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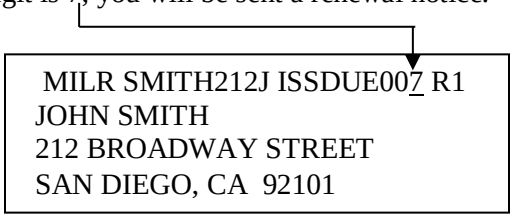

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MILITARY LAW REVIEW

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GIVING TEETH TO THE TIGER: HOW THE SOUTH CHINA SEA CRISIS DEMONSTRATES THE NEED FOR REVISION TO THE LAW OF THE SEA

LIEUTENANT COMMANDER AARON M. RIGGIO*

> *It would live in history, because of its length and its unremitting ferocity: it would live in men's minds for what it did to themselves and to their friends, and to the ships they often loved. Above all, it would live in naval tradition, and become legend, because of its crucial service to an island at war, its price in sailors' lives, and its golden prize—the uncut lifeline to the sustaining outer world.*[1]

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[1] NICHOLAS MONSARRAT, THE CRUEL SEA 506 (1951) (describing the World War II Battle of the Atlantic, during which German U-Boats nearly choked off all maritime sea lanes leading to Great Britain and the European continent).

> *I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide [and] . . . will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.*[2]

I. Introduction

On October 27, 2015, the *U.S.S. Lassen*, an *Arleigh Burke*-class destroyer, sailed within twelve nautical miles of a maritime feature in the South China Sea known as Subi Reef.[3] Intrigue surrounds this relatively insignificant speck in the Pacific Ocean, at least for political scientists and maritime law scholars, and for quite some time mystery surrounded the October voyage of the *Lassen*. The sailing was highly anticipated and widely covered by news outlets, yet in the aftermath, many were left wondering what it signaled for the future of the region.[4]

First, the "island," — a seemingly innocuous term; questions surround whether Subi Reef and other features like it are in fact islands, or something less. In a region of competing economic interests, this label can carry significant impact.[5] Furthermore, ownership of Subi Reef is contested, as China currently adversely possesses the feature, contrary to claims of the Philippines.[6] The dispute exists somewhere between rhetorical finger-pointing and full-fledged conflict as the Philippines sought relief from the Permanent Court of Arbitration at The Hague, and

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[2] President George W. Bush's Statement on the Advancement of United States Maritime Interests, 43 WEEKLY COMP. PRES. DOC. 635 (May 15, 2007).

[3] Adam Klein & Mira Rapp-Hooper, *After the Freedom of Navigation Exercise: What Did the U.S. Signal?*, LAWFARE (Oct. 27, 2015, 4:05 PM), https://www.lawfareblog.com/after-freedom-navigation-exercise-what-did-us-signal.

[4] Raul "Pete" Pedrozo & James Kraska, *Can't Anybody Play This Game? U.S. FON Operations and the Law of the Sea*, LAWFARE (Nov. 17, 2015, 10:57 AM), https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea.

[5] *See infra* Section III.B. for further discussion.

[6] Kristen E. Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. U. GLOBAL STUD. L. REV. 487, 504 (2014).

China persistently refused to participate in the proceedings.[7] Hence, on the day of the *Lassen*'s sailing, who held valid claim to Subi Reef, the legal definition of this spot of land, and corresponding maritime entitlements were all issues in dispute.

Subi Reef, one of many maritime features in a chain known as the Spratly Islands, has seen extensive land reclamation efforts by China since July 2014.[8] Scholars agree that Subi Reef is a low-tide elevation, at least preceding China's land reclamation efforts,[9] meaning the land feature is fully submerged at high tide but partially above water at low tide.[10] As China has developed the land, the reef has begun to look much more like a conventional island; similar works are underway by China on other features in the Spratly chain, some with disputed claims of sovereignty and some without.[11] The past year and a half witnessed rising tensions in the region as multiple nations staked claim to features within the South China Sea (the Spratly chain among them)[12] and outwardly opposed China's land reclamation efforts.

The regime of international maritime law—the United Nations Convention on the Law of the Sea (UNCLOS)[13]—provides the backdrop for this drama. The main text of the UNCLOS is the result of years of

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[7] Philippines v. People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. Oct. 29, 2015), http://www.pcacases.com /web/sendAttach/1506.

[8] *Subi Reef Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, http://amti.csis.org/subi -reef-tracker/ (last visited July 7, 2016). Referred to as the "Great Wall of Sand," China's efforts to create land masses capable of supporting construction in the South China Sea are sweeping; land reclamation in this instance entails dredging sand onto coral reefs, then paving over the top to create a stable surface. Simon Denyer, *U.S. Navy Alarmed at Beijing's "Great Wall of Sand" in South China Sea*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/world/us-navy-alarmed-at-beijings-great-wall-of-sand-in-south-china-sea/2015/04/01/dda11d76-70d7-4b69-bd87-292bd18f5918_story.html.

[9] *A Freedom of Navigation Primer for the Spratly Islands*, ASIA MARITIME TRANSPARENCY INITIATIVE, http://amti.csis.org/subi-reef-tracker/ (last visited July 7, 2015); Bonnie S. Glaser & Peter A. Dutton, *The U.S. Navy's Freedom of Navigation Operation around Subi Reef: Deciphering U.S. Signaling*, NAT'L INTEREST (Nov. 6, 2015), http://nationalinterest.org/feature/the-us-navy%E2%80%99s-freedom-navigation-operation-around-subi-reef-14272.

[10] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Art. 15 [hereinafter UNCLOS].

[11] *Island Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, http://amti.csis.org/island-tracker/ (last visited July 7, 2016).

[12] *See* Keyuan Zou, *The South China Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 626, 629 (Donald R. Rothwell et al. eds., 2015).

[13] UNCLOS, *supra* note 10.

multilateral negotiations and compromise, was published in 1982, and is currently joined by 167 nation states.[14] The international convention is simultaneously extraordinary for its breadth, scope, and completeness while remaining intentionally vague and deferential to national autonomy. The convention settles lingering disputes about the breadth of territorial waters and provides a framework for determining security, economic, and regulatory rights on the seas.[15] Among the more remarkable aspects are the institutions created within the UNCLOS framework to resolve disputes; but at the same time, the convention's deference to national sovereignty nearly eviscerates its own dispute resolution clauses.[16]

Enter the *Lassen*: the ship and her crew sailed near Subi Reef as part of a Freedom of Navigation Operation (FONOP)—a program run by the Department of Defense (DoD) in coordination with the Department of State—designed to "demonstrate a non-acquiescence to excessive maritime claims asserted by coastal states."[17] The U.S. Navy routinely conducts FONOPs throughout the globe, challenging a variety of excessive maritime claims or misapplication of international law principles.[18] But in the immediate aftermath of the *Lassen*'s voyage, as maritime security blogs and news outlets wondered what the U.S. Navy had actually challenged at Subi Reef, neither the DoD nor the Obama administration commented on the specifics of the operation.[19] What, then,

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[14] *United Nations Convention on the Law of the Sea Status*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII. aspx?src=TREATY&mtdsg_ no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited July 7, 2016). While the United States has not signed or ratified UNCLOS, the Department of Defense (DoD) has repeatedly asserted the desire to become party to the convention, and the United States treats the majority of the contents as customary international law. *See infra* Section II.A. for further discussion.

[15] *See infra* Parts II, III. for further discussion.

[16] *See infra* Part IV. for further discussion.

[17] *U.S. Department of Defense Freedom of Navigation Program Fact Sheet* (Mar. 2015), http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program% 20--%20Fact%20Sheet%20%28March%202015%29.pdf.

[18] *See U.S. Department of Defense Freedom of Navigation Report for Fiscal Year 2014* (Mar. 23, 2015), http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323% 202015%20DoD%20Annual%20FON%20Report.pdf. During the year, naval vessels exercised freedom of navigation in South America, the Persian Gulf, the Mediterranean Sea, the South China Sea, and the Indian Ocean, among others. *Id.*

[19] Upon request from Senator John McCain, Secretary of Defense Ash Carter submitted an analysis of the Freedom of Navigation Operation on December 22, 2015, which was made public in early January of 2016. *Document: SECDEF Carter Letter to McCain on South China Sea Freedom of Navigation Operation*, USNI NEWS (Jan. 5, 2016, 11:02 AM), http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation.

did the *Lassen* challenge at Subi Reef? Was it China's claim to sovereignty over the feature? Was it China's land reclamation efforts throughout the South China Sea? Or was it an excessive maritime claim, independent of whether China owns Subi Reef or whether the feature is in fact an island or a low-tide elevation?[20]

This article will explore the legal distinctions of each of these questions. First, it will discuss the background of the law of the sea and the relevant aspects of the UNCLOS. Among those aspects are the process for determining areas of sovereignty and areas of sovereign rights, and the process of maritime boundary delimitation (the establishment of boundaries for overlapping maritime entitlements). Additionally, this article will explore the mechanisms provided for dispute resolution, including nations' rights to opt out of compulsory tribunals. By applying these constructs to the situation within the South China Sea, including the discussion of rocks, islands, and low-tide elevations, this article will show that the issue of sovereignty influences the entire dispute.

Despite the fact that the Permanent Court of Arbitration issued a final award on the Philippines' claim in July 2016, the question of whether China's land reclamation actions within the South China Sea violate the UNCLOS remains unclear, and will remain so until the underlying issue of sovereignty is resolved.[21] As ground-breaking as the UNCLOS may have been in 1982 with its terms for dispute resolution,[22] the time has arrived to amend the treaty to implement compulsory dispute resolution—without reservation—for maritime territorial disputes. Recognizing the improbability of this endeavor, the United States should take the lead by ratifying the UNCLOS and proposing this change, thereby ensuring stability and predictability on the seas.

II. Background of the United Nations Convention on the Law of the Sea

To approach the conflicts within the South China Sea from a critical legal or political perspective, one must appreciate the circumstances under which the UNCLOS was drafted, and the different viewpoints that were

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[20] While Secretary Carter's letter eventually answers some of these questions, this paper will highlight the underlying issues with areas of disputed sovereignty and how it affects Freedom of Navigation Operations.

[21] *See infra* Part IV. for further discussion of the arbitration case and final award.

[22] *See infra* Part II.C for further discussion.

melded to formulate the convention as it stands today. Indeed, the history of the UNCLOS sheds light on China's precise position with respect to maritime claims in the South China Sea and its role in dispute resolution. An appreciation of the treaty's history illustrates the magnitude of the looming hurdle to overcome in attempting to invoke this article's proposed change.

A. The Convention's History

The United Nations Convention on the Law of the Sea is a culmination of many years of multilateral negotiations.[23] The Convention, as it is known today, represents significant compromises among blocks of nations, often diametrically opposed by politics, economic resources, and maritime interests. Yet the UNCLOS was hardly the first application of international law to the sea; in fact, it can be said that "[t]he law of the sea is a branch of international law as old as international law itself."[24] Hence, the strategic interests of the parties negotiating the convention existed parallel to decades of custom and tradition bestowed with the concept of international law.

While the roots extend even deeper into history, a fair discussion of maritime law usually begins with Hugo Grotius. In response to efforts by some nations to claim broad swaths of the sea as national property, and in defense of the Dutch East India Company, Hugo Grotius wrote a pamphlet in 1609 entitled *Mare Liberum.*[25] In this pamphlet, Grotius expressed a concept of freedom of the seas that would become a generally accepted binding principle to the present day; he argued that "[l]ike the air, and unlike land, the sea cannot in practice be occupied, thus demonstrating that nature intended it to be free for all to use."[26] To understand the appeal of seventeenth century Grotius, one must understand that free navigation of the seas in 1609 was equally as important for the economic interests of coastal states as it was for security or any principle of natural law.[27]

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[23] Tullio Treves, *Historical Development of the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1 (Donald R. Rothwell et al. eds., 2015).
[24] *Id.*
[25] Edward Gordon, *Grotius and the Freedom of the Sea in the Seventeenth Century*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 252, 256–57 (2008).
[26] *Id.* at 260.
[27] Yoshifumi Tanaka, *Navigational Rights and Freedoms*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 536 (Donald R. Rothwell et al. eds., 2015).

Over time, coastal states recognized this general principle of freedom of navigation on the high seas while also carving out sovereignty over narrow bands of water along their coasts. Although originally based on the range of a navy's artillery (the so-called "cannon-shot rule," which was subject to change with the technological advances of weaponry), most nations proclaimed discrete bands of sovereign seas by the beginning of the twentieth century, ranging from three to twelve nautical miles from their coasts.[28] Swept up in the desire for codification of international norms after World War I, the first attempt, albeit unsuccessful, to standardize the breadth of the territorial sea occurred at the 1930 Hague Conference on the Codification of International Law.[29] Throughout the twentieth century, the international community gradually recognized that many aspects of the law of the seas required more specificity in order to protect coastal state economic desires, and to more clearly determine the shape of territorial waters.[30]

Following its inception post-World War II, the United Nations (U.N.) began constructing a comprehensive law of the sea. The first conference to undertake this endeavor, attended by eighty-six states, was held in 1958; the second conference met two years later.[31] Neither conference achieved its goal of establishing a single legal framework to rule the seas.[32] In 1967, the U.N. was reinvigorated to adopt a comprehensive law of the sea. During a General Assembly, Arvid Pardo, the Maltese Ambassador to the U.N., presented a speech proposing that mineral resources on the seabed "be declared 'a common heritage of mankind,' to be developed by the United States for the benefit of all the nations, large and small."[33] In response to Ambassador Pardo's speech, the U.N. called for a third conference to consider the law of the sea, and to marry the concept of seabed mineral exploitation for the common good with existing principles of territorial rights and freedom of navigation.[34]

Over the course of nine years, nation states participated in eleven different sessions considering various proposals championed by individual

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[28] Treves, *supra* note 23, at 5.
[29] *Id.* at 7–9.
[30] *Id.* at 10–13.
[31] *Id.* at 13–16.
[32] *Id.*
[33] Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUM. J. TRANSNAT'L L. 285, 287 (1997).
[34] *Id.* at 288.

states and groups of states united by common goals.[35] In 1982, the third conference on the law of the sea achieved what the previous two conferences could not: a comprehensive treaty that would "settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea . . . ."[36] That the 1982 conference was able to produce a single text is somewhat remarkable; the conference was framed by the Cold War and a clear east-west rift, and was further complicated by a north-south rift created by the divergent interests of developing nations and industrial nations.[37] Country representatives proposed vastly differing ideas of how to establish a regime of territorial claims and a universal resource development construct.[38]

Considering the differing viewpoints represented at the conference, it is no surprise that the resulting text of the treaty was not universally accepted. Article 308 of the UNCLOS text states that the treaty would enter into force twelve months after the sixtieth ratification or accession.[39] However, as written in 1982, the treaty was unacceptable to a cadre of industrialized states, united in opposition with the United States.[40] While ratifications trickled in, it took eleven years to reach the sixtieth ratification; of the sixty nations that deposited ratification with the U.N., fifty-eight were considered developing nations.[41] The United States strongly opposed Part XI of the UNCLOS, the section dealing with Ambassador Pardo's vision for the exploration and exploitation of the deep seabed.[42] In an attempt to assuage the opponents of Part XI, while giving deference to the fifty-plus nations that had already ratified the UNCLOS, the U.N. General Assembly passed the 1994 Implementation Agreement specific to implementation of Part XI.[43]

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[35] Robin R. Churchill, *The 1982 United Nations Convention on the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 24, 25 (Donald R. Rothwell et al. eds., 2015).
[36] UNCLOS, *supra* note 10, Preamble.
[37] Alberto R. Coll, *Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role*, 79 AM. J. INT'L L. 891–94 (1985) (portraying the balance between competing interests from the perspective of Cuba, a nation with political ties to the Soviet bloc, but resource exploitation interests with much of Latin America and the United States).
[38] *Id.* at 894.
[39] UNCLOS, *supra* note 10, art. 308.
[40] Churchill, *supra* note 35, at 26.
[41] *Id.*
[42] Statement on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983).
[43] D.H. Anderson, *Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment*, 55 HEIDELBERG J. INT'L. L. 275, 277 (1995).

The 1994 Implementation Agreement achieved its intended effect and soothed the concerns of most industrialized nations, leading to relatively quick accession by nearly every remaining coastal state.[44] However, despite an active role in drafting the original 1982 text of the treaty and the 1994 Implementation Agreement, the United States failed to ratify the UNCLOS, and remains the only coastal nation in the world that is not a party.[45] Despite the fact that the U.S. Senate Foreign Relations Committee has twice recommended approval of the UNCLOS, in 2004 and 2007, and despite widespread support for accession,[46] the UNCLOS has yet to reach the Senate for a vote.[47]

B. The Convention's Text

Notwithstanding the lack of ratification by the United States, the UNCLOS was considered a tremendous success, both in the scope of the treaty and the worldwide breadth of support.[48] There were several important components that made it "the constitution of the sea."[49] The third conference finally succeeded in providing a new rubric for determining coastal state maritime claims where the 1930 Hague Conventions and the first two law of the sea conferences had failed. The newly constructed process began with the establishment of a "baseline" for each coastal state, which is dependent on the contours of the coastline and the presence of islands—the coastal state was now entitled to a standardized territorial sea ending twelve nautical miles seaward of the

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[44] Churchill, *supra* note 35, at 27. *See also List of Participants by Date*, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#1 (last visited July 7, 2016).

[45] Marjorie Ellen Gallagher, *The Time is Now: The United States Needs to Accede to the United Nations Convention on the Law of the Sea to Exert Influence Over the Competing Claims in the South China Sea*, 28 TEMP. INT'L & COMP. L. J. 1, 9 (2014).

[46] Support for UNCLOS includes the Clinton, George W. Bush, and Obama presidential administrations, numerous former Secretaries of State, and every living former Chief of Naval Operations. *See also Diplomacy in Action Supporters*, U.S. DEP'T OF STATE, http://www.state.gov/e/oes/lawofthesea/statements/index.htm (last visited July 7, 2016) for a list of supporters.

[47] John H. Knox, *The United States, Environmental Agreements, and the Political Question Doctrine*, 40 N.C. J. INT'L L. & COM. REG. 933, 947–48 (2015).

[48] NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 1–2 (2005).

[49] In a plenary session, the United Nations (U.N.) General Assembly stated that "the universal and unified character of the Convention . . . sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance . . . ." G.A. Res. 67/78, Preamble (Apr. 18, 2013).

baseline.[50] Broader than the territorial seas, the UNCLOS also granted title to an Exclusive Economic Zone (EEZ) based on the same baseline.[51] The EEZ allowed coastal states to exercise certain sovereign rights to exploit natural resources and to regulate certain activities.[52]

Responsive to the demands of the industrialized nations present at the third conference, the UNCLOS also formalized the customary principles of freedom of navigation, including the establishment of concepts such as innocent passage,[53] transit passage through international straits,[54] archipelagic sea lanes passage,[55] and a reservation for freedom on the high seas.[56] While not explicit with respect to every possible scenario, the UNCLOS provided much clearer rights and responsibilities both for coastal states and transiting vessels than had been settled before the third conference.[57] Nonetheless, the text's framers certainly intended for some vagueness; on occasion they defer potential conflicts to unstructured

[50] UNCLOS, *supra* note 10, arts. 2–16.
[51] *Id.* art. 57.
[52] *Id.* arts. 55–75. In the Exclusive Economic Zone (EEZ), a coastal state enjoys certain "sovereign rights" over the seabed and the entire water column. *Id*. art. 56. The EEZ may extend up to 200 nautical miles from the state's baseline. *Id.* art. 57.
[53] *Id.* arts. 17–32.
[54] *Id.* arts. 37–44.
[55] *Id.* arts. 53–54.
[56] *Id.* art. 87.
[57] *Compare, e.g.*, Treves, *supra* note 23, at 5 (describing the "cannon-shot rule" of sovereign seas), *with* UNCLOS, *supra* note 10, arts. 2–16 (establishing a twelve-nautical mile-territorial sea).

resolution by the interested states [58] and also purposefully utilize ambiguous terms.[59]

In light of these areas of intentional ambiguity, the UNCLOS does provide several internal mechanisms for rulemaking and dispute resolution, as well as consideration for dispute resolution before standing international tribunals. Recognizing "[t]he sustainability of the Convention as the 'legal order of the oceans' depends upon its ability to adapt to changes in the legal, political, and technical environment in which it exists,"[60] the UNCLOS contemplates later interpretation, growth, and persistence. For instance, the UNCLOS establishes: an annual meeting of the state parties to receive reports and consider rules for implementation of UNCLOS;[61] the International Tribunal for the Law of the Sea to provide provisional measures to preserve parties' rights pending arbitration or to settle certain disputes under the convention;[62] a Commission on the Limits of the Continental Shelf "to oversee the delineation of the continental shelf beyond 200 nautical miles;"[63] and the International Seabed Authority to

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[58] For instance, the issue of maritime boundary delimitation, the process of clearly establishing boundaries between national maritime zones where they would otherwise overlap, is primarily left to the states to resolve through diplomatic channels. Article 15 of UNCLOS provides:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, *failing agreement between them to the contrary*, to extend its territorial seas beyond the median line . . . [unless] necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Id. art. 15 (emphasis added). Language such as this leads to conclusions such as "[i]t is axiomatic that States are free to agree upon the course of the maritime boundaries between themselves in any way they wish." Malcolm Evans, *Maritime Boundary Delimitation*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 254, 255 (Donald R. Rothwell et al. eds., 2015).

[59] For instance, "A hallmark of the law of the sea has been the preference to treat security concerns implicitly rather than explicitly." Natalie Klein, *Maritime Security*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 582, 597 (Donald R. Rothwell et al. eds., 2015).

[60] James Harrison, *The Law of the Sea Convention Institutions*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 373–74 (Donald R. Rothwell et al. eds., 2015) (quoting U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Preamble).

[61] UNCLOS, *supra* note 10, art. 319; Harrison, *supra* note 60, at 376–78.

[62] UNCLOS, *supra* note 10, annex VI; Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 398–99 (Donald R. Rothwell et al. eds., 2015).

[63] Harrison, *supra* note 60, at 382–85; UNCLOS, *supra* note 10, Annex II.

"oversee development and implementation of the deep seabed mining regime found in Part XI of the Convention."[64]

C. Dispute Resolution in the UNCLOS

The complicated issue of dispute resolution under the UNCLOS simultaneously provides a wealth of interpretation of the law of the sea and consternation over the binding nature of dispute resolution clauses. This paradigm again represents the delicate balance of competing interests at the third conference. On the one hand, the provisions of the UNCLOS are recognized as "a flexible, comprehensive, and binding dispute resolution settlement system for the oceans,"[65] and "the most important development in the settlement of international disputes since the adoption of the U.N. Charter and the Statute of the International Court of Justice."[66] The heart of this statement is the fact that the UNCLOS purports to mandate jurisdiction for the resolution of disputes to compulsory arbitration or adjudication.[67] On the other hand, some argue that the UNCLOS is a paper tiger, subjugating arbitration to diplomacy and ancillary international agreements, and allowing sufficient limitations and exceptions to compulsory procedures so as to make them anything but.[68]

In a thorough analysis of the compulsory procedures of the UNCLOS, law of the sea specialist Professor Natalie Klein highlighted this balance. Recognizing the competing interests of parties at the 1982 conference, Klein acknowledged that "the dispute settlement system in UNCLOS relies on a spectrum of resolution techniques—ranging from formal adjudication or arbitration, to compulsory conciliation, to diplomatic initiatives and negotiation. What procedure is available depends on the substantive question in dispute."[69] Therefore, where mandatory arbitration or adjudication does not apply, the third conference considered that such a compulsory mechanism would be either politically untenable, or practically unnecessary.[70]

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[64] Harrison, *supra* note 60, at 385–87; UNCLOS, *supra* note 10, arts. 156–157.
[65] KLEIN, *supra* note 48, at 25.
[66] Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37 (1997).
[67] KLEIN, *supra* note 48, at 2.
[68] *Id.* at 26–27.
[69] *Id.* at 28.
[70] *Id.*

Part XV of the UNCLOS deals with the settlement of disputes. The underlying premise of the UNCLOS dispute resolution is that the parties control the mechanism of resolution.[71] Compulsory procedures can only be invoked after the parties have exchanged views on the dispute,[72] and only in the absence of any general, regional, or bilateral treaty providing for dispute resolution.[73] Hence, an obligation exists—along with encouragement—to attempt diplomatic settlement before resorting to international tribunals, which comports with general international legal obligations, and is in accord with the U.N. Charter.[74]

The compulsory provisions of Part XV were largely intended to protect high seas freedoms, such as the freedom of navigation and overflight within the EEZ or continental shelf of coastal states.[75] In contrast, the UNCLOS left certain categories of disputes to more traditional consent-based modes of resolution. Under Article 298, states are allowed to opt out of compulsory dispute resolution for matters concerning maritime boundary delimitation, military or law enforcement activities, or matters under the purview of the U.N. Security Council.[76] As Professor Klein noted concerning these categories of dispute, "mandatory jurisdiction is either not necessary . . . or not politically viable . . . ."[77]

This balanced treaty, reflective of nine years of negotiation and concession, created a common framework to map the sovereign rights of coastal nations. It has led to a new body of jurisprudence, further defining rights and responsibilities on the seas. Yet, it can be read with sufficient interpretation and nuance so as to allow leeway for some coastal states to expand maritime claims and creatively participate in bilateral and multilateral negotiations. In this latter reality, China has implemented the UNCLOS and dealt with its neighbors in the South China Sea.

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[71] "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." UNCLOS, *supra* note 10, art. 280.
[72] *Id.* art. 283.
[73] *Id.* art. 282.
[74] KLEIN, *supra* note 48, at 31–32.
[75] *Id.* at 142–43.
[76] UNCLOS, *supra* note 10, art. 298.
[77] KLEIN, *supra* note 48, at 227–28.

III. China and the Convention

China actively participated in the conferences and was one of the first signatories to the UNCLOS, signing on December 10, 1982; China's formal ratification of the UNCLOS occurred on June 7, 1996.[78] As anticipated by the convention, and allowed under Article 298 of the UNCLOS, China exercised the right to make certain declarations and reservations upon ratification. Importantly, China declared that "[t]he Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."[79]

This reservation allows China to resist the Compulsory Procedures Entailing Binding Decisions (Section 2 of Part XV), which otherwise would require resolution of differing interpretations of UNCLOS at the International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ), or other arbitral tribunals.[80] As discussed above, the specific matters excluded from compulsory dispute resolution are those concerning maritime boundary delimitation, military and law enforcement activities, and actions sanctioned by the U.N. Security Council.[81]

The UNCLOS only provides for compulsory dispute resolution when all other options have been exhausted, including mandating deference to any bilateral or regional agreements that state parties may enter into.[82] One such regional treaty is the Charter of the Association of Southeast Asian Nations (ASEAN). Currently, China is not a party to ASEAN,[83] however, China and ASEAN jointly signed the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002.[84] While the DOC

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[78] *Status of the United Nations Convention on the Law of the Sea*, http://www.un.org/Depts/los/reference_files/status2010.pdf (last visited July 17, 2016).

[79] *Declarations and Reservations of China to the United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#EndDec (last visited July 7, 2016).

[80] UNCLOS, *supra* note 10, Part XV Section 2.

[81] *Id.* art. 298.

[82] *Id.* art. 299.

[83] *ASEAN Member States*, ASS'N OF SOUTHEAST ASIAN NATIONS, http://www.asean.org/asean/asean-member-states/ (last visited July 17, 2016).

[84] *Declaration on the Conduct of Parties in the South China Sea*, ASS'N OF SOUTHEAST ASIAN NATIONS (Nov. 4, 2002), http://www.asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea (last visited July 17, 2016) [hereinafter DOC].

contains aspirational commitments of cooperation and peaceful resolution of conflicts, it does not contain any compulsory dispute resolution procedures.[85]

China is also a signatory to the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC).[86] This treaty, signed by each member state of ASEAN, as well as over twenty non-ASEAN nations, is similarly aspirational with respect to the resolution of disputes through peaceful means, and with mutual understanding and respect among nations.[87] While the TAC does provide a mechanism for dispute resolution, the recommended provisions are only applicable if both parties to a dispute consent to the particular mechanism for a given dispute.[88]

In light of China's reservation upon ratification of the UNCLOS, together with the lack of any bilateral or regional treaties requiring binding dispute resolution, many disputes over the interpretation of the UNCLOS provisions remain beyond the reach of the very dispute resolution provisions that have been hailed as revolutionary.[89] At least, this is China's position.[90] However, this position is currently under intense scrutiny relative to China's actions within the South China Sea.

A. The South China Sea

The South China Sea lies south of the Strait of Taiwan and north of the Strait of Malacca, bordered on the west by Vietnam and Cambodia and on the east by the Philippines. The size, location, and resources of the sea make it of immense strategic importance to Southeast Asian countries and significant maritime powers such as the United States and Australia.[91] It

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[85] *Id.* ¶ 4.

[86] Treaty of Amity and Cooperation in Southeast Asia, ASS'N OF SOUTHEAST ASIAN NATIONS (Feb. 24, 1976), http://agreement.asean.org/media/download/20131230235433.pdf (for the United States July 22, 2009).

[87] *See Instruments of Ratification*, ASS'N OF SOUTHEAST ASIAN NATIONS, http://agreement.asean.org/agreement/detail/60.html (last visited July 17, 2016)

[88] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 86 art. 16.

[89] At least with respect to the three excluded types of conflicts; however, as the current dispute in the South China Sea shows, disputes over maritime boundary delimitation and disputes over military activities can be squarely in the international limelight. *See infra* Part IV.

[90] *See infra* Part IV for further discussion.

[91] Commander Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 130 (2014).

is also a hotbed of competing claims of sovereignty and regional power struggles.[92]

1. The Nine-Dash Line

China asserts a vast maritime claim to the South China Sea that can be formally traced back to 2009. That year, China issued two *notes verbales*[93] to the U.N. member nations outlining a territorial claim to almost the entire South China Sea.[94] The *notes* included the statement that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[95] In support of this claim, China attached a map containing nine dashes forming a line,[96] purportedly serving as a maritime boundary. The dash lines appear to originate from Chinese maps published as early as 1947.[97]

Despite frequent appeals from other member states, China has not provided clarity on its statements exerting sovereignty over the islands or the sovereign rights of the waters within the nine-dash line, nor has China provided any further justification for the basis of the nine dashes.[98] Further frustrating international relations, China has not claimed an EEZ, or continental shelf, based off of the nine-dash line, or published a baseline

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[92] *Id.*

[93] A *note verbale* is "a diplomatic note that is more formal than an *aide-mémoire* and less formal than a note, is drafted in the third person, and is never signed." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/note%20verbale (last visited July 7, 2016).

[94] U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 143: CHINA MARITIME CLAIMS IN THE SOUTH CHINA SEA (Dec. 5, 2014), http://www.state.gov/documents/organization/234936.pdf [hereinafter LIMITS IN THE SEAS].

[95] Permanent Rep. of the People's Republic of China to the U.N., Note Verbale CML/17/2009 dated May 7, 2009, http://www.un.org/Depts/los/clcs_new/submissions files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; Permanent Rep. of the People's Republic of China to the U.N., Note Verbale CML/18/2009, dated May 7, 2009, http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[96] The original 1947 map published by the Chinese government actually had eleven dashes and was adopted by the newly formed People's Republic of China in 1949. *See* Wallace, *supra* note 91, at 130. In 1953, in a show of solidarity with the Communist government of North Vietnam, China removed two dashes, and the resulting nine-dash line has been used ever since. *Id.*

[97] LIMITS IN THE SEAS, *supra* note 94, at 3.

[98] *Id.* at 23.

reflective of its claims of territorial sovereignty.[99] Therefore, when it comes to interpreting China's claims, educated guesses and conjecture have become standard practice; but what is abundantly evident is that absent some extraordinary justification that China has yet to provide, the nine-dash line deviates significantly from the provisions of the UNCLOS.[100]

The breadth and shape of a coastal state's territorial sea, contiguous zone, exclusive economic zone, and continental shelf is based upon a fixed distance from the state's baseline.[101] Under normal circumstances, the baseline is simply determined by an artificial line that mimics the coast of the nation at the low-water line (as reflected on standard nautical charts).[102] The general rule, then, is that the maritime zones claimed by a coastal state derive from land features. The establishment of a baseline, although simple in principle, can lead to significant disputes, and is often at the core of maritime boundary delimitation conflicts.[103]

Within the UNCLOS there are only two allowances that depart from the normal baseline approach; the first is to allow the use of a straight baseline when mimicking land features is impractical,[104] and the second is to allow for coastal state claims to historic waters.[105] One possible explanation for China's deviation from the normal baseline procedures is to view the nine-dash line as a claim of historic title.[106] This may be a natural inclination, especially considering China's reliance on a mid-twentieth century map and repeated Chinese references to historical

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[99] *Id.*

[100] For example, the nine-dash line greatly exceeds the standard twelve-nautical-mile territorial zone that is afforded by Articles 3 and 4 of the UNCLOS.

[101] UNCLOS, *supra* note 10, arts. 5, 33, 57, 76.

[102] *Id.* art. 5.

[103] Evans, *supra* note 58, at 254, 262.

[104] Straight baselines may be employed when coast lines are "deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." UNCLOS, *supra* note 10, art. 7. Similarly, a straight baseline may be used for waters properly classified as a bay. *Id.* art. 10. Lastly, archipelagic States may employ straight baselines to encircle the entire archipelago. *Id.* art. 47.

[105] The UNCLOS contains two references to historic claims, in Articles 10 and 15. The Convention does not provide a definition of, or methodology for, establishing historic title. *Id.* arts. 10, 15.

[106] Conversely, the nine-dash line may purport to be a claim of sovereignty over all islands encompassed or a claim to sovereign rights of all waters encompassed. *See* LIMITS IN THE SEAS, *supra* note 94, at 11–15.

title.[107] Establishing historic title to a body of water could significantly advantage a coastal state in that it would accrete a maritime zone beyond what associated land features would typically allow.

In light of this potential windfall, the standard for establishing historic title should be relatively rigorous. In the view of the United States, a coastal state must establish: "(1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority."[108] Like many national policies, this language essentially demands a judicial body to interpret and provide final judgment.

However, with the law of the sea, that is unlikely to occur. Just as with maritime boundary delimitation of normal baselines, the UNCLOS allows for states to except—or opt-out of—mandatory dispute resolution for conflicts concerning historic title.[109] In its 2006 declaration, China expressly reserved this right by exception.[110] It is currently unclear whether China has actually asserted a claim of historic title to the South China Sea.[111] But, even if such a claim is asserted, and if the international community disputes such a claim, an UNCLOS institution would likely not be the final arbiter, due to member state reservations in Article 298.[112]

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[107] *See, e.g.*, Wallace, *supra* note 91, at 150; Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml [hereinafter China Position Paper on Arbitration].

[108] LIMITS IN THE SEAS, *supra* note 94, at 10. Although the U.S. position is that an actual showing of acquiescence by foreign states is necessary, as opposed to a mere lack of opposition, the generally accepted standard is that mere toleration is sufficient. *See* A.R. Thomas & James C. Duncan, *Historic Bays*, NAV. WAR C. INT'L L. STUD. 73-7, § 1.3.3.1.

[109] UNCLOS, *supra* note 10, art. 298(1)(a)(i).

[110] *Declarations and Reservations of China to the United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec (last visited Feb. 22, 2016).

[111] LIMITS IN THE SEAS, *supra* note 94, at 18–19; Wallace, *supra* note 91, at 150.

[112] As will be discussed in later sections, the issue of China's historic title claim was addressed by the Permanent Court of Arbitration, although the efficacy of the tribunal's ruling has already been called into question. *See infra* Part IV and V for further discussion.

2. The Spratly Islands

The Spratly Island chain is just one group of maritime features within the South China Sea. The South China Sea is home to many competing claims of ownership over such features, as well as demonstrations of law enforcement or regulatory authority on the seas. Within the Spratlys alone, among the countless reefs, shoals, and atolls, are twelve naturally formed islets large enough to be considered "islands."[113] These twelve land formations are claimed in some fashion by a combination of Vietnam, Malaysia, Brunei, the Philippines, Taiwan, and China.[114]

Over the past several decades, several nations have undertaken land reclamation efforts on various Spratly Island features. Vietnam constructed a harbor on Southwest Cay; Malaysia constructed a naval base on Swallow Reef; Taiwan constructed an airstrip on Itu Aba; and the Philippines have planned construction of an airport and pier on Thitu Island.[115] However, none of these projects matched the scope of land reclamation undertaken by China in the past two years.

Starting in 2014, China began aggressively reclaiming several Spratly Island features. Over the course of an eighteen-month period, it is estimated that China reclaimed nearly 2000 acres—more than all other countries' reclaimed land in the South China Sea combined.[116] On Subi Reef, the subject of the *Lassen*'s FONOP in October, 2015, China has reclaimed approximately 3.9 million square meters, constructing pier facilities, a helipad, and multiple communications towers.[117] In its normal state, prior to China's reclamation efforts, Subi Reef would be submerged at high tide.[118]

The majority of China's land reclamation efforts (as well as those of other South China Sea nations) appear to be designed for military use. On Subi Reef, as on other features, construction efforts include garrisons,

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[113] Kenneth Pletcher, *Spratly Islands*, ENCYC. BRITANNICA, http://www.britannica.com/place/Spratly-Islands (last visited July 11, 2016).
[114] Wallace, *supra* note 91, at 131.
[115] Mira Rapp-Hooper, *Before and After: The South China Sea Transformed*, ASIA MARITIME TRANSPARENCY INITIATIVE (Feb. 18, 2015), http://amti.csis.org/before-and-after-the-south-china-sea-transformed/.
[116] BEN DOLVEN ET AL., CONG. RES. SERV., R44072, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS (2015) [hereinafter DOLVEN CRS REPORT].
[117] *Subi Reef Tracker*, *supra* note 8.
[118] *Id.*

airstrips, radar sites, fuel depots, and deep-draft pier facilities.[119] Experts assess that the increased capability the Chinese Navy may gain by using reclaimed features could increase the range of daily ship and aircraft operations, and greatly enhance potential anti-access/area denial systems.[120] From a historical perspective, such use should be expected; during World War II, Japan occupied the Spratly Islands and constructed a submarine base there.[121]

Tracking the progress of land reclamation efforts in the South China Sea is a relatively easy task with the benefit of satellite imagery. What is decidedly more difficult is assessing the motivations and implications of those same actions. Thus far, China's claims are both ambiguous and vague; it has not claimed a territorial sea or EEZ based on any South China Sea feature, declared whether any of the features are islands or something less, or indicated whether reclamation efforts are intended to change the maritime entitlements stemming from those features.[122] Meanwhile, international concerns over overlapping maritime entitlements and the UNCLOS reservation on the use of the seas for peaceful purposes linger in the background.

B. A Note on Rocks versus Islands

In its unadulterated state, Subi Reef would be submerged at high tide.[123] That fact is extremely relevant under UNCLOS in terms of determining maritime entitlements.[124] Classifying a maritime feature as either an island, a rock, or a low-tide elevation (sometimes referred to as a submerged feature) starts with Article 121.[125] What category a feature falls under operates distinctly from any question of sovereignty over the feature. However, as can be seen currently in the Spratlys, assigning maritime entitlements to a feature can lead to overlapping entitlements requiring delimitation.[126]

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[119] *Id.*; DOLVEN CRS REPORT, *supra* note 116, at 9. Starkly demonstrating this proposition, China recently positioned several anti-air missile batteries on Woody Island, a feature located within the disputed Paracel Island chain in the South China Sea. *Water Wars: China Makes Waves With Missile Deployment After Uneventful U.S.-ASEAN Summit*, LAWFARE (Feb. 19, 2016, 2:58 PM), https://www.lawfareblog.com/water-wars-china-makes-waves-missile-deployment-after-uneventful-us-asean-summit.

[120] DOLVEN CRS REPORT, *supra* note 116, at 8.

[121] Pletcher, *supra* note 113.

[122] LIMITS IN THE SEAS, *supra* note 94, at 11–22.

[123] *Subi Reef Tracker*, *supra* note 8.

[124] UNCLOS, *supra* note 10, art. 121.

[125] *Id.*

[126] *See* discussion *infra* Part IV.

Why does it matter? An island—no matter how small—is treated like any other contiguous piece of land in that it is allowed the full complement of maritime zones, including territorial sea, exclusive economic zone, and continental shelf.[127] A rock, on the other hand, is entitled only to a territorial sea.[128] A low-tide elevation, which is "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide," does not generate any territorial sea of its own.[129] Hence, the only time the sovereignty of a feature impacts the regime of the seas is where a feature "owned" by one coastal state creates a maritime zone that overlaps that of another coastal state.

Temporarily setting aside any question of sovereignty, an examination of China's land reclamation efforts in the South China Sea begs interpretation of several UNCLOS provisions. According to Article 121, the ability to "sustain human habitation or economic life of their own" distinguishes an island from a rock.[130] Land reclamation efforts trigger the key language here—"of their own"—which becomes starkly important. Is it consistent with international law to convert a submerged feature or rock to an island, and if so, what is the practical outcome of that action?

Like most legal questions, the answer is a resounding "it depends." In several instances, the UNCLOS contemplates the creation of artificial islands. Article 60 discusses artificial islands, installations, or structures in an exclusive economic zone, and grants a coastal state the right to construct such a feature within their own EEZ.[131] Artificial islands are only entitled to a 500-meter safety zone, both to preserve the safety of the feature and for navigational purposes.[132] Moreover, "artificial islands . . . do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."[133]

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[127] UNCLOS, *supra* note 10, art. 121.
[128] *Id.*
[129] *Id.* art. 13. However, "where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea." *Id*. Therefore, while low-tide elevations on their own do not create a territorial sea, they can affect the shape and size of the territorial sea of another landmass
[130] UNCLOS, *supra* note 10, art. 121.
[131] *Id.* art. 60. The same rights and protections with respect to artificial islands are incorporated on the continental shelf. *Id.* art. 80.
[132] *Id.*
[133] *Id.*

Interestingly, both coastal and land-locked states enjoy the right to construct artificial islands on the high seas.[134]

The UNCLOS does not explicitly provide the definition of an "artificial island." The convention defines islands, rocks, and low-tide elevations as "naturally formed area[s] of land."[135] By negative inference, it is reasonable to presume that an artificial island is not a naturally formed area of land, and therefore not an island, a rock, or a low-tide elevation under the meaning of the UNCLOS. However, when a feature is naturally formed, such as a low-tide elevation, the UNCLOS does not specifically allow or prohibit converting a low-tide elevation or rock to an island. Looking back to the definition of an island, having the ability to sustain life is the dispositive language. One could reasonably argue that an improved feature that can sustain human habitation on its own is truly an island under the plain meaning of the UNCLOS, and therefore entitled to the panoply of maritime zones.

The authorization to construct artificial islands within the EEZ is limited to the coastal state by the UNCLOS, and, while silent, it is safe to infer that constructing an artificial island in another state's territorial sea or EEZ is prohibited. Assuming such an action is undertaken without the coastal state's consent, that act undeniably impinges on the coastal state's sovereign rights and authority of jurisdiction over the EEZ.[136] Conversely, it is clear that under the UNCLOS, a coastal state may construct an artificial island within its own territorial sea without limitation,[137] and similarly within the coastal state's EEZ.[138] Lastly, while allowing

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[134] *Id.* art. 87.

[135] *Id.* arts. 13, 121.

[136] A state exercises complete sovereignty over the territorial sea in accordance with Article 2, subject to the right of innocent passage. Additionally, within a coastal state's EEZ, other states are limited to the rights and duties contained within Article 58. *Id.* arts. 2, 58.

[137] "Without limitation" is a maxim better left out of legal conversations. Of course, as discussed, there are limits on a coastal state's rights, even within their own territorial sea based on the *mare liberum* principle of Grotius. *See supra* Part II.A. For instance, construction of an artificial island may not impede the right of innocent passage in accordance with Article 24. *Id.* art. 24; s*ee also* Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'*, 23 COLO. J. ENVTL. L. & POL'Y 77, 101–06 (2012) (discussing some responsibilities of a coastal state with respect to other states after construction of an artificial island within the coastal state's own territorial sea).

[138] There are several examples where coastal states have constructed artificial islands, either without objection, or resulting in favorable international tribunal rulings. *See, e.g.*, *Johnston Atoll Kalama Atoll*, GLOBAL SECURITY http://www.globalsecurity.org/wmd/

construction of artificial islands on the high seas, the UNCLOS also prohibits claims of sovereignty over any part of the high seas,[139] meaning that an artificial island on the high seas would be treated merely as a navigational hazard entitled to a 500-meter safety zone.

The more problematic scenario is the construction of an artificial island in an area of overlapping maritime zones subject to delimitation. There is no clear answer as to the legality of island construction in a "disputed" zone. Though one would hope that, pending delimitation, claimants to the zone would refrain from actions that could potentially harm other claimants, there is no clear prohibition on such actions.[140] Furthermore, every state bears responsibility for protecting the marine environment, both within areas in exercise of sovereign rights such as territorial seas and the EEZ, as well as the high seas.[141] Construction of an artificial island or a major land reclamation project could have broad environmental impacts and, therefore, should not be undertaken on the high seas, or within another state's EEZ.

When applying this discussion to the Spratlys, it may be a stretch to categorize China's land reclamation efforts as construction of artificial islands in the first place. The maritime features in dispute in the South China Sea preexisted the reclamation efforts; some were likely considered islands under Article 121, and others were certainly rocks or low-tide elevations.[142] Therefore, as discussed, it is better to categorize China's efforts as an attempted conversion of a low-tide elevation into an island rather than construction of an artificial island.

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facility/johnston_atoll.htm (last visited July 31, 2016) (describing the U.S. land reclamation of Johnston Atoll); Sarah Dowdey, Why is the World's Largest Artificial Island in the Shape of a Palm Tree?, HOW STUFF WORKS, http://adventure.howstuffworks.com/dubai-palm.htm (last visited July 31, 2016) (detailing the construction of the Palm Islands in Dubai); and Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), 2008 I.C.J. 12 (May 23), ¶¶ 249–50 (discussing Singapore's proposed reclamation of Pedra Branca in the Singapore Straits despite a conflicting sovereignty claim with Malaysia).

[139] UNCLOS, *supra* note 10, art. 89.

[140] At best, parties can seek conciliation or provisional measures, assuming that UNCLOS Part XV is applicable. KLEIN, *supra* note 48, at 59–85.

[141] UNCLOS, *supra* note 10, art. 192.

[142] As discussed in the previous section, Subi Reef was submerged at high tide in its normal state, meaning it was a low-tide elevation under the UNCLOS. *Subi Reef Tracker*, *supra* note 8.

At least one U.S. governmental report concludes that China's reclamation efforts have no effect on any maritime entitlements.[143] According to the report, rocks are entitled to a territorial sea (but not an EEZ or continental shelf) even if they have been made inhabitable, and artificially converting a low-tide elevation into a structure that is above water at high tide (and therefore normally considered a rock or island) will not create a corresponding territorial sea.[144] In either case, China may effectively create an artificial island under common parlance, without necessarily creating an artificial island by legal definition. The report notwithstanding, there is nothing explicit in the UNCLOS or any international tribunal that supports the same premise. Until China clarifies its maritime claims, or a challenge to China's reclamation activities reaches a tribunal, the answer will remain murky.

IV. The Philippines and International Arbitration

Unsurprisingly, China's nebulous maritime claim in the form of the nine-dash line, coupled with its aggressive land reclamation efforts, have caused increased tension with their neighbors in the South China Sea.[145] Long-time ally Vietnam publicly rebuffed China's claim of ownership of the Spratly and Paracel Islands, and Vietnamese President Truong Tan Sang proclaimed that China's "large-scale reclamation of small islands to make them very big islands . . . [are acts that] violate international law."[146] Similar comments have come from Malaysia[147] and Indonesia,[148] as well

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[143] DOLVEN CRS REPORT, *supra* note 116, at 4.

[144] *Id.*

[145] M. Taylor Fravel, *Policy Report: U.S. Policy Towards the Disputes in the South China Sea Since 1995*, S. RAJARATNAM SCH. OF INT'L STUD. 4 (Mar. 2014), http://taylorfravel.com/documents/research/fravel.2014.RSIS.us.policy.scs.pdf.

[146] Truong Son, *Vietnamese President Reiterates Sovereignty Over Islands in East Sea*, THANHNIEN NEWS (Sept. 30, 2015, 10:48 AM), http://www.thanhniennews.com/politics/vietnamese-president-reiterates-sovereignty-over-islands-in-east-sea-51897.html. *See also* Simon Denyer, *China's Assertiveness Pushes Vietnam Towards an Old Foe, the United States*, WASH. POST (Dec. 28, 2015), https://www.washingtonpost.com/world/asia_pacific/chinas-assertiveness-pushes-vietnam-toward-an-old-foe-the-united-states/2015/12/28/15392522-97aa-11e5-b499 76cbec161973_story.html?tid=pm_world_pop_b.

