a capital defendant raises a claim of mental retardation, the court shall appoint at least two mental health experts to evaluate and submit reports to the court regarding the defendant's mental health); and Va. Code Ann § 19.2-264.3:1.2 (West 2007)(the defendant raising a mental retardation ordinarily must present expert testimony to substantiate the claim, but in the expert must meet certain criteria and the court may appoint such an expert if the defendant is unable to afford it).

The Constitution does not require that a jury hear an *Atkins* claim.¹⁴⁰ Central to understanding the jurisprudence surrounding this issue is the Supreme Court's ruling in *Ring v. Arizona*.¹⁴¹ The Supreme Court held in *Ring* that capital murder defendants are entitled to a jury determination of any fact that increases their maximum punishments.¹⁴² Subsequent to *Ring*, the majority of courts explicitly held that the decision does not render the absence of mental retardation the functional equivalent of an element of capital murder.¹⁴³ Although determining whether a defendant is mental retarded does indeed involve fact-finding, it is not the functional equivalent of an element of the crime.¹⁴⁴ It has nothing to do with the acts that make up the crime itself or the defendant's mental state while committing the crime, facts the Government must traditionally prove. As a result, *Ring* does not require a jury find the absence of mental retardation.¹⁴⁵ As the Louisiana Supreme Court has observed, "*Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates as the functional equivalent of an element of a greater offense."¹⁴⁶

In addition, nothing in the *Ring* progeny requires that a jury find the absence of mental retardation. In *Walker v. True*, the Fourth Circuit rejected a claim that *Ring* requires a jury determination of mental retardation, reasoning that "an increase in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease."¹⁴⁷ Similarly, the Fifth

¹⁴⁰ *Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁴¹ *Id.*

¹⁴² *Id.* at 609.

¹⁴³ See also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); *State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004) (following *Apprendi* and *Ring* in distinguishing aggravating factors from mitigating factors, such as mental retardation in this case, when placing on defendants the burden to prove mental retardation); *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003) (reasoning that *Ring* did not establish a requirement that a jury consider mental retardation in the capital murder context); *Bowling v. Commonwealth*, 163 S.W.3d 361, 377 (Ky. 2005) (relying on *Ring* in rejecting appellant's argument that having a judge consider his mental retardation claim, as opposed to a jury, violated his Sixth Amendment right to trial by jury); *Berry v. State*, 882 So.2d 157, 174 (Miss. 2004) (citing *Apprendi* in rejecting petitioners argument that his mental retardation claim must be submitted to a jury); and *State v. Laney*, 672 S.E.2d 726, 730 (S.C. 2006) (analyzing *Ring* and distinguishing between statutory aggravating factors, which require a jury, and mitigating factors, such as mental retardation in the *Atkins* context, which do not require a jury).

¹⁴⁴ See *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) (holding that defendant was not entitled to a jury determination of mental retardation because mental retardation was not the functional equivalent of an element of capital murder that the state had to prove beyond a reasonable doubt).

¹⁴⁵ See, e.g., *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005); *Ex Parte Briseno*, 135 S.W.3d 1, 10 (Tex. Crim. App. 2004); *Winston v. Commonwealth*, 604 S.E.2d 21, 50 (Va. 2004); *State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004); and *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003).

¹⁴⁶ *State v. Williams*, 831 So.2d 835, 860 (La. 2002) (quoting *Ring v. Arizona*, 536 U.S. 584 (2002)) (internal quotation marks omitted).

¹⁴⁷ *Walker v. True*, 339 F.3d 315, 326 (4th Cir. 2005).

Circuit has stated, “the absence of mental retardation is not an element of the sentence any more than sanity is an element of the offense.”¹⁴⁸ The Supreme Court has also signaled that a jury need not decide the issue of mental retardation.¹⁴⁹

Furthermore, most state legislatures have concluded that resolution of the mental retardation issue by the court is appropriate. Twenty-one states with statutes in place assign to the trial judge the determination of whether a defendant is mentally retarded.¹⁵⁰ Another two states currently have legislative proposals that would do the same.¹⁵¹ In four states the judge has been assigned this responsibility as a matter of case law.¹⁵² Thirteen states, including the federal government, have a hybrid system where the determination of the mental retardation issue will turn on whether the defendant decides to waive trial by jury, waive sentencing by jury, or to submit the issue post-trial as evidence in mitigation during sentencing.¹⁵³ In addition, three states give defendants the

¹⁴⁸ *In re Johnson*, 334 F.3d at 405; *see also* *State v. Williams*, 831 So.2d 835 (La. 2002); and *Russell v. State*, 849 So.2d 95 (Miss. 2003).

¹⁴⁹ *See Schriro v. Smith*, 546 U.S. 6, 8-9 (2005). When the Ninth Circuit suspended federal *habeas* proceedings, and ordered a state jury trial on the issue of mental retardation, the Supreme Court summarily reversed the decision, implicitly rejecting the conclusion that *Atkins* requires a jury trial.