[147] *Malaysian Deputy PM: We Must Defend Sovereignty in South China Sea Dispute*, NEWSWEEK (Nov. 14, 2015, 11:28 AM), http://www.newsweek.com/malaysian-deputy-pm-we-must-defend-sovereignty-south-china-sea-dispute-394421.

[148] Shannon Tiezzi, *Would Indonesia Actually Challenge China's Nine-Dash Line in International Court?*, DIPLOMAT (Nov. 13, 2015), http://thediplomat.com/2015/11/would-indonesia-actually-challenge-chinas-nine-dash-line-in-international-court/.

as concerned comments from outsiders Australia[149] and the United States.[150] Indeed, competing sovereignty claims in the South China Sea and China's land reclamation took front stage at a November, 2015, ASEAN meeting.[151]

Yet the strongest opposition to date has come from the Philippines. On January 22, 2013, the Philippines initiated arbitration against China at the Permanent Court of Arbitration (PCA) to resolve the disputed maritime jurisdiction between the two countries within the South China Sea, which includes Subi Reef and the other Spratly Islands.[152] By petitioning the PCA for relief, the Philippines became the first state to attempt to lay China's nine-dash line before an international tribunal, effectively forcing China to either clarify its maritime claims, or allow someone else to define them.

The Philippines' claim arose under Annex VII of UNCLOS, the procedure allowing for arbitration of matters under dispute.[153] Throughout the statement of claim, the Philippines relied heavily on the text of the UNCLOS.[154] Primarily, the Philippines sought the arbitral tribunal to assert the authority of the UNCLOS over both parties, and to declare the nine-dash line incongruous with the convention.[155] Secondly, the Philippines sought declarations of whether certain features within the Spratly Islands were indeed islands, rocks, or low-tide elevations in

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Although Indonesia is not one of the claimants to any maritime features within the South China Sea, China's nine-dash line does overlap Indonesia's Exclusive Economic Zone, a source of contention for the Indonesian government. *Id.*

149 *Australian Military Plane Flies over Disputed South China Sea*, DEF. NEWS (Dec. 16, 2015, 9:53 PM), http://www.defensenews.com/story/defense/2015/12/16/australian-military-plane-flies-disputed-south-china-sea/77458100/.

150 Jeffrey A. Bader, *The U.S. and China's Nine-Dash Line: Ending the Ambiguity*, BROOKINGS (Feb. 6, 2014), http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader.

151 *Media Availability with Secretary Carter at the ASEAN Defense Ministers-Plus Meeting in Kuala Lumpur, Malaysia*, U.S. DEP'T OF DEF. (Nov. 4, 2015), http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/627598/media-availability-with-secretary-carter-at-the-asean-defense-ministers-plus-me.

152 The Republic of the Philippines vs. The People's Republic of China, Notification and Statement of Claim (Jan. 22, 2013), http://www.philippineembassy-usa.org/news/3071/300/Statement-by-Secretary-of-Foreign-Affairs-Albert-del-Rosario-on-the-UNCLOS-Arbitral-Proceedings-against-China-to-Achieve-a-Peaceful-and-Durable-Solution-to-the-Dispute-in-the-WPS/d,phildet/ [hereinafter Philippines Notification and Statement of Claim].

153 *Id.*

154 *Id.*

155 Philippines Notification and Statement of Claim, *supra* note 152, ¶ 6.

accordance with the UNCLOS.[156] Lastly, the Philippines sought affirmation of the Philippines' full EEZ and continental shelf.[157]

In filing the request for arbitration, the Philippines recognized one major hurdle to jurisdiction: China's reservation of compulsory dispute resolution in accordance with Article 298. To defuse the issue, the Philippines repeatedly stated that it did not seek a decision on competing claims of sovereignty or delimitation of maritime boundaries.[158] However, the Philippines could not dodge the issue altogether; the Philippines described the nine-dash line as a claim to "sovereignty and sovereign rights," in fact borrowing the language from China's 2009 *notes verbales*.[159] In seeking a ruling that would effectively nullify the nine-dash line, the Philippines asked the arbitral tribunal to rule against Chinese claims of sovereignty over many of the maritime features within the South China Sea, even if it did not seek an affirmative award of sovereignty for those features currently claimed by the Philippines.

For its part, China refused to participate in the arbitration proceedings.[160] In response to the Philippines' notification seeking arbitration, China eventually released a position paper challenging the jurisdiction of the arbitral tribunal.[161] The Chinese position was simple. First, according to China, the subject matter of the arbitration is a dispute over territorial sovereignty of maritime features; on this matter, the UNCLOS does not require resolution via compulsory dispute resolution in accordance with Part XV of the convention.[162] Accordingly, because maritime zones are derived from land territory, one must first settle territorial disputes before determining the authorized extent of any nation's maritime claims.[163]

China's second contention was that even if the subject matter of the arbitration was not territorial sovereignty, then it must be considered a dispute over maritime boundary delimitation, and China reserved against

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156 *Id.*
157 *Id.*
158 *Id.* ¶ 7.
159 *Id.* ¶ 2.
160 The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 112 (Perm. Ct. Arb. Oct. 29, 2015).
161 China Position Paper on Arbitration, *supra* note 107.
162 *Id.* ¶ 3.
163 *Id.* ¶ 9.

compulsory participation with its declaration in 2006.[164] In opposing the Philippines' effort to seek favorable arbitral awards for only certain maritime features in the Spratly island chain, China argued that the Philippines is actually circumventing the delimitation process that has long been underway between the two states.[165] Indeed, the position paper states that the decision to arbitrate only those features the Philippines claims are within its EEZ is "obviously . . . an attempt to seek recognition by the Arbitral Tribunal that the relevant maritime areas are part of the Philippines' EEZ and continental shelf . . . . This is actually a request for maritime delimitation by the Arbitral Tribunal in disguise."[166]

In accordance with Annex VII, an arbitral tribunal may proceed to make findings and issue an award for a dispute even when one party fails to appear before the tribunal.[167] In October 2015, the PCA decided to do just that with respect to the Philippines' request for arbitration.[168] In announcing that the tribunal would consider evidence and enter findings with respect to some of the Philippines' claims, the tribunal recognized China's refusal to participate and took notice of the previously published position paper. The finding with respect to jurisdiction characterizes China's objections to the tribunal as procedural objections, rather than a bar to jurisdiction, allowing the tribunal to proceed.[169]

In its jurisdictional analysis, the Tribunal disagreed with both Chinese objections. On the matter of territorial sovereignty,

> The Tribunal . . . does not see that any of the Philippines' submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' submissions from the premise . . . that China is correct in its assertion of sovereignty . . . .[170]

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[164] *Id.*
[165] *Id.* ¶¶ 65–69.
[166] *Id.* ¶ 69.
[167] UNCLOS, *supra* note 10, Annex VII art. 9.
[168] The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 112–23 (Perm. Ct. Arb. Oct. 29, 2015).
[169] *Id.* at ¶ 128.
[170] *Id.* at ¶ 153.

Furthermore, the Tribunal asserted that deciding on the Philippines' challenge of certain maritime entitlements did not equate to delimitation.[171]

On July 12, 2016, the tribunal released its final award.[172] In a sweeping decision that exceeded prognostications, the tribunal dismissed Chinese claims of historic title to the South China Sea, found no basis to support the nine-dash line within the UNCLOS, and declared China in breach of several UNCLOS obligations.[173] The tribunal took further steps, ruling that Subi Reef (among other maritime features) was in fact a low tide elevation in accordance with Article 13, and not "capable of appropriation."[174] Lastly, the tribunal held that China's land reclamation activities violated UNCLOS obligations with respect to the preservation and protection of the marine environment [175] and impinged on the Philippines' sovereign rights within its EEZ.[176]

The tribunal's award was met with predictable responses. The Philippines hailed the ruling, referring to it as a "milestone decision."[177] China repeated its opposition to the tribunal, announcing that the decision is "null and void and has no binding force."[178] In the streets of Beijing, some Chinese citizens destroyed *iPhones*, attacked a man wearing *Nike* shoes, and called for a boycott of *Kentucky Fried Chicken* in apparent outrage over the perception that the United States somehow influenced the arbitration in the Philippines' favor.[179]

At the same time, the U.N. apparently distanced itself from the Permanent Court of Arbitration, stressing the independence of the tribunal

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[171] *Id.* at ¶ 156.
[172] The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award (Perm. Ct. Arb. July 12, 2016) [hereinafter Final Award].
[173] *Id.* at "Dispositif."
[174] *Id.* ¶ B.5.
[175] *Id.* ¶ B.13.
[176] *Id.* ¶ B.14.
[177] Kristine Angeli Sabillo, *PH Welcomes 'Milestone Decision' on West Philippine Sea*, INQUIRER (July 12, 2016, 5:37 PM), http://globalnation.inquirer.net/140963/ph-welcomes-milestone-decision-on-west-philippine-sea-calls-for-restraint-sobriety.
[178] Ankit Panda, *International Court Issues Unanimous Award in* Philippines v. China *Case on South China Sea*, DIPLOMAT (July 12, 2016), http://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/.
[179] Linette Lopez, *Chinese Nationalists Are Taking Their Anger Out on Anything American They Can Touch*, BUSINESS INSIDER (July 20, 2016), http://www.businessinsider.com/chinese-nationalist-attack-american-brands-2016-7.

and the fact that it is not a U.N. entity.[180] The distancing of the United Nations from the arbitration is concerning; coupled with the fact that China continues to effectively possess many of the disputed features, the appearance is that the award did not change anything in the South China Sea at all. As one commentator noted, "[t]he arbitration was never going to resolve issues of sovereignty over the islands and rocks in the South China Sea, because disputes over territorial sovereignty are beyond the jurisdiction of an UNCLOS Tribunal."[181] Therefore, while the tribunal's award may be a moral victory for the Philippines, it likely will have no effect on resolving the crisis.

V. The Question of Sovereignty

Underlying each of the issues discussed above—the efficacy of the nine-dash line, the legality of aggressive land reclamation projects, the delimitation of maritime boundaries, and the applicability of compulsory dispute resolution—is the question of sovereignty. Therein lies the irony: that which underpins each potential area of dispute within the South China Sea is that which is untouched by the "constitution of the sea." There are many successes to the UNCLOS, but by remaining silent on the resolution of questions of sovereignty, there is a significant gap in the legal regime governing access to the seas.

As written, the UNCLOS strongly relies on states resolving sovereignty disputes via mutual cooperation, diplomatic processes, and bilateral negotiation. The procedural mechanism for dispute resolution contained within Part XV was created to resolve disputes over the interpretation or application of the various provisions of the convention.[182] This intention reflected the political realities of the third conference, where "States were not of the view that mandatory jurisdiction was essential for every issue regulated under the Convention," allowing instead for

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[180] Daily Press Briefing by the Office of the Spokesperson for the Secretary-General. UNITED NATIONS (July 12, 2016), http://www.un.org/press/en/2016/db160712.doc.htm. *See also* INT'L COURT OF JUSTICE, http://www.icj-cij.org/homepage/index.php, last visited Nov. 9, 2016) ("The ICJ, which is a totally distinct institution, has had no involvement in the above mentioned case and, for that reason, there is no information about it on the ICJ's website.").

[181] Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (July 12, 2016, 11:28 AM), https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration.

[182] KLEIN, *supra* note 48, at 22–23.

instances where "the emphasis has been placed on national decision-making rather than the use of international processes."[183]

The method of dispute resolution between states, generally, is left for the states to determine. There is no requirement under the U.N. Charter to accept third-party control of a dispute absent action by the U.N. Security Council.[184] Therefore, submission of disputes to international bodies is always based on consent, and is generally achieved via the terms of treaties. On the question of territorial sovereignty (of an island, for instance), the UNCLOS did not fold this topic into its compulsory dispute resolution, nor does any provision of the UNCLOS discuss territorial sovereignty.[185]

The ability within the UNCLOS to except arbitration for questions of sovereignty is not an oversight; it was a vital part of the initial negotiations and an issue with vastly divergent viewpoints. In fact, U.S. proponents of the UNCLOS cite to this provision as a good reason to ratify the UNCLOS, in that the United States will not be signing over sovereignty to an international body.[186]

The nearest the UNCLOS gets to resolving questions of sovereignty appears in the discussion of maritime boundary delimitation. Yet, even for this matter, the UNCLOS maintains deference to national decision-making; the Convention does not tell states how to delimit their maritime zones, it only requires that it be done.[187] The delimitation processes that do exist are completely creatures of international tribunals.[188] Even so, as mentioned earlier, states are free to except participation in compulsory

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[183] *Id.* at 28. Professor Klein provides an excellent history of the three conferences and how each one viewed dispute resolution. As the contemporary view towards international bodies as rule-makers and arbiters shifted, so did the efforts at including mandatory resolution processes within the law of the sea. *Id.* at 7–28.

[184] Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 396 (Donald R. Rothwell et al. eds., 2015).

[185] *Id.* at 400.

[186] Information Paper, Office of the Judge Advocate General Code 10, *Eight National Security Myths: United Nations Convention on the Law of the Sea*, (on file with author) [hereinafter Eight National Security Myths] (stating that "there is simply no process or procedure whereby our determination can be subject to review").

[187] KLEIN, *supra* note 48, at 228–29.

[188] Evans, *supra* note 58, at 278.

dispute resolution processes for disputes concerning maritime boundary delimitation.[189]

A. Sovereignty and the Regime of Islands

One of the successes of the law of the sea is the specificity that it provides to categorizing the oceans and subsoil in order to provide stability and predictability. The breadth of maritime zones, the method of establishing a baseline, and the regime of islands are examples of this specificity. However, the UNCLOS applies these standards with one major assumption: questions of sovereignty have already been resolved. Applying the Convention to a particular maritime feature, one can fairly easily classify the feature as an island or a rock, and subsequently attach authorized maritime zones. But if sovereignty is disputed, then whom does the maritime zone benefit? If sovereignty is disputed, then how can one state's actions on that feature be judged against the provisions of the UNCLOS?

One potential outcome is that no state's claim of sovereignty is valid, and the feature is considered part of the high seas. In that case, the fortification of a feature for military purposes could be in violation of the reservation of the high seas for peaceful purposes.[190] Most commentators agree that the peaceful purposes reservation does not categorically prohibit military maneuvers, or even limited weapons-testing.[191] But conceivably, construction of a military outpost on the high seas is exactly what was intended by the Article, otherwise it would lack any "teeth" at all.

Looking at Subi Reef, another potential scenario is that China rightfully has sovereignty over this feature; in that case, the reclamation efforts are likely not in contravention of the UNCLOS, regardless of whether any maritime entitlements attach to the feature before or after reclamation. Conversely, if Subi Reef rightfully belongs to the Philippines, then China's land reclamation clearly is an affront to the Philippines' sovereignty.[192] Furthermore, if Subi Reef either entitles the

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[189] *See* discussion s*upra* Section II.C.

[190] UNCLOS, *supra* note 10, art. 88.

[191] Douglas Guilfoyle, *The High Seas*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 203, 210–12 (Donald R. Rothwell et al. eds., 2015) (discussing the peaceful purposes' textual history and the consensus of modern application).

[192] The UNCLOS echoes the general duty of the U.N. Charter by requiring states to "refrain from any threat or use of force against the territorial integrity or political

Philippines to a territorial sea or EEZ, or it falls within another maritime zone of the Philippines, then China's actions would also violate the environmental protection principals of the UNCLOS. The arbitral tribunal seemed to sidestep this discussion altogether by labeling Subi Reef a low-tide elevation and stating that such features are not "capable of appropriation."[193]

Lastly, even if a feature does not entitle the coastal state to a maritime zone based on that feature alone, the presence of a low-tide elevation can impact the state's baseline if the feature is situated within the territorial sea of another feature or coastline.[194] While the arbitral tribunal hinted at this with respect to Subi Reef (which lies within twelve nautical miles of the high-tide feature of Sandy Cay), it did not take the further step of determining how any particular baseline is actually affected since it did not rule on the sovereignty of Subi Reef or Sandy Cay.[195]

The question of sovereignty, therefore, is intricately woven into the resolution of maritime disputes. Determining whether actions such as land reclamation are legal in the context of a territorial dispute or applying the peaceful purposes reservation of the high seas is only the beginning. Even if a feature can be properly categorized to determine the extent of allowable maritime features, the ownership of the feature will likely lead to issues of maritime boundary delimitation.

B. Sovereignty and Maritime Boundary Delimitation

For centuries, humankind has accepted some form of territorial governance; the concept of land devoid of title by some nation was fully consumed, some might argue, by the Treaty of Westphalia.[196] Conversely, the overarching paradigm of the seas is that of Grotius; state control over the seas is the exception rather than the rule, and is subject to significant

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independence of any State, or in any other manner inconsistent with the principles of international law . . . ." UNCLOS, *supra* note 10, art. 301.

193 Final Award, *supra* note 172, "Dispositif" ¶ B.5.

194 UNCLOS, *supra* note 10, art. 6. *See also infra* note 177 and accompanying text.

195 Final Award, *supra* note 172, "Dispositif" ¶¶ B.3–B.5.

196 *See, e.g.*, Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830 (2006).

limitations.[197] Following the third conference, with the standardization of territorial seas and the creation of sovereign rights over EEZs and the continental shelf, the subject of maritime boundary delimitation has been the greatest percentage of cases before the ICJ.[198]

The first step in the process of delimitation is to establish maritime entitlements.[199] In order to accomplish this, "it is first necessary to establish whether the parties to a dispute do indeed have entitlements which overlap: just because a State claims that it has an entitlement does not mean that it does."[200] Specific to the distinction between islands and rocks and their effects on maritime zones, the "practical application remains uncertain and can only be determined on a case by case basis, providing yet another element of indeterminacy at the threshold stage of the delimitation process."[201]

It is perhaps axiomatic to state that questions of territorial sovereignty must be resolved prior to delimitation. Because maritime entitlements flow from corresponding land rights, there would be no maritime zone to delimit if the territorial sovereignty is undetermined. Hence, in its initial determination that jurisdiction was proper in the Philippines' request for arbitration, the arbitral tribunal was forced to assume, *arguendo*, that each of China's territorial claims were valid in order to determine whether China had any maritime entitlements in the Spratlys.[202] The question of sovereignty is woven into nearly every aspect of this maritime dispute; the arbitral tribunal, considering whether it has jurisdiction over the objection of one state, and recognizing that it is not empowered to consider matters of delimitation, is still required to make a presumption on sovereignty to even proceed to the merits.

VI. The United States' Position

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[197] For instance, all nations enjoy the right of innocent passage within the territorial seas of a coastal state, of which there is no corollary for land passage or overflight of a nation's land territory. UNCLOS, *supra* note 10, art. 17.

[198] Evans, *supra* note 58, at 255.

[199] *Id.* at 261.

[200] *Id.*

[201] *Id.* at 263. In analyzing the ICJ opinion in *Nicaragua v. Colombia*, Professor Evans notes that the court has been "remarkably coy" about clarifying the distinction between rocks and islands, and therefore complicated delimitation situations remain complicated and often unresolved by international tribunals. *Id.*

[202] The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility ¶¶ 153–57 (Perm. Ct. Arb. Oct. 29, 2015).

Dating back to at least 1995, the United States has officially stated a neutral position with respect to claims of sovereignty over maritime features within the South China Sea.[203] Notwithstanding this position of neutrality, the United States has sought to become more involved in settling the disputes in the South China Sea. This has primarily been done via gradually ratcheting State and Defense Department policy statements disagreeing with China's actions in the area and by active participation with other partner nations and the regional body ASEAN.[204] And of course, operations like the Freedom of Navigation military operation by the *Lassen* in October, 2015.

In his letter to Senator McCain regarding the *Lassen's* FONOP, Defense Secretary Carter reiterates this position of neutrality: "The United States does not take a position on which nation has the superior sovereignty claims over each land feature in the Spratly Islands."[205] In describing the *Lassen's* maneuvers as consistent with those of innocent passage, Secretary Carter stated that the operation was intended to challenge attempts to restrict freedom of navigation within territorial seas.[206] Although Subi Reef was one of five Spratly island features implicated in the operation, it received particular notoriety because of China's reclamation activity there.

The U.S. Navy furthered this message in a second widely-publicized FONOP in January 2016. On this occasion, the *U.S.S. Curtis Wilbur*, another *Arleigh Burke*-class destroyer, sailed within twelve nautical miles of Triton Island, within the South China Sea Paracel chain.[207] Like Subi

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[203] LIMITS IN THE SEAS, *supra* note 94, at 11 n.25 (citing a statement by the Acting U.S. Dep't of State Spokesperson on May 10, 1995); *see also* Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at Press Availability (July 23, 2010), http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm; Ash Carter, U.S. Sec'y of Defense, Letter to Sen. John McCain (Dec. 22, 2015), http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation.

[204] Fravel, *supra* note 145.

[205] Ash Carter, U.S. Sec'y of Defense, Letter to Sen. John McCain (Dec. 22, 2015), http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation.

[206] *Id.* Secretary Carter further illuminates the U.S. position with respect to China's land reclamation activities, stating "land reclamation cannot create a legal entitlement to a territorial sea." *Id.* The *Lassen's* voyage was executed consistent with that of innocent passage because Subi Reef, as a low-tide elevation within the territorial sea of another island, Sandy Cay, may form part of Sandy Cay's baseline, which would in effect envelop Subi Reef in a territorial sea. *Id.*

[207] Sam LaGrone, *U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation*, USNI NEWS (Jan. 30, 2016, 10:37 AM),

Reef, Triton Island is controlled by China, but ownership is disputed.[208] The FONOP was intended to challenge the straight baseline that China has claimed around the Paracels, as well as China's dubious requirement for prior notification from foreign warships to conduct innocent passage in China's territorial waters.[209] Unlike the *Lassen*'s voyage in October 2015, however, the Pentagon issued a statement the day after the operation explaining the specific legal assertions that were challenged.[210] A third South China Sea FONOP followed in May 2016, with similar U.S. messaging afterward.[211]

Outwardly, the United States' position seems to be that Chinese expansion, the extension of Chinese military capabilities, and the socio-economic and political fallout for China's maritime neighbors is of no concern; so long as the sea lanes remain open under the navigational provisions of the UNCLOS, then the United States is satisfied. This sentiment was captured by the Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs when he stated,

> For us, it's not about the rocks and shoals in the South China Sea or the resources in and under it, it's about rules and it's about the kind of neighborhood we all want to live in. So we will continue to defend the rules, and encourage others to do so as well.[212]

Nonetheless, China's military capabilities are certainly cause for concern for the United States, even if government officials have come short of alleging any international law violations. In testimony before the Senate Committee on Foreign Relations, the Assistant Secretary of Defense for Asia and Pacific Security Affairs stated,

> The United States welcomes China's peaceful rise . . . . Though increased military capabilities are a natural outcome of growing power, the way China is choosing to

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http://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation.

[208] The entirety of the Paracel chain is claimed by China, Taiwan, and Vietnam. *Id.*

[209] *Id.*

[210] *Id.*

[211] Jane Perlez, *U.S. Sails Warship Near Island in South China Sea, Challenging Chinese Claims*, N.Y. TIMES (May 10, 2016), http://www.nytimes.com/2016/05/11/world/asia/south-china-sea-us-warship.html?_r=0.

[212] Daniel R. Russel, Assistant Sec'y of State, Bureau of East Asian and Pacific Aff., Remarks at the Fifth Annual South China Sea Conference (July 21, 2015), http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm.

> advance its territorial and maritime claims is fueling concern in the region about how it would use its military capabilities in the future. Having these capabilities *per se* is not the issue—the issue is how it will choose to use them.[213]

Hence, China's activities in the South China Sea are worrisome to U.S. officials, despite the outward appearance of a lack of concern, based on the rapidity with which it has increased its presence, and the rhetoric regarding access to the seas coming from Beijing.

It is possible that the U.S. approach has emboldened China to continue reclamation actions and purposely stall any attempt at maritime boundary delimitation or formal dispute resolution with their South China Sea neighbors. This is not to suggest that China's expansion is solely due to U.S. acquiescence. However, the failure to outwardly rebuke China and stand in defense of American allies in the region cannot be ignored.[214]

VII. The Way Forward

The current situation in the South China Sea highlights a gap in the regime of the law of the sea. Despite the arbitral tribunal's findings, and largely due to the award's non-binding nature, the questions of sovereignty over various maritime features remain unresolved. This international drama is unfolding with no clear resolution in sight. The South China Sea situation is not merely a regional problem—as seen by the volume of media coverage within the United States, frequent comments from senior government and military officials, and recent FONOPs by the U.S. Navy—there is worldwide interest in resolution of some form or another. The United States can drastically influence this resolution, and should do so.

A. The United States Must Accede to the UNCLOS

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[213] *Safeguarding American Interests in the East and South China Seas: Hearing Before the S. Comm. On Foreign Relations*, 114th Cong. (2015) (statement of David Shear, Assistant U.S. Sec'y of Defense for Asian and Pacific Sec. Aff.).

[214] For instance, despite commenting on the South China Sea since at least 1995, State Department officials refrained from specifically commenting on China as an instigator of unrest until August, 2012. Fravel, *supra* note 145, at 7.

First and foremost, the United States must ratify and accede to the UNCLOS. There are many scholarly articles decrying the fact that the United States is the only major industrial nation that has not ratified the law of the sea.[215] Included in those articles are many strategically valid reasons to push for U.S. ratification, but this article will only address one. A common refrain from American UNCLOS opponents is that the United States has successfully exerted naval force throughout the globe and protected vital maritime interests for years without relying on membership.[216] Viewed through this pragmatic lens, any potential benefit of ratifying the UNCLOS must be outweighed by the potential for the United States to become subservient to an international body, thereby risking what has already been achieved.

However, the current situation in the South China Sea exposes this argument as untenable by providing a clear example of a situation where the scope of any U.S. response is significantly limited. It is simply not enough to rely on the development of "customary international law" to help resolve lingering vagaries in the convention.[217] Moreover, absent participation as a member, the United States cannot resist attempts to alter the UNCLOS in a way that would be inconsistent with U.S. interests, which could trump customary international law.

Rather, to protect U.S. maritime interests across the entire maritime domain, the United States must play an active role within the framework of the UNCLOS. Only through accession can the United States partake in the various institutions and governing bodies established by the UNCLOS.[218] Only through accession can the United States face maritime

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[215] *See, e.g.*, Gallagher, *supra* note 45, at 1; Kieran Dwyer, *UNCLOS: Securing the United States' Future in Offshore Wind Energy*, 18 MINN. J. INT'L L. 265 (2009); Julie A. Paulson, *Melting Ice Causing the Arctic to Boil Over: An Analysis of Possible Solutions to a Heated Problem*, 19 IND. INT'L & COMP. L. REV. 349 (2009); Wallace, *supra* note 91.

[216] Steven Groves, *The Law of the Sea: Costs of U.S. Accession to UNCLOS*, HERITAGE FOUND'N (June 14, 2012), http://www.heritage.org/research/testimony/2012/06/the-law-of-the-sea-convention-treaty-doc-103-39 (citing Mr. Groves's testimony before the U.S. Senate Committee on Foreign Relations on June 14, 2012).

[217] China's Position Paper in response to the Philippines highlights this point well; if the matters under dispute involve interpretations of the technical provisions of the UNCLOS, then the United States can hardly opine how that dispute should be resolved. Especially concerning disputes of territorial sovereignty, which are highly fact dependent, customary international law will never provide clear guidance beyond any one specific case.

[218] *See supra* Section II.A. Of note, the United States was refused the opportunity to attend the presentation of evidence before the arbitral tribunal in the Philippines arbitration against China because it is not a member of the UNCLOS. The Republic of the Philippines

adversaries and enforce valid maritime zones via Freedom of Navigation operations with a straight face.[219] And only through accession can the United States encourage reform of the treaty to address current shortfalls. That said, as with any negotiation, the United States must be willing to sacrifice to achieve net positive results.

B. The UNCLOS Should Be Amended

In an exhibition of leadership on the international stage, immediately following ratification and accession of the UNCLOS, the United States should push for a major amendment to the treaty to strengthen the compulsory dispute resolution processes. Undertaking such an action would amount to a herculean effort. If the Senate will not take a vote on the UNCLOS as it currently stands, voting on a treaty that removes more national decision-making from the United States would be a tough sell. Though an amendment would be difficult to accomplish, the effort is still worthwhile.

Disputes over territorial sovereignty have long been left to be resolved by the parties' choice of methods. Even with the significant advances of international law over the past century, this has been a matter left to the discretion of states. However, the UNCLOS itself, as a comprehensive treaty creating specific rights and responsibilities, already differs from the body of international law related to the land. Indeed, "The hallmark of the modern state . . . has always been its exclusive sovereignty over a defined territory. This emphasis on exclusive dominion was incompatible with the use of the oceans."[220] Perhaps the question of sovereignty as it relates to the sea *should* be treated differently.

First, Article 297 should be amended to include disputes concerning territorial sovereignty when those disputes relate directly to maritime entitlements. As discussed above, the question of sovereignty underpins

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vs. the People's Republic of China, Ninth Press Release (Perm. Ct. Arb. Nov. 30, 2015), http://www.pcacases.com/web/sendAttach/1524.

[219] Although the United States considers the navigational provisions of the UNCLOS to be customary international law, as stated by President Reagan in his Ocean's Policy Statement of 1984, the United States should no longer rely on this policy. As the prime enforcer of freedom of navigation rights throughout the globe, the United States cannot, in good faith, claim to police an area of the law that is formalized but the United States has failed to ratify, especially when there is no objection to those specific provisions. *See* Eight National Security Myths, *supra* note 186.

[220] KLEIN, *supra* note 48, at 7.

nearly every maritime dispute. Providing a forum to resolve these disputes will greatly enhance the predictability and stability of the law of the sea regime. Primarily, it will guide issues to resolution rather than allowing for long-simmering disputes with no clear path to resolution. Additionally, if territorial sovereignty issues related to maritime entitlements were more routinely considered via adjudication or arbitration,[221] a body of international jurisprudence would follow, thereby providing further predictability and order.

Second, Article 298 should be amended to remove the optional exception to compulsory dispute resolution for disputes of maritime boundary delimitation.[222] Delimitation is the most frequent cause of action in accordance with Part XV of the UNCLOS, resulting in the peaceful and final resolution of many overlapping maritime claims.[223] When invoked, the process clearly works.[224] Delimitation analysis focuses on equitable results; although each delimitation is extremely fact-dependent, the end-state remains—establishing fair and stable boundaries for all parties. Maritime boundary delimitation is clearly as important to the law of the sea regime as the question of territorial sovereignty, and the governing treaty should be empowered to resolve these frequent and important disputes.

Ironically, these proposals would substantially raise the hurdle before U.S. ratification, as "giving up sovereignty" is one of the major points of opposition to the UNCLOS as it stands today.[225] Opposition to UNCLOS within the United States is largely ideological. In an unspoken nod to American exceptionalism, opponents voice concerns over giving up any amount of sovereignty to an international body that may rule counter to U.S. desires, or espouse a general opinion of futility with respect to treaty law.[226] Even the U.S. Navy Judge Advocate General's Corps, the primary

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[221] This article does not propose changing the ability to choose a forum that is already established in the UNCLOS Article 287. Forcing the selection of one forum over another would only cause dispute among member states, as many states harbor significant distrust of certain international bodies. *See* KLEIN, *supra* note 48, at 53–59.

[222] Conversely, the optional exceptions to compulsory resolution related to military activities and matters under the purview of the U.N. Security Council should remain in Article 298.

[223] Evans, *supra* note 58, at 255.

[224] Although, as Professor Evans discusses, recent cases involving delimitation have signified shifting trends in the process, ranging from established objective principles to results-oriented equitable analyses. *Id.* at 278.

[225] Groves, *supra* note 216.

[226] Gallagher, *supra* note 45, at 911.

legal advisor to the U.S. Navy on FONOPs, and strong proponent of ratification, uses the optional reservation of compulsory dispute resolution as an argument in support of ratification.[227]

America is an exceptional nation, but the fear of being told "no" should not forestall efforts to cooperate with the international body. An important element of exceptionalism is leadership, which is a trait often invoked by government officials when describing U.S. foreign interactions.[228] Leadership by example is the bedrock of the U.S. Navy's FONOP program. To enhance international stability and predictability, the United States should be willing to lead by example when it comes to the peaceful resolution of international disputes. While the notion of third party resolution is fundamental to every American's understanding of domestic law, it should be no less fundamental to our understanding of international law.

Had an amended version of the UNCLOS been in effect in 2013, the situation in the South China Sea might look vastly different. First, all competing claims to the features within the Spratly Islands would be subject to adjudication or arbitration. A properly formed judicial body with a clear mandate could implement provisional measures to preemptively hold land reclamation efforts in abeyance. China's participation in arbitration would be assured, lest it risk alienation from the international community. Perhaps FONOPs, in general, would become unnecessary, or at least more mundane, thereby reducing the risk of accidental or unexpected military engagements at sea.

Although the UNCLOS defers greatly to bilateral and regional treaties, those can no more be relied on to resolve these issues than the current version of the UNCLOS. Other than the scorn of neighboring states, regional pacts lack enforceability and genuine interest from the international community beyond the region. For example, the ASEAN

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[227] Eight National Security Myths, *supra* note 186.

> It simply does not get any better than that—not in private contract law nor in treaty law. What this Convention makes clear is that a State party can completely reject all the dispute resolution procedures—on its own terms—for disputes involving maritime boundaries, military activities, and matters before the Security Council.

Id.

[228] *See e.g.*, American Leadership in the World, https://www.whitehouse.gov/the-record/foreign-policy (last visited July 31, 2016).

DOC has similar shortfalls in that there is no compulsory dispute resolution mechanism; even if it contained compulsory methods, a party like China could unilaterally disregard the provision with little or no repercussions.

The risk to modifying the UNCLOS stands that membership will significantly decrease. However, it is worth noting that relatively few of the member states have made use of the right to reserve the compulsory dispute resolution that is afforded by Article 298.[229] Perhaps the strongest negative impact to not acceding to the UNCLOS is international stigma. Faced with an enforceable treaty, a state like China could simply choose to walk away from the UNCLOS altogether to maintain its claims in the South China Sea. In that case, political and diplomatic isolation would be the appropriate response. This makes ratification by the United States all the more important.

VIII. Conclusion

The treaty resulting from the third conference on the law of the sea is a remarkable achievement. It brought significant stability to the maritime domain. For the most part, states can confidently exert claims of sovereignty and sovereign rights over the seas and expect recognition and due regard from other states. But the treaty also reflects the world politics of the 1970s and 1980s. Just as the law of armed conflict evolves as weapons and tactics change, the law of the sea should evolve as naval power shifts and natural resources become more sacred.

In light of the comprehensive nature of the UNCLOS, it is somewhat preposterous to allow such an important question as disputed claims of sovereignty to have no legal recourse. Recognizing the inherent struggle between national independence and international harmony, rule-making and order must override pragmatism at some point. This is one of the values of a system of laws to begin with—to establish predictability, order, and equity among various parties. There is a distinct difference between the law of the sea and other areas of international law. As Ambassador Pardo stated, the oceans are a "common heritage of mankind," and the world has recognized the need to implement rules and regulations that trump national independence.[230]

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[229] KLEIN, *supra* note 48, at 228.
[230] Sohn, *supra* note 33, at 287.

The world should take the next step. The United States can lead this change by ratifying the UNCLOS and accepting compulsory dispute resolution for maritime boundary delimitation, then advocating for compulsory processes for questions of territorial sovereignty related to maritime entitlements. The United States should not be afraid of subjecting its interests to the rules of an international body. If bound to defend maritime claims in court, the United States should be able to do so because those claims will always be in agreement with the principles of the UNCLOS.

LEGAL ASPECTS OF USING FORCE AGAINST THE ISLAMIC STATE IN SYRIA AFTER RUSSIAN INTERVENTION

LIEUTENANT COLONEL ALI FUAT BAHCAVAN (RETIRED)*

> *I'm so ashamed of what they are doing to me. There's a part of me that just wants to die. But there is another part of me that still hopes that I will be saved and that I will be able to embrace my parents once again.*[1]

I. Introduction

Since the summer of 2014, the world has witnessed "the map of the Middle East redrawn."[2] Over the course of one-hundred days, the Islamic State[3] (IS) changed the politics of the region drastically.[4] In early June 2014, IS militants advanced deep into northern Iraq from Syria. In a relatively short time, they took control of wide swaths of territory, including Mosul, Iraq's second largest city.[5] Following the takeover of

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[1] Nick Squires, *Yazidi Girl Tells of Horrific Ordeal as ISIL Sex Slave*, TELEGRAPH (Sept. 7, 2014), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11080165/Yazidi-girl-tells-of-horrific-ordeal-as-Isil-sex-slave.html.

[2] Simon S. Cordall, *How ISIS Governs Its Caliphate*, NEWSWEEK (Dec. 2, 2014), http://www.newsweek.com/2014/12/12/how-isis-governs-its-caliphate-288517.html.

[3] It is also referred to as Islamic State in Iraq and Syria (ISIS), or Islamic State in Iraq and the Levant (ISIL). The group's acronym in Arabic is DAESH. *See* Faisal Irshaid, *ISIS, ISIL, IS or DAESH? One group, many names*, BBC NEWS (Dec. 2, 2015), http://www.bbc.com/news/world-middle-east-27994277. This article will refer to the group as the "Islamic State" (IS) throughout the article.

[4] PATRICK COCKBURN, THE RISE OF ISLAMIC STATE: ISIS AND THE NEW SUNNI REVOLUTION 1 (2015).

[5] *See* Loveday Morris & Liz Sly, *Insurgents in Northern Iraq Seize Key Cities, Advance Toward Baghdad*, WASH. POST (June 12, 2014), https://www.washingtonpost.com/world/middle_east/insurgents-in-northern-iraq-push-toward-major-oilinstallations/2014/06/11/3983dd22-f162-11e3-914c-1fbd0614e2d4_story.html.

Mosul and subsequent attacks on adjacent areas, the IS targeted Iraq's minority communities of Yazidis, Shia Turkmens, and Christians.[6] More than 500,000 Yazidis and other minorities fled northern Iraq after the IS attacks began, while many were trapped on nearby Mount Sinjar, surrounded by IS fighters.[7] The IS militants tortured and raped women and girls, forced them to marry their fighters, or sold them in a slavery market in Syria.[8]

The IS drew substantial attention when it began releasing videos of western journalists, including James Foley and Steven Sotloff, being beheaded by masked terrorists holding knives at their necks.[9] On February 3, 2015, the IS released another horrible video depicting a Jordanian military pilot being burned alive while confined in a cage.[10] At the invitation of the Iraqi government, the coalition, led by the United States, began launching airstrikes on IS targets in Iraq and Syria in the face of ongoing atrocities.[11] The initial reaction from the international community concerning the legality of the operations was generally positive.[12] Then, on September 30, 2015, the world's news media circulated a surprising development: Russian warplanes had begun conducting airstrikes over Syrian territory.[13] While unexpected, Russia's

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[6] *See Iraq: Forced Marriage, Conversion for Yezidis*, HUM. RTS. WATCH (Oct. 11, 2014), https://www. hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis.

[7] *See Iraq's Yazidi Minority Flees Militant Threat*, DAWN (Aug. 4, 2014, 04:01 PM), http://www.dawn.com/ news/ 1123250.

[8] *See* Diana Chandler, *ISIS Forcing Yazidi Conversions, Marriages*, BIBLICAL RECORDER (Oct. 15, 2014), http://www.brnow.org/News/October-2014/ISIS-forcing-Yazidi-conversions-marriages.

[9] *See* Awr Hawkings, *U.S. Escalates Military Action in Iraq: A Timeline*, BREITBART (Aug. 24, 2014), http://www.breitbart.com/national-security/2014/08/24/u-s-escalates-military-action-in-iraq-a-timeline/. The IS announced that "his [James Foley's] beheading was brought about by Obama's decision to strike IS positions and pledged that they would behead others if the strikes continued." .

[10] *See* CBS & Associated Press, *Jordanian Pilot's "Obscene" Burning Death by ISIS Sparks Outrage in Mideast*, CBS NEWS (Feb. 4, 2015, 9:40 AM), http://www.cbsnews.com/news/jordanian-pilots-obscene-burning-death-by-isis-sparks-outrage-in-mideast/.

[11] *See Syria: US Begins Air Strikes on Islamic State Targets*, BBC NEWS (Sept. 23, 2014), http://www.bbc.com/ news/world-middle-east-29321136.

[12] *See Islamic State: Where Key Countries Stand*, BBC NEWS (Dec. 3, 2015), http://www.bbc.com/news/world-middle-east-29074514; *see also* Monika Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 21, 21–23 (2015) (arguing that several states expressly endorsed the operations, while the only vocal objections came from Russia and Iran).

[13] Ed Payne et al., *Russia Launches First Airstrikes in Syria*, CNN (Sept. 30, 2014), http://www.cnn.com/ 2015/09/30/politics/russia-syria-airstrikes-isis/.

intervention brought disputes concerning the legal basis of using military force in Syria to the forefront, especially after allegations arose that Russia was striking moderate rebels instead of IS targets.[14]

This article will evaluate the legal aspects of using force against the IS in Syria. After reviewing the security threat posed by the IS in the region, this article will examine the legal basis for the use of force against non-state actors, and the specific legal aspects of using force against the IS in Syria. Evaluating all the factors in light of the international legal standards, this article concludes that despite Russia's intervention, the Syrian government remains unwilling or unable to prevent the use of its territory for the IS's armed attacks. Therefore, upon the invitation of the Iraqi government, use of military force against the IS in Syria, in the exercise of both collective self-defense of Iraq and individual self-defense of other victim states, is in accordance with international law.

II. The Islamic State

A. Rise of the Islamic State

In the summer of 2014, the world awoke to the threat posed by the IS, but the story began years before.[15] The origins of the IS go back to 2003, when Abu Musab al-Zarqawi established *Jamaat al-Tawhid Wal Jihad*[16] in Iraq, an armed group aimed primarily at opposing the U.S. occupation.[17] In October 2004, al-Zarqawi declared allegiance to Osama Bin Laden, renaming his group al-Qaeda in Iraq (AQI).[18] Following al-Zarqawi's death in June 2006, AQI merged with other jihadist groups, which gave birth to the Islamic State of Iraq (ISI), an umbrella organization governed by Abu Omar al-Baghdadi.[19] However, between 2007 and 2010, the ISI

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[14] Lizzie Dearden, *Russia Launches First Airstrikes in Syria as Non-ISIS Rebels Claim They Are Being Targeted*, INDEPENDENT (Sept. 30, 2015), http://www.independent.co.uk/news/world/middle-east/russia-launches-first-airstrikes-in-syria-us-says-as-non-isis-rebels-claim-they-are-being-targeted-a6673621.html.

[15] JESSICA STERN & J.M. BERGER, ISIS THE STATE OF TERROR 13 (2015).

[16] *See Jamaat Al-Tawhid Wal-Jihad*, UNSOLICITED RES. (Nov. 20, 2014), https://unsolicitedresearch.wordpress.com/2014/11/20/jamaat-al-tawhid-wal-jihad/. This group was notorious for its high-profile operations, including targeting civilian organizations, such as the Jordanian Embassy, Canal Hotel, and Red Cross. *Id.*

[17] MICHAEL WEISS & HASSAN HASSAN, ISIS INSIDE THE ARMY OF TERROR 13–14 (2015).

[18] *Id.* at 34.

[19] *See* M. J. Kirdar, *Al-Qaeda in Iraq*, CTR. STRATEGIC & INT'L STUD. (June 2011), https://www.csis.org/analysis/al-qaeda-iraq; Ellen Knickmeyer &Jonathan Finer,

experienced significant setbacks due to the cooperation of Sunni tribes[20] with U.S. forces in confronting terrorist groups.[21]

In 2010, Abu Omar al-Baghdadi died and Abu Bakr al-Baghdadi became the ISI leader.[22] In early 2011, as the uprising in Syria spread and became more violent, al-Baghdadi decided to send members of his group, headed by Abu Muhammad al-Jawlani, into Syria in order to make Syria another battlefield of jihad.[23] Fleeing to Syria gave the ISI the chance to reconstitute itself by recruiting numerous foreign fighters.[24] In April 2013, the ISI joined the Syrian civil war, and al-Baghdadi proclaimed the establishment of the "Islamic State in Iraq and the Levant" or "al-Sham" (ISIL or ISIS), declaring the group's amalgamation with the terrorist group Jabhat al-Nusra.[25] However, al-Jawlani, now the leader of Jabhat al-Nusra, immediately denied the fusion.[26] By early 2014, the situation in

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Insurgent Leader Al-Zarkawi Killed in Irag, Coun. On Foreign Affairs (June 8, 2006 5:57 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060 800114.html/.

[20] *See* Kimberly Kagan, *Anbar Awakening: Displacing Al-Qaeda from its Stronghold in Western Iraq*, INST. FOR THE STUDY OF WAR (Aug. 21, 2006–Mar. 30, 2007), http://www.understandingwar.org/report/anbar-awakening-displacing-al-qaeda-its-stronghold-western-iraq. In 2007, a group of Sunni sheikhs in Ramadi refused al-Qaeda and began to cooperate with U.S. forces. *Id.* Known as "The Anbar Awakening," this movement transformed Anbar from a terrorist stronghold into an area where the U.S. and Iraqi forces could conduct effective operations. *Id.*

[21] Jessica D. Lewis, *Al-Qaeda in Iraq Resurgent the Breaking the Walls Campaign*, INST. FOR THE STUDY OF WAR (Sept. 2013), http://www.understandingwar.org/sites/default/files/AQI-Resurgent-10Sept_0.pdf.

[22] STERN & BERGER, *supra* note 15, at 33.

[23] Stephan Rosiny, *The Rise and Demise of the Islamic Caliphate*, 22 MIDDLE E. POL'Y 97 (2015). Almost ten years ago, al-Zarqawi had interpreted his fight in Iraq as an anticipation of Armageddon as he wrote, "The spark has been lit here in Iraq, and its heat will continue to intensify . . . until it burns the Crusader armies in Dabiq." *Id.*

> Dabiq is a village north of Aleppo in which the decisive battle against the western powers is supposed to take place, [and] will then open the way for the conquest of Constantinople and Rome. This is what [the] IS now predicts in its colorful magazine of the same name, Dabiq.

Id. at 98.

[24] Andrew W. Terrill, *Understanding the Strengths and Vulnerabilities of ISIS*, 44 PARAMETERS 15 (2014).

[25] Rosiny, *supra* note 23, at 98.

[26] *See* Terrill, *supra* note 24, at 15. *See also* ANDREW HOSKEN, EMPIRE OF FEAR INSIDE THE ISLAMIC STATE 164 (2015) (stating that al-Jawlani pledged his allegiance to Ayman al-Zawahiri, the leader of al-Qaeda).

Syria transformed into "a war within a war," with the ISIL battling against a number of rebel factions, including Jabhat al-Nusra.[27]

Despite a number of key groups in the area refusing to cooperate,[28] the ISIL was able to successfully capture and expand its territory by seizing and consolidating control of Raqqa, a city in eastern Syria, and most of the surrounding area.[29] Moreover, the ISIL gained control of Deir ez Zour, a major oil hub in the region, which provided a steady stream of income to finance its war effort.[30]

In early June 2014, the power-vacuum in Iraq gave the ISIL the opportunity to capture Mosul.[31] Shortly after Mosul, the hometown of Saddam Hussein, Tikrit, fell into ISIL hands. On June 29, 2014, the "IS announced the formation of a transnational entity infinite in its claim to territory and power: The Islamic State."[32] In an audio recording, the chief spokesman of the IS also declared that it was reestablishing the caliphate, a historical Islamic empire for Muslims around the world.[33] Abu Bakr al-Baghdadi was announced as the new caliph during his first public appearance, delivering a sermon at a Mosul mosque.[34]

B. The Islamic State's Structure, Strategy, and Ideology

The Islamic State is a hybrid of other jihadist groups, internalizing the radical Islamic ideology of al-Qaeda and the centralized command model and tactics of the Taliban.[35] Abu Bakr al-Baghdadi, the leader of the

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[27] STERN & BERGER, *supra* note 15, at 43.

[28] *See Al-Qaeda Disavows ISIS Militants in Syria*, BBC NEWS (Feb. 3, 2014), http://www.bbc.com/news/world-middle-east-26016318. The Jabhat al-Nusra was not the only key faction in the area disavowing affiliation with the IS. *Id.* On February 2, 2014, al-Qaeda formally repudiated the IS in a written statement: "[A]l-Qaeda has no connection with the group called the ISIS . . . . Therefore, it is not affiliated with al-Qaeda and has no organizational relationship with it. Al-Qaeda is not responsible for ISIS's actions." *Id.*

[29] *See* Rosiny, *supra* note 23, at 98.

[30] STERN & BERGER, *supra* note 15, at 44.

[31] *See* COCKBURN, *supra* note 4, at 11–13.

[32] Rosiny, *supra* note 23, at 99.

[33] *See* STERN & BERGER, *supra* note 15, at 46.

[34] *See id.* at 46–47.

[35] Lina Khatib, *The Islamic State's Strategy: Lasting and Expanding*, CARNEGIE ENDOWMENT 3 (June 2015), http://carnegieendowment.org/files/islamic_state_strategy.pdf.

group, is the supreme political, religious, and military authority.[36] The organizational structure of the IS consists of four main councils, each responsible for specific aspects of administration: Shura, Sharia, Military, and Security Councils.[37]

The IS considers itself as a state-building project, "with a need [of] not just fighters but also professionals."[38] Through its recruitment strategy, an unprecedented number of foreign fighters have traveled to Syria in order to join the IS. Andre Poulin, a Canadian-national IS fighter, expressed this notion in a video release: "[T]here is role for everybody. . . . If you cannot fight, then you give money, if you cannot give money, you can assist in technology."[39]

The ideology of the IS seems to be the same as that of al-Qaeda, but ideology is not the primary purpose of the group. "[I]t is a tool to acquire power and money."[40] A particularly extreme apocalyptic Salafi-Jihadi ideology drives the IS.[41] It "seeks to overthrow the existing world order," abolish the boundaries between states, "convert all the people to Islam, and rule all Islamic lands."[42]

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[36] Terrence McCoy, *How ISIS Leader Abu Bakr al-Baghdadi Became the World's Most Powerful Jihadist Leader*, WASH. POST (June 11, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/.

[37] *See* Richard Barreth, *The Islamic State*, THE SOUFAN GROUP 29–33 (Nov. 2014), http://soufangroup. com/wp-content/uploads/2014/10/TSG-The-Islamic-State-Nov14.pdf. The Shura Council is the main advisory body, and theoretically meant to approve al-Baghdadi's appointment and decisions. *Id.* The Sharia Council's duties include selection of the caliph and ensuring compliance with Sharia law. *Id.* The Military Council drives the campaigns to gain more territory and defend what is at hand, while the Security Council is responsible for ensuring physical security and eliminating rivals of al-Baghdadi. *Id.*

[38] J.M. Berger, *Tailored Online Interventions: The Islamic State's Recruitment Strategy*, COMBATING TERRORISM CTR. (Oct. 23, 2015), https://www.ctc.usma.edu/posts/tailored-online-interventions-the-islamic-states-recruitment-strategy.

[39] Laith Alkhouri & Alex Kassirer, *Governing the Caliphate: The Islamic State Picture*, COMBATING TERRORISM CTR. (Aug. 21, 2015), https://www.ctc.usma.edu/posts/governing-the-caliphate-the-islamic-state-picture.

[40] Khatib, *supra* note 35, at 14.

[41] Charles Lister, *A Long Way from Success: Assessing the War on the Islamic State*, 9 PERSP. ON TERRORISM 7 (2015).

[42] *Id.*

C. The Security Threat Posed by the Islamic State in the Region

Since 2010, the IS has evolved from a terrorist group into an almost "full-blown army."[43] Today, it is able to design and execute military campaigns at the strategic, operational, and tactical levels.[44] It possesses collective competencies, such as command and control, hybrid warfare, and maneuver capabilities that are critical to planning and operating at all three levels. It is through these capabilities that the IS is able to conquer terrain in both Syria and Iraq, and to conduct multiple offensive and defensive operations along several fronts.[45]

At the same time, the IS is a terrorist organization, without political or moral boundaries, killing innocent civilians, and threatening the very survival of nations.[46] The IS's actions have imperiled civilians of all ages, gender, ethnicity, and nationality. During its August, 2014 attack on the Sinjar region, the IS abducted hundreds of Yazidi women and girls, made them slaves, and sold them as "war booty" in markets across al-Raqqah.[47]

Although the IS initially focused on consolidating territorial gains in Iraq and Syria, it has now adopted a strategy of retaliatory attacks against coalition states in response to airstrikes. On June 26, 2015, an IS terrorist infiltrated a hotel and killed thirty-seven people on a beach in the Tunisian resort town of Sousse.[48] On October 10, 2015, two IS suicide bombers killed 102 people during a rally in Ankara.[49] The Turkish Office of the

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[43] Michael Knights, *ISIL's Political-Military Power in Iraq*, COMBATING TERRORISM CTR. (Aug. 27, 2014), https://www.ctc.usma.edu/posts/isils-political-military-power-in-iraq.

[44] Jessica D. Lewis, *The Islamic State: A Counter-Strategy for a Counter-State*, INST. FOR THE STUDY OF WAR (July 2014), http://www.understandingwar.org/ sites/default/files/ Lewis-Center%20of%20gravity.pdf.

[45] *Id. See also ISIS Territory Remains Larger than Many Countries*, N.Y. TIMES (Mar. 6, 2015), http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html? _r=0.

[46] *See* Ross Harrison, *Towards a Regional Strategy Contra ISIS*, 44 PARAMETERS 37 (2014).

[47] WILLIAM MCCANTS, THE ISIS APOCALYPSE THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE 112–13 (2015).

[48] *See Tourists Gunned Down at Tunisian Resort*, AL-JAZEERA AMERICA (June 26, 2015, 7:45 AM), http://america.aljazeera.com/articles/2015/6/26/tourist-hotel-in-tunisia-reportedly-attacked.html.

[49] *See ISIL Behind Oct. 10 Ankara Massacre, Says Prosecutor's Office*, HURRIYET DAILY NEWS (Oct. 28, 2015), http://www.hurriyet dailynews.com/isil-behind-oct-10-ankara-massacre-says-prosecutors-office-.aspx?pageID=238&nID=90441& NewsCatID=509.

Prosecutor determined that an IS terrorist cell committed the attack upon the order of the IS leadership in Syria.[50]

The IS also claimed responsibility on social media for double suicide-bomb attacks on November 12, 2015, which killed 43 people and wounded 239 others, in a Shia-majority district of Beirut.[51] On November 13, 2015, it carried out organized attacks across six locations in Paris. It was one of the worst terrorist attacks on French soil since World War II; 130 people were killed and 368 were wounded. The IS claimed responsibility for the attack and threatened France and other countries with more attacks.[52] Additionally, there is significant concern about foreign fighters who have travelled to Iraq or Syria to join the fight.[53] This creates extra pressure on security agencies, because the future intentions of returning fighters are unpredictable and difficult to assess.[54]

The armed conflict in Syria has triggered the world's largest refugee crisis since World War II.[55] Beginning in March 2011, more than 4.6 million people have fled into neighboring countries as refugees, while half of Syria's population has been internally displaced.[56] In September 2015, over 500,000 Syrian asylum-seekers and thousands of Iraqis have fled to

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[50] *Id.*

[51] Kareem Shaheen, *ISIS Claims Responsibility as Suicide Bombers Kill Dozens in Beirut*, THE GUARDIAN (Nov. 12, 2015), http://www.theguardian.com/world/2015/nov/12/beirut-bombings-kill-at-least-20-lebanon.

[52] *See* Adam Chandler et al., *The Paris Attacks: The Latest*, ATLANTIC (Nov. 22, 2015, 4:58 PM), http://www.theatlantic.com/international/archive/2015/11/paris-attacks/415953/.

[53] The number of foreign fighters that have joined the militant organizations in Iraq and Syria reportedly exceeded 20,000. *See* Peter R. Neumann, *Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s*, ICSR (Jan. 26, 2015), http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/.

[54] *See Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq*, THE SOUFAN GROUP (Dec. 8, 2015), http://soufangroup.com/foreign-fighters/.

[55] *See* Jan Egeland, *This Is the Worst Refugee Crisis Since WWII. It's Time for Us to Rethink Our Response*, WORLD POST (Sept. 15, 2014, 12:19 PM), http://www.huffingtonpost.com/jan-egeland/refugee-crisis-wwii-aid-_b_5791776.html.

[56] *See Syria's Refugee Crisis in Numbers*, AMNESTY INT'L (Feb. 3, 2016, 7:02 PM), https://www.amnesty. org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/. Lebanon hosts 1.1 million refugees, the largest per capita refugee population in the world. *Id.* Turkey hosts more than 2.5 million Syrian refugees, the largest number in a single country in the world. *Id.*

Europe, which has stoked a fear of more terrorism and violence in Europe.[57]

III. Theoretical Legal Basis for Use of Force Against a Non-State Actor[58]

A. Prohibition on the Use of Force

The architects of the United Nations (UN) Charter sought to establish a regime that would severely restrict the resort to force in order to "save succeeding generations from the scourge of war."[59] These efforts resulted in Article 2(4) of the UN Charter, which clearly set forth the obligation of states to "refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state . . . ."[60] Within the UN Charter, there are two exceptions to the prohibition on the use of force: measures taken by the UN Security Council (UNSC) authorizing use of force, and self-defense.[61] Finding its roots in international law, consent of a state is also recognized as an exception to the prohibition.

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[57] Daniel Byman, *Do Syrian Refugees Pose a Terrorism Threat?*, LAWFARE (Oct. 25, 2015, 10:26 AM), https://www.lawfareblog.com/do-syrian-refugees-pose-terrorism-threat

[58] "Non-state actor" is a category comprised of individuals or groups that are not part of or acting on behalf of a state. *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 14 (2010). This article classifies the IS as a non-state actor on the basis that it is an armed group using transnational force, but not affiliated or under the effective control of any state.

[59] AIDEN WARREN & INGVILD BODE, GOVERNING THE USE-OF-FORCE IN INTERNATIONAL RELATIONS 11 (2014).

[60] *Id. See also* Kimberley N. Trapp, *Actor-pluralism, the 'Turn to Responsibility' and the jus ad bellum: 'Unwilling or Unable' in the Context*, 2 J. ON USE OF FORCE & INT'L L. 8 (2015) ("The prohibition on the use of force in Article 2(4) is directed *at* states, and prohibits force *between* states . . . . In particular, Article 2(4) does not directly prohibit the use of force *by* [non-state actors] NSAs, nor does it speak to uses of force by states *against* NSAs." (emphasis added)).

[61] Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, *in* 79 INT'L L. STUDIES, INT'L L. & WAR ON TERROR 19 (Fred L. Borch & Paul S. Wilson eds., 2003).

B. Exceptions to the Prohibition on the Use of Force

1. Consent

Although not stated directly in the UN Charter, state consent to the use of force is a well-recognized principle of international law.[62] Article 2(4) of the UN Charter prohibits "the use of force against the territorial integrity and political independence" of any state. Therefore, consensual interventions to support a state in its internal conflicts are not within the scope of the prohibition.[63] Article 20 of the UN International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts concludes that "valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."[64] In other words, if a state consents to the use of force in its territory by another state, it is generally not considered to be a violation of international law.[65]

Valid consent justifies an act so long as the act remains within the context of consent.[66] The consenting state may also eventually revoke the consent it had given previously, and such revocation would render any future use of force unlawful.[67] Thus, it is generally the host state's domestic law that determines whether a particular occasion of consent is valid internationally.[68]

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[62] *See* Benjamin R. Farley, *Drones and Pakistan, Consent and Sovereignty*, D.C. EXILE (Mar. 16, 2013), http://dcexile.blogspot.com/2013/03/drones-and-pakistan-consent-and.html.

[63] *See* Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L. J. 364 (2011).

[64] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 72 (2001).

[65] Anders Henriksen, *Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World*, 19 J. OF CONFLICT & SECURITY L. 219 (2014).

[66] *See* Farley, *supra* note 62.

[67] *See* Lieblich, *supra* note 63, at 364.

[68] *See* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. J. INT'L L. 5 (2013).

2. Authorization from the United Nations Security Council

The principal objective of the UN is "[t]o maintain international peace and security."[69] According to Article 24(1) of the UN Charter, "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security . . . ."[70] Chapter VII of the UN Charter lays down the most extensive powers of the UNSC for the maintenance of international peace and security.[71] If the Council considers peaceful measures, such as economic sanctions or severance of diplomatic relations, to be inadequate in restoring international peace and security, it may authorize enforcement measures "including military operations by air, sea, or land forces."[72]

3. Self-Defense

Another exception to the prohibition on the use of force is the right of self-defense in response to a prior or impending illegal use of force.[73] Self-defense is generally accepted as a "fundamental right of States to survival,"[74] which grants States the right "to respond individually or collectively to an illegal armed attack directed against its territory or citizens, military vessels, aircraft . . . subject to the legal criteria and conditions in both the UN Charter and customary international law."[75]

Article 51 of the UN Charter describes self-defense as *inherent* in nature and recognizes both individual and collective self-defense.[76]

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[69] The United Nations (UN) Charter art. 1, ¶ 1 (stating that the purpose of the UN is "[t]o maintain international peace and security, and to that end: to take effective collective measures for prevention and removal of threats to the peace . . . .").

[70] *Id.* art. 24(1).

[71] *See* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER 33 (2001).

[72] *Id.* at 49. *See also* Adam Roberts, *The Use Force*, *in* THE UN SECURITY COUNCIL FROM COLD WAR TO THE 21ST CENTURY 133–39 (David M. Malone ed., 2003).

[73] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 187 (2011).

[74] *Id.* at 189.

[75] Terry D. Gill, *Legal Basis of the Right of Self-Defense Under the UN Charter and Under Customary International Law*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 187 (Terry D. Gill & Dieter Fleck eds., 2015).

[76] DINSTEIN, *supra* note 73, at 188. Article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

However, it does not disclose the specific elements of self-defense in explicit terms, leaving it to customary international law. The relevance of customary international law principles concerning the scope and meaning of self-defense has been the subject of much debate.[77] According to proponents of the restrictive view to self-defense, Article 51 is exclusively conditioned upon the phrase: "if an armed attack occurs," and without regard to the principles otherwise derived from customary international law.[78] On the other hand, the broader view is that Article 51 and customary international law complement each other, and the reference to the inherent right of self-defense in Article 51 incorporates customary international law, providing greater guidance for applying self-defense.[79]

This article analyzes a state's right to self-defense under the broader view. However, regardless of the view one ascribes to, nearly every current armed threat to regional and global security gives rise to the question of attribution. Therefore, discussion concerning whether an armed attack must first be attributed to a state before a victim state may respond in self-defense is necessary; analysis concerning the principles of self-defense and the "unwilling or unable" doctrine will follow.

Self-defense hinges on the phrase "armed attack," which is a threshold requirement in order to trigger the use of force allowed under Article 51 of the UN Charter.[80] Although almost all states agree that the right to self-defense arises when there is an armed attack, "there are disagreements as to what constitutes an armed attack."[81]

In the *Nicaragua* case, the International Court of Justice (ICJ) rendered a decision against the United States for using force against paramilitary forces under the claim of self-defense.[82] In its decision, the court first discussed the scope and criteria for determining what constitutes an armed attack.[83] The ICJ stated, "[S]cale and effects are to be considered

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[77] *See* Gill, *supra* note 75, at 189.
[78] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 98–99 (2004); *see also* ANTONIO CASSESE, INTERNATIONAL LAW 254–55 (2005).
[79] *See* Gill, *supra* note 75, at 188. *See also* THOMAS FRANCK, RECOURSE TO FORCE STATE ACTION AGAINST THREATS AND ARMED ATTACKS 45 (2003); Ian Brownlie, *The Use of Force in Self-Defense,* 37 BRIT. Y.B. INT'L L. 232–41 (1961).
[80] *See* DINSTEIN, *supra* note 73, at 193.
[81] GRAY, *supra* note 78, at 108.
[82] Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27) (distinguishing the most grave forms of the use of force (those constituting an armed attack) from other less grave forms).
[83] *Id.*

when determining whether particular actions amount to an armed attack."[84] In other words, "an armed attack denotes a reasonably significant use of force which rises above the level of an ordinary criminal act . . . ."[85]

Additionally, the ICJ appeared to adopt the position that an armed attack must indicate state involvement, and self-defense can only be exercised in response to an attack by a state.[86] In the *Nicaragua* case, the court decided that the conditions of self-defense were not present, because the armed attacks by non-state actors were not attributable to the host state.[87] The ICJ reiterated this position in the *Palestinian Wall* Advisory Opinion, concluding that an armed attack triggering a response in self-defense must first be attributable to a state.[88]

However, the judges on the ICJ are not unanimous on this point. Both Judge Higgins[89] and Judge Kooijmans[90] criticized this point in their separate opinions. The crux of their criticism was that unlike Article 2(4) of the UN Charter, which specifically refers to use of force by states, "Article 51 does not mention the nature of the party responsible for the attack" as an element to trigger a state's right to self-defense.[91] The ICJ, in its 2005 decision in *Democratic Republic of Congo (DRC) v. Uganda* case, further explained the impetus of attribution to states and the right to self-defense. In its decision, the ICJ ruled that the facts did not support the finding that actions of non-state actors against Uganda were

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[84] *Id.* at 101.
[85] Gill, *supra* note 75, at 191.
[86] *See* LUBELL, *supra* note 58, at 31.
[87] Nicar. v. U.S., 1986 I.C.J. at 103.
[88] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139, (July 9) ("Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in case of armed attack by one State against another State.").
[89] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 208, ¶ 33, (July 9) (Separate opinion by Higgins, J.) ("Nothing in the text of Article 51 . . . stipulates that self-defense is available only when an armed attack is made by a state.").
[90] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 219, ¶ 35, (July 9) (Separate opinion by Kooijmans, J.) ("Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of self-defense without making any reference to an armed attack by a state . . . . This is completely the new element in these resolutions.").
[91] LUBELL, *supra* note 58, at 31–32. *See also* Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 J. CONFLICT & SEC'Y L. 348–49 (2006).

attributable to the DRC.[92] But, in its decision, the ICJ made a distinction between the need for attribution before using force *against the state* from whose territory the attacks originate, versus using force *within the state* from whose territory non-state actors operate.[93] This is a key distinction, particularly because "each contentious case to come before the ICJ, the host [victim] state was the target of the defensive force,"[94] thus requiring attribution to state action before triggering Article 51. According to the Court's decisions, attribution is a necessary condition only when the use of force is targeted *against the state.* Thus, the ICJ's decisions do not prevent the use of force *against non-state actors* in a third state's territory in response to armed attacks that are not attributable to that state.[95]

Importantly, this approach appears to be endorsed by state practice. For example, the U.S. and UN responses to the al-Qaeda attack on September 11, 2001 (9/11), were authorized in self-defense against non-state actors operating in another country.[96] Even though the armed attacks carried out by al-Qaeda were not attributable to Afghanistan or its *de facto* Taliban government, the UNSC Resolutions 1368 (2001) and 1373 (2001), adopted in the wake of 9/11, recognized the actions of al-Qaeda as armed attacks, and accepted the legality of action taken in self-defense in response to these attacks.[97]

International law requires that any use of force under self-defense be necessary and proportionate.[98] The parameters of self-defense under customary international law generally date back to the *Caroline* incident.[99]

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[92] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 146, (Dec. 19).

[93] *See* KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 48-51 (2011).

[94] *Id.* at 51.

[95] *Id. See also* Brent Michael, *Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defense*, 16 AUS. INT'L L. J. 144 (2009). *But see* Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 590–91 (2011) ("The International Court of Justice (ICJ) has said that the armed attack must be attributable to a state for the exercise of self-defense on that state's territory to be lawful . . . . [B]efore you can take offensive measures against another state, that state has to be responsible for the first unlawful use of force.").

[96] *See* GRAY, *supra* note 78, at 164.

[97] TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 433–42 (2010). *See also* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 47, 47–50 (2002).

[98] *See* Michael, *supra* note 95, at 135.

[99] *British-American Diplomacy The Caroline Case*, AVALON PROJECT, http://avalon.law.

According to the principles established by the *Caroline* incident, a state resorting to self-defense must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . justified by the necessity . . . and kept clearly within it."[100]

As stated in the *Caroline* incident, necessity, proportionality, and immediacy are considered to be the bedrocks of self-defense.[101] Immediacy is the temporal aspect of self-defense and relates to the timeframe of an armed attack.[102] Necessity means there is an exigency to use force in response to an armed attack, because there is "no practicable alternative means of redress" within reach.[103] In other words, a state can rely on self-defense when peaceful measures have reasonably been exhausted, or when diplomatic efforts have clearly proved futile.[104] Proportionality focuses on counter attacks, and doctrine states that "[t]o comply with the proportionality criterion, [s]tates must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack."[105] It operates in tandem with the necessity requirement in that the use of force must not go beyond what is necessary to halt the armed attack.[106]

The "unwilling or unable" doctrine is generally defined as "the right of a victim state to engage in extraterritorial self-defense where the host state is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors."[107] The doctrine seeks to balance the right of sovereignty against that of self-defense and begins with the presumption that all states have an obligation[108] to make certain their

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yale.edu/19th_century/br-1842d.asp (last visited Sept. 23, 2016).

[100] James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 435 (2006).

[101] LUBELL, *supra* note 58, at 44.

[102] *See* JAMES A. GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENSE IN INTERNATIONAL LAW, 103–04 (2009).

[103] DINSTEIN, *supra* note 73, at 232.

[104] *See* RUYS, *supra* note 97, at 95.

[105] INT'S & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY JA 422, OPERATIONAL LAW HANDBOOK ch. 1, at 4 (2015). *See also* Gill, *supra* note 75, at 196.

[106] Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Terrorist Actors*, 56 INT'L COMP. L. Q. 146 (2007).

[107] Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test*, 36 U. N. S. W. L. J. 625 (2013).

[108] G.A. Res. 25/2625, annex, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the

territory is not used for acts contrary to the rights of other states.[109] If the host state is either unwilling or unable to prevent its territory from being used in contravention of international law, the victim state has the right to engage defensively against the non-state actor.[110]

However, the parameters of the doctrine remain relatively unclarified.[111] For instance, who determines whether the host state is unwilling or unable? It is generally suggested that the victim state should make that determination.[112] Regardless, the victim state must take into account the host state's capacity or willingness "as part of the assessment as to whether the use of force in self-defense is necessary."[113]

The legal basis for the unwilling or unable doctrine is not specified as a basis for self-defense pursuant to Article 51 of the UN Charter,[114] but originates from the responsibility of neutral parties pursuant to the *Hague Convention (V)*.[115] In this context, sovereignty of the host state is increasingly understood also in terms of responsibility, including its responsibility to prevent its territory from being used as a base for

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United Nations, ¶ 1 (Oct. 24, 1970) ("Every State has the duty to refrain from organizing, instigating, [or] assisting . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.").

[109] Louise Arimatsu & Michael N. Schmitt, *Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUM. J. TRANSNAT'L L. BULL. 1, at 21 (2014).

[110] *See* Trapp, *supra* note 106, at 147. S*ee also* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AM. J. INT'L L. 776 (2012).

[111] *See* Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA J. INT'L L. 519–33 (2012). The following parameters are suggested for victim states considering use of force under the doctrine. First, a victim state should seek consent if the circumstances permit time for diplomatic efforts. Second, the victim state must request that the host state address the threat, and give the host state time to respond. *Id.* If a victim state deems that time does not permit such action, or after making a reasonable assessment that the host state lacks the control or capacity to suppress the threat, the victim state should act under this doctrine. *Id.*

[112] *See id.* at 495–96. *But see* Dawood I. Ahmed, *Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense*, 9 INT'L L. & INT'L REL. 21 (2013) (arguing that the United Nations Security Council (UNSC) should act as a fact-finder and information transmitter and make this determination in order to protect weak states from unilateral determination by strong states).

[113] Williams, *supra* note 107, at 639–40.

[114] *See id.* at 630.

[115] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 5, Oct. 18, 1907, 36 Stat. 2310 (prohibiting neutral powers from allowing belligerents to conduct hostile operations within their territory).

activities that are harmful to security across its borders.[116] Accordingly, the doctrine prioritizes the right of self-defense above the principle of territorial sovereignty if the host state fails in its responsibility to prevent organized armed groups from posing a threat to victim states.

Recently, many states, including the United States, Russia, Turkey, and Israel have justified their extraterritorial use of force on the basis of the unwilling or unable doctrine.[117] This shows that there has been an increasing state practice that suggests the unwilling or unable doctrine is considered lawful under current international law.[118] Consequently, with the expanding phenomenon of non-attributable, non-state actor, cross-border armed attacks, it is apparent that the doctrine will have growing relevance and importance in international law.[119]

IV. Legal Basis for the Use of Force Against the Islamic State in Syria

Since June 2014, the IS has controlled large swaths of territory both in Iraq and Syria. Thousands of innocent civilians have lost their lives, and hundreds of thousands have fled their homes due to the IS attacks.[120] The U.S.-led coalition of states taking active military action in Syria generally use individual self-defense or collective self-defense of Iraq as their legal basis for use of force. Russia based its military involvement on consent pursuant to the invitation of the Syrian government. However, there are still many states that remain uncommitted on the grounds that there is an ambiguity as to the legal basis for military action in Syria.[121] Therefore, it is worth taking a closer look into the legal terrain created within the Syrian territory.

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[116] *See* Trapp, *supra* note 60, at 21–22.

[117] Israel's use of force against Hezbollah in Lebanon in 2006, Turkey's defending its resort to force against Partiya Karkeren Kurdistan (PKK) terrorists in Northern Iraq, and Russia's use of force against Chechen rebels in Georgia in 2002 are the examples. *See* Williams, *supra* note 107, at 626; *see also* Hakimi, *supra* note 12, at 13–14.

[118] *See* Deeks, *supra* note 111, at 486.

[119] Trapp, *supra* note 60, at 2.

[120] Arimatsu & Schmitt, *supra* note 109, at 3.

[121] *Id.* at 4.

A. Consent of the Syrian Government

The Syrian government did not expressly consent to the U.S.-led coalition of states conducting military operations in Syria. After the coalition states began airstrikes within Syria on September 23, 2014, the Syrian Foreign Minister warned the U.S.-led coalition "not to conduct airstrikes inside Syria against the Islamic State without the Syrian government's consent."[122] Even though there were some early speculations concerning the Syrian government's implied consent to coalition airstrikes,[123] the progress of events proved that it was not a valid justification for military actions.[124]

Conversely, according to the Syrian government's statement, Bassar al-Assad sent a letter to his Russian counterpart asking for support to fight against terrorists.[125] On September 30, 2015, the Russian Parliament approved a resolution by President Putin to conduct airstrikes against the IS in Syria.[126] On the same day, Russian military jets began launching airstrikes over Syrian territory.[127] From the outset, Russia justified its operations on the basis of Assad regime's consent.[128] However, the open-

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[122] *See* Seina Karam, *Syria Warns U.S. Against Bombing ISIS Without Permission*, NAT'L POST (Aug. 25, 2014, 8:35 PM), http://news.nationalpost.com/news/syria-warns-u-s-against-bombing-isis-without-permission. However, the airstrikes were taking place in areas totally controlled by the IS. United Nations Secretary General, Ban Ki Moon, seemed to affirm this when he announced that "[T]he strikes took place in areas no longer under the effective control of that [Syrian] [g]overnment." *See* Michelle Nichols, *Exclusive: United States Defends Syria Airstrikes in Letter to U.N. Chief*, REUTERS (Sept. 23, 2014, 3:11 PM), http://www.reuters.com/article/us-syria-crisis-un-usa-exclusive-idUSKCN0HI22120140923.

[123] There were arguments among legal scholars concerning implied consent of Syria based on statements from a Syrian government Spokesperson, stating, "We are facing an enemy. We should cooperate." *See Attacks on Islamic State: Another Long War*, ECONOMIST (Sept. 27, 2014), http://www.economist.com/news/briefing/ 21620220-americas-bombing-raids-so-called-islamic-state-syria-have-greatly-increased-its.

[124] Arimatsu & Schmitt, *supra* note 109, at 10.

[125] Albert Aji & Bassem Mroue, *Syria's Assad Welcomes Russian Decision on Sending Troops*, THE BIG STORY (Sept. 30, 2015, 9:30 AM), http://bigstory.ap.org/article/8d80568a19bd4556a5e14a1c661ed874/syrias-assad-welcomes-russian-decision-sending-troops.

[126] *See Russia Joins War in Syria: Five Key Points*, BBC NEWS (Oct. 1, 2015), http://www.bbc.com/news/ world-middle-east-34416519.

[127] *See id.*

[128] Statements of the Russian Foreign Minister equated Russia's legal position to that of the U.S.-led coalition states. However, there is a critical difference. The Iraqi government, which invited the United States to assist in their defense, had been duly elected and is considered to be the legitimate government of the Iraqi people. Whereas the legitimacy of

ended agreement between Russia and Syria, which allowed unrestricted passage of Russian personnel and material into Syria and permitted Russia to conduct military operations without Syrian input, raised "questions about Russia's broader ambitions in Syria and the region.[129]

B. The UN Security Council Actions

The UNSC has not issued a resolution giving member states specific authority to use force in Syria. However, the UNSC has issued resolutions urging member states to disrupt the IS's financial and recruitment aspects. In Resolutions 2170 (2014) and 2178 (2014), the UNSC condemned the actions of the IS, expressed its gravest concern that the territory in part of Iraq and Syria was under control of the IS, and principally urged member states to stop individuals believed to be foreign terrorist fighters crossing their borders.[130] The UNSC Resolution 2199 (2015) aimed at curtailing the funding streams of the IS. The Resolution 2199 (2015) condemned those buying oil from the IS, and called upon states to end ransom payments.[131] In UNSC Resolution 2249 (2015), the Council called upon member states that have the capacity to do so to take all necessary measures in the territory under the control of the IS.[132] It provided a "creative ambiguity," seeming to authorize use of force in Syria, but lacked the specific Chapter VII formula that is usually used when the UNSC intends to take a binding action.[133]

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the Syrian government, having been disowned by such an enormous segment of its population and having lost control of its territory, has been contested in the international community. *See* Nick Robins-Early, *Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?*, WORLD POST (Oct. 1, 2015, 05:33 PM), http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08.

[129] Molly McKew, *Details of Moscow's Deal with Syria Reveal Extent of Russian Dominance*, THE WASH. FREE BEACON (Jan. 19, 2016, 12:20 PM), http://freebeacon.com/national-security/details-of-moscows-deal-with-syria-reveal-extent-of-russian-dominance/ (asserting that Syria gave away considerable sovereignty to Russian military); *see also* Michael Birnbaum, *The Secret Pact Between Russia and Syria that Gives Moscow Carte Blanche*, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/01/15/the-secret-pact-between-russia-and-syria-that-gives-moscow-carte-blanche/.

[130] S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2178 (Sept. 24, 2014).

[131] S.C. Res. 2199 (Feb. 12, 2015).

[132] S.C. Res. 2249 (Nov. 20, 2015).

[133] Dapo Akande, *Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions*, EJIL TALK! (Sept. 11, 2015), http://www.ejiltalk.org/embedded-troops-and-the-use-of-force-in-syria-international-and-domestic-law-questions/. *But see* Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the*

C. Collective Self-Defense of Iraq and Individual Self-Defense of Other Victim States

On June 25, 2014, the Iraqi government wrote a letter to the UNSC noting that "ISIL has repeatedly launched attacks against Iraqi territory from eastern Syria."[134] In its second letter, Iraq announced that "ISIL has established a safe haven outside Iraq's borders that is a direct threat to the security of our people . . . . The presence of this safe haven made our borders impossible to defend."[135] In the same letter, the Iraqi government gave notice that it had requested assistance from the U.S.-led coalition to strike ISIL sites. This satisfied a key condition for collective self-defense, "a request from a state that has been the victim of an armed attack."[136]

Following the request from Iraq, the U.S. government declared that it "initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq."[137] The U.S. government also asserted that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense."[138] Furthermore, in September 2014, sixty-two other countries committed support to the U.S.-led coalition to work together to stop the IS's advances and assist Iraq.[139]

Right to Self-Defence Against Designated Terrorist Groups, EJIL TALK! (Nov. 25, 2015), http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/ (arguing that UNSC Resolution 2249 can be interpreted as making it easier for states to make argument for individual self-defense).

[134] Permanent Rep. of Iraq to the UN, Letter dated June 25, 2014 from the Permanent Rep. of Iraq to the UN addressed to the President of the Security Council, U.N. Doc. S/2014/440 (June 25, 2014) [hereinafter UN Letter] (stating also that "ISIL has since been terrorizing citizens, carrying out mass executions, persecuting minorities and women, and destroying mosques, shrines, and churches").

[135] Permanent Rep. of Iraq to the UN, Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014).

[136] *See* Arimatsu & Schmitt, *supra* note 109, at 23.

[137] Permanent Rep. of the United States of America to the UN, Letter dated Sept. 20, 2014, from the Permanent Rep. of the United States of America to the UN addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) [hereinafter the U.S. Letter to the UN].

[138] *Id.*

[139] *See* Annalise Lekas, *ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT'L L. REV. 324 (2015). Five Arab countries; Bahrain, Jordan, Saudi Arabia, Qatar, and the United Arab Emirates participated in airstrikes in Syria from the beginning. *Id.*

On July 25, 2015, Turkey declared that it had commenced military operations against the IS in Syria, in coordination with the U.S.-led coalition, in order to counter the terrorist threat and safeguard its territory and citizens.[140] In its letter to the UNSC, the Turkish government relied on both individual and collective self-defense as reflected in Article 51 of the UN Charter. Moreover, in late 2015, the governments of the United Kingdom and Australia announced that they had begun undertaking military operations against the IS in Syria in the exercise of the collective self-defense of Iraq.[141] France followed these states on September 9, 2015, submitting a letter to the UNSC in which it declared that it had taken military actions in response to attacks carried out by the IS from Syria.[142] Lastly, the Netherlands announced that it planned to join the U.S.-led coalition with airstrikes targeting the IS in Syria.[143]

Taking into account the IS's military capacity and the scale of attacks it has conducted to date, it is clear they are something more than just a criminal organization.[144] It is unquestionable that the military action taken either in individual or collective self-defense is necessary and proportionate with regard to the IS.[145] Excluding the issue of state attribution, it is reasonable to conclude that the military action taken by the U.S.-led coalition states in the exercise of both individual and collective self-defense, are lawful.[146] However, the IS's armed attacks are not directly attributable to the Syrian government, regardless of the symbiotic relationship that may exist between them. Therefore, what

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[140] *See* Permanent Rep. of Turkey to the UN, Letter dated July 24, 2015 from the Permanent Rep. of Turkey to the UN addressed to the Secretary-General, U.N. Doc. S/2015/593 (July 24, 2015) (stating that the IS's terrorist attacks took the lives of Turkish citizens including a Turkish soldier and Turkey is under the imminent threats of continuing attacks from the IS).

[141] *See Battle for Iraq and Syria in Maps*, BBC NEWS (Feb. 10, 2016), http://www.bbc.com/news/world-middle-east-27838034.

[142] *See* Permanent Rep. of France to the UN, Letter dated Sept. 9, 2015 from the Permanent Rep. of France to the UN addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015) (asserting that it had taken action in accordance with Article 51, but it was not clear whether this referred to attacks against Iraq or France).

[143] *See Dutch to Join US-Led Airstrikes Against IS in Syria*, N.Y. TIMES (Jan. 29, 2016, 11:25 AM), http://www.nytimes.com/aponline/2016/01/29/world/europe/ap-eu-netherlands-syria.html.

[144] Bilal Khan, *The Use of Force Against ISIS*, JURIST (July 9, 2014, 12:00 PM), http://jurist.org/hotline/ 2014/07/bilal-khan-force-isis.php.

[145] *Id.*

[146] *See* Mark Weller, *Islamic State Crisis: What Force Does International Law Allow?*, BBC NEWS (Sept. 25, 2014), http://www.bbc.com/news/world-middle-east-29283286.

remains to be discussed at this stage is whether the Assad regime is "willing and able" to suppress the threat posed by the IS even after Russia's intervention.

D. Is the Syrian Government "Willing and Able" to Deal with the Islamic State?

The United States declared in its letter to the UN that the Syrian government is unwilling and unable to prevent the use of its territory from the attacks of the IS and noted that it had initiated necessary and proportionate military actions in Syria.[147] Other coalition states carrying out airstrikes against the IS in Syria, including Canada, Turkey, and Australia also referenced the unwilling or unable doctrine in their letters to the UN[148]

In September 2015, the Syrian government sent two letters to the UN in which Syria contested the coalition states' interpretation of Article 51, and announced that combating terrorism on the ground requires cooperation and close coordination with the Syrian government.[149] Can these letters be interpreted to mean an offer—and be seen as a sign of willingness—for the Assad regime to cooperate with the western states in countering the IS threat? Arguably, no. First, it would be infeasible and unlawful for the western states to cooperate with the Assad regime, whose systematic violations of international law, and even use of chemical weapons, brought the region nearly into an international armed conflict with many of the states that are now conducting operations against the

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147 UN Letter, *supra* note 134 ("The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.").

148 *See* Jonathan Horowitz, *A Legal Map of Airstrikes in Syria (Part 1)*, JUST SECURITY (Dec. 7, 2015, 1:20 PM), https://www.justsecurity.org/28167/legal-map-airstrikes-syria-part-1. Additionally, British Prime Minister Cameron declared that "the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq." *See* David Cameron, *David Cameron's Full Statement Calling for UK Involvement in Syria Air Strikes*, TELEGRAPH (Nov. 26, 2015, 1:44 PM), http://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camerons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html.

149 *See* H. Said, *Foreign Ministry: British, Australian, and French Military Measures Against Syria Violate UN Charter*, SANA (Sept. 17, 2015), http://sana.sy/en/?p=55063. The letters assert that the Syrian Army has been successful in its fight against terrorist organizations, while the western armies yielded nothing tangible. *Id.*

IS.[150] Secondly, prior to the rise of the IS, many states called for Assad's ouster due to the number of atrocities committed by his regime against its own people.[151] Thirdly, conducting coordinated military measures by western states under Assad regime's control would put countries at substantial risk of Syrian intelligence operations against their militaries.[152] Therefore, those letters do not show that the Assad regime was willing to cooperate with western states to suppress the IS threat. Additionally, any fair-minded person who can closely observe the case would understand that Assad was playing a double-game and was not acting in good faith.[153]

On the other hand, this issue of consent as a sign of willingness to combat the IS may be moot. The legal considerations seem to have changed after Russia began conducting airstrikes in Syria. The Russian government justified its military action as part of a fight against terrorism, upon the invitation of the Syrian government.[154] So, does Russian intervention change the legal landscape for the U.S.-led coalition against the IS?

The crucial question is whether Syria and Russia are really willing to suppress the IS threat.[155] While Russia claimed its airstrikes were targeting the IS militants,[156] the NATO and U.S. officials stated that

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[150] Claus Kress *The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force Against 'IS' in Syria*, JUST SECURITY (Feb. 17, 2015, 8:45 AM), https://www.justsecurity.org/ 20118/claus-kreb-force-isil-syria/.

[151] CNN Wire Staff, *Al-Assad refects calls for ouster as U.N. team visits Syria*, CNN (Aug. 21, 2011, 4:53 PM), http://www.cnn.com/2011/WORLD/meast/08/21/syria.unrest/index.html

[152] Ryan Goodman, *International Law on Airstrikes Against ISIS in Syria*, JUST SECURITY (Aug. 28, 2014), https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/.

[153] *Id.*

[154] Liz Sly & Andrew Roth, *Russia Defends Syria Airstrikes Amid Claims of Blows to U.S.-backed Rebels*, WASH. POST (Oct. 1, 2015), https://www.washingtonpost.com/world/russia-vehemently-defends-syrian-airstrikes-and-denies-targeting-us--backed-rebels/2015/10/01/cddada92-67af-11e5-bdb6-6861f4521205_story.html

[155] Major Patrick Walsh, *What if Assad Becomes Willing Now that Russia is Able?*, LAWFARE (Oct. 20, 2015, 8:16 PM), https://www.lawfareblog.com/what-if-assad-becomes-willing-now-russia-able.

[156] Russia seems to have tailored its military operations to address the immediate vulnerabilities of the Assad regime by conducting airstrikes and launching artillery fires on the opposition-held territory. Russia also increased its force protection capabilities, long-range surface-to-air missile systems, which have little or no value in the direct fight against the IS. *See* Hugo Spaulding, *5 Huge Myths About Russia's Military Intervention in Syria*, BUS. INSIDER (Nov. 30, 2015, 6:47 PM), http://www.businessinsider.com/5-huge-myths-about-russias-military-intervention-in-syria-2015-11.

Russia is in fact targeting moderate opposition groups in order to support the Assad regime.[157] Setting aside Russia's claims about targeting the IS, there are allegations about Russia's cooperation with the IS at a gas facility in northern Syria known as the Tuweinan gas facility, which has been a site of collaboration between the IS and a Russian energy company.[158]

Furthermore, there are accusations from the international community that Russia intensified its airstrikes against Turkmen populated areas, killing many civilians and displacing thousands of others.[159] Apart from that, tens of thousands of Syrians had to flee the city of Aleppo after intense Russian airstrikes, which took place on February 5, 2016.[160] In another incident, Russian warplanes targeted medical facilities and schools in Azaz and Idlib regions in Syria, which killed almost fifty civilians on February 15, 2016.[161]

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[157] Nick Robins-Early, *What Putin's Airstrikes Mean For Syria*, WORLD POST (Sept. 30, 2015, 7:32 PM), http://www.huffingtonpost.com/entry/russia-airstrikes-syria-isis_us_560c1a7ce4b0af3706def546; *see also* Robert Chesney, *Does Article II Authorize the U.S. Military to Defend CIA-Trained Syrian Forces against a Russian Attack?*, LAWFARE (Oct. 1, 2015, 5:01 PM), https://www.lawfareblog.com/does-article-ii-authorize-us-military-defend-cia-trained-syrian-forces-against-russian-attack (arguing that U.S. forces have a right to defend the Syrian opposition groups, trained by the Department of Defense, in the event of an attack from the Russian forces).

[158] *See* Ceren Kenar & Ragip Soylu, *Why Are Russian Engineers Working at an Islamic State-Controlled Gas Plant in Syria?*, FP (Feb. 9, 2016), http://foreignpolicy.com/2016/02/09/why-are-russian-engineers-working-at-an-islamic-state-controlled-gas-plant-in-Syria/?utm_source=Sailthru&utm_ The Tuweinan gas facility is said to be under IS control since early 2014. *Id.* A Russian energy company, through a Syrian subcontractor, continued the facility's construction with the IS's permission, using Russian engineers to complete the project.

[159] *Map Shows Russian Airstrikes Target Syrian Moderate Opposition and Civilians, not Daesh*, DAILY SABAH (Nov. 27, 2015), http://www.dailysabah.com/syrian-crisis/2015/11/27/map-shows-russian-airstrikes-target-syrian-moderate-opposition-and-civilians-not-daesh. *See also* Bassem Mroue, *Dozens killed after suspected Russian airstrikes hit schools, hospitals in Syria*, STAR (Feb. 15, 2016), https://www.thestar.com/news/world/2016/02/15/dozens-killed-after-suspected-russian-airstrikes-hit-schools-hospitals-in-syria.html

[160] *See* John Davison, *Thousands Flee as Russian-Backed Offensive Threatens to Besiege Aleppo*, REUTERS (Feb. 6, 2016, 5:39 AM), http://www.reuters.com/article/us-mideast-crisis-syria-aleppo-idUSKCN0VE0ZA. Video footage shows thousands of innocent civilians massing at the Bab al-Salam crossing on the Turkish border. *Id.* An opposition spokesman said, "The situation in Aleppo is a humanitarian catastrophe." *Id.*

[161] *See* Suleiman Al-Khalidi & Lisa Barrington, *Around 50 Dead as Missiles Hit Medical Centers and Schools in Syrian Towns*, REUTERS (Feb. 15, 2016, 5:10 PM), http://www.reuters.com/article/us-mideast-crisis-syria-missiles-idUSKCN0VO12Y. The UN Secretary-General Ban Ki Moon announced that the attacks "were a blatant violation of international law." *Id.* The UN spokesman Farhan Haq said, "These incidents cast a

State sovereignty entails an obligation to prevent its territory from being used as a base for armed attacks against other states. In the case of Syria, the Assad regime has proved to be unwilling and unable to prevent its territory from being exploited by the IS to plan, prepare, and execute attacks against victim states such as Iraq, Turkey, and France.[162] Even after Russian intervention, it seems fair to conclude that Syria is still unwilling and unable to impede the IS attacks from its territory. Russia's involvement has not proved to substantially neutralize, degrade, or defeat the IS. In fact, Russian intervention created a new risky dynamic in an already complex conflict.[163] Therefore, the U.S.-led coalition and other victim states may continue to lawfully take forcible action in relation to the IS in areas beyond the control of the Syrian government in the exercise of both collective self-defense of Iraq and individual self-defense of other victim states.[164]

V. Conclusion

The Islamic State is the most deadly terrorist group operating in the world today. It controls large areas in both Iraq and Syria, posing an unprecedented threat to international peace and security.[165] The U.S.-led coalition of more than 60 states has engaged in international efforts to counter the IS threat in Syria since September 2014.[166] Recently, Russia began military operations in Syria.[167] In the midst of this chaos, there has been significant debate concerning the legal basis of using force against the IS in Syria.

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shadow on the commitments made at the International Syria Support Group meeting in Munich on February 11." *Id.*

[162] Michael Lewis, *What Does the "Unwilling or Unable" Standard Mean in the Context of Syria?*, JUST SECURITY (Sept. 12, 2014, 9:05 AM), https://www.justsecurity.org/14903/unwilling-unable-standard-context-syria/.

[163] Charles Lister, *Russia's Intervention in Syria: Protracting an Already Endless Conflict*, BROOKINGS (Oct. 21, 2015), http://www.brookings.edu/research/opinions/2015/10/21-russia-intervention-in-syria-lister.

[164] Marc Weller, *Islamic State Crisis: What Force Does International Law Allow?*, BBC NEWS (Sept. 25, 2014), http://www.bbc.com/news/world-middle-east-29283286.

[165] Daniel R. DePetris, *The 5 Deadliest Terrorist Groups on the Planet*, NAT'L INTEREST (Nov. 16, 2014), http://nationalinterest.org/feature/washington-watching-the-5-deadliest-terrorist-groups-the-11687.

[166] *See Syria: US Begins Air Strikes on Islamic State Targets*, *supra* note 11.

[167] *See* Payne et al., *supra* note 13.

There are three different legal bases that states employ to justify their actions according to the present facts and circumstances: the Syrian government's consent to Russia's intervention pursuant to Article 51 of the UN Charter; individual self-defense of states, such as Iraq, Turkey, and France, which have been direct victims of IS armed attacks; and collective self-defense on behalf of Iraq, upon the invitation of the Iraqi government.

Even though Russia's intervention following Assad regime's invitation seems to have a solid legal basis in international law, Russia's targeting of moderate opposition groups instead of the IS has produced considerable objection.[168] Additionally, Russia's unique agreement with Syria has raised questions concerning Russia's true ambition in the region.

The U.S.-led coalition states have generally justified military action based on individual or collective self-defense.[169] The actual situation in Syria supports the assertion that the Syrian government is still unwilling *and* unable to prevent its territory from being used by the IS to plan, prepare, and execute attacks in Iraq and in other victim states.[170] Russian intervention did not change this reality on the ground, as the IS still controls significant portions of territory in Syria.[171] In this context—under the broader reading of Article 51 of the UN Charter, and in accordance with the ICJ's case law and state practice—military actions taken in the exercise of both collective self-defense of Iraq and individual self-defense of other victim states against the IS in Syria are lawful.

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[168] *See* Robins-Early, *supra* note 157.
[169] *See* U.N. Letter, *supra* note 134, *see also* Lekas, *supra* note 139.
[170] *See* Lewis, *supra* note 162.
[171] *See* Lister, *supra* note 163.

WEAK LINK: TIME TO REFINE THE CONCEPT OF CRIMINAL CAUSATION IN THE MILITARY JUSTICE SYSTEM

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I. Introduction

Many offenses under the Uniform Code of Military Justice (UCMJ) include causation as a required element, with homicides being the most notable.[1] But what does it mean to say an accused's misdeeds *caused* a particular harm? This seemingly simple question can be deceptive. As eminent jurist Richard Posner once quipped, defining cause is a bit like trying to explain "the word 'time' in a noncircular way."[2] After all, every event is, in some way, the result of countless series of combined causes and effects, stretching back to the beginning of time. It is unsurprising, then, that the efforts of courts to narrow the concept of cause for purposes of legal liability have produced a proliferation of explanations for it.[3] Military courts are no different in this respect.[4] Yet such variety can be

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[1] *See, e.g.*, UCMJ arts. 108–09, 115–16, 118, 119–20, 124, 128 (2012).

[2] United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010).