¹⁵⁰ *See* *Ariz. Rev. Stat. Ann.* § 13-703.02(G) (2007); *Ark. Code Ann.* § 5-4-618 (West 2006); *Colo. Rev. Stat. Ann.* 18-1.3-1102(3) (West 2007); *Del. Code Ann. tit. 11* § 4209(d)(3)(C) (2007); *Fla. Stat.* § 921.137(4) (2007); *Idaho Code Ann.* § 19-2515A(3) (2007); 725 *Ill. Comp. Stat.* 5/114-15(b) (West 2007); *Ind. Code* § 35-36-9-4 (2007); *Kan. Stat. Ann.* § 21-4623(b) (2007); *Ky. Rev. Stat. Ann.* 532.135 (West 2006); *Mont. Code Ann.* § 46-18-301 (2005); *Neb. Rev. Stat.* § 28-105.01(4) (2006); *Nev. Rev. Stat.* 174.098(6) (2005); *N.M. Stat. Ann.* § 31-20A-2.1(C) (West 2007); *N.Y. Crim. Proc. Law* § 400.27 (12)(a) (McKinney 2007), *invalidated by* *People v. LaValle*, 783 N.Y.S.2d 485 (finding state death penalty sentencing statute unconstitutional on other grounds); *N.C. Gen. Stat. Ann.* § 15A-2005 (West 2007); *Okla. Stat. Ann. tit. 21* § 701.10b (West 2007); *S.D. Codified Laws* § 23A-27A-26.3 (2007); *Tenn. Code Ann.* § 39-13-203 (West 2007); *Utah Code Ann.* §§ 77-15a-101-106 (West 2007); and *Wash. Rev. Code Ann.* § 10.95.030 (West 2007).

¹⁵¹ *See* H.B. 1370, 119th Gen. Assem. (Pa. 2007); S.B. 751, 119th Gen. Assem. (Pa. 2007); and H.B. 3336, 74th Legis. Assem. (Or. 2007).

¹⁵² *See* *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004); *Chase v. State*, 873 So.2d 1013 (Miss. 2004); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); and *Franklin v. Maynard*, 588 S.E.2d 604 (S.C. 2003).

¹⁵³ *See* *Ca. Penal Code* § 1376 (West 2007)(judge will determine mental retardation issue pretrial unless defendant requests post-trial determination by a jury during sentencing); *Conn. Gen. Stat. Ann.* § 53a-46a (West 2007)(determination of the mental retardation generally occurs before the jury that convicted, but the jury may be waived by the defendant leaving the issue for the judge); *Ga. Code Ann.* § 17-7-131 (West 2006)(jury will decide mental retardation issue unless defendant waives jury in which case the judge will decide the issue); *La. Code. Crim. Proc. Ann. art.* 905.5.1 (2006)(determination of mental retardation issue will be before the jury during post-conviction sentencing unless the defendant and State agree to pretrial determination by the court alone); *Md. Code Ann., Crim. Proc.* § 4-343 (West 2007)(the jury which convicts will decide the mental retardation issue during sentencing unless defendant waives the jury in which case the judge will make the determination); *Mo. Ann. Stat.* § 565.030 (West 2007)(whichever was the trier of fact during the guilt phase of trial will determine the mental retardation issue), *invalidated by* *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003)(holding the state capital murder sentencing statute

option to raise mental retardation before the jury if the judge initially finds they are not mentally retarded.¹⁵⁴

Of the states that determine mental retardation before trial, many of their statutes were enacted in response to *Atkins*, presumably recognizing that consideration of the defendant's mental retardation by the judge was the most practical solution.¹⁵⁵ Many courts have also recognized the practical and economic benefits of resolving an *Atkins* claim by the judge in a pretrial hearing.¹⁵⁶ For example, significant resources could be saved in terms of "trial

unconstitutional on other grounds); N.H. Rev. Stat. Ann. § 630:5 (2007)(mitigating factors in capital murder sentencing are determined by the jury that convicted unless the jury is waived by the defendant); N.J. Stat. Ann. § 2C:44-1 (West 2007)(for basic sentencing procedures); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006)(the jury will decide the mental retardation issue unless the defendant raises it pretrial in which case it will be resolved by the court alone); Or. Rev. Stat. Ann. § 163.150 (West 2005)(jury which convicts will also determine mental retardation issue unless jury is waived by the defendant); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007)(jury which convicted determines mental retardation issue), *invalidated by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007), *Brewer v. Quarterman*, 127 S.Ct. 1706 (2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007)(judge will determine mental retardation if trial was by judge or jury if trial was by jury); Wyo. Stat. Ann. § 6-2-102 (2007)(mental retardation issue will be determined by judge if trial was by judge or jury if trial was by jury); and 18 U.S.C. § 3593(b)(2007)(determination of mental retardation will be decided by the jury that convicted, by the judge if the jury was waived or if the defendant chooses to waive sentencing by jury).