[3] *Id.* at 947 "[Causation] continues to confuse lawyers, in part because of a proliferation of unhelpful terminology (for which we judges must accept a good deal of the blame)." The court further observed that *Black's Law Dictionary* lists twenty-six different terms to describe the word "cause." *Id.* at 948 (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

[4] Depending on the factual circumstances of the case, military trial judges currently rely on one (or more) of five standardized instructions to explain causation to court-martial panels. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 5-19 (15 Sept. 2014) [hereinafter BENCHBOOK]. In turn, these instructions employ a variety of causal terms such as proximate cause; direct cause; contributory cause; intervening cause; and contributory negligence. *Id.* para. 5-19 nn.2–7.

problematic in the criminal context. To what degree can the definition of cause vary without violating an accused's right to know what he is accused of and by what standard he will be judged? And what if one definition of cause is less difficult to prove than another?

Such uncertainties in the law of criminal causation recently attracted the Supreme Court's attention in *Burrage v. United States*.[5] In *Burrage*, the Court held that, absent a statutory definition, but-for cause generally represents the minimum standard for cause when causation is an element of an offense.[6] Importantly, the Court also determined this standard cannot be met by showing the defendant's actions were merely a contributing or substantial factor in producing the harm.[7] Instead, the government must prove that but for the defendant's actions, the harm would not have occurred.[8]

Burrage brings needed clarity to the concept of criminal causation and exposes flaws in the military judiciary's current efforts to define it. In Part I, this article attempts to explain why this is so, and the practical impact *Burrage* may have on military justice practice in the future. Part II discusses the Court's analysis in *Burrage* and its implications in the criminal context. Part III demonstrates why the various courts-martial panel instructions and military appellate court explanations of causation conflict with the Supreme Court's standard and create the potential for legal error. Finally, Part IV proposes that military courts incorporate the *Burrage* Court's holding into courts-martial practice by adopting the causation standard expressed in the American Law Institute's Model Penal Code.

II. The Supreme Court's Decision in *United States v. Burrage*

In *Burrage*, the Supreme Court considered the applicability of a federal mandatory-minimum sentence for drug distribution when "death or serious bodily injury results from the use of such substance."[9] To

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[5] 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).
[6] *Id.* at 889, 892.
[7] *Id.* at 886, 891.
[8] *Id.* at 892.
[9] *Id.* at 885 (internal quotation marks omitted) (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012)). Because the mandatory minimum sentence provision required proof of additional facts, the Court treated the provision as an element of the offense for due process purposes. *See id.* at 887 (citing Alleyne v. United States, 133 S. Ct. 2151, 2162–63 (2013);

determine this, the Court granted certiorari on two related questions: (1) could Burrage be convicted of the sentence enhancement when the drug he provided was only a contributing cause of a recipient's death; and (2) did the trial court err by not instructing the jury to decide whether death was a foreseeable result of Burrage's drug-trafficking.[10] As the Court observed, these questions generally coincide with the law's traditional understanding of causation as a hybrid concept,[11] requiring proof that a defendant's conduct be "both (1) the actual [or but-for] cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."[12] However, because the Court found the actual cause question dispositive, it did not address the legal cause issue.[13]

A. Trial Proceedings

Marcus Burrage stood trial in federal district court for unlawfully distributing heroin, which resulted in the death of a recipient named Banka.[14] The evidence established that, before obtaining heroin from Burrage, Banka ingested multiple other drugs obtained from independent sources.[15] A government expert also testified that Banka died from a "mixed drug intoxication with heroin, oxycodone, alprazolam, and clonazepam all playing a contributing role."[16] The expert "could not say whether Banka would have lived had he not taken the heroin, but observed that Banka's death would have been "[v]ery less likely."[17]

In light of this evidence, Burrage moved for a judgement of acquittal to the sentence enhancement, arguing "that Banka's death did not 'result from' heroin use because there was no evidence that heroin was a but-for cause of death."[18] Burrage also requested jury instructions explaining that the mandatory-minimum sentence provision did not apply unless the

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Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[10] *Id.* at 886.

[11] *Id.* at 887 (citing H.L.A. HART & ANTHONY M. HONORÉ, CAUSATION IN THE LAW 104 (1959)).

[12] *Id.* (internal quotation marks omitted) (quoting 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 464–66 (2d ed. 2003); also citing MODEL PENAL CODE § 2.03 (AM. LAW INST. 1985)).

[13] *Id.*

[14] *Id.* at 885.

[15] *Id.*

[16] *Id.* at 886 (internal quotation marks omitted).

[17] *Id.*

[18] *Id.*

government proved his distribution was the proximate cause of Banka's death.[19] He further proposed defining proximate cause as "a cause of death that played a substantial part in bringing about the death, meaning that '[t]he death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.'"[20] The trial court denied both motions and instead instructed that the government need only "prove that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death."[21] The jury ultimately convicted Burrage of drug distribution and the enhancement, resulting in a mandatory-minimum sentence of twenty years' imprisonment.[22]

B. The Supreme Court's Analysis

The crux of the Supreme Court's decision lies in the ordinary meaning of "results from" when the phrase is not defined by statute.[23] According to the Court, phrases like "results from" generally impart actual causality, requiring proof that the injury would not have occurred but for the accused's wrongful acts.[24] And unless a statute indicates otherwise, the but-for cause "formulation represents '*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'"[25] As the Court explained, "it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event."[26]

The Court also rejected the idea that acts amounting to a substantial or contributing factor can establish actual causation.[27] According to the Court, Congress could have included such language in the statute, but

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[19] *Id.*
[20] *Id.* (internal quotation marks omitted).
[21] *Id.* (internal quotation marks omitted).
[22] *Id.*
[23] *Id.* at 887.
[24] *Id.* at 888–89.
[25] *Id.* at 888 (emphasis in original) (quoting MODEL PENAL CODE § 2.03 explanatory note, at 25–26 (AM. LAW INST. 1985)).
[26] *Id.* The Court analogized this idea to a baseball team winning a game by 5–2. Under those circumstances, it makes no sense to say the victory resulted from the first or last run scored. *See id.*
[27] *Id.* at 890–91.

chose not to.[28] Citing the rule of lenity,[29] the Court emphasized that it may not derogate from the ordinary meaning of a criminal statute at the defendant's expense.[30] The Court further found that attempting to estimate a defendant's contribution to the outcome as material or substantial creates uncertainty of a kind that "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend."[31] In other words, lower courts and defendants cannot be left to guess how substantial a contributing factor must be to establish guilt.[32]

Applying this reasoning, the Court reversed and remanded the case for further review.[33] Subsequently, the Eighth Circuit Court of Appeals held the sentence enhancement legally insufficient and ordered a sentence rehearing.[34]

C. Implications of *Burrage*

The Court's decision in *Burrage* not only provides clarity in the statutory interpretation process, but also emphasizes the special importance of but-for causation in criminal cases. By doing so, the Court's decision limits the discretion of subordinate federal courts to adopt alternative formulations for actual cause in a number of respects.

1. Application to Statutory Construction

First, while the *Burrage* Court does not mandate but-for cause in every instance, it does dictate the starting point when interpreting causation elements. As recognized by both the Supreme Court and the U.S. Court of Appeals for the Armed Forces (CAAF), the first step in statutory

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[28] *Id.* at 891.

[29] The rule of lenity is a "judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] *Burrage*, 134 S. Ct. at 891.

[31] *Id.* at 892 (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89–90 (1921)).

[32] *Id.* at 892.

[33] *Id.*

[34] United States v. Burrage, 747 F.3d 995, 997–98 (8th Cir. 2014).

interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[35] When applying this test to causation, it is now clear that the "but-for requirement is part of the common understanding of cause."[36] Consequently, courts may only derogate from the but-for standard if its application would frustrate other provisions of the same statute.

For example, in *Paroline v. United States*, the Court did not apply a strict but-for cause standard to avoid an anomalous result.[37] In that case, the defendant was convicted of possessing numerous images of child pornography.[38] Relying on 18 U.S.C. § 2259, the government sought $3.4 million in restitution against the defendant on behalf of a victim depicted in two of the images he possessed.[39] According to the government, the victim's claimed losses were attributable to the trauma caused to her by the widespread distribution of the images.[40] However, the government produced no evidence that the victim was aware of or suffered any specific loss, probably due to the defendant's comparatively minor role in this distribution.[41] These facts created an ambiguity when applied to the text of § 2259. While the statute clearly required the district court to award the full amount of the victim's losses, it also required the government to prove that the defendant's offense was the proximate cause of those losses.[42] If, as the district court held, proximate cause required proof that the victim's losses would not have occurred but for the defendant's offense, the victim would be entitled to nothing.[43] Yet if, as the circuit court held, the victim was entitled to the full amount of her losses, the defendant would effectively be held criminally liable for offenses he did not commit.[44]

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[35] United States v. McPherson, 73 M.J. 393, 394 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002)).
[36] *Burrage*, 134 U.S. at 888.
[37] Paroline v. United States, 134 S. Ct. 1710, 1726–27 (2014) (citing 18 U.S.C. § 2259 (2006)).
[38] *Id.* at 1717–18.
[39] *Id.* at 1718.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1718–19, 1726–27.
[43] *Id.* at 1718.
[44] *Id.* at 1718, 1726. Though restitution seeks monetary damages and liability is determined by a preponderance of the evidence, the Court considers restitution suits under the rubric of criminal law. *See id.* at 1726.

The Supreme Court resolved the ambiguity in *Paroline* by interpreting the statute to require a non-traditional causation standard.[45] As in *Burrage*, the Court confirmed that the concept of proximate cause generally requires proof of both actual and legal causation.[46] The Court also reiterated that "the traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former."[47] However, based on the overall statutory scheme, the Court found that a strict but-for cause standard would undermine Congress's express intent to make restitution mandatory.[48] At the same time, the Court could not interpret the statute to hold the defendant liable for the entirety of the victim's losses without potentially violating the Eighth Amendment's Excessive Fines Clause.[49] Instead, the Court adopted a modified form of actual causation, which allows a defendant to be held proportionally liable "in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[50] Thus, in *Paroline* the Court illustrates how a statute may textually or contextually preclude application of the traditional but-for cause standard.[51]

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[45] *Id.* at 1727.
[46] *Id.* at 1719.
[47] *Id.* at 1722; *see also Burrage*, 134 S. Ct. at 888–89 ("[C]ourts regularly read phrases like 'results from' to require but-for causality.").
[48] *Paroline*, 134 S. Ct. at 1726–27.
[49] *Id.* at 1726.

> [T]here is a real question whether holding a single possessor [of child pornography] liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests.

Id.
[50] *Id.* at 1727. Essentially, the Court interpreted the statute to require a two-step analysis for determining liability. First, instead of asking whether the victim's losses would not have occurred but for the defendant's actions, courts must determine if the defendant was part of an aggregate force which produced the victim's losses. Second, courts must then, in their discretion, assess a reasonable amount of restitution based on the defendant's relative contribution to the victim's losses. *Id.* at 1727–28. Obviously, a test of this kind makes sense only in the context of restitution or civil damages involving divisible monetary claims.
[51] *See id*. (citing *Burrage*, 134 S. Ct. at 889–90).

2. Application in Criminal Cases

Second, criminal and tort law conceptions of causation differ in key respects.[52] As one legal scholar observed:

> Because of the higher stakes in the criminal law, and its especially strong commitment to personal, rather than vicarious, responsibility, some courts expressly provide that a tort conception of causation is insufficient to impose criminal responsibility. Instead, a stricter test, requiring a closer connection between the defendant's conduct and the resulting harm, may be applied.[53]

This focus on personal responsibility "illustrates why the [Supreme] Court has been reluctant to adopt [tort law] aggregate causation logic in an incautious manner, [when] interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach."[54] Similar considerations also explain the *Burrage* Court's emphasis on the rule of lenity.[55]

Moreover, in criminal cases, the use of vague language to define causation may violate the Constitution. As explained in *Burrage*, describing cause in terms of probabilities or relative shares of contribution "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend."[56] This conclusion is rooted in the Court's decision in *United States v. L. Cohen Grocery Co.*, which considered the constitutionality of a federal statute criminalizing the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ."[57] There, the Court held the statute

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[52] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.01, at 182 (3d ed. 2001).
[53] *Id.*
[54] *Paroline*, 134 S. Ct. at 1724 (citing *Burrage*, 134 S. Ct., at 890–91).
[55] *See Burrage*, 134 S. Ct. at 891 ("Especially in the interpretation of a criminal statute subject to the rule of lenity . . . we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."). For the two concurring members of the Court, Justices Ginsburg and Sotomayor, the rule of lenity was the deciding factor in *Burrage*. The concurring justices wrote separately only to clarify that they would not interpret antidiscrimination laws to require but-for causality in the context of civil litigation. *Id.* at 892 (Ginsburg and Sotomayor, J.J., concurring).
[56] *Id.* at 892 (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89–90 (1921)).
[57] *L. Cohen Grocery Co.*, 255 U.S. at 86 (internal quotation marks omitted) (quoting Lever Act, ch. 53, § 4, 40 Stat. 276 (1917), as amended by Act of Oct. 22, 1919, ch. 80, § 2, 41

unconstitutional under the Fifth and Sixth Amendments because it did not fix "an ascertainable standard of guilt and [was not] adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them."[58] The Court also found the statute to be an unconstitutional delegation of legislative authority, because its vague language effectively allowed individual courts and jurors to determine the applicable standard of guilt.[59] Thus, the *Burrage* Court's reliance on *L. Cohen Grocery Co*. warns that interpreting causation elements to require but-for causation is essential to criminal due process, unless Congress itself affixes an ascertainable alternative.[60]

III. Contrasting the Supreme Court and Military Court Definitions of Causation

Military courts endorse a causation standard inconsistent with *Burrage*. This conflict arises from the problematic definition of proximate cause repeatedly expressed in military appellate court decisions over the past sixty years. That precedent now forms the basis of the military trial judiciary's standard causation instructions.[61] Until the military bench reconciles its conception of cause with that of the Supreme Court, affected courts-martial could be at risk of legal error.

A. Development of Military Court Causation Precedent

Among the first military cases to address causation was the 1954 Court of Military Appeals (CMA) decision in *United States v. Schreiber*.[62] In *Schreiber*, the accused was convicted of murder after ordering subordinates to shoot an injured Korean detainee.[63] At trial, competing

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Stat. 297 (1919)).

[58] *Id.* at 89.

[59] *Id.*

[60] *See also* Boos v. Barry, 465 U.S. 312, 330–31 (1988) (explaining that courts have a duty to interpret potentially overbroad statutes narrowly to "avoid constitutional difficulties . . . if such a construction is fairly possible").

[61] *See* BENCHBOOK, *supra* note 4, para. 5-19 references (citing United States v. Taylor, 44 M.J. 254 (C.A.A.F. 1996); United States v. Reveles, 41 M.J. 388 (C.A.A.F. 1995); United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990); United States v. Cooke, 18 M.J. 152 (C.M.A. 1984); United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); United States v. Romero, 1 M.J. 227 (C.M.A. 1975); United States v. Klatil, 28 C.M.R. 582 (A.B.R. 1959)).

[62] 18 C.M.R. 226 (C.M.A. 1954).

[63] *Id.* at 229.

experts disagreed on whether the shooting ordered by the accused caused the detainee's death, or merely contributed to the death in combination with the victim's prior injuries.[64] Based on this testimony, the accused appealed his conviction asserting the evidence legally insufficient to establish shooting as the cause of death.[65] In reply, the CMA held that "the evidence presented by both sides established, at the very least, that the shooting contributed to the ultimate result. This is sufficient."[66] Regrettably, the CMA's contribution theory of causation proved persistent.

A few years later, in *United States v. Houghton*, the CMA considered the question of causation in the context of panel instructions.[67] There, the accused was convicted of the child abuse-related murder of his daughter.[68] At trial, the accused claimed his daughter died not from his abuse, but of wounds sustained after falling out of bed.[69] Based on this theory, the defense requested an instruction directing the panel that "it must be satisfied beyond a reasonable doubt that the accused's acts were the sole proximate cause of the subdural hematoma which eventually led to the victim's death."[70] Denying this request, the law officer instead instructed the panel "as a matter of law . . . an accused is criminally responsible for homicide if his unlawful act contributed to or accelerated the death of the victim."[71]

On appeal, Houghton claimed the law officer's instruction improperly permitted the panel to convict, even if his actions did not directly result in death.[72] The CMA disagreed this was error. Relying on *Schreiber*, the court reasserted its view that "[c]riminal responsibility for a homicide exists . . . if the accused's act directly causes death or contributes to death."[73] According to the court, "the challenged instruction merely presented the second basis for liability to complete the statement of the general rule."[74]

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[64] *Id.* at 230–31.
[65] *Id.* at 231.
[66] *Id.*
[67] 32 C.M.R. 3, 4 (C.M.A. 1962).
[68] *Id.* at 4–5.
[69] *Id.* at 5.
[70] *Id.* (internal quotation marks omitted).
[71] *Id.* at 4 (internal quotation marks omitted).
[72] *Id.* at 5.
[73] *Id.* (citing United States v Schreiber, 18 C.M.R. 226, 231 (C.M.A. 1954); 40 C.J.S. Homicide § 11d, at 855–56 (1962)).
[74] *Id.* More specifically, Houghton claimed there was "no evidence to support liability on

The general rule announced in *Houghton* laid the foundation for the formulation of proximate cause later developed by the CMA. Based in part on *Houghton*, successive CMA decisions in the 1970s held:

> [A]n accused is responsible for a homicide only if his act was a proximate cause of same. To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause—the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's decease.[75]

Since its adoption, both the CMA and its successor, the CAAF, have consistently upheld this "material role" theory of proximate cause.[76] And, at the trial level, this remains the standard causation instruction memorialized in the *Military Judge's Benchbook*.[77]

B. Conflicts with *Burrage*

The military court definition of proximate cause does not jibe with the Supreme Court's description of the concept. As the Court explained in *Burrage* and *Paroline*, the default test for determining proximate cause is a two-step analysis of both actual and legal causation.[78] Within this analysis, but-for causation provides the minimum standard for establishing actual cause.[79] Thus, the government cannot prove proximate cause

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the theory [that his] acts contributed to, rather than directly caused, death; and, as a result, the court-martial might have based its finding on a theory not presented by the evidence." *Id*. (internal quotation marks omitted). The court disagreed, citing ample evidence that Houghton denied abusing his daughter and that she sustained the fatal head injury by falling out of bed. *Id*. at 5–6. Of course, the same evidence also demonstrates that the panel might have acquitted Houghton, had the law officer required the government to prove that the victim would not have died but for his acts or omissions.

[75] United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1970) (citing *Houghton*, 32 C.M.R. 3; 1 O. WARREN AND B. BILAS, WARREN, HOMICIDE § 59 (perm. ed. 1938); 1 R. ANDERSON, WHARTON, CRIMINAL LAW AND PROCEDURE § 290 (1957)). The CMA re-affirmed the same passage from *Romero* seven years later. United States v. Moglia, 3 M.J. 216, 217 (C.M.A. 1977) (quoting *Romero*, 1 M.J. at 230).

[76] *See, e.g*., United States v. Reveles, 41 M.J. 388, 394 (C.A.A.F. 1995); United States v. Lingenfelter, 30 M.J. 302, (C.M.A. 1990); United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984).

[77] *See* BENCHBOOK, *supra* note 4, para. 5-19 nn.2–7.

[78] Burrage v. United States, 134 S. Ct. 881, 887 (2014); Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[79] *Burrage*, 134 S. Ct. at 887.

without first establishing but-for cause.[80] By failing to incorporate but-for cause as an essential element of proximate cause, the CMA's material role standard is equivalent to the substantial or contributing factor theory of actual cause expressly repudiated in *Burrage*.[81]

The rationale behind the CMA's material role standard further demonstrates its error. In *United States v. Cooke*, the CMA favorably compared its material role standard to the concepts of concurrent sufficient causes and intervening cause as expressed in some legal treatises.[82] Quoting one legal treatise, the CMA explained the concept of concurrent sufficient causes as follows:

> In the criminal law . . . the situation sometimes arises where two causes, each alone sufficient to bring about the harmful result, operate together to cause it. Thus A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head with a gun, also inflicting such a wound; and B dies from the combined effects of the two wounds. *It is held that A has caused B's death (so he is guilty of murder if his conduct included an intent to kill B, manslaughter if his conduct constituted recklessness). (X, of course, being in exactly the same position as A, has equally caused B's death.) So the test for causation-in-fact is more accurately worded, not in terms of but-for cause, but rather: Was the defendant's conduct a substantial factor in bringing about the forbidden result?* Of course, if the result would not have occurred but for his conduct, his conduct is a substantial factor in bringing about the result; but his conduct will sometimes be a substantial factor even though not a but-for cause.[83]

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[80] *See id.* at 887, 892 (finding it unnecessary to address the applicability of legal cause where the government did not establish but-for cause).

[81] *See id.* at 890 (rejecting the "less demanding . . . line of authority, under which an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing a given result").

[82] 18 M.J. 152, 154–55 (C.M.A. 1984).

[83] *Id.* at 154 (alteration and footnotes omitted in original) (quoting LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 249–50 (1972). Concurrent sufficient causes should not be confused with the concept of principal liability, wherein two or more persons acting in concert may be found guilty of the same offense. *See* UCMJ art. 77 (2012). Instead, the concept of concurrent sufficient causes only addresses circumstances where the action of two or more persons and/or forces *independently* cause a particular harm and each act or

The CMA then observed that some legal scholars address the concepts of concurrent sufficient causes and intervening cause "in an almost identical fashion."[84] Quoting one such source, the court explained:

> It must not be assumed that negligence of the deceased or of another is to be entirely disregarded. Even though the defendant was criminally negligent in his conduct it is possible for negligence of the deceased or another to intervene between his conduct and the fatal result in such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation. *This is true only in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result.*[85]

After analyzing these sources, the CMA concluded they "accord with our understanding of proximate cause."[86] However, in *Burrage*, the Supreme Court considered and roundly rejected sources substantially similar to those relied upon in *Cooke*.[87]

In *Burrage*, the Government urged the Court to adopt a test for causation wherein the defendant's act or omission "need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force . . . that is itself a but-for cause of death."[88] Like the CMA's analysis in *Cooke*, the government's argument relied on authorities using the substantial factor test to address multiple-cause scenarios.[89] The Supreme Court found the government's reliance on these authorities misplaced. According to the Court, the majority view is that the substantial factor test applies, if ever, only in the context of concurrent sufficient causes.[90] This represents an exceedingly narrow exception to the but-for cause standard. While theoretically possible, circumstances involving multiple forces that independently inflict the

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force "alone was sufficient to cause the result that occurred *when it did*." DRESSLER, *supra* note 52, § 14.02, at 185.

[84] *Cooke*, 18 M.J. at 154 (citing R. PERKINS, CRIMINAL LAW, 698–701 (2d ed. 1969)).

[85] *Id.* (alteration in original) (quoting PERKINS, *supra* note 84, at 703).

[86] *Id.* at 155.

[87] Burrage v. United States, 134 S. Ct. 881, 890 (2014).

[88] *Id.*

[89] *Id.*

[90] *Id.*

same harm at the same time represent the rare case.[91] Absent these unique circumstances, the Court found it unnecessary to "accept or reject the special rule developed for [concurrent sufficient cause] cases . . . ."[92]

The Court expressly rejected the minority view, which extended application of the substantial factor test to all cases involving multiple-factor causation.[93] Under the minority view, "an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing the result."[94] Unlike concurrent *sufficient* cause cases, the minority view replaces but-for cause with a form of aggregate causation, even when the defendant's actions are *insufficient* to produce the result independent of other factors beyond his control.[95] Following the Model Penal Code's lead, the *Burrage* Court declined to adopt this more permissive view of causation.[96]

As *Burrage* demonstrates, the CMA's material role standard for proximate cause represents the minority view. Like other expressions of the minority view, the material role test relies on a form of aggregate causation incompatible with the Supreme Court's understanding of actual cause. Under *Burrage*, actual cause requires proof that the prohibited result would not have occurred but for the *defendant's* actions even in the presence of other contributing factors.[97] Stated differently, while other factors may render a victim more susceptible to a particular result, the defendant's actions must represent "the straw that broke the camel's back," not simply one among the bale.[98] Accordingly, an accused cannot be an actual cause if his actions are merely a contributing cause that plays

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[91] *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2525 (2013); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 467 (2d ed. 2003)).
[92] Burrage v. United States, 134 S. Ct. 881, 890 (2014).
[93] *Id.* (citing State v. Christman, 249 P.3d 680, 687 (Wash. Ct. App. 2011); People v. Jennings, 237 P.3d 474, 496 (Cal. 2010); People v. Bailey, 549 N.W.2d 325, 334–36 (Mich. 1996); Commonwealth v. Osachuk, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997)).
[94] *Id.*
[95] *Id.*
[96] *Id.* at 890–91 (citing American Law Institute, Proceedings of the American Law Institute 39th Annual Meeting 135–41 (1962); MODEL PENAL CODE § 2.03(1)(a) (AM. LAW INST. 1985)).
[97] Burrage v. United States, 134 S. Ct. 881, 890–91 (2014).
[98] *Id.* at 888.

a material role in the result.[99] And without proof of actual cause, proximate cause is a moot point.[100]

C. Change on the Horizon

How the military judiciary will reconcile the Supreme Court's definition of actual cause with its current understanding of proximate cause remains an open question. With its recent published opinion in *United States v. Bailey*, the Army Court of Criminal Appeals (ACCA) became the first military appellate court to address the apparent conflict.[101] And while the *Bailey* court ultimately sustained the *Benchbook*'s standard causation instructions, its analysis portends further legal challenges to the military's conception of proximate cause.

In *Bailey*, the ACCA considered whether the military trial judge "erred by instructing the panel that the appellant could be convicted of manslaughter and negligent homicide if appellant's actions were a contributing cause to the resulting death instead of a 'but for' cause."[102] The homicide charges against Bailey arose from his role in a fatal car crash. Precipitating this incident, Bailey abruptly drove across "three lanes into oncoming traffic and smashed into the driver's side of a Dodge Durango traveling in the opposite direction."[103] The impact deflected Bailey's vehicle off the road into the path of a pedestrian, whom he struck and killed.[104] After the vehicle came to rest, multiple witnesses testified that Bailey appeared "high or intoxicated."[105] Subsequent law enforcement investigation further revealed two empty packets of synthetic marijuana in Bailey's vehicle and metabolites of the same in his bloodstream.[106]

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[99] *Compare* BENCHBOOK, *supra* note 4, para. 5-19 n.3 (stating that a proximate cause need not be the only cause, but "must be a direct or contributing cause that plays a material role, meaning an important role, in bringing about the [harm]"), *with Burrage*, 134 S. Ct. at 891 (stating that but-for cause requires the harm to result from the defendant's conduct, "not from a combination of factors to which [that conduct] merely contributed").

[100] *See Burrage*, 134 S. Ct. at 887; Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[101] United States v. Bailey, 75 M.J. 527 (A. Ct. Crim. App. 2015).

[102] *Id.* at 529.

[103] *Id.* at 529–30.

[104] *Id.* at 530.

[105] *Id.*

[106] *Id.*

At trial, Bailey offered the testimony of an accident reconstruction expert to challenge the causation elements of the homicide offenses.[107] According to the expert, the driver of the Durango "took no action to avoid the collision . . ." with Bailey.[108] "The expert concluded that if the Durango driver had applied her brakes 1.6 seconds prior to impact, [the victim] would not have been struck by appellant's vehicle . . . ."[109]

The trial judge subsequently instructed the panel that the homicide offenses required proof beyond a reasonable doubt "that the act of the accused which caused the death . . . was the proximate cause."[110] In defining the term proximate cause, the trial judge explained:

> Proximate cause means that the death must have been the natural and probable result of the accused's culpably negligent act. The proximate cause does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death. If the death occurred only because of some unforeseeable, independent, intervening cause which did not involve the accused, then the accused may not be convicted of involuntary manslaughter. The burden is on the prosecution to prove beyond a reasonable doubt that there was no independent, intervening cause and that the accused's culpable negligence was the proximate cause of the victim's death.[111]

Consistent with military practice, the trial judge did not instruct the panel to determine whether the death would have occurred but for Bailey's culpable or simple negligence.[112]

In its analysis, the ACCA found *Bailey* and *Burrage* factually distinguishable in key respects.[113] As an initial matter, the court observed that "[t]he Supreme Court found in *Burrage* there was an instructional error in that the drug given to the victim by Burrage was not an '*independently sufficient cause of the victim's death or serious bodily*

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[107] *Id.* at 530–31.
[108] *Id.* at 530.
[109] *Id.* at 530–31.
[110] *Id.* at 531.
[111] *Id.* (citing BENCHBOOK, *supra* note 4, para. 3-44-2(d) n.1).
[112] *Id.* at 531–32 (citing BENCHBOOK, *supra* note 4, para. 3-44-2(d) n.1).
[113] *Id.* at 533.

injury.'"[114] Comparing this holding to the military's current causation precedent, the ACCA determined neither standard requires that "[s]tatutory phrases like 'because of' . . . be interpreted to mean 'solely because of.'"[115] And "[u]nlike in *Burrage*, the facts in [*Bailey*] support that the victim would have lived but for appellant's conduct."[116] Indeed, "the collision and injuries caused to the victim were wholly contingent on appellant's acts . . . ."[117] Any failure on the Durango driver's part merely represented a foreseeable "effect in a cause-and-effect chain of events."[118] Thus, in contrast to the facts in *Burrage*, Bailey's culpable acts were clearly an independently sufficient cause.

Under the circumstances, the ACCA found no instructional error. While recognizing the conflict between the holding in *Burrage* and the trial judge's reference to contributory cause, the court did not find the inconsistency dispositive. According to the ACCA, when viewed in context of the instructions as a whole, the trial judge's proximate cause definition sufficiently conveyed "the same meaning as 'but for' causation."[119] Moreover, even if the instructions did not implicitly include a but-for cause requirement, the court found the deficiency harmless beyond a reasonable doubt.[120]

Careful readers of *Bailey* will find no reassurance in its outcome. Far from endorsing the military's proximate cause standard, the ACCA's opinion expressly acknowledged its flaws. The court tacitly conceded that the contributing cause language in the trial judge's instructions was inconsistent with the Supreme Court's minimum standard for determining criminal causation.[121] More tellingly, the ACCA called on the military justice community to address this issue. Commenting in a footnote, the court stated:

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[114] *Id*. at 532 (alteration in original) (quoting Burrage v. United States, 134 S. Ct. 881, 892 (2014)).
[115] *Id*. (citing United States v. Gordon, 31 M.J. 30, 35 (C.M.A. 1990); United States v. Romero, 1 M.J. 227, 230 (C.M.A. 1975)); *see also id.* at 533 (quoting United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)).
[116] *Id.* at 533.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *See id.* ("While the words 'contributing cause' were used, the military judge qualified this by instructing the panel that the burden is on the government to establish beyond a reasonable doubt that there was no independent, intervening cause.").

> *Burrage* was decided subsequent to appellant's court-martial. As with all opinions of our superior courts applicable to the practice of military justice, the relevant provisions of the *Benchbook* should be re-evaluated in light of the Supreme Court's holding in *Burrage*.[122]

Thus, military justice practitioners should view *Bailey* as a warning, not a resolution.

Other aspects of *Bailey* also merit a note of caution. First, the ACCA's finding that the trial judge's proximate cause instruction sufficiently conveyed "the same meaning as 'but-for' causation," is not well-supported.[123] In reaching this conclusion, the court relies heavily on those portions of the instructions discussing intervening cause.[124] However, the intervening cause instruction only required the government to disprove that someone independent of the accused was the "only" cause of the result.[125] Simply disproving that someone else was not an independently sufficient cause does not prove that the accused's actions were independently sufficient to produce the result. If anything, the intervening cause instruction renders the trial judge's proximate cause instruction more problematic. Together, these instructions tell the factfinder that two independent but separately insufficient causes may combine to produce the result. In other words, the trial judge's instructions clearly replaced but-for cause with a form of aggregate causation in direct contradiction of the Supreme Court's analysis in *Burrage*.[126]

The ACCA's harmless error analysis in *Bailey* provides a far stronger basis to sustain the conviction. Even so, it is not safe to assume that the same instructions will be harmless in every case. As the ACCA correctly noted, *Bailey* "is not a *Burrage* case."[127] The overwhelming evidence in *Bailey* left no question that the accused's reckless behavior was independently sufficient to kill the victim.[128] Hence, the same outcome was inevitable, even had the trial judge provided an appropriate but-for cause instruction.[129] Unfortunately, the link between cause and effect is

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[122] *Id.* at 532 n.6 (italics added).
[123] *Id.* at 533.
[124] *Id.*
[125] *Id.* at 531.
[126] *See* Burrage v. United States, 134 S. Ct. 881, 890–92 (2014).
[127] *Bailey*, 75 M.J. at 533.
[128] *Id.* at 530, 533.
[129] *Id.* at 533.

not always so obvious. Had *Bailey* presented a more ambiguous set of circumstances, the court might have reached a different conclusion. For this reason, proximate cause instructions like those provided in *Bailey* remain fertile ground for litigation.

IV. Incorporating *Burrage* into Military Justice Practice

It is unnecessary to await the outcome of future appellate litigation to ensure the next case is not a "*Burrage* case." Trial judges should instead accept the ACCA's recommendation in *Bailey* to re-evaluate the *Benchbook's* standard causation instructions "in light of the Supreme Court's holding in *Burrage*."[130] As the ACCA apparently recognizes, existing military case law does not mandate the use of a particular causation instruction.[131] Moreover, the CAAF has long held that military trial judges "bear the primary responsibility for assuring that the jury [is] properly . . . instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law."[132] And "[i]n regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law."[133] Therefore, it is well within the discretion of the trial judiciary to amend the *Benchbook* to reflect the current state of the law, rather than perpetuate erroneous precedent.

Conforming the *Benchbook* to *Burrage* does not require drafting new causation instructions out of whole cloth. Trial judges need only look to the Model Penal Code's (MPC) causation provisions for a readily-adaptable example.[134] Along with providing an existing template, the MPC's causation standard offers at least two notable advantages over common law alternatives. The most obvious of these is that the Supreme

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[130] *Id.* at 532 n.6.

[131] *Cf.* United States v. Cooke, 18 M.J. 152, 153–55 (C.M.A. 1984) (upholding the trial judge's decision not to provide proximate and intervening cause instructions and simply explain cause as a result of the accused's actions).

[132] United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008) (internal quotation marks omitted) (quoting United States v. Westmoreland, 31 M.J. 160, 164 (C.M.A. 1990)).

[133] United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012).

[134] *See* MODEL PENAL CODE § 2.03 (AM. LAW INST. 1985). Seven state jurisdictions currently apply causation standards modeled on the Model Penal Code. *See* ARIZ. REV. STAT. ANN. § 13-203 (West 2015); DEL. CODE ANN. tit. 11, §§ 262-264 (West 2015); HAW. REV. STAT. ANN. §§ 702-214 through 702-217 (West 2015); KY. REV. STAT. ANN. § 501.060 (West 2015); MONT. CODE ANN. § 45-2-201 (West 2015); N.J. STAT. ANN. § 2C:2-3 (West 2015); 18 PA. CONS. STAT. ANN. § 303 (Purdon 2016).

Court approvingly cited the MPC's treatment of actual cause throughout its analysis in *Burrage*.[135] Equally important, however, is that the MPC resolves any potential conflict between actual and legal cause.[136]

As defined by the MPC, the word "cause" exclusively means actual cause as expressed through the but-for causation standard.[137] The MPC consequently eliminates the traditional idea of cause as a measure of both actual cause and the proximity between cause and effect sufficient to justify legal liability.[138] Instead, the MPC reframes legal cause as a question of culpability when divergence exists between the result and the *mens rea* element of the offense.[139] Under the MPC, divergence occurs when the result intended or risked differs from: "(1) the victim or object of harm[;] (2) the extent or severity of harm[;] (3) the character of the harm[;] [or] (4) the manner of occurrence of the harm."[140] When evidence raises a divergence issue, the question is not whether the defendant's conduct proximately caused the result, but whether "he caused the prohibited result with the level of culpability—purpose, knowledge, recklessness, or negligence—required by the definition of the offense."[141] For example, in a negligent homicide case, an MPC-based causation instruction would require the government to prove the following:

> First, but for the defendant's conduct, the result in question would not have happened. In other words, without defendant's actions the result would not have occurred. . . .
>
> Second, . . . that the actual result must have been within the risk of which the defendant should have been aware. If not, it must involve the same kind of injury or harm as the probable result and must also not be too remote, too

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[135] *See* Burrage v. United States, 134 S. Ct. 881, 887–88, 890 (2014) (citing MODEL PENAL CODE § 2.03).

[136] "The idea of proximate [or legal] cause, as distinct from actual cause or cause in fact, defies easy summary." Paroline v. United States, 134 S. Ct. 1710, 1719 (2014).

[137] DRESSLER, *supra* note 52, § 14.04, at 195; *see also* MODEL PENAL CODE § 2.03(a).

[138] *See* MODEL PENAL CODE § 2.03, explanatory note, at 26. *See also Paroline*, 134 S. Ct. at 1719 ("Every event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate [or legal] cause of another means that it was not just any cause, but one with a sufficient connection to the result.").

[139] DRESSLER, *supra* note 52, § 14.04, at 195; *see also* MODEL PENAL CODE § 2.03, explanatory note, at 26.

[140] David J. Karp, *Causation in the Model Penal Code*, 78 COL. L. REV. 1249, 1266 (1978).

[141] DRESSLER, *supra* note 52, § 14.04, at 195.

> accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his/her offense.[142]

The MPC treats causation in the context of specific intent and recklessness offenses in a similar fashion.[143] Under this framework, the MPC eliminates the fuzzy distinction between actual causes and causes which, from a policy standpoint, are sufficiently related to the result to merit criminal punishment.[144] In so doing, the MPC ensures that whatever the collateral circumstances, proof of but-for causation remains the *sine qua non* of actual cause.[145]

The MPC represents the kind of holistic approach to causation currently lacking in military courts. As demonstrated in Appendix A, the military trial judiciary should draw on the MPC's example to develop causation instructions that not only explicitly require but-for causality, but also deconflict that concept with proximate (or legal) cause. Amending the *Benchbook* accordingly will ensure uniform integration of the Supreme Court's minimum standard for causation into military practice.

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[142] N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf. *See also* N.J. STAT. ANN. § 2C:2-3 (West 2015); MODEL PENAL CODE § 2.03.

[143] *See* N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf; N.J. STAT. ANN. § 2C:2-3 (West 2015); MODEL PENAL CODE § 2.03.

[144] As the Supreme Court recently noted, "The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary." *Paroline*, 134 S. Ct. at 1719. This uneasy distinction was also the subject of Judge William Andrews's famous dissent in *Palsgraf v. Long Island Railroad Co*., where he lamented: "A cause, but not the proximate cause. What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J. dissenting).

[145] *Sine qua non* is Latin for "without which not" and is commonly used as a legal term of art to describe "[a]n indispensable condition or thing; something on which something else necessarily depends." *Sine qua non*, BLACK'S LAW DICTIONARY (10th ed. 2014). But-for cause is also often referred to as the "s*ine qua non* test." DRESSLER, *supra* note 52, § 14.02, at 182.

V. Conclusion

The Supreme Court's decision in *Burrage* shows that when causation is an element of an offense, there is a big difference between contributing factors and actual causes. Like all other elements of an offense, causation elements derive their meaning from a statutory text, not judicial prerogative. In that respect, *Burrage* clarifies that when a criminal statute requires a specified outcome, the text ordinarily refers to a result that would not have occurred but-for the accused's actions. Military courts have thus far ignored this basic principle of causation. Instead, military judges have expanded the reach of causal offenses to punish actions that contribute to, or play a material role in, a particular result, even when it is unclear whether the same result could have occurred without the accused's involvement. This view of causation not only decreases the Government's burden of proof, but subjects the accused to an unconstitutionally vague legal standard.

Without a clear statutory basis to justify a less demanding causation standard, it seems inevitable that the CAAF will eventually adopt the Supreme Court's reasoning in *Burrage*. When it does, any completed courts-martial that relied on a form of aggregate causation may be at risk of reversal for instructional error or legal insufficiency. In the meantime, military trial courts can—and should—mitigate the risk of legal error by adopting panel instructions that clearly articulate cause in terms of but-for cause.

Appendix A. Recommended Model Penal Code-Based *Benchbook* Instruction

5–19. LACK OF CAUSATION, INTERVENING CAUSE, AND CONTRIBUTORY NEGLIGENCE[146]

NOTE 1: General. Some offenses require a causal nexus between the accused's conduct and the harm alleged in the specification. For example, if the accused's omission is alleged to have suffered the loss of military property, the prosecution must prove beyond a reasonable doubt that the omission caused the loss. Other offenses may also raise this issue, e.g., homicides, hazarding a vessel.

NOTE 2: Using this instruction. The military judge must provide appropriately tailored instructions on causation when an element of an offense requires proof of a causal nexus between the accused's conduct and a specified harm. When raised by some evidence, the military judge must also provide, *sue sponte*, appropriately tailored instructions on intervening cause and/or contributory negligence.

a. If transferred intent is not in issue, and there is no evidence of an intervening cause independent of the accused, only give the instructions following NOTE 3.

b. If the evidence raises the issue of transferred intent, incorporate the instructions following NOTE 4 with the instructions following NOTE 3 as appropriate.

c. If there is evidence that an independent, intervening event or person, other than the victim or accused, played a role in the alleged harm, give the instructions following NOTEs 3 and 5.

d. If contributory negligence of the alleged victim is in issue, give the instructions following NOTEs 3 and 6. When the evidence raises the issue of intervening cause and contributory negligence, give the instructions following NOTEs 3, 4, and 6, tailored as

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[146] This instruction represents a hybrid between the current *Benchbook* causation instruction and the Model Penal Code-based causation instruction employed by New Jersey state courts. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 5-19 (15 Sep. 2014); N.J. SUP. CT. COMM. ON MODEL CRIMINAL JURY CHARGES, MODEL JURY CHARGE (CRIMINAL): CAUSATION AND TRANSFERRED INTENT (2013), http://www.judiciary.state.nj.us/criminal/charges/causatnti.pdf.

appropriate to the circumstances.

NOTE 3: Causation in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) caused the (injury to_____) (loss of_____) (destruction of_____) (damage to_____) (grievous bodily harm to_____) (death of_____) (_____). The accused's (act) (omission) need not be the only factor related to the result, nor must it immediately cause the result. However, the (act) (omission) must be essential to the result.

Causation has a special meaning under the law. To establish causation, the prosecution must prove two elements, each beyond a reasonable doubt:

First, but for the accused's conduct, the result in question would not have happened. In other words, without accused's actions the result would not have occurred.

[WHEN INTENTIONAL OR KNOWING CONDUCT INVOLVED]

Second, the actual result must have been within the design or contemplation of the accused. If not, it must involve the same kind of injury or harm as that designed or contemplated, and must also not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the accused's liability or on the gravity of his/her offense.

[WHEN RECKLESS OR NEGLIGENT CONDUCT INVOLVED]

Second, that the actual result must have been within the risk of which the accused (was) (should have been) aware. If not, it must involve the same kind of injury or harm as the probable result and must also not be too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the accused's liability or on the gravity of his/her offense.

> In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was the cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), you must consider all relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).
>
> The burden is on the prosecution to prove causation. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) caused the alleged harm, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Transferred intent in issue.

> An accused is not relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured or affected or that a less serious or less extensive injury or harm occurred.

NOTE 5: Intervening cause. If there is evidence that an intervening event, act, or omission independent of, and not in concert with, the accused caused the alleged harm, give the following instruction:

> There is evidence raising the issue of whether (state the event or the act/omission of one or more persons other than the accused) may have caused the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____). If the accused's (conduct) (act) (omission) (negligence) (_____) caused the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), the accused is not relieved of criminal responsibility simply because another (event) (act) (omission) may also have contributed to the alleged result. However, if some other unforeseeable, independent, intervening (event) (act) (omission), that did not involve the accused, was the only cause that brought about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), then the accused is not guilty.

To find the accused guilty of this offense, you must be convinced, beyond a reasonable doubt, that the (state the event or the act/omission of one or more persons other than the accused) was not the only cause of the alleged harm to (state the name of the alleged victim). You must also be convinced, beyond a reasonable doubt, that the (conduct) ((willful) (intentional) (omission) ((culpable) negligence) (recklessness) (_____) of the accused did cause the alleged harm as I have previously described.

NOTE 6: Contributory negligence. If there is evidence that the victim of an injury or death may have been contributorily negligent, the military judge should give the following instruction. The military judge should consider whether there are situations other than homicide, assault, or injury in which contributory negligence can be a defense.

There is evidence raising the issue of whether (state the name of person(s) allegedly harmed/killed) failed to use reasonable care and caution for his/her own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) caused the (injury) (death), the accused is not relieved of criminal responsibility simply because the negligence of (state the name of person(s) allegedly harmed/killed) may have contributed to his/her own (injury) (death). However, the conduct of the (injured) (deceased) person should be considered in determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was the cause the (injury) (death).

If some other unforeseeable, independent, intervening (act) (omission), that did not involve the accused, was the only cause that brought about the (injury) (death), then the accused's (conduct) (act) (omission) (negligence) (_____) was not the cause of the harm. Therefore, if the negligence of (state the name of the victim) looms so large in comparison with the (conduct) (act) (omission) (negligence) (_____) by the accused that the accused's conduct should not be regarded as the cause of the final result, then the conduct of (state the name of the victim) is an independent, intervening cause and the accused is not guilty.

To find the accused guilty of this offense, you must be convinced, beyond a reasonable doubt, that the conduct of (state the name of the victim) was not the only cause of his/her the alleged harm. You must also be convinced, beyond a reasonable doubt, that the

(conduct) ((willful) (intentional) (omission) ((culpable) negligence) (recklessness) (_____) of the accused did cause the alleged harm as I have previously described.

DEFENSE BUDGETS ARE LEAN, BUT WE CAN STILL GO GREEN: USING THIRD-PARTY FINANCING TO MEET THE PRESIDENT'S RENEWABLE ENERGY GOALS

MAJOR SAMUEL T. MILLER*

I. Introduction

The Department of Defense (DoD) is the largest single energy consumer in the United States,[1] incurring annual energy costs of approximately $4 billion.[2] As the major energy consumer, the DoD is in a unique position to become an industry leader in the renewable energy arena. President George W. Bush, realizing the critical role played by the federal government in furthering the use of renewable energy, enacted the Environmental Policy Act of 2005 (EPAct 2005) to establish renewable energy goals for the federal government.[3] Importantly, Section 203 of EPAct 2005 mandated that renewable energy sources supply at least 7.5percent of the federal government's electric energy use by 2013.[4] In March of 2015, President Obama added Executive Order 13963, which required that at least 30 percent of all electric building energy consumed by federal agencies come from renewable sources by 2025.[5]

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[1] Cheryl Pellerin, *DoD Gives High Priority to Saving Energy,* U.S. DEP'T OF DEF. (Sept. 29, 2011), http://archive.defense.gov/news/ newsarticle.aspx?id=65480.

[2] *See* U.S. DEP'T OF DEF., ANNUAL ENERGY MANAGEMENT REPORT FISCAL YEAR 2014, at 17 (May 2015). The Department of Defense (DoD) spent $4.2 billion on facility energy in 2014. This amounted to 1.2% of the U.S. commercial sector's total energy consumption.

[3] Energy Policy Act (EPACT) of 2005 § 203, 42 U.S.C. § 15852 (2005).

[4] *Id.*

[5] Exec. Order No. 13,693 § 3(c), 80 Fed. Reg. 15,871 (Mar. 19, 2015). This Executive Order defines renewable energy as, "energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, geothermal heat pumps, microturbines, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project . . . ." *Id.*

To move toward an increased use of renewable energy, each DoD department has enacted goals in addition to the goals set forth in Executive Order 13963.[6] As a result, service branches are constructing renewable energy projects at a rapid rate. For example, as of 2013, the Air Force alone had 261 projects, either under construction or in operation.[7] Not to be outdone, in 2014, the Army awarded $7 billion in multiple award task order (MATOC) contracts to ninety separate contractors for the construction of third-party financed projects, which will produce ten megawatts or more of renewable or alternative energy.[8] In total, these MATOC contracts are expected to produce 37.5 million megawatt hours of renewable energy.[9]

There are a variety of different ways that the DoD can fund renewable energy projects. One option is for the DoD to pay for the projects using up-front appropriations from Congress.[10] The more realistic option is for the DoD to enter into a power purchase agreement (PPA), whereby a third-party developer finances, develops, and maintains the project throughout its life. The DoD then pays the developer for costs incurred by purchasing the renewable energy produced by the project at a negotiated rate.[11] One additional incentive for the DoD to use PPAs is the authority found in 10 U.S.C. § 2922a, which permits the secretaries of military departments to enter into contracts for renewable energy production for a period of up to

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[6] *See Selected U.S. Department of Defense Goals, Priorities and Requirements for Renewable Energy*, AMERICAN COUNS. RENEW. ENERGY, http://acore.org/dod-energy-goals (last visited July 7, 2016). The Department of the Navy has set a goal to derive 50 percent of all energy consumption from renewable sources by 2050. *Id.* Further, the Departments of the Air Force and the Army have set the goal to ensure all new buildings are designed to achieve zero-net-energy, which means that a building produces renewable energy sufficient to meet its energy needs over the course of one year, by 2030. *Id.* Finally, the Department of the Army has set the goal to deploy one gigawatt of renewable energy on Army installations by 2025. *Id.*

[7] *Renewable Energy*, U.S. AIR FORCE CIVIL ENGINEER CENTER, http://www.afcec.af.mil/energy/renewableenergy/index.asp (last visited July 9, 2016).

[8] Karen Henry, *Army Awards Final Contracts to Support $7B Renewable Energy Plan*, ENERGY MANAGER TODAY (Aug. 7, 2014), http://www.energymanagertoday.com/army-awards-final-contracts-support-7b-renewable-energy-plan-0103805/.

[9] Chad T. Marriott, *FAQ on Army's $7 Billion Draft RFP for Renewable Energy*, ALT. ENERGY MAG. (Mar. 29, 2012, 9:37 AM), http://www.altenergymag.com/content.php?post_type=1875.

[10] *Financing Mechanisms for Renewable Energy Projects*, ENERGY GOV., http://energy.gov/eere/femp/financing-mechanisms-federal-renewable-energy-projects (last visited Sept. 23, 2016).

[11] *Id.*

thirty years.[12] With tightening defense budgets, third-party financing and ownership of renewable energy projects on DoD installations, specifically using the authority in Section 2922a, is the most efficient way for the DoD to meet both the presidential and service-specific renewable energy goals.

To support this point, this article will first provide a background of the different vehicles available to finance renewable projects. It will then compare and contrast the implications of using appropriated funds versus third-party financing, with a specific focus on why current appropriations are insufficient to meet the renewable energy goals. The article will then address obstacles inhibiting the use of third-party financing vehicles. Specifically, it will identify factors causing developers to associate significant risk with these projects, such as limitations on contract length, complexities of the government contracting process, and the ability to get the projects in service in time to benefit from federal tax credits. Finally, the article will recommend increased use of Section 2922a as an authority to finance DoD renewable energy projects, and lastly discuss how the underlying process can be improved to speed up project timelines and ease developer concerns.

II. Appropriated Funding vs. Third-Party Financing

A. A Background of Available Financing Options

The first option for the DoD to fund renewable energy projects is to use up-front appropriations from Congress. Up-front appropriations can be made in in three different ways. First, appropriations can be made for military construction (MILCON) projects.[13] Military construction funds

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[12] 10 U.S.C. § 2922a (2006). *See also* Policy Memorandum, Acting Deputy Under Sec'y of Def. for Installations and Envt., subject: Financing of Renewable Energy Projects Policy (9 Nov. 2012) [hereinafter Office of Secretary of Defense (OSD) Policy Memo] ("Section 2922a applies to any type of energy production facility, not just geothermal.").

[13] *See* U.S. GOV'T ACCOUNTABILITY OFFICE., GAO-12-401, RENEWABLE ENERGY PROJECT FINANCING: IMPROVED GUIDANCE AND INFORMATION SHARING NEEDED FOR DOD PROJECT-LEVEL OFFICIALS 10 (2012) [hereinafter GAO-12-401]. The Energy Conservation Investment Program (ECIP) administered by the Under Secretary of Defense for Installations and Environment has been established as a subset of the Defense-wide Military Construction program and is specifically designated for projects that save energy and or reduce energy costs. *See also* FY2015 ENERGY CONSERVATION INVESTMENT PROGRAM, CONGRESSIONAL NOTIFICATION FY2015 ECIP PROJECT LIST, http://www.acq.osd.mil/eie/Downloads/IE/FY2015%20ECIP%20Congressional%20Notification.pdf. In 2015, thirty-nine DoD projects were listed on the Energy Conservation

are useful for larger projects because there are no statutory caps on the amount of money that can be appropriated for an individual project.[14] The DoD can also use annual operations and maintenance (O&M) funds to finance projects not exceeding $1 million.[15] Operation and maintenance funds are useful for smaller projects that do not require significant capital expenditures. For example, Nellis Air Force base installed solar panels to illuminate its marquee sign using O&M funds.[16] Finally, appropriated funds can be used to finance projects through other types of direct appropriations. The American Recovery and Investment Act of 2009 is an example of this type of appropriation. The DoD reported spending $200 million of these stimulus funds on renewable energy projects.[17]

Another option for the DoD to fund renewable energy projects is to use third-party financing through various vehicles. One vehicle is an Energy Savings Performance Contract (ESPC). An ESPC is a contract between the DoD and an energy service company whereby the company designs, finances, and constructs a project, which is intended to save energy.[18] The contractor guarantees that the project will create sufficient energy savings to pay back the project costs throughout its life.[19] While ESPCs have been used to finance renewable energy projects, they are primarily intended to generate energy savings.[20]

An alternate financing vehicle is the Enhanced Use Lease (EUL). An EUL is used to lease non-excess real property to a project developer in return for cash or in-kind consideration.[21] One major drawback to using an EUL is that it requires the DoD installation to have surplus property that is not currently needed, but is not considered excess property for potential future use.[22] The Government Accountability Office (GAO) has

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Investment Program (ECIP) project list totaling $144,589 million. However, these totals also include energy efficiency and water conservation projects. *Id.*

[14] 10 U.S.C. § 2802 (2014) (providing that the Secretary of Defense and Secretaries of the military departments may carry out specified military construction projects as authorized by law). *See also* 10 U.S.C. § 2805 (2014) (providing that the Secretary of a military department may carry out unspecified military construction projects with an approved cost of $3 million or less).

[15] 10 U.S.C. § 2805(c) (2014).

[16] GAO-12-401, *supra* note 13, at 10.

[17] *Id.* at 11.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 12.

[22] *Id.* at 17.

found cases where the installation has actually needed to lease back property that had been leased through an EUL due to mission requirements.[23]

Department of Defense installations can also contract directly with their utility provider using a Federal Acquisition Regulation (FAR) Part 41 contract to construct a renewable energy project.[24] Pursuant to the contract, the utility will own the project and sell the energy it generates back to the installation.[25] While this option may prove especially efficient due to convenience and familiarities that exist between the installation and the local utility, some utility providers may not be in a position to offer the best value to the government.

In most cases, the most useful vehicle available to the DoD is a PPA, where a private developer will obtain financing, develop, and maintain the renewable energy project. As discussed above, the DoD agency pays for the project by purchasing the energy it produces from the developer at an agreed upon rate.[26] This rate can either be fixed or escalated.[27] A fixed rate is usually set higher than the price that the installation is currently paying for energy, with the expectation that it will be more cost-effective in the long-term as utility rates rise throughout the duration of the contract.[28] At the end of the contract, the contractor is responsible for removing all equipment and returning the site to the same condition that existed prior to construction.[29] However, the option will likely exist for the installation to renew the contract with the developer at the end of the term, or to purchase the equipment from the developer.[30]

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[23] *Id.*

[24] Federal Acquisition Regulation (FAR) 41.103 (2014). The DoD agencies are permitted to enter into contracts for the procurement of utility services for a period of up to 10 years. *See also* 10 U.S.C § 2922a (2006) (providing DoD installations the option of entering into contracts for up to 30 years for renewable energy projects).

[25] *Financing Mechanisms*, *supra* note 10.

[26] *Id.*

[27] *Why Power Purchase Agreements Make Sense* 4, SUN POWER (2011), http://us.sunpower.com/sites/sunpower/files/media-library/white-papers/wp-why-power-purchase-agreements-make-sense.pdf.

[28] *Id.*

[29] *Strategy for Renewable Energy*, U.S. DEP'T OF NAVY 6 (Oct. 2012), http://greenfleet.dodlive.mil/files/2013/01/DASN_EnergyStratPlan_Final_v3.pdf.

[30] John Hopkins, *A Guide to End of Term Options in a Solar PPA*, BREAKING ENERGY (Sept. 26, 2012), http://breakingenergy.com/2012/09/26/a-guide-to-end-of-term-options-in-a-solar-ppa/.

The length of a PPA is important because longer contract periods allow developers to attract more financers, because they will have more time to earn a return on their investment.[31] The standard FAR part 41 utility service contract for the purchase of power is limited to 10 years.[32] Therefore, it is necessary to find other statutory authority that allows for longer contract periods. One tool available to extend the length of PPA contracts is to use the Western Area Power Administration (WAPA)[33] as an intermediary to broker the contract for the government.[34] The WAPA is authorized to enter into contracts for durations exceeding ten years; however, in order for an installation to take advantage of this contract authority, it must be located within WAPA's fifteen-state service territory.[35] Therefore, the best option for the DoD to enter into PPAs for an extended period of time is to use the authority found in Section 2922a.[36] Under Section 2922a, military departments can enter into contracts for the purchase of renewable energy for up to thirty years.[37] It is important to

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[31] *Why Power Purchase Agreements Make Sense*, *supra* note 27, at 8.

[32] *See* 40 U.S.C. § 501(b)(1) (2011). The General Services Administration (GSA) is charged with providing non-personal services to executive agencies. *See* 40 U.S.C. § 501(b)(1)(A). Contracts for utility services are limited to 10 years. *See* 40 U.S.C. § 501(b)(1)(B) Under FAR Part 41.103(b), this authority is delegated to the DoD. *See* FAR 41.103 (2014). The DoD is also authorized, pursuant to FAR Part 41.103(a)(2), to acquire utility services under 10 U.S.C. 2304 and 40 U.S.C. 113(3)(3). *Id.* This provision permits the DoD to contract for utility services using vehicles other than the GSA-delegated authority such as 10 U.S.C. 2922a. *See* U.S. DEP'T OF ARMY, REG. 420-241, ACQUISITION AND SALE OF UTILITIES SERVICES para. 3-2l (3 Mar. 2015) for a list of regulatory and statutory regulations authorizing the acquisition of utility services.

[33] *See* ANTHONY ANDREWS, CONG. RESEARCH SERV., R41960, FEDERAL AGENCY AUTHORITY TO CONTRACT FOR ELECTRIC POWER AND RENEWABLE ENERGY SUPPLY 10-13 (Aug. 15, 2011). The WAPA is a power marketing administration (PMA), which functions under the Department of Energy. *Id.* There are currently four federal PMAs, which are responsible for marketing and distributing hydropower. *Id.* The WAPA works with the Federal Energy Management Program (FEMP) to coordinate the purchase of renewable energy for federal facilities within its fifteen-state service territory. *Id.* The WAPA does this by issuing a request for proposals (RFP) for renewable energy projects. The federal agency then pays for the projects at cost plus FEMP administrative fees. *Id.* In July 2015, the Department of the Navy entered into an interagency agreement with the WAPA that allowed the WAPA to issue an RFP which ultimately resulted in a contract for the Mesquite 3 solar project, which will provide 210 megawatts of solar energy; enough to supply one-third of the energy required for thirteen Navy and Marine Corps installations. *See Navy Signs Agreement for Largest Purchase of Renewable Energy by Federal Entity*, AMERICA'S NAVY (Aug. 20, 2015), http://www.navy.mil/submit/display.asp?story_id=90684.

[34] *Why Power Purchase Agreements Make Sense*, *supra* note 27, at 12.

[35] *Id.*

[36] 10 U.S.C. § 2922a (2006). *See also* OSD Policy Memo, *supra* note 12 ("Section 2922a applies to any type of energy production facility, not just geothermal.").

[37] 10 U.S.C. § 2922a.

note that projects utilizing Section 2922a authority must be approved in advance of award by the Secretary of Defense (SecDef).[38] This requirement can lead to lengthy delays, which can impact overall project feasibility; an issue that will be addressed later in this article.

B. Why Third-Party Financing Using PPAs Is a Better Option Than Appropriated Funds

1. Some Benefits of Using Appropriated Funds

There are some benefits to using appropriated funds to finance renewable energy projects. One clear reason to use up-front appropriations is that Executive Order 13693 requires this option to be considered prior to utilizing alternative financing options.[39] While this requirement does not preclude financing projects using third parties, it does mandate that the feasibility of using appropriated funds be considered before any final decision on project funding is made.[40]

Another incentive to fund projects with appropriations is that it does not obligate DoD land for an extended period of time.[41] If the DoD owns the project from the beginning, it is free to remove the project from service when the mission requires. A PPA will require the military department to give up use of the land where the project is sited for the duration of the contract, because the developer owns the project. Operational requirements may limit the amount of flexibility an installation has to forfeit land for an extended period. The government does have the option to terminate the contract for convenience if the mission requires; however, the government will still generally be required to pay the contractor fair compensation based on the work performed and termination costs.[42]

Similarly, using appropriated funds can be beneficial because the

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[38] OSD Policy Memo, *supra* note 12. Section 2922a approval authority has been delegated to the Deputy Under Secretary of Defense Installations and Environment. *Id.*

[39] Exec. Order No. 13,693 § 3(d)(i), 80 Fed. Reg. 15,871 (Mar. 19, 2015).

[40] *Id.*

[41] U.S. DEP'T OF ARMY, ARMY GUIDE: DEVELOPING RENEWABLE ENERGY PROJECTS BY LEVERAGING THE PRIVATE SECTOR 34 (Nov. 6, 2014), http://www.asaie.army.mil/Public/ES/oei/docs/2014%2011%2006%20Army%20Guide%20to%20Developing%20Renewable%20Energy%20Projects.pdf.

[42] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-337, DEFENSE INFRASTRUCTURE: IMPROVED GUIDANCE NEEDED FOR ESTIMATING ALTERNATIVELY FINANCED PROJECT LIABILITIES 22 (2013) [hereinafter GAO-13-337].

government is not committed to purchasing the commodity for years to come.[43] Power purchase agreements require the government to commit to buying back the power at a fixed or escalated rate, which creates some risk based on the uncertainty of future defense budgets. Additionally, the rate set in the contract may result in the government overpaying if energy market prices fall during the life of the agreement.[44] A project paid for with appropriated funds does not require the government to hedge on the future market prices of energy.

2. Third-Parties Are Better Suited to Finance, Develop, and Maintain Projects

Another potential benefit to using up-front appropriations to fund renewable energy projects is the potential that doing so may prove to be more cost-effective in the long-run, because the government will not be required to pay the finance charges associated with third-party financed projects.[45] Unfortunately, as discussed below, the current amount of DoD appropriations are insufficient to fund the enormous up-front capital costs that these projects require at levels to meet the renewable energy mandates. In addition to the lack of appropriated funding, private parties are better-suited to manage the complexities that exist with these projects based on the experience they have in the industry. Moreover, private parties are in a position to take advantage of financial incentives that exist; thereby allowing them to pass these cost-savings on to the federal government through a discounted utility rate.

The most obvious benefit of third-party financing of DoD renewable energy projects is that it eliminates the need to use appropriated funds to pay for these projects. Large-scale renewable energy projects require massive initial capital expenditures. For example, consider that the Nellis Solar array, completed in 2007, required up-front capital costs in excess of $100 million.[46] With narrowing budgets, annual congressional appropriations for DoD renewable energy projects are insufficient to cover

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[43] ARMY GUIDE, *supra* note 41.

[44] *See* Michael Callahan et al., *Lessons Learned From Net Zero Energy Assessments and Renewable Energy Projects at Military Installations*, NAT'L RENEW. ENERGY LAB. (Sept. 2011), http://www.nrel.gov/docs/fy11osti/51598.pdf.

[45] *See* GAO-12-401, *supra* note 13, at 16.

[46] *Nellis Solar Power Systems Tour Nellis Air Force Base Las Vegas* NV, WHITE HOUSE (May 27, 2009), https://www.whitehouse.gov/the-press-office/nellis-solar-power-system-tour-nellis-air-force-base-las-vegas-nv.

these costs. To demonstrate this deficit, understand that in 2014, renewable energy appropriations for all defense agencies was below $98.853 million, split among 130 projects.[47] While this seems like a significant appropriation, it does not approach the amount of up-front capital needed to fund renewable energy projects at the levels necessary to meet the 2025 mandates. To put into perspective just how short these appropriations fall, consider that in 2011, the Secretary of the Army estimated that $7.1 billion in private investment would be required for the Army to meet the 2025 renewable energy mandates.[48] This estimate would require over $507 million to be invested annually on renewable projects. The significant shortfall in appropriations highlights the necessity to use third-party financing vehicles to fund the astronomical up-front capital expenditures required to get these projects in service.

Financing and development of renewable energy projects is a complicated endeavor that can be overwhelming for DoD personnel with minimal experience in the field. Therefore, third parties are often better suited to navigate the intricacies of these projects based on prior their experience. The United States Air Force Academy (the Academy) solar array project presents an example of the detrimental effects that government inexperience can have on project development. The Academy project was the result of a General Services Administration (GSA) area-wide contract whereby the local utility provider, through a third party, was responsible for designing, constructing, connecting, owning, and operating the solar array.[49] However, the project was not financed through the local utility; rather, the $18.3-million project was paid for using appropriations stemming from the American Recovery and Reinvestment Act of 2009.[50] The project became the subject of a DoD Inspector General (IG) report, which found that the Academy erred by classifying the entire $18.3 million as a "connection charge,"[51] required to be paid in advance

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[47] U.S. DEP'T OF DEF., ANNUAL ENERGY MANAGEMENT REPORT FISCAL YEAR 2014, 63 (May 2015).

[48] Donna Miles, *New Task Force to Promote Energy Initiatives*, U.S. DEP'T OF DEF. (Aug. 11, 2011), http://archive.defense.gov/news/newsarticle.aspx?id=65002.

[49] *U.S. Air Force Academy Solar Array*, COLORADO SPRINGS UTIL'S, https://www.csu.org/Pages/usafa-solar-r.aspx (last visited Sept. 23, 2016).

[50] Inspector Gen., U.S. Dep't of Def., No. D-2011-071, Report of Investigation: U.S. Air Force Academy Could Have Significantly Improved Planning Funding, and Initial Execution of the American Recovery and Reinvestment Act Solar Array Project (16 June 2011).

[51] A connection charge is the payment made to the utility owner to install the service line between the building point of demarcation and the utility main. *Id.* at 8.

pursuant to FAR 32.404(a)(5).[52] The IG report found that, in fact, only $1.2 million of the actual costs should have been paid in advance as a connection charge.[53] The report concluded that as a result of the advance overpayment, the Academy lost $676,000 in interest earnings.[54] Furthermore, the report concluded that by paying all of the project costs in advance, "the Government retained no payment leverage in the management of the project's execution, which was over seven months behind schedule as of December 20, 2010."[55]

The Academy IG report provides a valuable example of why private parties may be better-suited to fund projects. It is true that the government's mistake of overpaying the connection charges in advance could have been avoided by simply following the FAR rules; however, if the project was financed by a private investor, the financial loss resulting from this erroneous overpayment would have fallen squarely on the private party. Moreover, if the utility was responsible for funding the project, it likely would have been incentivized to get the project in service in a timely manner in order to begin earning a return for investors.

Private parties are also best-suited to operate and maintain the equipment once in service. For instance, if the equipment requires a major repair, the developer will be responsible for fixing the equipment. Having a private party perform maintenance on the system allows the installation to focus on the mission, and eliminates the need to devote personnel assets to upkeep the equipment.[56] Such arrangements are also likely to garner the support of installation and higher-headquarters leadership, who can be assured that the project will not require significant manpower expenditures.

A private developer can also benefit from certain financial incentives that do not apply to the federal government. One of the main benefits that private parties can take advantage of are renewable energy tax credits.[57] These credits provide a 30% tax credit for companies investing in solar

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[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 10.
[56] Sun Power, *supra* note 27, at 7.
[57] *Id.* at 6.

and wind projects.[58] The credits, set to expire on January 1, 2017, were extended by five years through a congressional spending bill in December 2015.[59] However, it is important to note that the bill also eliminates the wind credit in 2022, and phases down the solar credit to remain at 10% beginning in 2022.[60]

The DoD cannot benefit from these tax credits if they own the project because it is not a taxable entity.[61] Alternatively, private developers who own the project are able to take advantage of the financial incentives that these tax breaks provide.[62] As a result, the DoD may be able to realize a corresponding decrease in the cost of energy produced by the project from the tax savings being passed on from the third-party owner.[63]

Another major tool that private investors have to drive down the cost of renewable energy projects is the ability to sell renewable energy certificates (RECs).[64] A REC is "a document which represents and is used to account for the technological and environmental (non-energy) attributes of energy generated from renewable resources."[65] A REC can be sold separately from the underlying physical electricity produced by a renewable project.[66] However, the Armed Services Board of Contract Appeals has held that RECs are personal property due to their "exclusive nature and transferability."[67] As such, the DoD cannot sell RECs without first meeting the burdensome requirements of the GSA property disposal

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[58] Richard Martin, *Congress Extends Tax Credit for Renewables*, MIT TECH'Y REVIEW (Dec. 17, 2015), http://www.technologyreview.com/news/544741/congress-extends-tax-credits-for-renewables/.

[59] *Id.*

[60] *Id.*

[61] *Federal Clean Energy Contracting*, SOLAR ENERGY INDUST'S ASS'N, http://www.seia.org/policy/renewable-energy-deployment/federal-clean-energy-contracting (last visited Sept. 23, 2016).

[62] *See* Bethany K. Speer, *Funding Solar Projects at Federal Agencies: Mechanisms and Selection Criteria*, NAT'L REN. ENERGY LAB. (Mar. 9, 2012, 9:00 AM), http://www.nrel.gov/docs/fy12osti/53322.pdf.

[63] *Id.*

[64] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-104, DEFENSE INFRASTRUCTURE: DOD NEEDS TO TAKE ACTIONS TO ADDRESS CHALLENGES IN MEETING FEDERAL RENEWABLE ENERGY GOALS 23 (2009).

[65] Policy Memorandum, Assistant Sec'y of the Army for Installations, Energy and Envt., subject: Department of the Army Policy for Renewable Energy Credits (24 May 2012), at 2 [hereinafter ASAIE&E Policy Letter].

[66] *See* ANDREWS, *supra* note 33, at 2.

[67] Honeywell International, Inc., ASBCA No. 57779, 7 Aug. 2013, at 10.

regulations.[68] Therefore, when appropriated funds are used to pay for the project, the government is stuck with the associated RECs at whatever their current value is in the market where the project is built.[69] Private parties, however, have the ability to sell the RECs from the project and buy replacement RECs at lower costs, so long as the contract is written in a fashion that allows the financer to sell the RECs.[70] Like the tax credits, the cost-savings generated from these transactions can be passed on to the DoD agency through a reduced energy rate.[71] The cost savings associated with the federal tax benefits and REC sales can work to drive down energy prices and should serve as a major financial incentive for the DoD to use third-party financing to fund renewable projects. While third-party financing and ownership of renewable energy projects is the best—and likely the only—option for the DoD to meet the renewable energy goals, many obstacles and misconceptions are currently limiting the potential of these vehicles.

III. Current Obstacles to Third-Party Financing and Ownership

A. Limitations on Contract Length

Contract duration is a very important factor for investors who are considering financing a renewable energy project. Research has shown that contracts much longer than the standard ten-year FAR Part 41 contract are needed to ensure potential investors of a project's viability.[72]

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[68] *Id.* The government may not sell personal property unless the property cannot be used elsewhere. *Id.* Prior to sale, an agency must deem the property as excess government property and report this to GSA for potential transfer to other agencies. *Id.* If GSA determines that there is no other use, the property is labeled as surplus and available for donation. *Id.* The property is only available for competitive sale if it is not selected for donation. *Id.* Any such sale must be executed by an agent authorized to execute the sale and bind the government. *Id.*; *see also* 41 C.F.R. § 102.35-102.42 (2007).

[69] ASAIE&E Policy Letter, *supra* note 65, at 3.

[70] *Id.*; *see also Renewable Energy Case Study: Nellis Air Force Base, Nevada Solar Photovoltaic Array*, U.S. AIR FORCE CIVIL ENG. CENT. (Dec. 7, 2012), http://www.afcec.af.mil/shared/media/document/AFD-121207-056.pdf ("[T]he agreement allows FRV to sell the renewable energy certificates [RECs].").

[71] *Frequently Asked Questions*, ASS'T SEC'Y OF THE NAVY ENERGY, INST. & ENVIR., http://www.secnav.navy.mil/eie/Pages/FAQs.aspx (last visited July 7, 2016) (Question: "Does the [Department of Navy] DON want to own the renewable energy certificates (credits) that are tied to a renewable project?" Answer: "No, [i]f the DON can get a better price for power by not owning the RECs we will negotiate having the contractor retain ownership of them.").

[72] *See* ANDREWS, *supra* note 33, at 2.

Specifically, investors need the assurance of long-term revenue from the project due to the high up-front capital required.[73] Long-term contracts also lower the rate of return required for investors and, in turn, can reduce the overall price of the project.[74] These lower project costs translate into lower power costs for the agency over the life of the contract.[75]

While long-term contracts work better to attract investors by making projects more economically viable, most contracting mechanisms significantly limit the length of the agreement. For instance, contracts entered into pursuant to FAR Part 41 have a ten-year limit.[76] While the WAPA has authority to broker renewable energy projects for the DoD for up to 40 years, it is important to remember that the WAPA is only authorized to enter into these contracts in its fifteen-state jurisdictional territory.[77] Further, brokering PPAs is not the primary mission of a power administration. Therefore, it is difficult to determine how long the WAPA will continue to use this authority.[78]

Despite the benefits of longer-term contracts, at least some DoD agencies are still opting to use shorter-term contract vehicles at a considerable rate. For example, as of April 2015, five of the fifteen large-scale Army renewable energy projects, which were either in construction or under contract, were implemented using a GSA area-wide contract.[79] To attract more investors, and thereby spur on competition, it is in the DoD's best interest to move toward full-scale use of long-term contracting tools.

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[73] *See* Dr. Jurgen Weiss & Dr. Mark Sarro, *The Importance of Long-Term Contracting for Facilitating Renewable Energy Project Development*, BRATTLE GROUP (May 7, 2013), http://www.brattle.com/system/publications/pdfs/000/004/927/original/The_Importance_of_Long-Term_Contracting_for_Facilitating_Renewable_Energy_Project_Development Weiss_Sarro_May_7_2013.pdf?1380317003.

[74] *Id.*

[75] *Id.*

[76] FAR 41.103(a)-(b) (2014).

[77] ANDREWS, *supra* note 33, at 10-13.

[78] Bethany K. Speer, *Federal PV Projects Face Finance Barriers—Interview with NREL Experts: Part One of Two*, NAT'L REN. ENERGY LAB. (Apr. 11, 2011, 3:37 PM), https://financere.nrel.gov/finance/content/federal-pv-projects-face-finance-barriers-interview-nrel-experts-part-two-two. "If they were to get busier doing other things more central to their core operations, they might not have the capacity to do these solar PPAs." *Id.* (statement of Blaise Stoltenberg).

[79] *Presentation of Amanda Simpson, U.S. Army: Office of Energy Initiatives* (Apr. 22, 2015), http://www.asaie.army.mil/Public/ES/oei/docs/ACORE_2015_OEI-ED.pdf.

B. Complexities Associated with the Government Contracting Process

DoD renewable energy projects are generally governed by the FAR.[80] When entering into renewable energy contracts, the DoD is required to comply with FAR and Defense Acquisition Regulation Supplement (DFARS) rules that do not apply to private sector utility contracts.[81] These regulations can intimidate private developers who are not familiar with the FAR rules and the associated clauses that are required to be incorporated into a government contract. This unfamiliarity can cause financers and developers concern over the amount of risk involved in contracting with the government.[82] A complete analysis of the nuances of the government contracting process is beyond the scope of this article; however, it is important to highlight some of the common provisions that cause investor concern.

One provision of the FAR that is unique to the government contracting process is the Buy American Act (BAA). As a general rule, under the BAA, the government is only permitted to contract for domestic end-products.[83] An item is considered to be a domestic end-product manufactured in the United States if the cost of its domestic components amounts to at least 50% of the combined cost of all components.[84] In the realm of renewable energy, the BAA has a major effect on the purchase of photovoltaic panels for solar energy projects.[85] The requirement that at least 50% of all panels for a solar project be purchased from a domestic supplier has the potential to drive project costs up considerably, if the price of domestic panels is significantly higher than in foreign markets. Furthermore, in such a situation, a developer whose overall business plan

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[80] *See* GAO-13-337, *supra* note 42, at 11.

[81] Peter Mostow, *Armed Forces' Gigawatt Initiative For Renewable Energy Creating Great Interest*, NATURAL GAS & ELEC'Y. (June 2013), https://www.wsgr.com/publications/PDFsearch/mostow-0613.pdf.

[82] *Id.*

[83] FAR 25.01 (2016); *see also* FAR 25.103 (2016) (carving out numerous exceptions to the BAA, including that the prohibition does not apply if the item is not available in sufficient commercial quantities, the domestic product would be inconsistent with public interest, the cost of the domestic product would be unreasonable, the product is for commissary resale, or the product is information technology that is a commercial item).

[84] FAR 25.101(a)(2) (2016).

[85] *See* Defense Acquisition Regulation Supplement (DFAR) 252.225-7017(b) (Jan. 2016). This clause implements section 858 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291). A covered contract for BAA purposes includes any contract awarded by the DoD that provides for a photovoltaic device to be either installed inside the DoD property or in a facility owned by the DoD; or reserved for the exclusive use of the DoD in the United States for the full economic life of the device. *Id.*

involves purchasing foreign panels at discount prices may be deterred from contracting with the DoD altogether. Therefore, it is crucial for government attorneys to make sure the parties are aware of the BAA requirements early on, to prevent the deal from falling through in a later phase of project development.

Another common concern for developers is the government's ability to terminate the contract for convenience.[86] Under FAR Part 49.5, the government is permitted to terminate a contract at any point when it is in the government's interest.[87] The FAR requires that termination for convenience clauses—tailored to specific contract types—be incorporated into the contract.[88] From a developer and financer perspective, the government's ability to terminate a contract at any point causes some developers to associate significant risk with a government renewable energy project. Some experts in the finance industry have stated that they will not finance a DoD renewable energy project unless there is a termination value schedule included in the underlying contract.[89]

While developer concern over terminations is understandable, it is imperative for DoD contract officers involved in negotiations to understand that the developer will not be left "out in the cold" in the event of a termination. Specifically, the FAR termination clauses provide for monetary relief to the contractor.[90] The DoD administering meaningful monetary relief to developers after terminations of renewable energy contracts is not new. After the 2005 Base Realignment and Closure, the DoD provided more than $24 million in combined settlement costs for

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[86] *See* Mostow, *supra* note 81.
[87] FAR 49.5 (2013).
[88] *Id.*
[89] *Power Contracts With the U.S. Military*, CHADBOURNE & PARKE (June 2013), http://www.chadbourne.com/files/Publication/2f6965ab-f964-4256-b7b4-9efb1896d4fb/Presentation/PublicationAttachment/9077b778-9a29-48dc-b607-a25aa4816590/PowerContractsUSMilitary_pfnJun13.pdf; *see also* Ellen S. Friedman & Tiana M. Butcher, *Shades of Green: New Department of Defense Renewable Energy Commitment Presents Significant Opportunities (And Risks) for Developers*, NIXON PEABODY (Aug. 7, 2013), http://www.nixonpeabody.com/Shades_of_Green_Contract_Management_November_2013 (stating that a termination value schedule sets forth the negotiated amount the developer will be compensated if the contract is terminated after the project begins commercial operation).
[90] *See* FAR 52.249-2(g) (2012). In the event of a termination, the contractor is entitled to the contract price for completed supplies or services accepted by the government, the costs incurred performing work on the project, a fair and reasonable profit unless the contractor would have sustained a loss if the contract had been completed, and reasonable costs of settling the work terminated. *Id.*

three terminated renewable energy projects, and was still paying these settlement costs as of 2013.[91]

It should also be understood that any amount of termination risk imposed on the developer is highly dependent on the private developer's ability to continue to utilize the project for third-party power sales after termination.[92] For instance, after the termination of a solar project, it is possible that the developer will be able to retain the panels for installation at another location and begin to sell energy to other customers relatively easily. On the other hand, a geothermal plant placed on an installation may not serve as great a benefit to a developer after termination. Therefore, the type of renewable project and the corresponding opportunity for reutilization in the event of default should always be considered in price negotiations for DoD renewable energy projects.

IV. Section 2922a Is the Best Tool to Meet the Renewable Energy Goals

A. Benefits of Section 2922a

Section 2922a is an energy-production statute that permits the secretary of a military department to enter into a contract for up to thirty years for the development of any geothermal energy resource within lands under the Secretary's jurisdiction, and for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction, or on private property.[93] The statute further permits the secretary concerned to enter into thirty-year contracts to purchase energy produced from such facilities.[94] The primary benefit of Section 2922a is the thirty-year contract authority.[95] As discussed above, this authority attracts investors who can offer the DoD lower energy rates based on their confidence in the more stable rate of return associated with longer contract terms.[96]

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[91] GAO-13-337, *supra* note 42, at 27.
[92] *See* Friedman & Butcher, *supra* note 89.
[93] 10 U.S.C. § 2922a (2006).
[94] *Id.*
[95] *Id.*
[96] Jurgen & Sarro, *supra* note 73; *see also Installations, Environment, Energy and BRAC: Hearing Before the Subcommittee on Military Construction, Veteran Affairs, and Related Agencies of the House Appropriations Committee* 19 (2014) (statement of John Conger, Acting Deputy Under Secretary Of Defense, Installations and Environment)

Another feature of Section 2922a is that it provides a work-around for the requirement that DoD installations purchase power from state regulated utilities pursuant to 40 U.S.C. § 591. This statute prevents a department of the federal government from purchasing electricity in a manner inconsistent with state law.[97] This generally means that a DoD installation located in a state with a regulated utility market is required to purchase power from an authorized utility provider. However, 40 U.S.C. § 591 carves out an exception to this requirement, which states that the secretary of a military department is permitted to enter into contracts pursuant to 10 U.S.C. § 2394 (recodified as Section 2922a).[98] Further, DoD policy specifically provides that 40 U.S.C. § 591 does not prevent a DoD agency from entering into power purchase contracts under Section 2922a.[99] This exception allows an installation in a regulated jurisdiction to utilize Section 2922a to expand the field of potential project developers and increase competition. However, there are also benefits to having the local utility provider develop the project; mainly, using the local utility works to preserve the existing relationship between the installation and the utility.[100]

While DoD policy provides that 40 U.S.C. § 591 does not apply to Section 2922a projects, it is important for agencies using Section 2922a authority in a state with a regulated utility market to understand that potential litigation risk may exist. Specifically, while 2922a and the statute's underlying policy seem to clearly delineate the DoD's authority to purchase power in a regulated jurisdiction, some experts in the field believe that the authority of a non-regulated developer to sell power in such a jurisdiction is still in dispute.[101] To reduce this risk, it is incumbent

> There are particular authorities for renewable energy—particularly the ability to sign power purchase agreements of up to [thirty] years—that not only provide incentive for private firms to fund the projects themselves, but also can provide a good enough business case that they are able to offer DoD lower energy rates than are being paid currently.

Id.

97 40 U.S.C. § 591 (2002).

98 *Id.* § 591(b)(2)(A) (2002).

99 OSD Policy Memo, *supra* note 12, at 3.

100 Telephone Interview with Karen White, Attorney, Air Force Civil Engineer Ctr. (Jan. 19, 2016) (stating that entering into a PPA with a local utility provider can help to preserve the political relationship that exists between the utility and the installation, make the procurement process more timely, and eliminate the need to enter into a new interconnection agreement to connect the project to the utility grid).

101 Maura Goldstein, *The Bigger Picture: A Lean, Green Fighting Machine? Part 1: The Regulatory Risk Posed by the Army's Renewables Initiative*, ELECTRIC ENERGY, http://

upon agency attorneys involved in project planning to coordinate with the regulated utility early in the project development phase to reduce the potential for litigation and ease investor concerns.[102]

B. The Current Status of Section 2922a Project Approval

1. A Brief History of Section 2922a Policy and Legislation

The authority under Section 2922a was first enacted in 1978 under President Carter's administration.[103] A review of the congressional history behind the legislation reveals that at least part of the intent behind the statute's enactment was to promote the use of geothermal energy.[104] The authority under Section 2922a was mainly viewed to apply only to geothermal projects, until the Deputy Under Secretary of Defense for Installations and Environment (DUSDI&E) issued policy guidance in 2012, clarifying that the statute applied to any type of energy production facility.[105] As of January 2016, the DUSDI&E had approved ten Section 2922a renewable energy projects.[106]

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www.electricenergyonline.com/show_article.php?mag=82&article =686 (last visited Sept. 23, 2016).

[102] *See* Callahan & Anderson, *supra* note 44.

> Before beginning the contracting process for a renewable energy project, installations should consult with local utilities. Under 40 USC 591, a department, agency, or instrumentality of the federal government cannot purchase electricity,"in a manner inconsistent with state law governing the provision of electric utility service." In the case of the Nellis PPA, the utility preferred that Nellis issue a competitive [photovoltaic (PV)] for the PV array.

Id.

[103] Military Construction Authorization Act of 1979, Pub. L. No. 95-356, § 803, 92 Stat. 565 (1978). This legislation provided the initial authority found in Section 2922a. It was later entered into law under Section 803a of the Military Construction Act of 1979. It was codified in 1982 as 10 U.S.C. § 2394. The statute was renumbered as 10 U.S.C. § 2922a in 2006.

[104] H.R. REP. NO. 95-1448, at 9 (1978) ("To encourage geothermal energy resource utilization, the conferees agreed to modified language of a Senate provision authorizing the development of such energy production facilities on lands under military [j]urisdiction.").

[105] OSD Policy Memo, *supra* note 12, at 2.

[106] Telephone Interview with Sara Streff, Deputy in the Office of the Deputy Sec'y of Def. for Installations and Env't. (Jan. 15, 2016) [hereinafter Sara Streff Telephone Interview].

2. The Approval Process

Pursuant to DUSDI&E policy, any agency engaging in a Section 2922a project must complete all phases of project development prior to final approval of the contract. The process begins with a concept brief to the Office of the Assistant Secretary of Defense for Energy, Installations, and Environment (OSD).[107] There are two major approval steps involved in the process. To the extent that a contract under Section 2922a provides for the exclusive use of DoD real property, the agency must comply with the requirement under 10 U.S.C. § 2662(b)(2)(G) by certifying that the project is consistent with the DoD energy performance goals and master plan.[108] This real property requirement is independent of the Section 2922a contract, and approval must occur in advance of contract solicitation.[109] Prior to submitting the actual "ready to award" contract to OSD for final approval, a laundry list of requirements must be met. The requirements include the following: a ready to award contract that has been agreed to by the contractor, but not yet awarded; appropriate real property documentation consistent with DoD Instruction 4165.70;[110] an economic business case analysis; appropriate National Environmental Policy Act (NEPA) documentation; a memorandum for record expressing whether the project is on withdrawn lands; a summary of the project's contribution to federal renewable energy goals; and, if required, a justification and cost-benefit-analysis of the decision to exclude the pursuit of energy security on the grounds that the inclusion of energy security is cost-prohibitive pursuant to Section 2822 of the National Defense Authorization Act for Fiscal Year 2012.[111]

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[107] OSD Policy Memo, *supra* note 12, at 5.

[108] *Id.* at 2; *see* 10 U.S.C. § 2662(b)(2)(G) (2013).

> If the proposed lease involves a project related to energy production, a certification by the Secretary of Defense that the project, as it will be specified in the contract solicitation or other lease offering, is consistent with the Department of Defense performance goals and plan required by section 2911 of this title.

Id. § 2662(b)(2)(G).

[109] OSD Policy Memo, *supra* note 12, at 2.

[110] *Id.* at 5. Such real property outgrant documentation includes a statement of the fair market value of the outgrant. *Id.* If the fair market value meets any of the reporting requirements of 10 U.S.C. § 2662, the documentation must show how and when the required reports were or will be made, and an explanation why the property is not currently needed for public use. *Id.*

[111] *Id.* at 5–6.

C. Changes in Policy and Better Communication are Needed to Improve the Process

The fact that only ten Section 2922a projects have been approved, to date, underscores the need for more efficiency in the process. As one can imagine, the OSD requirements for Section 2922a approval makes for a very lengthy application timeline. Agency employees working these projects indicate that the process is currently taking between two to three years to get final project approval.[112] The expediency of the process is one of the greatest concerns for developers, who are used to private sector projects with much shorter timelines.[113] This concern is warranted when one considers variables such as fluctuating energy markets and, most certainly, the reduction and elimination of federal tax credits for solar and wind respectively. Based on the current timeline, investors in the coming years will likely be worried that a project may not be in service in time to retain the 30% solar tax credit prior to it dropping to 10% in 2022.[114] This concern will likely cause developers to raise project prices, or even resort to avoiding DoD projects in favor of the private sector.

To attract investors and lower project costs, it is crucial for the DoD and the service agencies to implement measures that will speed up the approval process. One potential way to do this is to re-delegate the authority down to the service secretaries.[115] At first glance, this appears to be the most useful option to expedite the process; however, it fails to account for the fact that the majority of time lost is being taken up at the service levels.[116] Regardless of where the bottleneck is, the better option is for OSD to issue additional policy that requires the agency to informally

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[112] Telephone Interview with Daniel Gerdes, Chief of Rates and Renewables, Air Force Civil Engineer Ctr. (Jan. 14, 2016); *see also* Telephone Interview with Veronica Norman, Assoc. Deputy Gen., Army Installations, Env't & Civil Works Practice Group (Jan. 12, 2016); *but see* Sara Streff Telephone Interview, *supra* note 106 (stating that packages are taking between three to five years to reach OSD for approval).

[113] Sara Streff Telephone Interview, *supra* note 106.

[114] Martin, *supra* note 58.

[115] Section 2922a approval authority has already been delegated from the Secretary of Defense through the Under Secretary of Defense for Acquisition, Technology and Logistics down to the Under Secretary of Defense for Energy, Installations and Environment. *See* U.S. DEP'T OF DEF., DIR. 5134.01, UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS para. 3.3 (9 Dec. 2005).

[116] *See* Sara Streff Telephone Interview, *supra* note 106. Packages received by OSD have historically taken anywhere from 10 days to 11 weeks to receive approval. *Id.*

coordinate with OSD during critical points in the development process.[117] Such policy will ensure that essential aspects of the project, such as NEPA analysis and drafting the Request for Proposals (RFP), are done correctly; thereby reducing the risk that an insufficient package will be sent back to the agency for reworking. Furthermore, such consultations will likely expedite higher-headquarter approval at the service levels by increasing the quality of the packages being reviewed.

In conjunction with improving the timeliness of the overall approval process, it is critical that key players are actively engaged and familiar with the requirements. In particular, attorneys who understand the legal implications and how they may affect project timelines, or the overall viability of a project, need to be involved as soon as a potential opportunity is identified. First, an attorney familiar with the regulatory environment of the jurisdiction where the project will be located is needed to advise on jurisdictional rules governing things such as interconnection or dimensions of the actual construction.[118] To provide an example, Texas passed a law that limits a non-utilities' ability to build a solar project that is greater than two megawatts (MW) in a regulated utility jurisdiction. As a result, Fort Bliss decided to pursue a sole-source award of a twenty-MW solar contract to its regulated utility provider.[119] This example underscores the importance of having an attorney involved at the outset who understands the regulatory limitations of a project. Interestingly, as a result of the installation and the utility not being able to agree on favorable easement provisions, the Fort Bliss deal fell through after being in the works for multiple years.[120] This highlights just how essential the real property agreement is to the overall deal.

An attorney familiar with environmental laws and regulations is also crucial to steer the project through the NEPA analysis. Ensuring

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[117] *Id.* The OSD has requested that agencies pursuing Section 2922a approval engage in informal consultations throughout the process. *Id.* These consultation allow the OSD to be involved in critical aspects of the process such as review of the RFP, NEPA analysis and contract negotiations. Considerable OSD involvement during these key phases helps ensure the project is done correctly, and provides for a much quicker approval once the final package is submitted. At this point, these informal consultations are not written into OSD policy. *Id.*

[118] ARMY GUIDE, *supra* note 41, at 15.

[119] Margaret P. Simmons, Challenges with Renewable Energy Projects, slide 10 (Nov. 14, 2014) (unpublished PowerPoint presentation) (on file with author).

[120] Vic Kolenc, *El Paso Electric Axes Fort Bliss Solar Plant Plans*, EL PASO TIMES (Aug. 21, 2015), http://www.elpasotimes.com/story/money/2015/08/21/el-paso-electric-axes-fort-bliss-solar-plant/71993368/.

compliance with NEPA is a time-consuming process that can also foster developer uncertainty, because it is only required for federal projects.[121] At the beginning of the project, environmental attorneys should work to identify categorical exclusions that will expedite the NEPA analysis.[122]

Finally, an attorney familiar with utility acquisitions is in the best position to serve as lead counsel on the project. This attorney should review all documents, including the real property outgrant, the interconnection agreement, the RFP, and the ready to award contract to ensure they include the necessary FAR clauses and follow OSD templates, if available. Moreover, it is especially critical for the attorney to be involved in the negotiations of the final contract. In this role, it is essential that the attorney understand the realistic risks of variables such as expiring tax credits, termination clauses, and potential litigation with regulated utilities. By developing expertise on these issues, the attorney will be able mitigate the potential for high project costs stemming from a developer's overvaluation of the risk involved through knowledgeable negotiation.

V. Conclusion

The DoD's status as the largest energy consumer in the United States is unlikely to change. The question that remains is whether the DoD will continue to use this position as a platform to catapult a wider-scale movement toward the utilization of renewable technology. As Pike Research President Clint Wheelock states, "In particular, military investment in renewable energy and related technologies can help bridge the 'valley of death' that lies between research [and] development and full commercialization of these technologies."[123] While Congress has fallen short in appropriating the funding necessary to meet renewable energy goals, it has at least provided statutory assistance in the form of Section 2922a to help the DoD take the lead on renewable energy production. Unfortunately, the utility of Section 2922a is burdened by a lengthy—yet

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[121] U.S. DEP'T OF ENERGY: FED. ENERGY MGMT. PROGRAM, LARGE-SCALE RENEWABLE ENERGY GUIDE: DEVELOPING RENEWABLE ENERGY PROJECTS LARGE THAN 10 MWS AT FEDERAL FACILITIES (2013).

[122] *See* 40 C.F.R. 1508.4 (1978). A categorical exclusion is a category of actions that do not have a have a significant effect on the human environment, and therefore do not require an environmental assessment nor an environmental impact statement.

[123] *U.S. Military to Invest $10 Billion Annually in Renewable Energy by 2030, According to Pike Research*, NAVIGANT RES. (Oct. 13, 2011), https://www.navigantresearch.com/newsroom/u-s-military-to-invest-10-billion-annually-in-renewable-energy-by-2030.

likely necessary—approval process, coupled with skittish developers who do not understand the process and overvalue the risks involved. These obstacles are evidenced by the fact that the OSD has only approved ten projects to date.[124] The pending reductions and eliminations of federal renewable tax credits in 2022 create an even bleaker forecast, and have the potential to increase costs to a level where projects are no longer economically viable.

To combat these barriers, policy must be implemented whereby the services entering into these projects are mandated to work hand-in-hand with the OSD throughout all phases of the project. Doing so will work to standardize the process and improve the quality of packages being submitted for approval. As a result, project approval will be accelerated. Furthermore, attorneys must play an active role in the project and work to counter the risks that investors and developers associate with these contracts. Only after these steps are taken will Section 2922a have a chance to live up to its potential as a useful tool to help the DoD meet the 2025 renewable energy goals.

[124] Sara Streff Telephone Interview, *supra* note 106.

'TIL DEATH DO US PART: A RECOMMENDATION TO MAKE DOMESTIC VIOLENCE AN ENUMERATED ARTICLE IN THE UCMJ

MAJOR FAITH R. COUTIER*

> *Domestic violence is a pervasive problem that transcends all ethnic, racial, gender[,] and socioeconomic boundaries, and it will not be tolerated in the Department of Defense. Domestic violence destroys individuals, ruins families and weakens our communities.*[1]

I. Introduction

There are days when more family members are injured by a soldier at home than troops injured in war. June 25, 2013, was one of those days.[2]

At approximately 9:20 PM, Sarah Monroe responded to a banging on her door.[3] She opened it to find her neighbor, Camille Roberts, who was shaken, her face bruised, and with her husband, Specialist (SPC) Isaac Roberts, approaching fast behind her. Ms. Monroe quickly pulled Camille

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[1] *Domestic Violence in the Military*, NAT'L COAL. AGAINST DOM. VIOL., www.ncadv.org (last visited July 19, 2016).

[2] *Honor the Fallen*, MIL. TIMES, http://thefallen.militarytimes.com/search?year_month =2010-04 (last visited July 21, 2016). The assertions in the introduction are based on the author's recent professional experience as a special victim prosecutor at Fort Bliss from July 2012 to July 2015, as well as an actual court-martial conducted on March 4, 2014 [hereinafter Professional Experience]; *see also* United States v. Roberts (Mar. 4, 2014) (on file with author).