¹⁵⁴ See Ark. Code Ann. § 5-4-618 (d)(2)(A) (West 2006)(if pretrial determination by trial court is unfavorable to defendant, defendant can demand de novo determination by jury); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007)(if pretrial determination is unfavorable to defendant, mental retardation issue may be submitted to the jury during trial or as mitigating evidence during sentencing phase); and Okla. Stat. Ann. tit. 21 § 701.10b (West 2007)(if pretrial determination is unfavorable to the defendant issue may be submitted for the jury's consideration during trial).

¹⁵⁵ See, e.g., Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Nev. Rev. Stat. Ann. § 174.098 (2005); and Utah Code Ann. § 77-15a-104 (West 2007).

¹⁵⁶ See, e.g., *Morrow v. State*, 928 So.2d 315, 324 (Ala. Crim. App. 2004)("[t]he better practice under *Atkins* is reflected by the procedure of such states as Indiana and Missouri, where the court makes a pretrial determination of whether the defendant is mentally retarded and thereby spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing proceeding")(quoting, *State v. Williams*, 831 So.2d 835, 860 (La. 2002))(quotation marks in original)(emphasis added); *United States v. Nelson*, 419 F.Supp.2d 891, 893 (E.D.La. 2006)(finding that overriding practical considerations—such as the saving of significant resources in terms of trial preparation, motions practice, voir dire, trial time, mitigation research, etc.—dictate that the *Atkins* issue be resolved up front by the trial judge); *United States v. Sablan*, 461 F.Supp.2d 1239, 1241 (D.Colo. 2006)(implicitly finding that pretrial determination of an *Atkins* claim by the trial judge is more practical than leaving the question for the jury); and *State v. Williams*, 831 So.2d 835, 860 (La. 2002)(noting that having the judge consider the *Atkins* claim pretrial avoids the onerous burden of a second post-trial penalty phase), *abrogated by State v. Turner*, 936 So.2d 89 (La. 2006)(noting that *Williams* was decided in the interim between *Atkins* and the state legislature's enactment of procedures for hearing *Atkins* claims and that *Williams* was superseded in part by subsequent legislation that also provided defendants the option to have their *Atkins* hearing post-trial where the jury was the decider of fact).

preparation, motion practice, voir dire, trial time, mitigation research, etc.”¹⁵⁷ The benefits of having a judge hear an *Atkins* claim, as opposed to a jury, are difficult, if not impossible, to extrapolate from the benefits of having the *Atkins* hearing pretrial. Indeed, the benefits of a pretrial hearing are partially due to the absence of a jury and partially due to the fact the hearing is *before* the trial. This is particularly true for pretrial *Atkins* hearings, the outcome of which could drastically transform the subsequent proceedings. It is conceivable that a jury could be impaneled pretrial just to hear an *Atkins* claim, but that would detract from at least part of the benefit of deciding some issues before trial where a jury is not ordinarily impaneled to adjudicate facts which will be dispositive at trial. Moreover, not a single state statute or state court approves this type of unusual procedure. Those states that provide the defendant a jury on the issue of mental retardation unanimously require the jury to consider the claim *after* the trial has concluded.¹⁵⁸ This averts the possibility of the court going through the time and expense of selecting and impaneling a jury to hear the *Atkins* claim only to have the case subsequently dismissed or a plea agreement reached such that the trial is never held. In such a situation, it would have been much more efficient to simply have the judge alone consider the *Atkins* claim during the course of considering all the other pretrial motions that inevitably will be filed with the court.

Furthermore, in those states that leave determination of mental retardation to the jury, it is generally because state law provides the defendant with a right to request a jury on the issue or the legislature decided to shoehorn *Atkins* procedures into pre-*Atkins* capital murder sentencing statutes, not because it is more practical or efficient than having the judge decide the issue.¹⁵⁹ Thus, the question of whether mental retardation is for the judge or jury to decide often turns on whether there is state law that entitles the defendant to a jury on the

¹⁵⁷ *United States v. Nelson*, 419 F.Supp.2d 891, 893 (E.D.La. 2006).

¹⁵⁸ *See, e.g.*, Cal. Penal Code § 1376 (West 2007); Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Ga. Code Ann. § 17-7-131 (West 2006)(based on Georgia’s unique treatment of mental retardation as a quasi-affirmative defense, the issue is not generally considered post-trial, but is usually litigated at trial and, in any event, not before trial); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Md. Code Ann., Crim. Law § 2-303 (West 2007); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Mo. Ann. Stat. § 565.030 (West 2007); Neb. Rev. Stat. § 28-105.01; N.H. Rev. Stat. Ann. § 630:5 (2007); N.J. Stat. Ann. § 2C:44-1 (West 2007); Or. Rev. Stat. Ann. § 163.159 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *found unconstitutional on other grounds by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007), *Brewer v. Quarterman*, 127 S.Ct. 1706 (2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007); and Wyo. Stat. Ann. § 6-2-102 (2007).