[3] Transcript of Record at 203, United States v. Roberts (Mar. 4, 2014) (on file with author) [hereinafter Transcript].

inside and shut and locked the door. Crying, Camille told her that SPC Roberts had punched her, strangled her in front of their children, and dragged her down the hallway.[4] Ms. Monroe called the military police (MP); she knew that this was not the first time that SPC Roberts had put his hands on his wife, and she feared it would not be the last.[5]

Specialist Roberts and Camille were high school sweethearts. They had their first child, Jason, in September 2008, and got married on January 27, 2009, when SPC Roberts was nineteen years old. Specialist Roberts joined the Army in April 2010, the same month their second child, Sean, was born. He attended basic training at Fort Knox, Kentucky, where he received the military occupational specialty of a cavalry scout.[6] Specialist Roberts arrived at Fort Hood, Texas, in August 2010, and was assigned to the 3d Armored Brigade Combat Team, 1st Cavalry Division.[7] Two months later, in October 2010, he was arrested for domestic assault against Camille.[8] Though this is the first documented incident of domestic violence committed by SPC Roberts, it is likely that his aggression began at least a month before, when he sought counseling at the Family Advocacy Program (FAP) for marital discord.[9]

As frequently happens in domestic violence cases, the charge of domestic assault was dismissed when Camille recanted. Four months later, in January 2011, SPC Roberts deployed with his unit to Tallil, Iraq, in support of Operation New Dawn.[10] While SPC Roberts was in Iraq, Camille gave birth to their third child, Brooke, in May 2011. Specialist Roberts redeployed in November 2011, and he and a pregnant Camille relocated to Fort Bliss, Texas, in the summer of 2012.[11] In October 2012, their fourth child, Claire, was born. The Roberts now had four children under the age of five.[12] Two months later, SPC Roberts and Camille began to argue when Camille stated that she wanted a divorce. In the presence of their baby daughter, SPC Roberts strangled his wife and punched her in

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[4] *Id.* at 204.
[5] U.S. Dep't of Army, DA Form 2823, Sworn Statements, Sarah Monroe (Dec. 2, 2012, Jun. 25, 2013) [hereinafter DA Form 2823]. Ms. Monroe told the military police (MP) that the police had been called to the Roberts' home numerous times over the past 6–8 months. *Id*.
[6] United States v. Roberts (Mar. 4, 2014) (on file with author).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

the face, causing her head to hit a concrete wall.[13] Fed up, Camille called the MPs and SPC Roberts was arrested. However, Camille later refused to cooperate with law enforcement.

On June 25, 2013, SPC Roberts was drinking at home. He and Camille were arguing after he accused her of cheating on him, a recurring theme in their disagreements.[14] In the presence of their children, SPC Roberts strangled Camille, punched her in the leg, and dragged her down the hallway.[15] Camille managed to escape and ran to her next-door neighbor's house. The neighbor, Ms. Monroe, called the MPs and SPC Roberts was ordered to stay away from his wife.[16] He ignored that order. Instead, on September 14, 2013, SPC Roberts called 911, admitted to hurting his wife, and asked that the police come get him. When the police arrived, they learned that SPC Roberts had again strangled his wife in the presence of their children.[17] Specialist Isaac Roberts was court-martialed on March 4, 2014; he was convicted of two specifications of assault consummated by a battery, two specifications of disobeying an order, and one specification of driving under the influence.[18] He was acquitted of two specifications of aggravated assault, and two specifications of assault consummated by a battery, because Camille refused to testify under oath that SPC Roberts had ever hit or strangled her.[19] As a result, SPC Roberts was sentenced to only eight months of confinement and a bad conduct discharge.[20]

Domestic violence is a serious scourge on society from which the military is not immune.[21] Though offenders are typically charged with assault, none of the offenses listed in the Uniform Code of Military Justice (UCMJ) adequately address the dangerous effects of this crime; many offenders rarely face punishment or prosecution for abusing their spouses

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[13] DA Form 2823, *supra* note 5, Camille Roberts (Dec. 2, 2012).
[14] *Id.* (statement of Camille Roberts dated Jun. 25, 2013).
[15] *Id.*
[16] Professional Experience, *supra* note 2.
[17] *Id.*
[18] Transcript, *supra* note 3, at 282.
[19] Professional Experience, *supra* note 2. By the time the court-martial took place, Camille had reconciled with Specialist (SPC) Roberts and wanted nothing to do with the trial. Instead, the government relied on medical documents and photos, excited utterances, and 911 calls to prove their case. *Id.*
[20] Transcript, *supra* note 3, at 353.
[21] Peter Dutton, *Spousal Battering as Aggravated Assault: A Proposal to Modify the UCMJ*, 43 NAVAL L. REV. 111 (1996).

and those who do tend to receive relatively light punishment.[22] While the military has made a good-faith effort to provide programs and services to prevent domestic violence and save lives, it is not enough. The crime of domestic violence should have its own enumerated article under the UCMJ to demonstrate how seriously military and political leaders take this offense, and to more appropriately and effectively create deterrence and appropriate punishment for this crime.

II. The Impact of Domestic Violence on Society

Domestic violence is a global epidemic;[23] research estimates that one in every three women will report abuse by an intimate partner in their lifetime.[24] The Department of Justice defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[25] It crosses over every demographic boundary, affecting every race, ethnicity, religion, educational background, and socio-economic group.[26]

While physical violence is the most common form of domestic violence, it may also include psychological, financial, and sexual abuse, as well as attempts to isolate the victim.[27] In fact, domestic violence often encompasses acts that would not meet the definition of violence in the generic sense, or in a nondomestic context.[28] The Supreme Court acknowledged that it is "'hard to describe . . . as 'violence' a squeeze of the arm [that] causes a bruise.' But an act of this nature is easy to describe as 'domestic violence' when the accumulation of such acts over time can

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[22] *Id*. at 121 (discussing the limitations of the maximum punishment of Article 128). *See also* UCMJ art. 128 (2012).

[23] *Violence against women: a 'global health problem of epidemic proportions'*, WORLD HEALTH ORG. (July 21, 2013), http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/ (containing "[n]ew clinical guidance launched to guide [the] health sector response").

[24] Alysha D. Jones, *Intimate Partner Violence in Military Couples: A Review of the Literature*, 17 AGG'N & VIOL. BEHAV. 147, 148 (2012) (internal citations omitted).

[25] *What is Domestic Violence?*, DEP'T OF JUSTICE (Oct. 6, 2015), http://www.justice.gov/ovw/domestic-violence (defining forms of domestic violence and describing the accompanying behavior).

[26] Dutton, *supra* note 21, at 111.

[27] *Tenth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence*, 10 GEO. J. GENDER & L. 369, 370 (Sarah Lorraine Solon ed., 2015).

[28] United States v. Castleman, 134 S. Ct. 1405 (2014).

subject one intimate partner to the other's control.'"[29] Therefore, it is commonly recognized that domestic violence "is a series and pattern of behaviors and not simply a sum of discrete acts of violence."[30]

In the United States, more than a million acts of domestic violence are committed each year, making it the largest cause of injury to women, and resulting in hundreds of deaths.[31] In fact, research shows that domestic violence accounts for more injuries to women than car accidents, rapes, and muggings combined.[32] In addition to the staggering statistical data, domestic violence also differs from other types of violence in that it is underreported, and has a high rate of recidivism.[33]

Victims of domestic violence often live in fear of repeated attacks, a fear not unfounded since they are three times more likely to experience a repeat assault within a six-month period when compared to stranger assaults.[34] Furthermore, recidivism is the most important predictor of future violence, because domestic violence is a pattern of abuse that escalates in frequency and severity.[35]

Research shows that domestic violence "exacts an enormous toll on its victims, other adults and children in these homes, and society more broadly."[36] The close, intimate relationship between the abuser and victim leads to frequent violence that is more severe, and results in greater

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[29] *Id.* at 1412 (internal citations omitted).

[30] Emily J. Sack, *United States v. Castleman*: *The Meaning of Domestic Violence*, 20 ROGER WILLIAMS U. L. REV. 128, 142 (2015).

[31] *Castleman*, 134 S. Ct. at 1408.

[32] Solon, *supra* note 27, at 370. "Estimates show that between 960,000 and three million incidents of domestic violence occur each year. Every six minutes a woman is raped and battered in the United States and every fifteen seconds an intimate partner beats a woman." *Id*.

[33] Jason M. Fritz, *Unintended Consequences: Why Congress Tossed the Military-Family out of the Frying Pan and into the Fire when It Enacted the Lautenberg Amendment to the Gun Control Act of 1968*, 1 WISC. L. REV. 157 (2004). "[A]pproximately one in five victims of domestic abuse report three or more similar assaults within that six-month period." Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 823 (2000).

[34] *Id.*

[35] *Id.* at 824. "For example, victims of domestic violence are almost twice as likely to be seriously injured and more likely to require medical care than are victims of stranger violence." *Id.*

[36] Keith Klostermann et al., *Intimate Partner Violence in the Military: Treatment Considerations*, 17 AGGR'N AND VIOLENT BEHAV. 53, 54 (2012) (internal citations omitted).

physical and psychiatric illnesses than stranger assaults.[37] In addition to deaths and injuries, domestic violence is associated with a number of other adverse health conditions, including cardiovascular, gastrointestinal, endocrine, and immune system issues caused by chronic stress.[38] Domestic violence is a significant public health issue, costing the United States over four billion dollars annually in medical and mental healthcare expenses.[39] Furthermore, from a military perspective, domestic violence is also linked to low morale, poor job performance, and increased risk to mission safety.[40]

III. The Impact of Domestic Violence on the Military

The military draws its members from the surrounding community and is often said to be a mirror of society.[41] However, domestic violence in the military community occurs at a much higher rate than in civilian communities.[42] Servicemembers are committing an alarming number of violent crimes, including violent offenses against intimate partners.[43] Analysis of this issue shows that domestic violence in the military occurs at a rate two to five times higher than that of the civilian population.[44] Not only is the perpetration of domestic violence more prevalent, it is also more severe in military families compared to their civilian counterparts.[45] Given that the Department of Defense (DoD) is the largest employer in the United States, with over 1.3 million active duty members and over 825,000

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[37] Kylee Trevillion et al., *A Systematic Review of Mental Disorders and Perpetration of Domestic Violence Among Military Populations*, 50 SOC. PSYCH. & PSYCH. EPID. 1329, 1330 (2015).

[38] *Intimate Partner Violence: Consequences*, CENT. FOR DIS. CONTROL AND PREV'N, http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html (last visited July 21, 2016).

[39] Trevillion, *supra* note 37, at 1330.

[40] Sarah Krill Williston et al., *Military veteran perpetrators of intimate partner violence: Challenges and barriers to coordinated intervention*, 21 AGG'N & VIOL. BEHAV. 55 (2015).

[41] Dutton, *supra* note 21, at 114.

[42] Simeon Stamm, *Intimate Partner Violence in the Military: Securing our Country, Starting with the Home*, 47 FAM. CT. REV. 321, 322 (2009).

[43] Jerri L. Fosnaught, *Domestic Violence in the Armed Forces: Using Restorative Mediation as a Method to Resolve Disputes Between Service Members and Their Significant Others*, 19 OH. ST. J. ON DISP. RESOL. 1059 (2004).

[44] *Id.*

[45] Klostermann et al., *supra* note 36, at 54. *See also*, Stacy Bannerman, *High Risk of Military Domestic Violence on the Home Front*, SF GATE (Apr. 7, 2014) http://www.sfgate.com/opinion/article/High-risk-of-militarydomestic-violence-on-the-5377562.php.

Army Reserve and National Guard personnel, properly addressing the infection of domestic violence in the military is crucial to the long-term health of the institution.[46]

In addition to the impact on its members, domestic violence in the military has the potential for long-term impact on the American civilian populace as well. Every year, large numbers of military personnel return to civilian life from active military service.[47] While there are very few studies focused on identifying possible risk factors for domestic violence among active duty Soldiers and veterans,[48] researchers believe that domestic violence may occur at a higher rate in the military due to stressors and challenges that are unique to military life.[49]

Specifically, being a part of the armed forces "requires frequent transfers to sometimes undesired locations, separation from extended family members, uncertainty about future assignments, varying schedules, long hours, strenuous training and physically-demanding jobs, [repeated deployments,] and fears for the military member's safety."[50] These factors may influence the prevalence of domestic violence in the military, especially occupational stress, deployments, post-traumatic stress disorder (PTSD), and the presence of children in the home.

A. Occupational Stress

Occupational stress in the military differs greatly from occupational stress in the civilian work force.[51] When soldiers enter active duty, they are drilled physically and mentally to prepare them for the risks of battle.[52] This environment instills in soldiers "new ways of responding to perceived threats of violence and/or hostility,"[53] with the understanding that the use of violence is an acceptable and often-used tool to achieve military goals.[54]

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[46] *About the Department of Defense*, U.S. DEP'T OF DEF, http://www.defense.gov/About-DoD (last visited June 23, 2016).
[47] Trevillion et al., *supra* note 37, at 1330.
[48] Jones, *supra* note 24, at 151.
[49] Fritz, *supra* note 33, at 175.
[50] Klostermann et al., *supra* note 36, at 54.
[51] Williston et al., *supra* note 40, at 56.
[52] *Id.*
[53] *Id.*
[54] Jones, *supra* note 24, at 153.

Many victims of domestic violence are reluctant to report assaults to law enforcement due to feelings of shame, embarrassment, and the fear that their abuser may retaliate.[55] In addition to these feelings, active-duty families have an additional barrier to reporting, in that any allegation of domestic violence will have an adverse effect on their abuser's career, including negative economic consequences for the entire family.[56]

For example, due to the consequences of reporting the abuse, a victim may lose the household's primary—and often only—source of income, along with on-base housing, military health insurance, and potential retirement benefits.[57] Additionally, for many soldiers, "being in the military is more than just a career; it is their identity."[58] The loss of this identity through the court-martial or separation process may lead to an increase in violence because the abuser may feel as though he has nothing left to lose.[59]

As part of their service to their country, military families often experience frequent relocations, family separations, financial pressure, and isolation from familiar support systems.[60] Due to repeated transfers—quite often to economically repressed areas of the country—it is difficult for the (usually female) spouse in most military families to maintain a career, and the soldier is typically the primary breadwinner.[61]

Also as a result of service, most military spouses endure periods of involuntary unemployment, leaving them dependent on their spouse, which subsequently gives their abuser more power and control.[62] Moreover, frequent moves can lead to isolation for victims, separating them from family and other familiar support systems such as friends and

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[55] Stamm, *supra* note 42, at 325.
[56] *See* Bannerman, *supra* note 45.
[57] *Id.*
[58] Jones, *supra* note 24, at 148.
[59] *Id.*
[60] Fosnaught, *supra* note 43, at 1062.
[61] Jones, *supra* note 24, at 151. There has been some effort made by state governments to assist military spouses; however, these efforts are geared toward those with professional licenses. EXECUTIVE ORDER—ESTABLISHING PRINCIPLES OF EXCELLENCE FOR EDUCATIONAL INSTITUTIONS SERVING SERVICE MEMBERS, VETERANS, SPOUSES, AND OTHER FAMILY MEMBERS (April 27, 2012), https://www.whitehouse.gov/the-press-office/2012/04/27/executive-order-establishing-principles-excellence-educational-instituti. "All fifty states have now acted to streamline professional licensing for military spouses so that if their families are transferred across state lines, they can continue to do the work they love." WHITE HOUSE (July 2, 2016), https://www.facebook.com/White House/?pnref=story.
[62] Jones, *supra* note 24, at 151.

community. In turn, this forces them to be dependent on the batterer, which may ultimately prevent the victim from ever being able to leave the abusive relationship.[63]

B. Deployments

The U.S. military has been at war for over a decade since the attacks of September 11, 2001,[64] the longest period of sustained conflict in U.S. history.[65] Over 2.5 million people have deployed in support of combat operations in Iraq and Afghanistan, many deploying in unprecedented frequencies and duration.[66] This sustained international conflict has placed a high burden on our military, not only for soldiers who have deployed to combat zones, but also for the soldiers and family members who do not deploy, but take up additional duties at home.[67]

Multiple deployments and reunifications can create unique stress for the soldier, as well as for the spouse left behind, especially if there are children present in the home.[68] Many factors of deployment can contribute to spousal abuse, including separation, isolation, length of deployment, and uncertainty of faithfulness.[69] While the deployment itself may seem to create the most tension, reintegration of the soldier into family life can also be a difficult time. In addition to the issues regarding the division of household roles, the adjustment period may be further complicated by a combat injury, anxiety, or symptoms of PTSD.[70]

Though many families report an increase in stress due to deployment, the relationship between deployment and domestic violence has rarely been scientifically examined, and is therefore largely unknown.[71] What is

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[63] *Id.* at 153.
[64] Williston et al., *supra* note 40, at 55.
[65] *The Military-Civilian Gap: Fewer Family Connections*, PEW RESEARCH CENTER (Nov. 23, 2011), http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/ [hereinafter Survey].
[66] Glenna Tinney & April A. Gerlock, *Intimate Partner Violence, Military Personnel, Veterans, and Their Families*, 52 FAM. CT. REV. 400 (July 2014).
[67] Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. TIMES (Feb. 15, 2008), http://www.nytimes.com/2008/02/15/us/15vets.html?_r=0&pagewanted=print.
[68] Jones, *supra* note 24, at 153.
[69] *Id.*
[70] Tinney & Gerlock, *supra* note 66, at 403.
[71] Jones, *supra* note 24, at 153.

known, however, is that the risk of post-deployment domestic violence is four to five times greater when there is a history of domestic violence prior to deployment.[72] This is evident in the case of SPC Roberts, whose first documented act of domestic violence occurred prior to his deployment to Iraq, who then assaulted his wife on three additional subsequent occasions after he returned home.[73]

C. Post-traumatic Stress Disorder

With the extended conflict in the Middle East, there is a growing number of servicemembers returning home from war with symptoms of mental health difficulties, such as post-traumatic stress disorder (PTSD).[74] Post-traumatic stress disorder is a "mental health condition that [is] triggered by a terrifying event—either experiencing it or witnessing it. Symptoms may include flashbacks, nightmares and severe anxiety, as well as uncontrollable thoughts about the event."[75] Some common risk factors for the development of PTSD include: childhood abuse, physical or sexual assault, and combat exposure.[76] This is relevant because researchers discovered that soldiers diagnosed with PTSD are "significantly more likely to perpetrate violence towards their partners," with over eighty percent committing at least one act of violence in the previous year.[77] That percentage is more than fourteen times higher than in the general civilian population.[78]

While the majority of soldiers who deploy to a combat zone will not develop PTSD,[79] the health implications of those who do cannot be ignored. A large percentage of soldiers returning from Iraq and Afghanistan met criteria for diagnosis of PTSD upon redeployment.[80] These numbers are concerning in view of the fact that studies show a

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[72] *Id.*
[73] Professional Experience, *supra* note 2.
[74] Jones, *supra* note 24, at 155.
[75] *Post-traumatic Stress Disorder (PTSD): Definition*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/post-traumatic-stressdisorder/basics/definition/CON-20022540 (last visited June 23, 2016).
[76] *Id.*
[77] *See* Bannerman, *supra* note 45.
[78] *Id.*
[79] Tinney & Gerlock, *supra* note 66, at 403.
[80] Klostermann et al., *supra* note 36, at 55. "Specifically, 6% to 10% of soldiers returning from Operation Enduring Freedom and 10% to 13% of Operation Iraqi Freedom veterans met criteria for PTSD upon return from deployment." *Id.* (internal citations omitted).

strong connection between veterans who have developed PTSD and domestic violence, finding that those veterans are responsible for almost twenty-one percent of domestic violence nationwide.[81]

D. Family Impact

Studies agree that children who witness domestic violence experience a negative impact on their health and development.[82] This is critical because statistics show that children are eyewitnesses to approximately eighty to ninety-five percent of domestic violence incidents that occur in the home.[83] On a yearly basis, more than one in fifteen American children witness domestic violence, and more than 275 million children are exposed to domestic violence worldwide.[84] Experts believe that a child's exposure to domestic violence may be particularly damaging to their development, because the altercation typically involves an abuser and victim who are both known to, and loved by, the child.[85]

Witnessing domestic violence negatively affects a child's functioning, including the development of behavioral and emotional problems.[86] Some examples include acting out at school or in social situations, aggression, hostility, symptoms of PTSD and depression, and low academic performance, which may lead to difficulties obtaining an advanced education and successful employment.[87] While children of both genders are affected by the exposure to domestic violence, research shows that boys who witness domestic violence are more likely to become perpetrators of domestic violence as adults, thus continuing the cycle of violence.[88] Regardless of gender, children who witness domestic violence

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[81] *Id. See also*, Tinney & Gerlock, *supra* note 66, at 402; Williston et al., *supra* note 40, at 56.

[82] James C. Spilsbury et al., *Clinically Significant Trauma Symptoms and Behavioral Problems in a Community-based Sample of Children Exposed to Domestic Violence*, 22 J. FAM. VIOL. 487 (2007).

[83] Kathryn H. Howell et al., *Developmental variations in the impact of intimate partner violence exposure during childhood*, 8 J. INJ. VIOL. RES. 43 (2016).

[84] *Id.*

[85] Spilsbury et al., *supra* note 82, at 487–88.

[86] Dawnovise N. Fowler & Amy Chanmugam, *A Critical Review of Quantitative Analyses of Children Exposed to Domestic Violence: Lessons for Practice and Research*, 7 BRIEF TREATMENT AND CRISIS INTERVENTION 322 (2007).

[87] Howell et al., *supra* note 83, at 51.

[88] Blair et al., *Child Witness to Domestic Abuse: Baseline Data Analysis for a Seven-Year Prosepective Study*, 41 PEDIATRIC NURSING 23 (Jan–Feb 2015) (internal citations omitted).

experience a significant psychological burden.[89] With more mental, emotional, and interpersonal difficulties, "these children may not progress optimally into adulthood."[90]

This is a serious problem for the U.S. Army given that approximately 200,000 young adults join the military every year.[91] That statistic makes the armed forces one of the larger employers for youth between the ages of seventeen and twenty-four.[92] Furthermore, research shows that parents are a stronger influence on youth career decisions than school or peers.[93] As a result, many children with parents in the military make the decision to join the military themselves. A 2011 survey showed that veterans are more than twice as likely as the general public to have a child serving in the military.[94] If these same children have also witnessed domestic violence in the home, then the cycle of violence could be perpetuated throughout the armed forces for years to come.

IV. Military Response to Domestic Violence

Given the consequences discussed above, the DoD can no longer afford to turn a blind eye to the epidemic of Soldiers perpetrating domestic violence. Military-related calls into the National Domestic Violence hotline almost tripled from 437 in 2006 to over 1100 in 2010, with sixty-one percent of these calls reporting physical abuse.[95] The U.S. Army has the highest rates of domestic violence of all the services, which suggests that domestic violence may be worsening in that population.[96]

Congress has mandated studies regarding domestic violence in the military since 1989.[97] However, it was a *60 Minutes* exposé in 1999, entitled *The War at Home*, which highlighted the problem of domestic

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[89] Howell et al., *supra* note 83, at 51.
[90] *Id.*
[91] Jennifer Lee Gibson et al., *Parental influence on youth propensity to join the military*, 70 J. OF VOC'L BEHAV. 525 (2007).
[92] *Id.*
[93] *Id.*
[94] *See* Survey, *supra* note 65. Furthermore, 75% of veterans would recommend a career in the military. *Id.*
[95] Williston et al., *supra* note 40, at 55.
[96] Stamm, *supra* note 42, at 322.
[97] Maureen Orth, *Fort Bragg's Deadly Summer*, VANITY FAIR (Dec. 2002), http://www.vanityfair.com/news/2002/12/fortbragg200212.

violence in the military and galvanized a public outcry.[98] Ed Bradley, the reporter for *60 Minutes*, analyzed Pentagon records from 1992 through 1996 that showed the rate of domestic violence in the military was five times higher than that of the civilian population.[99] The report also indicated that the military was ignoring the problem, and very few abusers were being held accountable.[100]

In response, Congress established the Defense Task Force on Domestic Violence (DTFDV) to study the issue of domestic violence in the military.[101] The task force, comprised of twenty-four military and civilian experts, was directed to make recommendations on how the DoD could improve victim safety, offender accountability, and the general climate surrounding domestic violence.[102] They were required to meet regularly for three years and to provide Congress with reports of their findings.[103]

The DTFDV's first report, released on February 28, 2001, listed more than seventy-five recommendations and focused on four main categories: military collaboration with the local community, domestic violence education and training, offender accountability, and victim safety.[104] The second report, released on February 25, 2002, was similar to the first report in that it focused on the same four initial categories, but also added a fifth category: program management.[105] Through their analysis of records from each service, the task force discovered that soldiers who perpetrated acts of domestic violence rarely faced punishment or prosecution.[106] Therefore, both reports called for sweeping changes in the way the military handles domestic violence cases, including tracking servicemembers who

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[98] *See* Alvarez & Sontag, *supra* note 67.
[99] Stamm, *supra* note 42, at 326.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *See* Alvarez & Sontag, *supra* note 67.
[104] Stamm, *supra* note 42, at 326. For example, the task force recommended an increase in victim advocates and domestic violence training for commanding officers. *See* Alvarez & Sontag, *supra* note 67.
[105] Stamm, *supra* note 42, at 326. "The Program Management Category is responsible for addressing the more global, system-wide issues that cut across all of the other categories." *Id*. at 337.
[106] *See* Alvarez & Sontag, *supra* note 67.

were under restraining orders for domestic violence, or who were convicted of a domestic violence offense.[107]

Unfortunately, prior to the implementation of any changes, the issue came to a head in the summer of 2002, when four soldiers murdered their wives in unrelated events within a six-week period at Fort Bragg, North Carolina.[108] Three of the four soldiers were members of the Special Forces who had recently returned from Afghanistan; the fourth was an Army cook.[109] Of the four offenders, two immediately turned their guns on themselves and one hanged himself in a jail cell.[110]

These murders reinforced public concerns about military domestic violence that had led to the formation of the task force two years earlier.[111] However, when the moment arrived for the task force to provide their third and final report to Congress, the timing could not have been worse.[112] The leaders of the DTFDV, Deborah Tucker and Lieutenant General Garry Parks, presented their findings and recommendations to the House Armed Services Committee on March 20, 2003, the very day that the Iraq war began, effectively destroying any interest in the DTFDV program.[113] Ms. Tucker described it as, "one of the more surreal experiences of my life."[114]

Pentagon officials claim that overseas operations did not derail their efforts to improve the way the military handles domestic violence; however, the task force was disbanded and their request to reconvene in 2005 to evaluate progress was denied.[115] Furthermore, the rate of domestic violence in the United States decreased after the attacks of September 11, 2001, but the rate of domestic violence within the military continued to explode, with assaults tripling between 2006 and 2011.[116] While the DTFDV provided 200 proposals for change, it had one overarching recommendation: the DoD must "establish a military culture that does not tolerate domestic violence, holds batterers accountable for

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[107] Fox Butterfield, *Wife Killings at Fort Reflect Growing Problem in Military*, N.Y. TIMES (July 29, 2002), http://www.nytimes.com/2002/07/29/us/wife-killings-at-fort-reflect-growing-problem-in-military.
[108] *See* Alvarez & Sontag, *supra* note 67.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See* Bannerman, *supra* note 45.

their actions, and provides victims of abuse with the services they need."[117]

One of the most significant changes to the military's response to domestic violence was the implementation of the Family Advocacy Program (FAP), established under Army Regulation 608-18.[118] The FAP was created to execute the military's policy on the prevention, identification, reporting, investigation, and treatment of spousal and child abuse.[119] It is responsible for ensuring victim safety, access to support and advocacy services, and intervention services for abusers.[120] The FAP also tracks incidents of domestic violence for the DoD, in an effort to identify trends and predictive behaviors to help combat the growing rate of intimate partner violence.[121]

Unfortunately, after all the years of research, even the DoD does not have a good grasp on the extent of domestic violence in the military. The data provided by the FAP only reflects child abuse and domestic abuse that has been reported to their program, leaving one to question the number of actual cases—reported and unreported.[122] Furthermore, this data only includes married couples in incidents of domestic violence, not former spouses or dating partners.[123] This lack of information makes the official rate of domestic violence in the military difficult to calculate, but what experts do agree on is that the number is significantly higher than that of their civilian counterparts.[124]

In August 2013, the issue of domestic violence in the military was addressed anew, this time by the Military Justice Review Group (MJRG).[125] General Martin Dempsey, the then-Chairman of the Joint Chiefs of Staff, recommended a complete review of the UCMJ to "ensure

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[117] Stamm, *supra* note 42, at 326.

[118] *Id.* at 328. *See also* U.S. DEP'T OF ARMY, REG. 608-18, ARMY FAMILY ADVOCACY PROGRAM (13 Sept. 2011) [hereinafter AR 608-18].

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See* Bannerman, *supra* note 45.

[123] *See* Butterfield, *supra* note 107.

[124] *Id.* Experts include Deborah Tucker, co-chairwoman of the Defense Department's Task Force on Domestic Violence, Christine Hansen, executive director of the Miles Foundation, and Dr. Angela Browne, associate director of the Injury Control Research Center at Harvard. *Id.*

[125] *Report of the Military Justice Review Group Part 1: UCMJ Recommendations*, MILITARY JUSTICE REVIEW GROUP (Dec. 22, 2015), http://www.dod.gov/dodgc/images/report_part1.pdf [hereinafter MJRG].

that it effectively and efficiently achieves justice consistent with due process and good order and discipline."[126] This review was conducted by military justice experts from all of the military services whose goal was to analyze "each UCMJ article, including its historical background, current practice, and comparison to federal civilian law[,]" and to propose changes.[127] As part of their 1300 pages of recommendations, the MJRG proposed "aligning the definition of assault with federal civilian law, which would permit greater flexibility to address assaults involving domestic violence as an aggravating factor."[128]

This proposal, while laudable, is not enough to counteract the problem of domestic violence in the armed forces. Only by making domestic violence an independent criminal offense—separate from every other—will a message be sent that domestic violence is not tolerated in the military. Furthermore, it will counteract years of failure by senior leaders to treat this crime as seriously as it deserves.

V. Domestic Violence Needs to Be an Enumerated Article in the UCMJ

Given the serious nature of domestic violence, and its prevalence in the military, it is important that Congress and the DoD take every step necessary to eradicate it from our ranks. However, this will only be possible if the military has a criminal offense that clearly accounts for the dynamics and consequences of intimate partner violence.[129] Many states recognize that domestic violence is a wrong that violates community safety and trust, and have taken extra measures to counteract its deleterious effects. Currently, forty-five states and the territory of Guam have enacted specific statutes for domestic violence, with varying sentences.[130] The

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Dutton, *supra* note 21, at 121.
[130] *State Statutes: Misdemeanor Crimes of Domestic Violence*, BATTERED WOMEN'S JUSTICE PROJECT—NATIONAL CENTER ON FULL FAITH AND CREDIT (2015), http://www.bwjp.org/assets/documents/pdfs/ncpoffc-state-statutes-misdemeanor-crimes-of-domesti.pdf (containing hyperlinked lists of all state statutes organized alphabetically). (The following states have yet to enact a specific domestic violence statute: Florida, New Jersey, New York, Utah, and Wisconsin). *Id.* Massachusetts enacted a specific domestic violence statute (GL c. 265 § 13M) on August 8, 2014, which added the offense of Domestic Assault or Domestic Assault and Battery. *General Laws*, THE 189TH GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter265/Section13m.

military has yet to follow suit. As of June 2016, there is no charge under the UCMJ that sufficiently addresses the serious nature of domestic violence.[131]

A. Article 128 is Inadequate

Article 128 of the UCMJ[132] is an ineffective charge to address the serious consequences of domestic battering. First, it fails to account for the aggravating factors that are present in most domestic violence cases, as well as the long-term harmful effects on the victim.[133] Second, Article 128 fails to sufficiently distinguish between the different types of assaults and the gravity of the harm that can be achieved.[134]

A typical military domestic violence case may come to the attention of a trial counsel after a reported assault, preceded by years of physical abuse.[135] Often, there may be only one or two instances of physical violence in the relationship that the trial counsel can confidently put on the charge sheet based on the evidence provided. Unfortunately, in most cases the acts of abuse occurred months or years before the report, the victim has forgotten many critical facts, and any corroborating facts and records are unavailable.[136] This limits a trial counsel's ability to adequately express to the fact-finder the serious and continuous nature of this crime, because they are often left with a single specification of assault consummated by a battery. The maximum punishment an accused may receive if convicted of that charge is six months confinement.[137] If the accused is an officer, then the trial counsel may have the option of charging conduct unbecoming an officer and a gentleman under Article 133,[138] which adds the possibility of another six months confinement.[139]

In rare instances where an accused assaults his victim with a weapon, inflicts grievous bodily harm, or uses force likely to produce death or

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131 Dutton, *supra* note 21, at 121.
132 UCMJ art. 128 (2012).
133 Dutton, *supra* note 21, at 121.
134 *Id.*
135 *Id.* at 119.
136 *Id.*
137 MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 54b (2012) [hereinafter MCM].
138 UCMJ art. 133 (2012).
139 MCM at ¶ 59c

grievous bodily harm, then he may be charged with aggravated assault under Article 128.[140] In those situations, an accused convicted of aggravated assault could receive a maximum confinement of three to ten years.[141]

Article 128 fails to sufficiently distinguish between the different types of assaults and the gravity of the harm that can be achieved.[142] If an attack does not meet the criteria for an aggravated assault, then a trial counsel is left with charging assault consummated by a battery. Therefore, under the current law, a bar-room brawl must be charged in the same manner as an attack by a soldier on a loved one in the presence of their children.[143]

The assumption that one assault is the same as any other fails to take into account the unique dynamics of domestic violence. "[W]hereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' that is not true of 'domestic violence.' 'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[144]

If the prosecution is limited to a charge of assault consummated by a battery, then the maximum confinement available is six months; a rather insignificant punishment to address a "crime that may be the culmination of years of physical, emotional, and psychological abuse, and which left the victim emotionally and financially isolated, psychologically paralyzed, and living with the day-to-day uncertainty whether she will be brutalized or even killed."[145] As previously noted by the U.S. Supreme Court, there is more to the crime of domestic violence than a few isolated blows and bruises, and the current charge of assault consummated by a battery is utterly inadequate to describe that pattern of behavior.[146]

Furthermore, the recommendation that domestic violence be added as an aggravating factor to the existing assault statute is also inadequate. Domestic violence is a multidimensional concept that involves a range of behaviors.[147] It is not "merely generic violence exhibited in a particular

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[140] *Id.* ¶ 54b
[141] *Id.*; *see also* UCMJ art. 128 (2012).
[142] Dutton, *supra* note 21, at 121.
[143] *Id.*
[144] Castleman, 134 S. Ct. 1405 (2014) (internal citations omitted).
[145] Dutton, *supra* note 21, at 121.
[146] Sack, *supra* note 30, at 142. *Id.*
[147] Spilsbury et al., *supra* note 82, at 487.

locale or by a perpetrator with a particular relationship to his victim. It is this pattern of domination, and not a particular level of violent force, that is central to the concept of domestic violence."[148] While this article does not include recommended text for the enumerated article, it is important to note that the "principles of ensuring victim safety and batterer accountability must guide the drafting process of any new law."[149] Enacting a domestic violence article would show that one assault is not the same as another and would not only demonstrate that the government takes this type of crime seriously, but would also better serve the needs of the military community.

B. An Enumerated Domestic Violence Article Would Have Ancillary Benefits

Creating an enumerated article of domestic violence in the UCMJ would also have ancillary benefits, such as allowing the command to recognize abusers at an earlier stage, potentially increasing the odds that perpetrators will be identified and receive necessary counseling, and easing the burden for victims to demonstrate their eligibility for government benefits.[150]

1. Making Employers Aware of Abusers

First, enacting a domestic violence article would increase the odds that commanders would recognize members of their unit who have a tendency to commit intimate partner violence prior to an egregious assault being carried out. For example, a soldier might be committing domestic violence against their spouse that does not rise to the level of physical violence, e.g. financial control or emotional abuse such as name-calling. By counseling this soldier about their violation of the domestic violence article, the commander not only puts the soldier on notice, potentially reducing their risk of reoffending, but the commander also has documentation to show future commanders that there may be an issue with this particular soldier that they need to monitor.

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[148] Sack, *supra* note 30, at 142.

[149] *Sample National Domestic Violence Laws*, STOP VIOLENCE AGAINST WOMEN, http://hrlibrary.umn.edu/svaw/domestic/laws/samplelaws.htm (last visited July 15, 2016).

[150] Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 175 (2014).

Furthermore, charging abusers under a domestic violence article would promote consistency in the treatment of these types of cases, and serve as a deterrent to other prospective offenders.[151] A separation or conviction under the domestic violence article would provide future employers critical information about the applicant that would otherwise not be found in a background check.[152] This is especially important for employers who are looking for candidates for jobs in sensitive settings.[153] Having a charge that correctly identifies the crime would help to accomplish that goal.

2. Lautenberg Amendment

Limiting the prosecution's charging decision to assault consummated by a battery also hinders the enforcement of the Lautenberg Amendment.[154] The Lautenberg Amendment, which amends the federal Gun Control Act of 1968, prohibits anyone convicted of a misdemeanor crime of domestic violence from possessing a firearm.[155] Congress felt that this amendment was necessary because domestic violence offenses were often undercharged or pleaded down to a lesser offense than the behavior demanded.[156] Furthermore, unlike the Gun Control Act, there is no exemption for police and military personnel under the Lautenberg Amendment.[157] This is important given that, as stated above, research shows that the rate of domestic violence is higher in the armed forces than in the general population.

Moreover, the most accurate predictor of a domestic assault involving a weapon is a history of domestic violence.[158] Therefore, there may be many misdemeanor convictions that could qualify under the Lautenberg Amendment, but are often difficult to recognize given the limited charging options provided to prosecutors.[159]

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[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] 18 USC s 922(g)(9). *See also* Sack, *supra* note 30, at 130
[156] *Id.*
[157] *Domestic Violence*, *supra* note 27, at 388.
[158] Nathan, *supra* note 33, at 854.
[159] Lininger, *supra* note 150, at 191.

When an assault conviction is entered into the National Crime Information Center (NCIC), it is usually not clear that it meets the requirement for the Lautenberg Amendment, because most assault charges do not explicitly state that they resulted from domestic abuse.[160] Having an enumerated domestic violence article would make such convictions more easily recognizable in NCIC and other law enforcement databases, leading to greater accuracy in background checks, and making Lautenberg violators more recognizable to law enforcement.[161] The best way to ensure that domestic batterers do not thwart the intent of Congress by possessing a firearm is to have an enumerated domestic violence charge.

3. Victim Benefits

A potential criticism of this article's proposal is that it might have a chilling effect on victims of domestic violence, leading to a fear of reporting. On the contrary, much like sexual assault in the military, if Congress enacted an enumerated article of domestic violence it would demonstrate how seriously they take this crime. Due to the attention Congress gave sexual assault in the military, victim reporting has increased because they now trust the system.[162] Additionally, the number of sexual assaults committed in the military has sharply declined within the past two years.[163] Creating a domestic violence article would likely have a similar effect because it sends the message that domestic violence will not be tolerated in the military. Furthermore, such an article would assist leaders in monitoring and maintaining a culture and climate where incidents of domestic violence become rare, but when they do occur, victims are confident in coming forward, because they know that the command will take appropriate action.

In addition, a domestic violence article would lead to greater precision and clarity in court and military records. When domestic violence is explicitly labeled as such, it is likely that victims will have an easier time demonstrating why their abuser should not have physical custody of the

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[160] *Id.*

[161] *Id.*

[162] Helene Cooper, *Reports of Sexual Assault in Military on Rise*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/us/reports-of-sexual-assaults-in-military-on-rise.html.

[163] Steven A. Holmes, *Sharp decrease of sexual assault in military, study finds*, CNN POLITICS (May 1, 2015), http://www.cnn.com/2015/05/01/politics/military-sexual-assault-report/

children, why they are entitled to support, and why they qualify for government benefits such as transitional compensation. The goal of the military transitional compensation program is to help alleviate the financial hardship a victim may face when they decide to leave an abusive relationship.[164] To qualify, the victim must have been living in the home of, and married to, the servicemember.[165] Additionally, the servicemember must have been convicted of a domestic violence offense (of a dependent) and either separated as part of a court-martial sentence, ordered to forfeit all pay and allowances as part of a court-martial sentence for a domestic violence offense, or administratively separated, at least in part, for a domestic violence offense.[166]

Having an enumerated offense of domestic violence in the UCMJ would make this process infinitely easier, instead of requiring victims to re-litigate the issue, or search various court documents for proof that the proper relationship existed to qualify for this often much-needed service. Such an article would ensure that victims receive the fair treatment by the legal system that they are entitled to.

VII. Conclusion

Domestic violence exacts a serious toll on its victims, the children who witness these assaults, and society. It represents actions on a continuum, with behavior ranging from emotional abuse to potentially deadly assaults. Despite various charges, the military currently has no effective means to combat this serious and pervasive crime, as existing UCMJ articles are inadequate. There is no better example than the case of SPC Roberts and his family to underscore the importance of having a punitive article that sends a message that this conduct will not be tolerated in the armed forces. Specialist Roberts had four young children who were present when he repeatedly struck and strangled his wife. Children who grow up in a violent home not only have emotional and psychological damage, they are more likely to commit domestic assaults themselves and perpetuate the cycle of violence. By enacting an enumerated article of domestic violence in the UCMJ, military leaders can foster and maintain a culture and climate where incidents of domestic violence become rare. Had such a tool existed

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[164] *Transitional Compensation: Help for Victims of Abuse*, MILITARY ONE SOURCE, http://www.militaryonesource.mil/abuse?content_id=266715 (last visited July 21, 2016).
[165] *Id.*
[166] *Id.*

for SPC Roberts' command, they might have been able to take a proactive response to his violence, as opposed to a reactive approach after the physical, emotional, and psychological damage had already been done.

ADVANCING SHARED INTERESTS: THE CASE FOR A MARITIME SECURITY AGREEMENT WITH CUBA

LIEUTENANT COMMANDER TIMOTHY N. CRONIN*

I. Introduction

Cuba's days as a conventional military threat to the United States "have come and gone."[1] Yet, located only ninety miles from Key West, Florida, Cuba's geographic proximity has enabled its internal machinations to rapidly erupt into significant U.S. national security risks.[2] Cuba has presented a continuous stream of risks since the 1960s, ranging from nuclear war[3] and cold war gamesmanship[4] to mass migration[5] and human smuggling.[6]

Today's Cuba continues to present a mix of risks to the United States, including illegal migration and human smuggling.[7] Additionally, and

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[1] General Charles Wilhelm, Speech, *in* WORLD POLICY INSTITUTE, NATIONAL SUMMIT ON CUBA 25 (Sept. 17, 2002), http://www.worldpolicy.org/sites/default/files/2002National SummitBook.pdf.

[2] *See* Lana Wylie, *Isolate or Engage? Divergent Approaches to Foreign Policy toward Cuba*, *in* FOREIGN POLICY TOWARD CUBA 4–9 (Michele Zebich-Knos et al. eds., 2005).

[3] *See, e.g.*, Anthony Lewis, *President Grave*, N.Y. TIMES, Oct. 23, 1962, at A1.

[4] *See, e.g.*, *Castro's Globetrotting Gurkhas*, TIME, Feb. 23, 1976, at 29.

[5] *See, e.g.*, John M. Crewdson, *Hundreds in Boats, Defying U.S., Sail for Cuba to Pick Up Refugees; Hundreds in Boats, Defying Authorities, Sail to Cuba to Rescue Kin Refugees Let In 'Conditionally'*, N.Y. TIMES, Apr. 25, 1980.

[6] *See, e.g.*, Mimi Whitefield, *Cuba, U.S. Take Aim at People Smuggling*, MIAMI HERALD (Dec. 1, 2015), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article47440865.html.

[7] MARK P. SULLIVAN, CONG. RESEARCH SERV., R43926, CUBA: ISSUES FOR THE 114TH CONGRESS 45-47 (2015).

perhaps more concerning, transnational criminal organizations (TCOs) have increasingly moved their operations into the eastern Caribbean.[8] These TCOs are lethal and highly adaptable, drug-trafficking enterprises that seek to leverage general instability to their advantage.[9] They are also diversified, participating in a wide range of other criminal activities, including support for terrorism.[10] Until recently, these TCOs specialized in trafficking illicit narcotics—predominantly cocaine—through Central America into Mexico and then the United States.[11] Since 2010, however, in response to heighted governmental pressure, the percentage of the total amount of cocaine originating in the Western Hemisphere that flows through the eastern Caribbean has tripled, signaling a broad shift by the TCOs to the east.[12] Unfortunately, violent crime rates have followed

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[8] EXEC. OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POLICY, COCAINE SMUGGLING IN 2013 8–9 (2013) [hereinafter COCAINE SMUGGLING IN 2013]; *U.S.-Caribbean Border: Open Road for Drug Traffickers and Terrorists: Hearing Before the Subcomm. on Oversight, Investigations, and Management of the H. Comm. on Homeland Security*, 112th Cong. 20-29 (2012) [hereinafter *Caribbean Border Hearing*] (statement of Luis G. Fortuno, Governor, Puerto Rico).

[9] EXEC. OFFICE OF THE PRESIDENT, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 5 (2011) [hereinafter TOC STRATEGY]. In this strategy, President Obama committed the United States to achieving five policy goals:

> [Protecting] Americans and our partners from the harm, violence, and exploitation of transnational criminal networks; [helping] partner countries strengthen governance and transparency, break the corruptive power of transnational criminal networks, and sever state-crime alliances; [breaking] the economic power of transnational criminal networks and [protecting] strategic markets and the U.S. financial system from [transnational organized crime] penetration and abuse; [defeating] transnational criminal networks that pose the greatest threat to national security by targeting their infrastructures, depriving them of their enabling means, and preventing the criminal facilitation of terrorist activities; and [building] international consensus, multilateral cooperation, and public-private partnerships to defeat transnational organized crime.

Id. at 1.

[10] JOHN ROLLINS & LIANA SUN WYLER, CONG. RESEARCH SERV., R41004, TERRORISM AND TRANSNATIONAL CRIME: FOREIGN POLICY ISSUES FOR CONGRESS 7-16 (2013); TOC STRATEGY, *supra* note 9, at 5–8.

[11] JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 1–3.

[12] *Confronting Transnational Drug Smuggling: An Assessment of Regional Partnerships: J. Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the H. Comm. on Transp. and Infrastructure & Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 44 (2014) [hereinafter *Drug Smuggling Hearing*] (statement of Luis Arreaga, Deputy Asst. Sec'y of State, Bureau of Int'l Narcotics and Law Enforcement Affairs).

suit.[13] Puerto Rico is now the most violent place in the United States, having a homicide rate four times the national average.[14] The risk for Cuba, and by extension, the United States, is that TCOs will seek to gain a foothold in Cuba for its use as a transshipment point to the United States, as they have in Central America.[15] Cuba's existing smuggling networks, combined with the potential instability caused by its dynamic political, economic, and social landscape, make Cuba a potential target for TCOs seeking new avenues to the United States.

The United States' maritime border defense against these threats is handled principally by the U.S. Coast Guard and various law enforcement agencies, including U.S. Customs and Border Protection. These agencies have adopted a strategy that seek to interdict illegal migrants at sea and quickly return them to their country of departure.[16] The strategy is largely unilateral and reactionary in nature. With only limited cooperation with Cuba, U.S. maritime and air assets continuously patrol the ninety-mile stretch of water between the two countries intending to find, track, and interdict inbound targets in the time it takes for a vessel to depart Cuba and reach the United States.[17] While years of experience have improved this strategy's effectiveness, the Coast Guard estimates that it interdicts only 40 percent of illegal smuggling from Cuba.[18] This success rate was perhaps historically acceptable, but is now concerning given the prospect of TOC in the eastern Caribbean.

Today, the United States government has an opportunity to address the risk of TCOs in Cuba in addition to the more traditional threats of human smuggling and mass migration. Due to recent improvements in

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[13] *Caribbean Border Hearing*, *supra* note 8, at 20–29 (statement of Luis G. Fortuno, Governor, Puerto Rico).

[14] U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, 2014 CRIME IN THE UNITED STATES TABLE 5 (2015). *See also Caribbean Border Hearing*, *supra* note 8, at 20–29 (statement of Luis G. Fortuno, Governor, Puerto Rico).

[15] CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERVICE., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 1–2 (2011); COCAINE SMUGGLING IN 2013, *supra* note 8, at 10 (2013).

[16] *Office of Law Enforcement*, U.S. COAST GUARD, http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp (last visited May 16, 2016).

[17] *See Overview of U.S. Coast Drug and Migrant Interdiction: Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 33-40 (2009) (statement of Rear Admiral Wayne E. Justice, U.S. Coast Guard, Assistant Commandant for Capabilities) [hereinafter *Interdiction Hearing*].

[18] *Id.*

U.S.-Cuba relations, the United States is positioned to overhaul its maritime security strategy toward Cuba. In December 2014, President Barack Obama announced a major shift in U.S. policy.[19] Departing from the "outdated" U.S. policy of Cuban isolation nurtured since the 1960s, the President committed to a policy of engagement, and promised to "advance shared interests" in areas such as counter-narcotics, counterterrorism, and migration.[20] Since his announcement, the U.S. government has reiterated its desire to cooperate in the realm of maritime security, but has not taken any significant action.[21] To that end—and as this article argues—the United States should capitalize on this policy shift by seeking a maritime security agreement with Cuba.

Maritime security agreements (MSAs) are a form of agreement that commits two or more nations to a common purpose, and typically avails each party of the others' capabilities and authorities.[22] Common MSA provisions include information-sharing, procedures to effectuate joint operations, and standing permissions to conduct operations in another party's waters.[23] Maritime security agreements are a key element of the U.S. government's strategy for countering maritime trafficking threats in the Western Hemisphere.[24] The United States has some form of a MSA in place with 43 other countries, including virtually every Central American and Caribbean country—except Cuba.[25] The maritime threats associated with Cuba are evolving, and U.S. maritime strategy should evolve to keep pace. The conclusion of a MSA would be an important step toward ensuring the U.S. government can effectively counter future threats to the United States.

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[19] President Barack Obama, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes.

[20] *Id.*

[21] *Fact Sheet: One-Year Anniversary of the President's Policy of Engagement with Cuba*, WHITE HOUSE (Dec. 16, 2015), https://www.whitehouse.gov/the-press-office/2015/12/16/fact-sheet-one-year-anniversary-presidents-policy-engagement-cuba.

[22] In the context of this article, a maritime security agreement (MSA) refers to any form of bilateral or multilateral agreement between nations concluded for the purposes of combatting transnational organized crime (TOC). Also, MSAs are often referred to as "bilats," "bilaterals," or "bilateral agreements," but the terms have the same meaning.

[23] *See generally* U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS (2012) (For Official Use Only manual that includes text of all MSAs relating to U.S. Coast Guard maritime law enforcement operations) (copy on file with author).

[24] *Interdiction Hearing*, *supra* note 17, at 33–40.

[25] *See generally* U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23.

This article will explore the merits of a potential MSA with Cuba. Section I provides an introduction and background. Section II describes current and prospective national security risks posed by Cuba, with a particular emphasis on the potential impact of transnational organized crime (TOC). Section III explains that while broader changes to the maritime security strategy would require congressional action, current U.S. law does not prohibit a MSA with Cuba. Section IV explains how MSAs function and illustrates their effectiveness in the overall counter-narcotics effort in the Western Hemisphere. Section V outlines how and why a MSA with Cuba would more effectively address Cuban-based maritime security threats than the current framework. This section also argues that a MSA would promote a collective response in countering TOC and supports Cuba's recent effort toward compliance with international human rights standards. Section VI concludes by recommending a short- and long-term strategy for pursuing and implementing a MSA with Cuba.

II. The Risk Posed by Cuba to U.S. National Security

A. Traditional Threats: Mass Migration and Human Smuggling

Illegal migration from Cuba to the United States poses a continued and rising threat to the United States. Since 2010, the number of Cuban migrants interdicted by the U.S. Coast Guard between Cuba and Florida has annually increased; in 2015, the Coast Guard interdicted the highest number since 1995.[26] Similarly, the number of Cuban migrants arriving by land at the southwestern U.S. border peaked in 2015 at over 43,000.[27] Many Cuban migrants arriving at the southwestern U.S. border initially traveled by sea from Cuba into Central America, then accomplished the remaining travel by land.[28]

Illegal Cuban migration presents two separate threats to the United States. First, Cuba poses a persistent threat of mass migration by sea to

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[26] U.S. COAST GUARD, *Office of Law Enforcement*, *supra* note 16.

[27] *See Potential Terrorist Threats: Border Security Challenges in Latin America and the Caribbean: Hearing Before the Subcomm. on the Western Hemisphere. of the H. Comm. on Foreign Affairs*, 114th Cong. 13 (2016) (statement of Alan D. Bersin, U.S. Department of Homeland Security, Assistant Secretary for International Affairs and Chief Diplomatic Officer).

[28] RUTH WASEM, CONG. RESEARCH SERV., R40566, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 11 (2009).

the United States. The most recent mass migrations occurred in 1980 and 1994.[29] In 1980, Fidel Castro authorized the departure of any Cuban national from the port of Mariel, Cuba.[30] The ensuing mass exodus, termed the *Mariel Boatlift*, resulted in more than 125,000 Cuban nationals departing by sea to seek asylum in the United States.[31] Similarly, following riots in Havana in 1994, 40,000 Cubans departed for the United States.[32] The risk that an internal Cuban disturbance will result in a mass migration remains present today. The U.S. government, for example, feared that President Obama's announcement of the restoration of diplomatic relations with Cuba in 2014 would also spark mass migration.[33] Cuban nationals associated the announcement with a possible end to favorable U.S. immigration policies.[34] This, in turn, fostered a belief by many Cubans that they should depart Cuba in order to reach the United States before any changes in law occurred.[35] Although President Obama's announcement did not start a mass migration, the threat is ever-present.

The influx of undocumented aliens associated with mass migrations by sea are a threat to U.S. sovereignty.[36] They place significant strain on the border control function of the United States,[37] requiring the Coast Guard, law enforcement agencies, and the military to divert large numbers of resources to stop the thousands of boats involved.[38] Such operations are extremely costly, both in resources expended during the direct response and the follow-on requirement to provide humanitarian assistance to those taking to the sea.[39]

Second, Cuban migrants utilize criminal smuggling networks as a primary mode of transportation from the northern coast of Cuba to the

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[29] *Id.* at 1.
[30] *Id.*
[31] *Id.*; *see also* Vice Admiral Benedict L. Stabile & Robert L. Scheina, *U. S. Coast Guard Operations During the 1980 Cuban Exodus*, U.S. COAST GUARD, http://www.uscg.mil/history/articles/uscg_mariel_history_1980.asp (last visited May 11, 2016).
[32] WASEM, *supra* note 28, at 1.
[33] Frances Robles, *In Rickety Boats, Cuban Migrants Again Flee to U.S.*, N.Y. TIMES (Oct. 9, 2014), http://www.nytimes.com/2014/10/10/us/sharp-rise-in-cuban-migration-stirs-worries-of-a-mass-exodus.html?_r=0.
[34] *See, e.g.*, Javier de Diego, *More Cubans Head for U.S. after Policy Change Rumors*, CNN (Jan. 5, 2015), http://www.cnn.com/2015/01/05/americas/cuba-migrants-to-us/.
[35] *Id.*
[36] Robert Watts, *Caribbean Maritime Migration: Challenges for the New Millennium*, HOMELAND SECURITY AFFAIRS (Apr. 2008), https://www.hsaj.org/articles/133.
[37] *See* Stabile & Scheina, *supra* note 31.
[38] *Id.*
[39] WASEM, *supra* note 28, at 1.

southeast United States.[40] These criminal networks are highly sophisticated, utilizing high-speed, multi-engine vessels to increase their chances of success.[41] They bring thousands of illegal aliens to the United States each year, ultimately seeking a percentage of the multimillion-dollar market associated with human smuggling.[42] As these criminal networks focus on profit margins, the danger of alien smuggling has increased, sometimes resulting in migrant death.[43]

In summary, the threat of mass migration and illegal smuggling to the United States continues to threaten U.S. national security. Mass migration causes the United States to divert significant resources—quickly becoming very costly—and is disrupting resources from utilization for other interests. Human smuggling, like mass migration, represents a challenge to U.S. sovereignty, enabling thousands of undocumented aliens to enter the United States without proper security screening.

B. Prospective Threats: Transnational Organized Crime in Cuba

Transnational organized crime refers to the activities of organizations that operate transnationally and seek illegal financial gain by utilizing violence, corruption, and intimidation.[44] Organizations can vary

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[40] *Interdiction Hearing*, *supra* note 17, at 33–40.

[41] *Id.*

[42] *Id.*

[43] Lieutenant Commander Brian W. Robinson, *Smuggled Masses: The Need for A Maritime Alien Smuggling Law Enforcement Act*, ARMY LAW., Aug. 2010, at 20, 21–22. *See, e.g.*, David Goodhue, *Fatal Smuggling Voyage Ended off Key West. Boat Crew Facing Life Sentence for Five Migrants' Death*, KEYS INFO NET (May 29, 2015), http://www.keysnet.com/2015/05/29/502906/fatal-smuggling-voyage-ended-off.html.

[44] National Security Staff, *Strategy to Combat Transnational Organized Crime*, WHITE HOUSE (July 25, 2011), http://r.search.yahoo.com/_ylt=A0LEV7hVTWBXoX4Apo UnnIlQ;_ylu=X3oDMTBybGY3bmpvBGNvbG8DYmYxBHBvcwMyBHZ0aWQDBHNlYwNzcg/RV=2/RE=1465957846/RO=10/RU=https%3a%2f%2fwww.whitehouse.gov%2fsites%2fdefault%2ffiles%2fStrategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf/RK=0/RS=w_0ha4WGrhz0LHQ0DUvw7.lIkGg-. The introduction to the strategy states,

> Transnational organized crime refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication

considerably in structure, criminal focus, and location of their operations. Some, like the Sinaloa cartel, a powerful drug trafficking organization based out of Mexico, generally limit their operations to criminal activities.[45] Others, such as the Revolutionary Armed Forces of Colombia (FARC) and Hezbollah, merge traditional criminal activities with terrorism.[46]

Transnational organized crime is considered a top security risk to U.S. interests, and the President has called on "all elements of national power" to confront it.[47] It "poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe."[48] Transnational crime organizations are beginning to diversify their operations, conducting cybercrime and weapons trafficking, and increasingly linking their operations to designated terrorist groups.[49]

The next two sub-sections of this article describe the potential for TCOs to gain a foothold in Cuba and the resulting risk that such an outcome would pose to the United States.

1. Transnational Organized Crime in the Western Hemisphere

Transnational organized crime in the Western Hemisphere has historically been dominated by illicit drug-trafficking; specifically, the production and distribution of cocaine into the United States.[50] As explained below, the history of cocaine trafficking is instructive today and

> mechanisms. There is no single structure under which transnational organized criminals operate; they vary from hierarchies to clans, networks, and cells, and may evolve to other structures. The crimes they commit also vary.

Id.

[45] JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 14 (2015). The Sinaloa cartel principally traffics cocaine and other illegal drugs into the United States, is known to operate in at least 50 countries worldwide, and earns an estimated $3 billion annually. *Id.*

[46] JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 19–20.

[47] TOC STRATEGY, *supra* note 9, at 1.

[48] *Id.* at 5.

[49] JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 7–16; TOC STRATEGY, *supra* note 9, at 1.

[50] CLARE RIBANDO SEELKE ET AL., *supra* note 15, at 1–2.

suggests that TCOs specializing in it are capable of leveraging virtually any weakness to their advantage.

In the 1980s, virtually all of the world's coca leaf and refined cocaine were produced in Bolivia and Peru.[51] Colombian cartels then imported, further refined, and packaged the product for distribution.[52] The U.S. government responded by leading large-scale eradication efforts in Bolivia and Peru, which in turn shifted production to Colombia.[53] The shift of production to Colombia effectively consolidated the power of the major Colombian cartels, giving them control of all aspects of the cocaine trade, from coca leaf production to cocaine distribution.[54] Similar to the prior efforts in Bolivia and Peru, the Colombian government, in conjunction with the United States, responded with an "all-out war" against the Colombian cartels.[55] As a result, the cocaine industry adjusted again.[56] This time it shifted internally, however, with the power moving away from the cartels to paramilitary groups.[57] By the late 1990s, groups such as the FARC had effectively replaced the major cartels as the world's primary cocaine producers and distributors.[58]

As pressure between rival paramilitary groups and the government continued and intensified within Colombia into the early 2000s, the next shift in power was northward toward Mexico.[59] Gradually, the Mexican drug cartels became the principal TCOs in the Latin American drug trade, with production remaining in the source countries of Colombia, Bolivia, and Peru.[60] More recently, the region has witnessed an adjustment toward other countries in Central America—primarily Honduras and Guatemala.[61] While these countries had historically played a role in the cocaine trade as transit countries, Mexican cartels were now basing their

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[51] Bruce Bagley, *The Evolution of Drug Trafficking in Latin America*, 71 SOCIOLOGIA: PROBLEMS Y PRACTICAS 102 (2013); Paul Gootenberg, *Cocaine's Long March North, 1900–2010*, 54 LATIN AM. POLITICS AND SOC'Y 166, 169 (2012).

[52] Gootenberg, *supra* note 51, at 169–70.

[53] Bagley, *supra* note 51, at 102; Gootenberg, *supra* note 51, at 169–70.

[54] *Supra* note 53 and accompanying sources.

[55] Bagley, *supra* note 51, at 102.

[56] *Id.* at 103; SEELKE ET AL., *supra* note 15, at 5.

[57] *Supra* note 56 and accompanying sources.

[58] *Id.*

[59] Bagley, *supra* note 51, at 102; Gootenberg, *supra* note 51, at 170.

[60] Bagley, *supra* note 51, at 102; SEELKE ET AL., *supra* note 15, at 4–5.

[61] WILSON CTR., THE CRIMINAL DIASPORA: THE SPREAD OF TRANSNATIONAL ORGANIZED CRIME AND HOW TO CONTAIN ITS EXPANSION 10 (Juan Carlos Garzon & Eric L. Olson eds.) (2013); Bagley, *supra* note 51, at 102.

operations in the countries themselves, after having successfully leveraged governmental weakness to their advantage.[62]

This decades-old pattern of TCOs moving their operations from areas of relatively high competition and pressure into areas characterized by reduced pressure has been termed the "balloon effect."[63] As pressure is applied in one area, cocaine production and distribution simply move to another. Violence has been a consistent and lethal consequence of the balloon effect.[64] Where the TCOs move, violence follows.[65] At the height of the Colombian cartels' power, Colombia's drug-fueled violence made it one of the most dangerous places in the world.[66] By 2008, the influence of drug trafficking dealt Mexico the same fate.[67] Today, Central America finds itself in the same position.[68]

Like the power shifts in drug trafficking, the balloon effect is similarly evident in the smuggling routes used to transport cocaine from the source countries into the United States. In the early 1980s, cocaine arrived in the United States predominantly by air and sea routes from source countries into the Caribbean, and then into South Florida.[69] In response to heavy law enforcement presence along those routes, smuggling shifted to Central American routes.[70] Since then, the majority of trafficked cocaine has been smuggled by land and sea from the source countries, through Central America into Mexico, then over the southwestern U.S. border.[71] The vast majority of cocaine is still moving along these Central American routes.[72] Over the last several years, however, the balloon effect has again altered smuggling routes, this time eastward. For the first time in decades there has been a rapid increase in the amount of cocaine moving along the old eastern Caribbean routes, into Puerto Rico.[73] This eastward movement brings with it an associated risk of TOC in Cuba.

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[62] THE CRIMINAL DIASPORA, *supra* note 61, at 4, 6–7; Bagley, *supra* note 51, at 102
[63] THE CRIMINAL DIASPORA, *supra* note 61, at 11; SEELKE ET AL., *supra* note 15, at 26.
[64] Bagley, *supra* note 51, at 107; SEELKE ET AL., *supra* note 15, at 6–8.
[65] *See* Bagley, *supra* note 51, at 103–07.
[66] *Id.* at 102.
[67] BEITTEL, *supra* note 45, at 1.
[68] SEELKE ET AL., *supra* note 15, at 10.
[69] *Id.* at 2.
[70] Bagley, *supra* note 51, at 106.
[71] SEELKE ET AL., *supra* note 15, at 2.
[72] COCAINE SMUGGLING IN 2013, *supra* note 8, at 8–9.
[73] THE CRIMINAL DIASPORA, *supra* note 61, at 4; *see also Drug Trafficking in the Caribbean: Full Circle*, ECONOMIST (May 24, 2014), http://www.economist.com/news/americas/21602680-old-route-regains-popularity-drugs-gangs-full-circle.

2. Risk of Transnational Organized Crime in Cuba

The risk for Cuba—and consequently for U.S. national security—is that it will fall victim to this recent spread of transnational drug trafficking back into the eastern Caribbean. As it stands today, Cuba is not a drug trafficking threat to the United States.[74] Traffickers have largely avoided the island due to strict criminal sentencing, an intensive security presence, and strong interdiction efforts.[75]

Cuba, however, still presumably represents a future target for TCOs. Transnational criminal organizations have recently shifted an increasing percentage of their drug trafficking operations into the eastern Caribbean.[76] They are reviving dormant smuggling routes by moving drugs from source countries into Puerto Rico and the U.S. Virgin Islands (USVI).[77] From Puerto Rico and the USVI, the drugs are then smuggled into various cities along the east coast of the continental United States.[78] Between 2011 and 2013, the relative percentage of the total amount of cocaine flowing to the United States through the eastern Caribbean has tripled.[79] As is the case in Central America, the rapid increase in drug trafficking has been accompanied by significantly higher levels of violence.[80] Puerto Rico's murder rate currently stands at over four times the U.S. national average.[81] In 2012, Puerto Rico's homicide rate per 100,000 was higher than Mexico's,[82] and an estimated eighty percent of murders were linked to illegal drug trafficking.[83]

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[74] U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, 2015 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 146 (2015), http://www.state.gov/documents/organization/239560.pdf.

[75] *Id.*

[76] COCAINE SMUGGLING IN 2013, *supra* note 8, at 8–9; *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

[77] *See supra* note 76 and accompanying sources.

[78] *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

[79] *Drug Smuggling Hearing*, *supra* note 12, at 44 (statement of Deputy Asst. Sec'y Arreaga) ("In 2011, cocaine transiting the Caribbean to the [United States] totaled approximately five percent, which increased to nine percent by 2012. By the end of 2013, cocaine flowing within the Western Hemisphere Transit zone increased to [sixteen] percent of the 646 metric tons total flow."); COCAINE SMUGGLING IN 2013, *supra* note 8, at 4–5.

[80] *See* SEELKE ET AL., *supra* note 15, at 6.

[81] U.S. DEP'T OF JUSTICE, *supra* note 14.

[82] UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE 2013 22–24 (2014).

[83] *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

By establishing a foothold in Cuba, TCOs would streamline the eastern Caribbean smuggling route. Currently, to move drugs through the eastern Caribbean route, TCOs utilize a circuitous route from the source countries east, then north into Puerto Rico or the USVI.[84] This transit can be accomplished by land, sea, or a combination of both, and can be accomplished in one or multiple legs. For example, drugs could be moved by land from source countries into the northern coast of Venezuela and then by boat up the island chains of the French West Indies, USVI, and British Virgin Islands.[85] Once the drugs reach Puerto Rico or the USVI, they are transported west into the continental United States.[86]

With a presence in Cuba, TCOs could eliminate this circuitous route by transporting drugs directly into Cuba. From Cuba, drugs are only 90 miles from their U.S. destination, and TCOs could leverage the robust smuggling networks that already exist between Florida and Cuba to complete their transit.

The principal argument against Cuba becoming a haven for TCOs is its success in countering them through a strong security presence.[87] Unfortunately for Cuba, however, TCOs have been successfully increasing the amount of cocaine moving through the eastern Caribbean, even amidst a heavy counter-narcotics security presence.[88] The U.S. government has launched several large-scale, joint initiatives to address the increase in eastern Caribbean drug flows, but the volume and associated violence continue to rise in the region.[89] If this is an indicator, strong security alone is insufficient to stop TCOs committed to moving into a particular area.

Transnational criminal organization's future in Cuba will also likely depend on whether instability accompanies the eventual succession of the Castro-led government. A defining characteristic of today's TCOs is their

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[84] *See Caribbean Border Hearing*, *supra* note 8, at 10–13 (statement of John P. de Jongh, Jr., Governor, United States Virgin Islands); *Caribbean Border Hearing*, *supra* note 8, at 20–29 (Luis G. Fortuno, Governor, Puerto Rico).

[85] *Id. See also Drug Smuggling Hearing*, *supra* note 12, at 23 (statement of General John Kelly, Commander, U.S. Southern Command) [hereinafter General Kelly].

[86] *Id.*

[87] U.S. DEP'T OF STATE, *supra* note 74, at 146.

[88] MARK P. SULLIVAN, CONG. RESEARCH SERVICE., R43882, LATIN AMERICA AND THE CARIBBEAN: KEY ISSUES FOR THE 114TH CONGRESS 27 (2016); *see also* EXEC. OFFICE OF THE WHITE HOUSE, CARIBBEAN BORDER COUNTERNARCOTICS STRATEGY 8–9 (2015) [hereinafter COUNTERNARCOTICS STRATEGY].

[89] *See* COUNTERNARCOTICS STRATEGY, *supra* note 88, at 3–6, 8–9.

push to leverage instability, especially in fragile states.[90] TCOs based in Mexico have, for example, preyed upon governmental weakness and the accompanying susceptibility to corruption in Honduras and Guatemala.[91] They have effectively penetrated both governments by utilizing their immense financial resources to leverage these weaknesses.[92] The Mexican-based TCOs outspend any efforts to oppose them by bribing key government officials. In Guatemala, officials who refuse to take bribes face a threat of death.[93] As a result, "the Honduran and Guatemalan governments have seemingly lost control over large swaths of their territory," enabling TCOs to operate with impunity.[94]

The current situation in Honduras and Guatemala is perhaps the hemisphere's worst-case scenario in terms of the correlation between TOC and overall instability. In Cuba, impending changes in the political, economic, and social environment also suggest potential for instability.[95] Politically, Cuba is undergoing its most significant change since 1961.[96] Fidel Castro handed control of the government to his brother Raul Castro in 2006, who, in turn, has begun to implement a succession plan[97] following his intent to step down in 2018.[98] If realized, this change would mark the first non-Castro leadership of the country in more than 50 years.[99] While the immediate succeeding Cuban government will likely remain under the influence of the Castro brothers,[100] the anticipated turnover invites questions about how effectively a non-Castro led government will maintain internal control in the medium- and long-term.[101] Any

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90 TOC STRATEGY, *supra* note 7, at 5.

91 Steven S. Dudley, *Drug Trafficking Organizations in Central America: Tranportistas, Mexican Cartels and Maras*, *in* WILSON CTR., SHARED RESPONSIBILITY: U.S. MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 76–79 (Eric L. Olson et al eds.) (2010); Hal Brands, *Crime, Irregular Warfare, and Institutional Failure in Latin America: Guatemala as a Case Study*, 34:1 STUDIES IN CONFLICT & TERRORISM 228, 230–33 (2011).

92 Dudley, *supra* note 91, at 76–79.

93 Brands, *supra* note 91, at 233.

94 Dudley, *supra* note 91, at 76–79.

95 SULLIVAN, CUBA, *supra* note 7, at 51.

96 SULLIVAN, LATIN AMERICA *supra* note 88, at 5–6.

97 *See* Eusebio Mujal-Leon, *Survival, Adaptation and Uncertainty: The Case for Cuba*, 65 J. OF INT'L AFFAIRS 149, 159–65 (2011).

98 Damien Cave, *Raúl Castro Says His New 5–Year Term as Cuba's President Will Be His Last*, N.Y. TIMES (Feb. 24, 2013), http://www.nytimes.com/2013/02/25/world/americas/raul-castro-to-step-down-as-cubas-president-in-2018.html.

99 *Id.*

100 *See* Mujal-Leon, *supra* note 97, at 159–65.

101 *See id.*

diminished capacity to maintain control presents TCOs with opportunities to seek influence through corruption.

Cuba is also characterized by economic uncertainty. President Castro has focused on a series of reforms intended to galvanize the nation's economy,[102] and his concern for Cuba's economy is well-placed.[103] Cuba is still largely reliant on subsidized Venezuelan imports for the vast majority of its energy use.[104] With Venezuela's economy in shambles, Cuba's ties to Venezuela represent significant economic liability that threatens the overall stability of the Cuban government.[105] In Central America, such economic instability is strongly correlated with the influence of TCOs.[106] For example, the "chief enabler of continuing insecurity in Guatemala is the fundamental debility of the state."[107] Poor economic performance invites corruption, which in turn enables TCO growth. Additionally, a weaker economy degrades Cuba's ability to continue funding the intensive security activities that are historically associated with preventing TOC in the country.

Socially, Cuba's future will likely be defined by increasing off-island contact. This off-island influence will come in many forms. President Obama has decreased restrictions for U.S. citizens seeking to travel to Cuba,[108] and tourism has become a major segment of the Cuban economy.[109] Finally, President Castro's major economic reforms include tax incentives designed to attract direct foreign investment.[110] Like its political and economic environments, Cuba's social sphere will be characterized by significant change, as the Cuban populace is increasingly exposed to various off-island influences. This increased access to Cuba

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[102] *Id.* at 159–65.

[103] *See* SULLIVAN, LATIN AMERICA, *supra* note 88, at 10.

[104] Danielle Renwick & Brianna Lee, *Venezuela's Economic Fractures*, COUNCIL ON FOREIGN RELATIONS (Dec. 26, 2014), http://www.cfr.org/economics/venezuelas-economic-fractures/p32853.

[105] *See, e.g.*, Michael McCarthy, *6 Things You Need to Know about Venezuela's Political and Economic Crisis*, WASH. POST (May18, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/18/6-things-you-need-to-know-about-venezuelas-political-and-economic-crisis/; Moisés Naím & Francisco Toro, *Venezuela is Falling Apart*, ATLANTIC (May 12, 2016), http://www.theatlantic.com/international/archive/2016/05/venezuela-is-falling-apart/481755/.

[106] *See, e.g.*, Brands, *supra* note 91, at 233, 238.

[107] *Id.* at 238.

[108] SULLIVAN, LATIN AMERICA, *supra* note 88, at 24.

[109] *Id*. at 10.

[110] *Id*. at 23.

provides TCOs a previously unrealized opportunity to exert influence over government officials and citizens. The low average income of Cuba's populace enables TCOs to offer enticing monetary incentives for Cuban citizens willing to become involved in their criminal enterprises.[111]

The future influence of TOC in Cuba is unclear. The best-case scenario would likely involve the Cuban government continuing to exert the required level of pressure to keep TCOs out of the country. This, in turn, would decrease the prospective threat of TOC to the United States. In the worst-case, TCOs would successfully infiltrate and establish control in a similar manner to Honduras or Guatemala, giving them direct access to the United States through well-established smuggling routes. The apparent commitment of TCOs to expanding their eastern Caribbean smuggling operations, coupled with Cuba's proximity to the United States, suggest that TOC's future in Cuba likely lies somewhere in the middle. While Cuba is not currently considered a drug-trafficking threat,[112] "[t]he drug threat from Cuba seems destined to increase . . . ."[113] Transnational criminal organizations have already forced their way into Puerto Rico, despite a robust multi-agency prevention effort. Additionally, forecasted political, economic, and social changes in Cuba are likely to create some level of general instability. Such instability would, in turn, invite TOC influence, as has occurred in Central America.

3. Links Between Transnational Organized Crime and Terrorism

Drug- and alien-smuggling networks pose a collateral, national security risk for the United States "that terrorist organizations could seek to leverage [smuggling] routes to move operatives with intent to cause grave harm to [U.S.] citizens or even quite easily bring weapons of mass destruction into the United States."[114] The threat of radical Islamic terrorist organizations using Cuban smuggling networks as a gateway to the United States has not yet been realized.[115] There is, however, an

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[111] *Id*. at 12.

[112] U.S. DEP'T OF STATE, *supra* note 74, at 146.

[113] *National Security Implications of U.S. Policy Toward Cuba: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 111th Cong. 31 (2009) (statement of Rensselaer Lee, Foreign Policy Research Institute).

[114] *Drug Smuggling Hearing*, *supra* note 12, at 51 (statement of General Kelly).

[115] U.S. DEPT. OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2014 256–57 (2015).

established and growing nexus between TCOs and foreign terrorist organizations (FTOs). Increasingly, FTOs are turning to criminal activities, such as drug trafficking, to fund their endeavors.[116] In 2010, the Department of Justice reported that 29 of the top 63 international drug trafficking enterprises were associated with terrorist organizations,[117] and this nexus between TOC and terrorism has been assessed as a significant threat to overall U.S. national security.[118]

This nexus is concerning, given the ease with which smuggling organizations currently penetrate the U.S. border. The commander of U.S. Southern Command recently remarked, "This network . . . is so efficient that if a terrorist, or almost anyone, wants to get into our country, they just pay the fare."[119] The obvious concern is that the well-established migrant smuggling routes from Cuba could be leveraged by terrorist organizations to move people and material into the United States. The Coast Guard estimates that it stops only about 40 percent of the smuggling traffic from Cuba into South Florida, presenting TOC entities with a relatively high chance of gaining access to the United States by sea.[120]

III. U.S. Policy Toward Cuba: Limited Authority for Increased National Security Engagement

Beginning in the early 1960s, the United States instituted—and currently maintains—a strategy aimed at forcing democracy upon Cuba.[121] As this section of the article describes, the legal framework underpinning this strategy has grown progressively stronger over time, moving from the realm of administrative to statutory control.[122] Two mainstays of U.S. strategy, the economic embargo and Cuba's ineligibility for foreign assistance, require Congressional action before any significant

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116 JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 3–4.
117 TOC STRATEGY, *supra* note 9, at 6.
118 JOHN ROLLINS & LIANA SUN WYLER, *supra* note 10, at 2–3.
119 *Hearing to Receive Testimony on U.S. Northern Command and U.S. Southern Command in Review of the Defense Authorization Request for Fiscal Year 2016 and the Future Years Defense Program: Hearing Before the S. Committee on Armed Services*, 114th Cong. 23 (2015) (statement of General Kelly).
120 *Interdiction Hearing*, *supra* note 17.
121 *Charting a New Course on Cuba*, WHITE HOUSE, https://www.whitehouse.gov/issues/foreign-policy/cuba (last visited May 11, 2016).
122 *See* SULLIVAN, CUBA, *supra* note 7, at 18–19.

modification to them may occur.[123] In terms of national security, this inflexible strategy, designed for the geopolitical realities of the 1960s, has limited the scope of actions available to the U.S. national security community to effectively confront today's threats.[124]

There is still space within this rigid framework for effective action in the realm of national security. The current legal and regulatory framework with Cuba is comprehensive with respect to U.S. commercial and private entities.[125] With very few exceptions, they are absolutely prohibited from providing or receiving any economic benefit to or from Cuba.[126] Notably, however, the framework does not prohibit intergovernmental engagement, unless such engagement involves the provision of prohibited aid to Cuba.[127] Because a MSA with Cuba would not involve prohibited aid, the otherwise comprehensive framework would not prohibit international engagement with Cuba through a MSA.

A. Isolation Through the Economic Embargo

The most expansive element of the U.S. policy towards Cuba is the economic embargo.[128] The economic embargo against Cuba originated in the 1960s under the Eisenhower administration and until the 1990s, existed within the executive branch's regulatory control.[129] From 1960 to 1963, the president, through the Commerce Department and its successor agency, the Treasury Department, imposed three successive sets of

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123 *See* Cuban Democracy Act (CDA), 22 U.S.C. § 6001 (1992); Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

124 *See* Hal Klepak, *Cuba–U.S. Cooperation in the Defense and Security Fields*, *in* DEBATING U.S.—CUBAN RELATIONS 79 (Jorge I. Dominguez et al. eds., 2012).

125 Cuban Asset Control Regulations, 31 C.F.R. §§ 515.101-515.206 (2014).

126 *Id.*

127 *See* DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RESEARCH SERV., R43888, CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS 3 (2015).

128 Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. § 2151). The term "embargo" was first used in the Foreign Assistance Act (FAA), which authorized the president to impose a "total embargo upon all trade between the United States and Cuba." *Id.*

129 SULLIVAN, CUBA, *supra* note 7, at 18–19. These regulations were initially authorized pursuant to the FAA and the Trading with the Enemy Act. *Id.* (citing 27 Fed. Reg. 1085 (1962) and 27 Fed. Reg. 2765-2766 (1962)).

comprehensive regulations that effectively prohibited trade with Cuba.[130] The final set, the Cuban Asset Control Regulations (CACR), which remain in effect today, generally prohibit trade between persons and entities of the United States and Cuba, requiring any such trade to be accomplished only after obtaining a license from the Treasury Department.[131] The CACR also ban most travel to Cuba and prohibit virtually all financial transactions between Cuba, or its nationals and persons, subject to the jurisdiction of the United States.[132]

This economic embargo against Cuba was administered through the CACR until 1992, when Congress began codifying the embargo with a body of increasingly restrictive legislation.[133] Of these, the Cuban Democracy Act of 1992 (CDA) and Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD Act) are the most consequential.[134] Among certain of its provisions, the CDA prohibits U.S. foreign subsidiaries from engaging in trade with Cuba and conditions the lifting of the embargo on Cuba adopting a democratic government.[135]

The LIBERTAD Act codified the embargo by requiring full enforcement of the CACR.[136] Notably, the LIBERTAD Act also strengthened the pre-conditions necessary for the president to suspend the embargo and sanctioned the trafficking in U.S. property confiscated by the

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130 *See* Miscellaneous Amendments, 25 Fed. Reg. 10,006 (Oct. 20, 1960); Pres. Proclamation No. 3447, 27 Fed. Reg. 1085 (1962), *reprinted* in 22 U.S.C. § 2370 note; Cuban Import Regulations, 27 Fed. Reg. 1116 (Feb. 7, 1962).

131 Cuban Assets Control Regulations (CACR), 28 Fed. Reg. 6974 (July 9, 1963).

132 *Id.*

133 *See* Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. § 2151); Cuban Import Regulations, 27 Fed. Reg. 1116 (Feb. 7, 1962); Cuban Assets Control Regulations, 28 Fed. Reg. 6,974 (July 9, 1963); Cuban Democracy Act (CDA), 22 U.S.C. § 6001 (1992); Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act) of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996); Trade Sanctions Reform and Export Enhancement Act of 2000 (P.L. 106-387, Title IX). In addition to these regulations and statutes, other existing U.S. legislation restricts the conduct of U.S. entities with respect to Cuba to some degree. *See* DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3–14. This other legislation, not directly addressed in this article, does not impact the ability of the United States to seek a MSA with Cuba. *Id.*

134 *See* SULLIVAN, CUBA, *supra* note 7, at 18–19; Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOREIGN AFF. 199, 203–24 (2007); Andrew Mihalik, *The Cuban Embargo: A Ship Weathering the Storm of Globalization and International Trade*, CURRENTS: INT'L TRADE L.J., 98–100 (2003).

135 22 U.S.C. § 6007 (2014).

136 22 U.S.C. § 6032(c) (2014).

Cuban government.[137] Today, by law, United States' entities are prohibited from virtually any trade with Cuba, until Cuba achieves the pre-conditions laid out in the LIBERTAD Act.[138] These include Cuba holding free elections, respecting human rights, and adopting a free-market system.[139]

In terms of a potential MSA with Cuba, the key feature of the embargo is what it does *not* prohibit. The laws related to the economic embargo are focused on prohibiting financial transactions between Cuba and private and commercial entities associated with the United States.[140] In this realm, they are comprehensive: U.S. private and commercial entities are prohibited from providing to or receiving any economic benefit from Cuba.[141] They do not, however, limit or constrain the United States government from engaging with the Cuban government, when that engagement does not involve the provision of any economic benefit to Cuba.[142] Thus, as the next section illustrates, the U.S. government is prohibited from providing most forms of direct international aid to Cuba, because this aid represents a direct economic benefit. Instruments such as a MSA, however, are permissible because they do not require the provision of any economic benefit.

B. Isolation through Prohibitions on the Provision of U.S. Aid

In addition to the core elements of the CACR, CDA, and LIBERTAD Act, Congress has attempted to intensify Cuba's isolation by significantly limiting the types of international aid that may be directed to Cuba. The Foreign Assistance Act of 1961 (FAA) prohibits the U.S. government from providing aid to Cuba in two ways. First, section 2370(a)(1) of the FAA prohibits the U.S. government from providing any aid to Cuba otherwise authorized by the FAA.[143] This provision is not discretionary and represents an absolute limitation on the president's authority to

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[137] *Id.* § 6064.
[138] *Id.* Several changes were made to the CACR in January 2015 to conform with President Obama's intent to normalize relations with Cuba. *See* 80 Fed. Reg. 2286-2302, Jan. 16, 2015. These changes eased restrictions in certain areas such as travel. *Id.*
[139] *Id.*
[140] *See generally* 31 C.F.R. §§ 515.101–515.901 (2014).
[141] *Id.*
[142] *Id.*
[143] 22 U.S.C. § 2370(a)(1) (2014) ("No assistance shall be furnished under this chapter to the present government of Cuba.").

provide direct economic aid to Cuba.[144] Thus, Cuba, unlike most other countries with which the United States has a MSA, is prohibited from receiving aid authorized by the FAA related to international narcotics control, foreign military sales, international military training, etc.[145] These restrictions essentially prevent the United States from fighting the spread of TOC into Cuba through international anti-drug assistance programs.[146] Whereas the United States is authorized by statute to transfer nonlethal equipment to Colombia to reduce illicit drug trafficking,[147] for instance, or utilize appropriated funds to train Guatemalan forces in at-sea law enforcement,[148] these options are illegal with respect to Cuba.[149]

Notably, section 2370(a)(1) prohibits only those forms of aid specified in the FAA.[150] It does not constrain the actions of the U.S. government in areas outside of the FAA. Since engagement with Cuba, and more specifically a MSA with Cuba, is not characterized in the FAA as a form of assistance that may be provided to a foreign government, section 2370(a)(1) does not preclude the pursuit of a MSA with Cuba.

The second provision of the FAA that limits the provision of aid to Cuba is section 2370(a)(2), which prevents Cuba from receiving "any other benefit under any law of the United States."[151] While "any other benefit" is not defined within the statute, this provision of the FAA is expressly discretionary.[152] It specifically permits the president to waive

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144 DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3.

145 22 U.S.C. § 2370(a)(1).

146 CLARE RIBANDO SEELKE ET AL., *supra* note 15, at 9–11. Since the 1970s, the United States has directed significant funding to various Latin American countries to assist in the overall counter-drug effort through various anti-drug assistance programs. *Id.* These programs, such as "Plan Colombia" in Colombia and the "Merida Initiative" in Mexico, typically focus on crop eradication, interdiction, and training a foreign government's military and law enforcement. *Id.*

147 22 U.S.C. § 2291-5 (2014).

148 *Id.* § 2347 (2014).

149 *Id.* § 2370(a)(1) (2014). The FAA's limitations do not restrict all forms of aid. The CDA and LIBERTAD Act both authorize limited authority to provide assistance "notwithstanding any other provision of law." *See* 22 U.S.C. § 6004(a) and 22 U.S.C. § 6039(a). This aid, however, managed by the U.S. Department of State and U.S. Agency for International Development, must be utilized consistent with its enabling legislation. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-285, CUBA DEMOCRACY ASSISTANCE: USAID'S PROGRAM IS IMPROVED, BUT STATE COULD BETTER MONITOR ITS IMPLEMENTING PARTNER 18 (2013).

150 22 U.S.C. § 2370(a)(1) (2014).

151 *Id.* § 2370(a)(2) (2014).

152 *See* DIANNE E. RENNACK & MARK P. SULLIVAN, *supra* note 127, at 3.

the limitation when he or she deems it necessary in the interests of the United States.[153] While a MSA with Cuba could arguably be viewed as a benefit to Cuba, section 2370(a)(2)'s implicit discretion would still permit the president to pursue the MSA, assuming he or she determines the action to be in the interests of the United States.[154] President Obama has already stated that engagement with Cuba in areas such as immigration, drug trafficking, and counterterrorism are beneficial to the interests of the United States.[155] Thus, to the extent section 2370(a)(2) of the FAA may represent a limitation to concluding a MSA with Cuba, President Obama has ostensibly signaled his intent to waive that limitation.[156]

As explained above, the strategy of isolation adopted in the 1960s with respect to Cuba largely remains in effect today. While the strategy is comprehensive in its restrictions on commercial and private entities and the provision of direct U.S. government aid to Cuba, it does not prohibit intergovernmental engagement. Thus, a potential MSA with Cuba would be authorized, as long as its terms did not commit the United States to any of the transactions prohibited by current legislation. The remainder of the article describes the utilization of MSAs in current maritime interdiction operations and how an MSA could effectively advance the shared maritime security interests of the United States and Cuba.

IV. Maritime Security Agreements: A Model of Success in Maritime Interdiction Operations

The Coast Guard and other U.S. federal agencies depend heavily on MSAs with other nations in the overall national strategy to combat international drug smuggling and TOC. These MSAs, a form of international agreement, typically involve the United States and other nations committing to combating illicit narcotics trafficking and working collaboratively to that end. As this section describes, a MSA with Cuba is achievable based on the existing relationship between the Cuban and U.S. governments and standing authority for the executive branch to conclude such an agreement.

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153 *Id.*; 22 U.S.C. § 2370(a)(2) (2014) ("Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba . . . .").

154 *Supra* note 153 and accompanying sources.

155 *Charting a New Course on Cuba*, *supra* note 121.

156 *See id.*

A. The Role of Maritime Security Agreements in Maritime Interdiction Operations

The Coast Guard is the lead federal agency for maritime drug interdiction and maritime TOC.[157] To accomplish this mission, the Coast Guard maintains a constant presence throughout the "transit zone," the seven million square-mile area around Central and South America and the Caribbean, where TCOs are transporting the vast majority of the world's cocaine.[158] The goal of Coast Guard operations in the transit zone is to stop drug smuggling vessels as close to their source countries as possible.[159]

For decades, however, international drug smugglers have frustrated this goal by transiting the sovereign waters of foreign nations.[160] Their rationale is simple. Under international law, the United States, like any other nation, has jurisdiction over only those vessels located in its own waters, i.e. coastal state jurisdiction,[161] and vessels registered or flagged in the United States, i.e. flag state jurisdiction.[162] The corollary is that the United States does not have jurisdiction over vessels flagged in foreign countries and over those found in foreign waters.[163] Further, absent consent, the United States is generally prohibited from both entering another nation's sovereign waters to conduct law enforcement and boarding a vessel flagged in a foreign nation.[164] For example, if a U.S. Coast Guard cutter observed a Honduran registered vessel on the high seas or in Panamanian waters and suspected it of drug smuggling, the cutter would be prohibited from boarding that vessel, absent consent from Honduras or Panama, respectively.

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[157] *Drug Smuggling Hearing*, *supra* note 12, at 8–10 (Summary of Subject Matter); *Id.* at 23 (statement of Admiral Robert J. Papp, Commandant, U.S. Coast Guard) [hereinafter statement of ADM Papp].

[158] *Id.* at 8–10 (Summary of Subject Matter).

[159] *Id.*

[160] Lieutenant Commander Wes Hester, *Hemispheric Framework for Counter Narcotics Operations*, 3:4 INTERAGENCY J. 39, 42 (2012), http://thesimonscenter.org/wp-content/uploads/2012/12/IAJ-3-4-pg39-48.pdf; Lieutenant James E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121, 127 (2000).

[161] United Nations Convention on the Law of the Sea (UNCLOS) arts. 2, 25, Dec. 10, 1982, 1833 U.N.T.S. 397.

[162] *Id.* arts. 89, 92.

[163] *Id.*

[164] James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L. J. 1, 11 (2010).

In the realm of counter-narcotics, the notion of consent is an important element in the collective effort. Under Article 17 of the 1988 United Nations (UN) Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention), a principal authority through which MSAs are concluded, parties are encouraged to enter agreements to facilitate the consent necessary to conduct counter-narcotics operations on their behalf.[165] Maritime security agreements on illicit trafficking represent the implementation of this Article 17 obligation and are the primary mechanism by which the U.S. government and foreign governments facilitate this consent.

Referring to the previous examples, Honduras could consent to the U.S. Coast Guard boarding its vessel on the high seas, pursuant to the provisions of the current Honduras-United States agreement,[166] or Panama could consent to the Coast Guard boarding the Honduran vessel in its waters, pursuant to the Panama-United States agreement.[167] Further, if the Coast Guard found that the vessel was smuggling drugs, after being granted consent to board, U.S. domestic law permits either Honduras, in the first example, or Panama, in the second, to waive criminal jurisdiction to the United States over the vessel and its crewmembers.[168] Thus, assuming the proper consent at each appropriate stage, the Coast Guard may feasibly operate in any of the waters within the transit zone, board any vessel, and facilitate the prosecution of any individual found to be smuggling drugs in the U.S. courts. Maritime security agreements are the vehicles that enable this consent.

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[165] Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 17, Dec. 19, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 497 [hereinafter 1988 Convention] ("The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article."). The United States ratified on Apr. 16, 1980; Cuba ratified on Apr. 26, 1976. *Id.*

[166] Implementing Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, art. V, Jan. 30, 2001, T.I.A.S. 13088.

[167] Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, art. VI, Feb. 5, 2002, T.I.A.S. 02-205.1.

[168] *See* 46 U.S.C. § 70502(c)(1)(c) (2014); *but see* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) (holding the Maritime Drug Law Enforcement Act is unconstitutional as applied to the defendants, who were charged with conspiracy to possess cocaine and possession of cocaine with intent to distribute in Panamanian waters).

Today, the Coast Guard is the executive agent for the United States in forty-three MSAs with other states relating to maritime law enforcement.[169] The majority of these agreements were negotiated specifically to cover counter-narcotics operations, but more recently, they have been drafted to encompass both counter narcotics and human smuggling.[170]

Each MSA is negotiated individually, thus offering varying levels of cooperation and a great degree of flexibility. This flexibility has allowed the United States to negotiate agreements with countries such as the Bahamas,[171] with which the United States enjoys strong relations, and Venezuela,[172] with which relations are more strained.[173] Some MSAs are restrictive, providing only a framework for obtaining permission for U.S. action against a foreign-flagged vessel, or entry into a coastal state's waters.[174] Some are permissive, giving the United States standing permission to enter a foreign nation's territorial seas to take action on behalf of that nation.[175] A future MSA with Cuba could include any sub-

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[169] *See* U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23; *see also* U.S. STATE DEP'T, OFFICE OF THE LEGAL ADVISOR, TREATY AFFAIRS, TREATIES IN FORCE: A LIST OF TREATIES OF THE UNITED STATES AND OTHER AGREEMENTS IN FORCE ON JANUARY 1, 2013 (Jan. 1, 2013).

[170] *Id.*

[171] Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement, July 29, 2004, T.I.A.S. 04-629 [hereinafter Bahamas MSA].

[172] Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, Nov. 9, 1991, T.I.A.S. 11827 [hereinafter Venezuela MSA] .

[173] U.S. DEP'T OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, U.S. RELATIONS WITH VENEZUELA (Jul. 20, 2015), http://www.state.gov/r/pa/ei/bgn/35766.htm.

[174] *See, e.g.*, Agreement Between the Government of the United States of America and the Government of the Republic of Colombia to Suppress Illicit Traffic by Sea art. 7 (Feb. 20, 1997) [hereinafter Colombia MSA].

> Whenever law enforcement officials of one Party find a vessel meeting the conditions under paragraph 6 claiming registration in the other Party, competent authority of the former Party may request the competent authority of the other Party to verify the vessel's registry, an in case it is confirmed, its authorization to board and search the vessel.

Id.

[175] *See, e.g.*, Bahamas MSA, *supra* note 171, art. 9.1 ("This Agreement authorizes the law enforcement officials of one Party ('the first Party') to board suspect vessels located seaward of either Party's territorial sea claiming nationality in the other Party . . . .").

set of the provisions currently utilized in existing agreements.[176] Additionally, this flexibility would enable the United States and Cuban governments to tailor these provisions to meet their specific needs. For example, most MSAs define what conduct is permissible within and outside of each party's territorial sea.[177] The United States disputes Cuba's calculation of its territorial sea, which creates a difference in interpretation about the delimitation of where U.S. Coast Guard vessels can operate without the permission of the Cuban government.[178] Since 1977, both governments have operated under a negotiated agreement that redrew the boundary in a mutually acceptable manner.[179] The definition of "territorial sea" would need to be addressed in any prospective MSA with Cuba, and the flexibility of a MSA would permit the U.S. and Cuban governments to either incorporate their long-standing agreement or negotiate a new one. Ultimately, this flexibility is one of the reasons MSAs have become critical in the U.S. government's overall response to illicit trafficking, and one of the reasons, as the next section illustrates, they have been so effective.