¹⁵⁹ *See e.g.*, Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Ga. Code Ann. § 17-7-131 (West 2006); Md. Code Ann., Crim. Law § 2-303 (West 2007); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Mo. Ann. Stat. § 565.030 (West 2007); Neb. Rev. Stat. § 28-105.01; N.H. Rev. Stat. Ann. § 630:5 (2007); N.J. Stat. Ann. § 2C:44-1 (West 2007); Or. Rev. Stat. Ann. § 163.159 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *found unconstitutional on other grounds by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007), *Brewer v. Quarterman*, 127 S.Ct. 1706 (2007); and Wyo. Stat. Ann. § 6-2-102 (2007).

issue or mental retardation is handled in the context of pre-*Atkins* sentencing statutes. If not, the majority of jurisdictions have recognized the practical and economic advantages of having a judge alone decide the *Atkins* claim in a pretrial hearing and therefore require defendants to raise the claim by pretrial motion.

Finally, having the military judge decide whether an accused is mentally retarded rather than the members is consistent with procedure in similar areas of military justice practice. For example, all pretrial motions, including those related to the mental capacity or mental responsibility of the accused,¹⁶⁰ are decided by the military judge.¹⁶¹ In addition, determination of the accused's mental capacity to stand trial after referral of charges is an "interlocutory question of fact"¹⁶² for the military judge.¹⁶³ Thus, current military justice practice and procedure suggests an *Atkins* claim is a question better suited for the military judge than the members.¹⁶⁴

In sum, federal law does not require an accused be provided a jury for his *Atkins* hearing. The majority of states also do not require that a jury consider the issue. In those states where a jury is required, it is generally because *Atkins* was incorporated into an existing legislative framework, not because the legislature expressly found it more beneficial to have a jury rather than a judge

¹⁶⁰ See R.C.M., *supra* note 75, Rule 906(b)(14). Rule 906(b)(14). "The following may be requested by motion for appropriate relief . . . Motions relating to mental capacity or responsibility of the accused."

¹⁶¹ See R.C.M., *supra* note 75, Rule 905(a). Rule 905(a):

A motion is an application to the *military judge* for particular relief (emphasis added); and Uniform Code of Military Justice, 10 U.S.C. § 839(a) (2007) (providing that a military judge may conduct hearings pretrial, and at other stages as needed, without members, in order to resolve issues relating to such things as motions, procedure, or pleas).

¹⁶² See R.C.M., *supra* note 75, Rule 909(e)(1). Rule 909(e)(1). "The mental capacity of the accused is an interlocutory question of fact."

¹⁶³ See R.C.M., *supra* note 75, Rule 909(d). Rule 909(d):

After referral [of charges], the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

¹⁶⁴ It should also be noted that a pretrial finding by a judge does not preclude the defendant from presenting the mental retardation claim as evidence in mitigation to the sentencing authority in most jurisdictions. Even post-*Atkins* most state statutes still provide defendants the right to present evidence of general mental defect as a mitigating circumstance. See *supra* note 78. Some states take it one step further even and offer defendants the opportunity to present the mental retardation claim to a sentencing jury *de novo* where the judge has already found the defendant is not mentally retarded. See *supra* note 154.

decide the issue. Indeed, it is more practical to have the judge hear the *Atkins* claim rather than impaneling a jury for that purpose. This approach is also consistent with current military justice practice. For these reasons, the military judge should decide an accused's *Atkins* claim in the military justice system.

IV. CONCLUSION

In this article the authors have attempted to clarify many of the substantive and procedural issues surrounding mental retardation and its effect on capital murder trials. In short, it is the authors' contention that the military justice system is in need of official guidance. Mental retardation is an important issue that should be clarified before any capital murder case is undertaken. In order to avoid unnecessary confusion or delay in the processing of an accused raising an *Atkins* claim, and to ensure the rights of the accused are observed to the extent required by law, the military needs guidance from Congress, the Court of Appeals for the Armed Forces, or the President through his regulatory authority.

The important substantive and procedural issues discussed can be summed up in two basic principles. First, military courts in the future should adopt the AAMR three-prong definition of mental retardation as the appropriate standard to be applied. Second, the accused in the military justice system should be provided a pretrial hearing for the adjudication of his mental retardation claim. This hearing should be presided over by a military judge alone, and the accused should bear the burden of proof by a preponderance of the evidence. Authoritative action is necessary to implement these principles in the military justice system.

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