B. The Effectiveness of Maritime Security Agreements in Maritime Interdiction Operations

Maritime security agreements utilized by the Coast Guard, in conjunction with the U.S. State Department, are a key element in maritime interdiction operations.[180] Their principal benefits are two-fold. First,

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[176] *See* U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23. The provisions of various MSAs include: shipboarding, i.e. procedures by which one nation may board vessels flagged in the other; entry into territorial seas, i.e. procedures by which one nation may enter the territorial waters of the other to investigate vessels reasonably suspected of illicit trafficking or to chase such vessels after they have entered the territorial seas; overflight, i.e. procedures by which one nation may obtain permission to operate aircraft over the waters and territories of the other; shiprider programs, i.e. programs by which nation *A* physically places its officers on board the vessels of nation *B*, who may authorize nation *B* to take law enforcement action on behalf of nation *A*; technical assistance, i.e. procedures by which either nation can request law enforcement assistance from the other; and maritime interdiction support, i.e. procedures by which either nation can request primarily logistical assistance in a case, such as expedited access to a dockside facility for fueling or an intrusive search. *Id.*

[177] Bahamas MSA, *supra* note 171, arts. 6, 9.

[178] U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 110: MARITIME BOUNDARY CUBA-UNITED STATES 3 (1990).

[179] *Id.*

[180] *Drug Smuggling Hearing*, *supra* note 12, at 44 (statement of Deputy Asst. Sec'y Arreaga).

these agreements permit the U.S. government to attack the problem near its source.[181] Rather than waiting for drug shipments to reach U.S. waters, where they have already been cut and diluted for sale, the Coast Guard and other agencies can concentrate their efforts in the transit zone, where the cocaine is pure and packaged in bulk.[182] The ability to strike at the source is the most effective way to attack the problem.[183]

Second, these agreements significantly enhance the "cycle of success."[184] The "cycle of success" refers to the continuous process of feeding intelligence gleaned from each interdiction into current operations and into longer-term investigations of the TCOs controlling drug movements.[185] With each interdiction in the transit zone, the interagency[186] is able to "gather valuable information about the sophisticated criminal enterprises that move these drugs."[187] The ability to leverage the cycle of success into prosecutions of higher-level TOC leaders has been as successful as the transit zone operations themselves: "more than half the designated priority drug targets extradited to the United States from South America over the last ten years are directly

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[181] *Id.* at 8 (statement of ADM Papp).

> [The transit zone] is where we get the very best value for the taxpayer's dollar. It is also where we have our first best chance to address this problem: close to the source, and far from our shores, where the drugs are pure and uncut, where they are in their most vulnerable bulk form, and before they are divided into increasingly smaller loads, making them exponentially harder and more expensive to detect and interdict.

Id.

[182] *Id.*

[183] *Id.*

> Over the last five years, Coast Guard ships and law enforcement detachments operating in the offshore regions have removed more than 500 metric tons of cocaine with a wholesale value of nearly $17 billion. This is more than two times the amount of cocaine and twice the purity seized by all other U.S. federal, state, and local law enforcement agencies combined.

Id.

[184] *Id.*

[185] *Id.*

[186] "The interagency" refers to the collection of U.S. government agencies that participate in maritime interdiction operations.

[187] *Drug Smuggling Hearing*, *supra* note 12, at 8 ("By understanding the criminal networks, [the interagency is] better prepared to combat other illicit enterprises, including human traffickers and international terrorists.").

linked to Coast Guard interdictions."[188] The widespread use of MSAs in the overall counter-trafficking effort, and their associated success, indicate the future potential for a MSA with Cuba. The question, addressed in the next section, is whether a MSA with Cuba is feasible.

C. A Maritime Security Agreement with Cuba Is Achievable

1. A Maritime Security Agreement Would Build upon Existing Cooperation in Maritime Operations

A MSA with Cuba could likely be negotiated quickly and efficiently, based on the relationship between the U.S. Coast Guard and U.S. State Department and the Cuban government. The Coast Guard has interacted with the Cuban government on a working basis since 1980.[189] Since that time, the Coast Guard has utilized a formal line of communication with the Cuban Border Guard for passing operational information.[190] This communication line, called the *Telex* system, was established "to facilitate the transmittal of preapproved messages containing non-sensitive, real-time, tactical search and rescue information and suspicious aircraft and vessel movements."[191] The relationship grew stronger in 1994, when the United States entered into a migration agreement with Cuba, in which Cuba agreed to accept migrants interdicted by the United States at sea.[192] Since then, Coast Guard ships have been entering ports in Cuba weekly to physically repatriate Cuban migrants found at sea.[193]

In 2004, a permanent party Coast Guard officer was stationed as a drug interdiction specialist in the U.S. Interests Section of Cuba.[194] Since that

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188 *Id.*
189 *Id.* at 26.
190 *Id.*
191 *Id.*
192 *See* WASEM, *supra* note 28, at 2–3.
193 *See e.g.*, Joey Flechas, *U.S. Coast Guard Repatriates 169 Cuban Migrants*, MIAMI HERALD (Jan. 14, 2016), http://www.miamiherald.com/news/nation-world/world/Americas/cuba/article54789885.html.
194 *See* Randy Beardsworth, *U.S.–Cuba Functional Relationship: A Security Imperative*, *in* 9 WAYS FOR [U.S.] TO TALK TO CUBA AND CUBA TO TALK TO [U.S.] 95–96 (Sarah Stephens et al. eds., 2009). The "U.S. Interest Section" in Havana was the headquarters for the U.S. State Department diplomatic presence in Cuba. *Id.* When normal diplomatic relations between the United States and Cuba were restored in 2015, it was reopened as the U.S. Embassy. *See* U.S. DEP'T OF STATE, http://havana.usembassy.gov/about_the_usint.html (last visited May 12, 2016).

time, this officer—the only permanent party U.S. military member stationed in Cuba since 1961—has served as the liaison between the United States and Cuban Coast Guards, facilitating repatriations and information exchange on mutually beneficial topics such as smuggling and search and rescue.[195]

Most recently, the relationship between the Coast Guard, in conjunction with the U.S. State Department, and the Cuban government enabled negotiation of the Operational Procedures Between the United States Coast Guard and the Aeronautical and Maritime Search and Rescue System of the Republic of Cuba (Procedures).[196] These non-binding Procedures, effective as of June 30, 2014, specify operational and communications procedures for search and rescue cases occurring in the Cuban area of responsibility, and designate the protocols by which Cuba may request assistance from the U.S. Coast Guard for cases occurring within Cuban waters.[197] These Procedures are important in the historical development of U.S.–Cuban relations in maritime cooperation.

In addition to the Procedures, the Cuban government appears ready for a MSA with the U.S. government specific to TOC. Cuba has, to date, negotiated 36 counter-drug MSAs with other nations and an additional 27 MSAs related to law enforcement.[198] With respect to the U.S. government specifically, the Cuban government has presumably been interested in a counter-narcotics agreement since 2003, when it forwarded a draft agreement to the U.S. State Department.[199] In summary, through their long-standing cooperation and the recent formalization of a non-binding search and rescue agreement, both governments have manifested a willingness to continue strengthening their cooperation in maritime operations.

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[195] *See* Beardsworth, *supra* note 194, at 95–96.

[196] U.S. DEP'T. OF STATE, DIPLOMATIC NOTE 181/27, OPERATIONAL PROCEDURES BETWEEN THE UNITED STATES COAST GUARD AND THE AERONAUTICAL AND MARITIME SEARCH AND RESCUE SYSTEM OF THE REPUBLIC OF THE CUBA (2014) (copy on file with author).

[197] *Id.*

[198] BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *supra* note 74, at 146.

[199] *Id.*

2. A Maritime Security Agreement Should Be Concluded as an Executive Agreement

In the United States, there is a distinction made between treaties and "other international agreements."[200] While both are binding, treaties refer to that subset of international agreements brought into force with the advice and consent of the Senate, while "other international agreements" are those concluded pursuant to other constitutional bases.[201] These "other constitutional bases" include preexisting treaties, legislation, and the constitutional authority of the President.[202] Preexisting treaties are authoritative when they require parties to enter other, more specific, agreements to carry out their provisions.[203] International agreements may also be authorized by legislation, such as statutes delegating such authority to the President.[204] Finally, international agreements may be concluded pursuant to the President's various constitutional authorities, including those as Commander-in-Chief.[205] The vast majority of "other international agreements,' hereinafter referred to as executive agreements, are unilaterally negotiated and concluded by the executive branch, without the formal advice and consent of the Senate.[206]

In all cases, unless first prompted by Congress, the U.S. State Department decides whether a proposed international agreement should be concluded as a treaty or executive agreement.[207] This decision is made by applying a standard set of criteria, contained in the State Department's regulations for concluding international agreements, called the Circular 175 Procedure.[208] The Circular 175 Procedure also specifies that Congress should be consulted when there are lingering questions about whether an international agreement should be concluded as a treaty or other international agreement.[209]

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[200] *See* U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006) [hereinafter 11 FAM § 720] (commonly known as the *Circular 175 Procedure*).
[201] *Id.* § 723.2-2.
[202] *Id.*
[203] *Id.* § 723.2-2(A).
[204] *Id.* § 723.2-2(B).
[205] *Id.* § 723-2-2(C).
[206] Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. J. 140, 145 (2009).
[207] 11 FAM § 720, *supra* note 200, § 724.
[208] *Id.* § 723.3.
[209] *Id*.

Forty-three of the United States' MSAs on illicit maritime trafficking that are currently in force were concluded as executive agreements.[210] For those dealing exclusively with illicit narcotics trafficking, their primary authority derives from the 1988 Convention, a preexisting treaty that was concluded with consent of the Senate.[211] Article 17 of the 1988 Convention requires that "the Parties cooperate to the fullest extent possible to suppress illicit traffic by sea . . . [and] shall consider entering into bilateral and regional agreements to carry out . . . the provisions of [Article 17]."[212] Pursuant to this international obligation, Congress provided the president standing authority "to conclude agreements, including reciprocal maritime agreements, with other countries" to control illicit drug trafficking.[213]

For those MSAs dealing with alien smuggling, authority derives primarily from the U.N. Protocol Against the Smuggling of Migrants by Land, Sea, and Air (Smuggling Protocol), also a preexisting treaty concluded with consent of the Senate.[214] Article 17 of the Smuggling Protocol requires its parties "to consider the conclusion of bilateral agreements" to counter human smuggling.[215]

For Cuba, the conclusion is the same. A future MSA should be negotiated as an executive agreement, pursuant to the same authorities, with due regard for the sensitive nature of U.S.–Cuban relations. The principal authorities for a MSA with Cuba are identical. Both the United States and Cuba ratified the 1988 Convention[216] and Smuggling Protocol,[217] giving rise to a shared set of responsibilities concerning narcotics trafficking and maritime alien smuggling.[218] Additionally, although not cited in any U.S.–Cuban agreement since the 1950s, the United States and Cuba entered the Convention between the United States of America and the Republic of Cuba for the Suppression of Smuggling

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210 U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23; *see also* Hathaway, *supra* note 206, at 151.

211 1988 Convention, *supra* note 165, art. 17.

212 *Id.*

213 22 U.S.C. 2291(a)(2) (2014).

214 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Annex III (Nov. 15, 2001) [hereinafter Smuggling Protocol] (The United States ratified on Nov. 3, 2005. Cuba ratified on Jun. 20, 2015).

215 *Id.* art. 17.

216 1988 Convention, *supra* note 165.

217 Smuggling Protocol, *supra* note 214.

218 1988 Convention, *supra* note 165, art. 17; Smuggling Protocol, *supra* note 214, art. 17.

Operations between Their Respective Territories (Smuggling Treaty) in 1926.[219] This Smuggling Treaty, still in force and presumptively binding under its own terms, commits the United States and Cuban governments "to aid each other mutually" in discovering and punishing the maritime smuggling of illicit drugs and humans.[220] To this end, the Smuggling Treaty commits both governments to using "all means possible" to prevent the illegal smuggling of narcotics and aliens into the territory of the other.[221] Thus, viewed in light of the Smuggling Treaty of 1926, a MSA with Cuba is not a novel approach, but a return to a preexisting state of cooperation between the two governments.

The negotiation of a MSA with Cuba is achievable. Maritime security agreements are a routine yet key element in overall maritime interdiction operations, and the U.S. government has significant experience in concluding and managing them. A MSA with Cuba should leverage this experience and be concluded pursuant to the same authorities as the other MSAs already in place.

V. A Maritime Security Agreement with Cuba Would Directly Address U.S. National Security Objectives

President Obama's 2011 Strategy to Combat Transnational Organized Crime (TOC Strategy) is designed to reduce TOC by "[building], [balancing], and [integrating] the tools of American power to combat transnational organized crime and related threats to national security—and to urge our foreign partners to do the same."[222] To accomplish this goal, it directs the U.S. government to pursue six priority actions, which include: enhancing information sharing; strengthening interdiction, investigations, and prosecutions; disrupting drug trafficking; and building international cooperation and partnerships.[223] A MSA with Cuba would directly serve these particular priority actions and ultimately enable the U.S. government to better address the threats described in section II. Additionally, a MSA would have the collateral effect of supporting the Cuban government's

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[219] Convention between the United States of America and the Republic of Cuba for the Suppression of Smuggling Operations Between their Respective Territories, June 28, 1926, 44 Stat. 2402 [hereinafter Smuggling Treaty].
[220] *Id.* art. 1.
[221] *Id.* art. 2.
[222] TOC STRATEGY, *supra* note 9.
[223] *Id.* at 15–28.

recent improvements in complying with international human rights standards.

A. A Maritime Security Agreement Would Enhance Information Sharing, Maritime Interdiction Operations, and the Disruption of Drug Trafficking

The conclusion of a MSA with Cuba would serve several of the U.S. government's policy actions in the counter-TOC strategy. First, a MSA would enhance information-sharing capabilities. A current lack of extensive information sharing has, in part, forced the U.S. government into a reactionary posture with respect to Cuban-based maritime threats.[224] While the Coast Guard and Cuban Border Guard maintain a formal means of communicating suspicious vessel movements, [225] the extent of information sharing is significantly lower in comparison to the U.S. government's interactions with other governments in the Caribbean region.[226] In other areas of the transit zone, for example, virtually every case begins with actionable intelligence provided by a foreign government, or generated by U.S. law enforcement officials working abroad. [227] This actionable intelligence is then leveraged by reconnaissance aircraft, which, through MSAs, are able to track departing vessels suspected of narcotics trafficking and then coordinate interdiction with U.S. assets in the area.[228] In this way, the U.S. government takes a proactive approach, utilizing intelligence to effectively position interdiction assets, often before smuggling vessels depart.

By comparison, Cuban-based threats are handled differently. Instead of a proactive approach, the U.S. government's intelligence capabilities are limited to what patrol aircraft can spot during routine flights, and what the Cuban Border Guard communicates to the Coast Guard through the

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[224] *See* U.S. COAST GUARD, *Coast Guard Repatriates Over 200 Cuban Migrants*, SEVENTH DISTRICT PUBLIC AFFAIRS (Jan. 8, 2016), http://www.d7.uscgnews.com/go/doc/4007/2772886/ ("The Coast Guard and partner agencies aggressively patrol the Florida Straits and the Caribbean Sea to detect and deter illegal and unsafe maritime migration."), CARL MEACHAM, CHANGING CUBA POLICY: IN THE UNITED STATES NATIONAL INTEREST, S. PRT. 111-5 (2009) (noting minimal levels of communication between the U.S. and Cuban governments).

[225] *Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp).

[226] *Interdiction Hearing*, *supra* note 17, at 33–40); *see also*, *Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp).

[227] *See supra* note 226 and accompanying sources.

[228] *Id.*

Telex system.[229] While this system is critical to current operations, the information provided is limited to "the transmittal of preapproved messages containing non-sensitive, real-time, tactical search and rescue information, and suspicious aircraft and vessel movements."[230] Without a MSA in place—or any other outlet for law enforcement information-exchange—the Coast Guard must translate these *Telex* communications and then attempt to coordinate an interdiction, all in the time it takes for a high-powered speedboat to move ninety miles from Cuba to the Florida Keys. A MSA would provide a vehicle to expand communications, enable the two governments to build on the successful use of the *Telex* system, and move toward the proactive approach utilized in other areas of the transit zone.

Second, a MSA would enhance the U.S. government's ability to conduct maritime interdiction operations, including drug trafficking interdiction operations. As described in section IV.A, the ability to operate in Cuba's waters or to take action against Cuban-flagged vessels requires permission of the Cuban government.[231] Without a MSA, there is no mechanism for the Coast Guard to request this permission. Consequently, suspicious vessels that are located inside Cuban territorial waters are not subject to U.S. interdiction efforts. These vessels can use Cuba's territorial waters as a shield by delaying their departure until their route to the United States is clear. Additionally, if they are detected after leaving Cuba's territorial seas, they can simply turn around and re-enter, disrupting the attempt to interdict them. The conclusion of a MSA with Cuba addresses the limitations of this current framework. Provisions that specify procedures for effectuating joint operations and requesting permission to conduct operations in the other party's waters could eliminate the use of Cuba's territorial seas as a shield.

A MSA alone will not necessarily forge a relationship that parallels those the United States has with long-time partners like Colombia. Such an agreement, however, would provide a significantly more flexible framework that advances the stated policy objectives of the TOC strategy.

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229 *Id*.
230 *Drug Smuggling Hearing*, *supra* note 12, at 26.
231 *See* Kraska, *supra* note 164, at 11.

B. A Maritime Security Agreement with Cuba Would Promote a Collective Response in Countering Transnational Organized Crime

The international community has long recognized the need for global cooperation in countering TOC.[232] To that end, the primary treaties drafted to counter TOC encourage a collective response aimed at preventing TCOs from leveraging weakness to their advantage.[233]

The need for global cooperation derives from the TCOs' ability to operate across borders and exploit areas characterized by reduced governance and weakness.[234] Their constant search for new exploitation opportunities necessitates a collective response to countering them, wherever they operate.[235] As stated in U.S. policy, the goal is to have "flexible networks of law enforcement and diplomatic partners" that are able to adapt to the rapidly changing dynamics of TOC.[236] Under the collective framework, nations must "look beyond [their own] borders to protect their sovereignty."[237]

Several counter-TOC legal instruments implement this collective response framework and have been ratified by both the United States and Cuba. They are the 1988 Convention;[238] the UN Convention against Transnational Organized Crime (TOC Convention);[239] its Smuggling Protocol;[240] and the Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).[241] Each

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232 *See* 1988 convention, *supra* note 165, introduction.

233 *Id.*; U.N. Convention Against Transnational Organized Crime art. 1, Jan. 8, 2001, U.N. GAOR, 55th sess., Supp. No. 49, U.N. Doc. A/45/49 [hereinafter TOC Convention] (The TOC Convention was ratified by the United States on Nov. 3, 2005. Cuba ratified on Feb. 9, 2007.); Smuggling Protocol, *supra* note 214; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Annex II (Nov. 15, 2001) [hereinafter Trafficking Protocol] (The Trafficking Protocol was ratified by the United States on Nov. 3, 2005. Cuba ratified on Jun. 20, 2013).

234 *Id.*

235 U.N. OFFICE ON DRUGS AND CRIME, *Introduction to* THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, U.N. Sales No. E.10.IV.6 (2010).

236 TOC STRATEGY, *supra* note 9 at, 26–27.

237 U.N. OFFICE ON DRUGS AND CRIME, *supra* note 235.

238 1988 Convention, *supra* note 165.

239 TOC Convention, *supra* note 233.

240 Smuggling Protocol, *supra* note 214.

241 Trafficking Protocol, *supra* note 233.

requires its signatories to cooperate with other signatories to best effectuate the goals of each treaty.[242]

A MSA with Cuba promotes the concept of global cooperation endorsed and required by each of the above-mentioned treaties. As it stands, the U.S. and Cuban governments' counter-TOC efforts are each largely unilateral in nature. With the exception of limited information sharing, the two governments do not present a collective response to TOC in the eastern Caribbean, either through practice or a MSA. As a result, the principle of the collective response to TOC imposed by the counter-TOC treaties is not present in the border region between the United States and Cuba. This absence, in turn, creates opportunities for TCOs. For example, TCOs are already exploiting the U.S. and Cuban governments' lack of coordination by transiting in the eastern portions of Cuba's territorial waters to evade law enforcement.[243]

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[242] The first of these legal instruments, the 1988 Convention, represents a formal acknowledgment of the collective international responsibility to stem the flow of illegal drugs. 1988 Convention, *supra* note 165. Within it, signatories pledge "to co-operate to the fullest extent possible to suppress illicit traffic by sea." *Id.* art. 17. To that end, under the 1988 Convention's Article 17 procedures, the parties are obligated to "consider entering into bilateral or regional or arrangements to carry out" the requirements of the Convention. *Id.* The second legal instrument, the TOC Convention, provides a broad framework for combatting TOC. TOC Convention, *supra* note 233. The broad framework highlights the importance of international cooperation. *Id.* arts. 5–17. While the TOC Convention does not obligate members to conclude MSAs, it supports broad, collective engagement. *Id.* arts. 18–30. The final two legal instruments, the Trafficking and Smuggling Protocols, focus on human trafficking and smuggling, two sub-sets of TOC, and provide specific obligations in those areas. *See* Trafficking Protocol, *supra* note 233; Smuggling Protocol, *supra* note 214. In terms of global cooperation, the Trafficking Protocol requires signatories to cooperate in the prevention of trafficking by adopting MSAs, sharing information, and providing inter-governmental training. *See* Trafficking Protocol, *supra* note 233, arts. 9–10. Similarly, the Smuggling Protocol contains broad global cooperation provisions. Smuggling Protocol, *supra* note 214, art. 7. These include obligations to cooperate in the prevention of smuggling by adopting MSAs, share information, conduct training programs, and provide technical assistance to countries recognized as migrant smuggling source countries. *Id.* arts. 10, 14, 17.

[243] *See Drug Smuggling Hearing*, *supra* note 12, at 26 (statement of ADM Papp). In particular, TCOs are smuggling narcotics from Jamaica, around the eastern tip of Cuba, and then north into the United States. *Id.* Because the United States does not have the authority to operate in Cuban waters or the means to request such authority through a MSA, smuggling vessels are able to transit around Cuba's eastern tip and north into the Bahamas, while remaining in Cuba's territorial waters for the majority of the voyage. *See id.* With a MSA, U.S. Coast Guard vessels would have the means to patrol that area and then request permission to enter Cuban waters to interdict the vessel. *Id.*

The positive impact of a prospective MSA between the Cuban and U.S. governments is difficult to estimate. By comparison, however, the principle of global cooperation effectuated by MSAs has generated success between the United States and other partners in similar situations. For instance, in the border region between the Dominican Republic and Puerto Rico,[244] the U.S. Coast Guard partially credits the conclusion of a MSA with the Dominican Republic in a seventy-percent reduction in the illegal migration of Dominican nationals in the years following the MSA's conclusion.[245]

The United States committed to the principle of global cooperation when it ratified the various counter-TOC treaties. These treaties call for a collective response to the threat of TOC.[246] By seeking a MSA with Cuba, the United States would fulfill its international obligations and bring the collective response framework to the maritime border region with Cuba.

C. A Maritime Security Agreement with Cuba Would Enhance Cuba's Human Rights Compliance

The conclusion of a MSA with Cuba would likely have the collateral effect of supporting Cuba's adherence to international human rights standards. The TOC Convention and its protocols are largely human rights based.[247] Concerning human trafficking specifically, UN Secretary General Anan's foreword to the TOC Convention characterizes the trafficking of women and children "as one of the most egregious violations of human rights that the UN now confronts."[248]

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[244] The Dominican Republic and Puerto Rico are separated by a body of water called the Mona Passage. *See Interdiction Hearing*, *supra* note 17, at 33–40. The distance between the Dominican Republic and Puerto Rico, i.e., sixty miles, in the Mona Passage is similar to the distance between Cuba and southern Florida in the Florida Straits, i.e., ninety miles. *Id.*

[245] *Interdiction Hearing*, *supra* note 17, at 33–40.

[246] 1988 Convention, *supra* note 165; Smuggling Protocol, *supra* note 214; TOC Convention, *supra* note 233; Trafficking Protocol, *supra* note 233.

[247] TOC Convention, *supra* note 233 (stating the TOC Convention was developed, in part, to "defend human rights and defeat the forces of crime, corruption and trafficking").

[248] *Id.*

The primary human rights concerns associated with Cuba relate to repression,[249] but Cuba is also viewed as a haven for human trafficking.[250] The U.S. State Department currently classifies Cuba as a "source country" for adults and children subjected to sex trafficking, forced labor, and prostitution.[251] Cuba's trafficking concerns are primarily internal, but there is an associated concern with Cubans being smuggled into other countries where they are then exploited through prostitution and forced labor.[252] The large number of individuals smuggled out of Cuba by sea suggests a connection between Cuba's human trafficking and human smuggling.[253] The specific correlation between Cuba's human smuggling and trafficking industries is unknown, but the correlation between smuggling and trafficking throughout Latin America and the Caribbean is known to be high.[254] Transnational criminal organizations are known to

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[249] As the State Department noted in 2014, Cuba's primary human rights abuses center on various forms of repression by the government. *See* U.S. DEP'T OF STATE, CUBA 2014 HUMAN RIGHTS REPORT 1 (2014), http://www.state.gov/documents/organization/236892.pdf ("Cuba's principal human rights abuses included those involving the abridgement of the ability of citizens to change the government and the use of government threats, extrajudicial physical assault, intimidation, violent government organized counter protests against peaceful dissent, and harassment and detentions to prevent free expression and peaceful assembly.").

[250] U.S. DEP'T OF STATE, 2014 TRAFFICKING IN PERSONS REPORT 135 (2015), http://www.state.gov/documents/organization/243558.pdf.

[251] *Id.*

[252] *See* U.S. DEP'T OF STATE, 2008 TRAFFICKING IN PERSONS REPORT 102 (2008), http://www.state.gov/documents/organization/105656.pdf; U.S. DEP'T OF STATE, 2009 TRAFFICKING IN PERSONS REPORT 116 (2009), http://www.state.gov/documents/organization/123361.pdf; U.S. DEP'T OF STATE, 2012 TRAFFICKING IN PERSONS REPORT 133 (2012), http://www.state.gov/documents/organization/192594.pdf; U.S. DEP'T OF STATE, 2013 TRAFFICKING IN PERSONS REPORT 144 (2013), http://www.state.gov/documents/organization/210738.pdf.

[253] *See, e.g.*, 2008 TRAFFICKING REPORT, *supra* note 252, at 102.

> Limited sex trafficking of Cuban women to Mexico, The Bahamas, and Western Europe has been reported. Some Cuban nationals willingly migrate to the United States, but are subsequently exploited for forced labor by their smugglers. Cuba also is a transit point for the smuggling of migrants from China, Sri Lanka, Bangladesh, Lebanon, and other nations to the United States and Canada. Some of these migrants may be trafficking victims, who are subject to forced labor, sexual exploitation, and abuse.

Id.

[254] *See* Ray Walser et al., *The Human Tragedy of Illegal Immigration: Greater Efforts Needed to Combat Smuggling and Violence*, HERITAGE FOUND. (June 22, 2011), http://www.heritage.org/research/reports/2011/06/the-human-tragedy-of-illegal-immigration-greater-efforts-needed-to-combat-smuggling-and-violence (describing the risk of migrants being sexually assaulted and sold into human trafficking).

frequently traffic undocumented migrants as a means of generating revenue.[255] The human rights concern for Cuba is that its robust smuggling industry is funneling migrants into the human trafficking industry, or that a connection between the two industries could develop.

A MSA with Cuba would help to address the correlation between maritime smuggling and human trafficking in the same way that it addresses drug smuggling. It would enable a more proactive framework to stop human smuggling vessels that are potentially feeding the human trafficking industry. A MSA would also bring the collective response framework into the border area between the two countries, an area that has traditionally been policed through unilateral efforts by the Cuban and U.S. governments.

Furthermore, Cuba has recently made modest improvements in its efforts regarding human trafficking, and a MSA with Cuba supports those efforts. In 2015, for the first time since the U.S. State Department began ranking countries on their response to human trafficking, Cuba was moved from Tier 3, which reflects those governments "that do not fully comply with the [Trafficking Victims Protection Act's, or TVPA's] minimum standards and are not making significant efforts to do so," to Tier 2, which reflects those governments "that do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards."[256] Since the policy of the U.S. government is to support Cuba's human rights compliance,[257] these improvements should be commended and rewarded. A MSA that enhances the collective ability to disrupt human trafficking further supports Cuba's efforts.

The conclusion of a MSA with Cuba both brings the collective response framework to bear on human trafficking and supports Cuba's recent efforts to comply with human rights standards.

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[255] *Id.*

[256] U.S. DEP'T OF STATE, 2015 TRAFFICKING IN PERSONS REPORT 47 (2015), http://www.state.gov/documents/organization/245365.pdf.

[257] The President is authorized to terminate the economic embargo after making a finding that there is a democratically elected government in power. 22 U.S.C. § 6064(c) (2014). The definition of a democratically elected government is defined, in part, as one that "is showing respect for the basic civil liberties and human rights of the citizens of Cuba." 22 U.S.C. § 6066(2) (2014).

VI. The Path to a Maritime Security Agreement with Cuba: Recommended Short- and Long-Term Actions

The United States should seek a MSA with Cuba. Cuba poses national security threats to the United States, including the traditional threats of maritime smuggling and mass migration, and also the prospective threats posed by TOC, including narcotics trafficking and terrorism. The TOC balloon-effect has repeatedly demonstrated its durability in the transit zone. When efforts to combat TOC in one area intensify, the targeted trafficking activities simply move elsewhere. Transnational criminal organizations have recently shifted their trafficking activities to the eastern Caribbean, and there is a very real possibility that they will seek to establish a foothold in Cuba.

Since the 1980s, the U.S. government and the international community have used MSAs as a key component to countering TCOs.[258] These agreements have successfully permitted the United States and its partner-nations to target the origins of the threat, where the gains are the greatest. A MSA with Cuba could be negotiated quickly and efficiently based on the long-term relationship between the U.S. and Cuban governments. Such an agreement with Cuba would advance the national security objectives of the TOC Strategy, promote the collective response framework imposed by the various counter-TOC legal instruments, and enhance Cuba's human rights compliance.

The following section recommends a strategy for negotiating a MSA with Cuba. Given the current legislative framework, any negotiation would require both short- and long-term action. In the short-term, the United States should seek a MSA modeled after others in the transit zone that provides an achievable and effective maritime strategy. In the long-term, the United States would need to consider a reconfiguration of its immigration framework with respect to Cuba in order to realize the full impact of such an agreement.

A. Short-Term Actions: The U.S. Government Should Seek a Maritime Security Agreement with Cuba

In the short-term, the United States should seek a MSA that both functions within the current limits of domestic legal policy and is

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[258] *See supra* section IV.A, B (discussing the history of MSA use in countering TCOs).

sufficiently flexible to evolve along with potential changes in the United States' relations with Cuba. The MSA recommended by this article[259] provides broad authority to take action against the full range of current and prospective maritime threats associated with Cuba.

1. Authority

The proposed MSA derives its authority primarily from the international law previously described in section V, namely the 1988 Convention, TOC Convention, Smuggling Protocol, and Trafficking Protocol. In comparison to the sources of authority cited in other MSAs currently in place between the United States and other nations, the inclusion of all of these authorities represents a novel approach. For instance, of the forty-three agreements, forty-one cite only the 1988 Convention, and only two cite one of the other authorities.[260] There is a geographic rationale behind these limits. The MSAs with nations that pose an illicit narcotics threat to the United States, but that are geographically distant, are limited in scope to provisions aimed at stopping illicit narcotics trafficking.[261] For instance, the likelihood of Colombian nationals migrating illegally to the United States by sea is remote. In contrast, MSAs with nations that are geographically close in proximity provide a broader range of authorities to take action against a broader range of conduct.[262] In these agreements, provisions are included to effect cooperation on smuggling and illegal immigration, in addition to narcotics trafficking.[263]

Because Cuba poses a broad range of known and prospective maritime threats, the proposed agreement includes authorities permitting action against vessels reasonably suspected of narcotics trafficking, migrant smuggling, the unsafe transport of migrants, and trafficking in persons. This concept of enabling cooperative action against these threats by the two governments is not a novel one. The 1926 Smuggling Treaty, which is still in force, commits the U.S. and Cuban governments to collectively address these threats.[264] The conclusion of a MSA is merely a return to this preexisting state of cooperation.

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[259] *See infra* App. A.
[260] *See* U.S. COAST GUARD, FAST ACTION REFERENCE MATERIALS, *supra* note 23.
[261] *See, e.g.*, Colombia MSA, *supra* note 174.
[262] *See, e.g.*, Bahamas MSA, *supra* note 175.
[263] *Id.*
[264] Smuggling Treaty, *supra* note 219, arts. 1–2.

2. Suggested Provisions of the Proposed Maritime Security Agreement

The proposed agreement includes each of the standard provisions described in Section IV. These include ship-boarding; entry into territorial seas; overflight; ship-rider authority; technical assistance; and maritime interdiction support. This range of authority is extremely broad, permitting U.S. Coast Guard ships to enter the sovereign waters of Cuba to target a suspect vessel and vice versa. Given the current state of relations between the two countries, this degree of cooperation is probably unlikely. The proposed MSA's check on its own scope is this: the enactment of any of these provisions require prior authorization of the opposing party. In this way, both the United States and Cuba can control when and where they permit a sovereign incursion. This method of premising action on prior authorization should foster a gradual building of mutual trust. Minor sovereign incursions, such as Cuba permitting the United States to interdict a suspected drug trafficking vessel just inside its territorial seas, would foreseeably pave the way for more intrusive actions, such as the two countries conducting joint operations in each other's waters.

In summary, the U.S. government should seek the proposed MSA in the short-term. It is largely modeled after previously negotiated MSAs with other nations, based on the same authorities and containing the same provisions. Such MSAs have been widely used and have historically been successful in countering the same threats currently associated with Cuba. The proposed MSA, however, is also sufficiently flexible to reflect the developing state of relations between the two governments.

A. Long-Term Actions: The Impact of Current U.S. Immigration Policy for Cubans

In the long-term, the complete realization of the benefits of a MSA with Cuba would likely require changes to the current immigration framework for Cuban nationals. Like the economic embargo, U.S. immigration policy regarding Cuban nationals is rooted in isolationist policy from the 1960s.[265] This view has resulted in an immigration framework for Cuban nationals that differs significantly from the one

[265] Lorena G. Barberia, *U.S. Immigration Policies Toward Cuba*, *in* DEBATING U.S.–CUBAN RELATIONS 183 (Jorge I. Dominguez et al. eds., 2012).

utilized for every other sub-set of immigrants.[266] Additionally, it creates several national security issues that warrant reconsideration of the Cuban Adjustment Act.

1. Immigration Framework for non-Cuban Aliens

Under current policy, aliens[267] that are not Cuban (non-Cuban aliens) seeking to enter the United States must apply at a designated port of entry, such as an airport.[268] Upon arrival, every alien is inspected by an authorized immigration officer[269] and must prove his or her eligibility for admission to the satisfaction of the immigration officer.[270] Aliens must show that they are not inadmissible for any of the designated reasons specified under the immigration laws[271] and must also possess required border entry documents.[272] Aliens attempting to enter the United States at a place other than a port of entry, or who enter without inspection and are later discovered, are presumptively inadmissible.[273]

Unless successfully applying for asylum or being afforded other process under the Immigration and Nationality Act (INA), aliens deemed inadmissible after inspection are eventually returned to their country of origin, whether voluntarily,[274] through expedited removal,[275] or after being charged administratively and referred to an immigration judge for removal proceedings.[276]

2. Immigration Framework for Cuban Aliens

For Cuban aliens attempting to enter the United States, the immigration framework differs significantly at both the legal and administrative level. The first major distinction between overall U.S.

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[266] *See* WASEM, *supra* note 28, at 1–5.
[267] 8 U.S.C. 1101(a)(3) (2014) ("The term "alien" means any person not a citizen or national of the United States.").
[268] 8 C.F.R. § 235.1 (2015).
[269] 8 U.S.C. § 1225(a) (2015).
[270] 8 C.F.R. § 235.1 (2015).
[271] 8 U.S.C. § 1182 (2014).
[272] *Id.* § 1182(a)(7)(B) (2015).
[273] 8 C.F.R. § 235.1(f)(2) (2015).
[274] 8 U.S.C. § 1225(a)(4) (2014); 8 C.F.R. § 235.4 (2015).
[275] 8 C.F.R. § 235.3 (2015).
[276] 8 U.S.C. § 1229a (2014).

immigration policy and Cuban immigration policy is statutory in nature. Congress passed the Cuban Adjustment Act of 1966[277] (CAA) based on the assumption that accepting Cuban emigrants would weaken the revolutionary government in Cuba.[278] At the time, the CAA represented the confirmation of the long-standing practice of accepting Cuban aliens as refugees from communism,[279] and notably, it gave the Attorney General the authority to grant lawful permanent resident status to any Cuban refugee after one year of physical presence in the United States.[280] This authority—still utilized today and not available for any other group of immigrants—provides Cubans with a strong incentive to seek refuge in the United States and provides an expedited path to U.S. citizenship.[281] Like the economic embargo, the CAA may only be repealed when Cuba establishes a democratic government.[282]

The second major distinction between overall U.S. immigration policy and Cuban immigration policy stems from the application of the Immigration and Nationality Act, the CAA, and the Migrant Accords. The Migrant Accords are the result of two sets of negotiations between the U.S. and Cuban governments on Cuban migration. In the first, concluded in 1994, the two governments agreed that Cuban migrants rescued at sea would not be permitted to enter the United States.[283] In the second,

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[277] *See* Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2000)) [hereinafter CAA].

[278] Barberia, *supra* note 265, at 183.

[279] *Id.*

[280] *See* CAA, *supra* note 297.

[281] Barberia, *supra* note 265, at 183.

[282] Omnibus Consolidated Appropriations Act of 1997, PL 104-208, Sept. 30, 1996, 110 Stat 3009 ("Public Law 89-732 is repealed effective only upon a determination by the President under section 203(c)(3) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Public Law 104-114) that a democratically elected government in Cuba is in power.").

[283] *See* Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba, Sept. 9, 1994, 35 I.L.M. 327 [hereinafter Joint Communiqué].

> [M]igrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States. Further the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways. . . . The United States and the Republic of Cuba agreed that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994 will continue to be arranged in diplomatic channels.

concluded in 1995, the governments agreed that Cuban migrants intercepted at sea would be returned to Cuba.[284] The Migrant Accords are still applicable and represent the current means by which the United States repatriates Cuban migrants when they are found at sea.

Regarding the INA, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) concluded, in a series of legal opinions issued between 1993 and 1996, that aliens not touching dry land in the United States are not entitled to proceedings under the INA.[285] Thus, Cuban aliens, like any other sub-set of aliens, who are interdicted at sea, are not entitled to the process requirements of the INA and may be immediately repatriated back to Cuba through the terms of the Migrant Accords.[286] Additionally, Cuban aliens, like any other sub-set of aliens, who touch dry soil in the United States are entitled to the process requirements under the INA.[287]

Regarding the CAA, despite the mutual understanding reflected in the Migrant Accords that "the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular

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Id. at 329.

[284] Joint Statement of the Government of the United States and the Government of the Republic of Cuba Regarding Migrant Accords, 35 I.L.M. 327, 328 [hereinafter Joint Statement].

[285] *See* Memorandum from Walter Dellinger, Assistant Attorney Gen, to Attorney Gen., subject: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters (Oct. 13, 1993); Memorandum from Walter Dellinger, Assistant Attorney Gen., to T. Alexander Aleinikoff, Gen. Counsel, Immigration & Naturalization Serv., subject: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an "Arrest" under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994); Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney Gen., to Attorney Gen., subject: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996) [hereinafter OLC Opinions]. These opinions, commonly known as the "feet wet/dry policy," are frequently mischaracterized. *Id.* In truth, the policy reflects the Department of Justice's opinion that any undocumented alien, regardless of nationality, who touches dry soil within the United States is entitled to the process requirements of the Immigration and Nationality Act, while those interdicted at sea do not. *Id. See also* Memorandum from Doris Meissner to all [Immigration and Nationality Service] officers, subject: Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (Apr. 26, 1999) [hereinafter Memorandum from Doris Meissner] (clarifying that Cubans, along with their spouses and children, who arrive at a location in the United States other than designated ports of entry, are eligible for parole, as well as eventual adjustment of status to that of permanent resident);

[286] *See id*; Joint Statement, *supra* note 284, at 328.

[287] *See* OLC Opinions, *supra* note 285.

ways," [288] eligibility under the CAA has always been "construed liberally."[289] Cubans found in the United States are eligible to apply for adjustment to lawful permanent residence under the CAA, regardless of whether they entered the United States at a designated port of entry, with the proper visa and entry documentation, or not.[290] Thus, unlike other aliens, Cubans are not automatically deemed inadmissible by avoiding the requirement to apply for legal admission at a port-of-entry and may, instead, enter illegally and then still successfully apply to adjust their status.[291]

Thus, the interplay between the INA, CAA, and Migrant Accords has given rise to a system where Cuban migrants found at sea are repatriated to Cuba through the Migrant Accords, without any further process under the INA. Those that touch dry land, however, regardless of where or how, are permitted to adjust their status under the INA. This differs significantly from the general immigration framework where aliens arriving to places other than a port-of-entry are considered presumptively inadmissible and removed.

The third and final distinction between overall U.S. immigration policy and Cuban immigration policy is not necessarily unique to Cuba. In reality, regardless of internal policy, the ability of the United States to remove or repatriate a person to Cuba is based entirely on Cuba's willingness to accept that individual.[292] Thus, the understanding reflected in the Migrant Accords that "the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways"[293] is ineffective without a corresponding willingness by Cuba to permit the return of such individuals. Cuba represents one of those nations that either significantly delays or outright refuses to accept

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[288] Joint Communique, *supra* note 283, at 329.
[289] *See* Matter of Mesa, 12 I. & N. Dec. 432, 435 (BIA 1967).
[290] *See* Memorandum from Doris Meissner, *supra* note 285.
[291] *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2014).
[292] *See Keep Our Communities Safe Act: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 27 (2011) (statement of Gary Mead, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement) [hereinafter Statement of Associate Director Mead] (discussing certain nations that refuse to accept their citizens under an order of removal).
[293] Joint Communique, *supra* note 283, at 329.

the return of nationals ordered removed by the United States.[294] This reality is reflected in the statistics. Of the 165,613 total number of Cuban nationals arriving to the United States between 2005 and 2013,[295] 95,872 were deemed inadmissible under the INA,[296] but only 1409 Cuban nationals were physically deported from the United States to Cuba.[297] While the Cuban government's rationale for not accepting Cuban nationals who have been ordered removed is unclear, it may be linked to the existence of the CAA, which is perceived by the Cuban government to encourage illegal emigration.[298]

3. National Security Implications of the Current Immigration Framework vis a vis *Cubans*

The current immigration framework with respect to Cubans inadvertently presents two potential national security concerns. First, the CAA and favorable immigration policy for Cubans is frequently said to promote the illegal migration of Cubans to the United States.[299] Although inadvertent, the overall policy incentivizes illegal immigration by Cuban nationals who realize that they will be eligible to adjust their status under the CAA, regardless of *how* they arrive on dry land in the United States. Furthermore, they understand that, even if ordered removed by the

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[294] *See* WASEM, *supra* note 28, at 2; *see also* Statement of Associate Director Mead, *supra* note 290 ("Cuba lacks formal relations with the United States and accepts only aliens from a very short list related to the Mariel boatlift.").

[295] DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2013 YEARBOOK OF IMMIGRATION STATISTICS 67 (2014) (The total number of arriving Cuban nationals was taken from Table 26.).

[296] *Id.* at 98 (The total number of Cuban nationals deemed inadmissible was taken from Table 37.).

[297] *Id.* at 107 (2014) (The total number of Cuban nationals deported to Cuba was taken from Table 41.).

[298] MINISTRY OF FOREIGN AFFAIRS OF CUBA, CUBAN DELEGATION STATEMENT ON THE HAVANA MIGRATION TALKS WITH THE UNITED STATES (Jan. 12, 2011), http://anterior.cubaminrex.cu/English/Statements/Articulos/StatementsMINREX/2011/PRESS.html.

> The Cuban delegation reaffirmed once again that migrant smuggling will not disappear nor could a legal, safe and orderly migration be achieved between our two countries as long as the *Cuban Adjustment Act* and the wet foot/dry foot policy—which encourage illegal departure of Cubans to the United States—remain in place.

Id.

[299] WASEM, *supra* note 28, at 20.

immigration system, there is no corresponding ability to physically remove them back to Cuba. Given a continuous stream of Cuban nationals seeking to enter the United States, there is a collateral incentive for alien smugglers to maintain the smuggling networks from Cuba into the United States.[300] The concern is that while these networks are currently utilized to smuggle aliens, they could easily be leveraged to smuggle drugs or terrorists.[301] Additionally, the smuggling networks will persist at least as long as the incentives created by the favorable immigration policy persist.

Second, the inability of the United States to send Cuban nationals back to Cuba disrupts the "cycle of success," where interdictions result in prosecutions, which in turn results in actionable intelligence.[302] If a Cuban is interdicted on the water for smuggling aliens, U.S. law enforcement officers face a choice: if the Cuban smuggler has never touched U.S. soil and the officers bring the smuggler into the United States, the smuggler, under the CAA and U.S. policy, will remain in the United States.[303] While the officers can arrest the smuggler, there is currently no mechanism by which to deport the smuggler back to Cuba after the criminal process concludes. This inability to deport creates pressure to repatriate the smuggler after he is stopped on the water, rather than bring him or her into the United States for prosecution, where favorable immigration benefits will likely accrue. This disrupts the cycle by necessitating a decision between criminal prosecutions or enabling permanent admission into the United States.[304]

In the long-term, the U.S. government should consider the apparent conflict between the national security concerns associated with the current immigration policy for Cubans and the counter-TOC purpose of a MSA. The conflict is, the immigration policy ultimately promotes the same types of threats that a MSA with Cuba would be designed to counter. While a complete analysis of this conflict is outside the scope of this article, the effectiveness of a MSA would appear to be diminished if U.S. immigration

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300 Donald L. Brown, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273 (2002).

301 *Drug Smuggling Hearing*, *supra* note 12, at 51 (statement of General Kelly).

302 *Id.* at 8 (statement of ADM Papp).

303 *See* Memorandum from Doris Meissner, *supra* note 285.

304 The situation is the same when U.S. law enforcement officers want to bring a Cuban national into the United States as a witness. While the officers might be able to utilize the witness at trial, he or she is afforded the same path to citizenship as any other Cuban national who touches dry land in the United States. *See* OLC Opinions, *supra* note 285.

policy is simultaneously incentivizing the continued existence of the maritime smuggling industry.

VII. Conclusion

When President Obama announced the normalization of relations with Cuba in 2014, he committed the United States to a policy of engagement and promised to "advance shared interests."[305] This policy of engagement represents the first opportunity to formulate a collective maritime security framework between the U.S. and Cuban governments since the 1960s, and should not be wasted.

Today's Cuba presents a broad spectrum of national security risks for the United States, including the known threats of alien smuggling and mass migration, and the prospective threats of TOC and TOC-financed terrorism. Transnational criminal organizations are increasingly moving drug-smuggling operations into the eastern Caribbean. They have already infiltrated Puerto Rico and the USVI, despite a robust security response, prompting the question of whether they will seek a foothold in Cuba. While the answer to this question is unknown, forecasted changes in Cuba's political, economic, and social environment suggest some future degree of instability is likely. Unfortunately for Cuba, and by extension the United States, TCOs have sought, found, and exploited instability and weakness since at least the 1980s. Where the TCOs move, violence follows.

The opportunities to engage Cuba in the realm of maritime security are limited but significant. Notably, the U.S. legal framework does not prohibit a MSA with Cuba, and the United States should capitalize on this opportunity. Maritime security agreements are a critical element in current maritime interdiction operations and have a proven record of success. By working collectively with foreign nations, MSAs enable a proactive approach in which maritime threats can be countered wherever they are located. The U.S. government has concluded a MSA with virtually every country in the Western Hemisphere, in recognition of the principle that a collective response network is necessary for countering such a dynamic threat as TOC. A MSA with Cuba would bring this collective response framework to the maritime border between Cuba and the United States, would directly serve the principal policy objectives contained in the TOC

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[305] President Barack Obama, *supra* note 19.

Strategy, and have the collateral impact of supporting Cuba's recent efforts to comply with human rights standards. Moreover, such a MSA could be concluded quickly, based on the long-standing cooperation in maritime operations between the U.S. and Cuban governments. The downside is minimal—if Cuba remains free of TOC, the conclusion of a MSA would provide a means to counter the current threats associated with Cuba and provide a platform for future engagement should TCOs become an actual threat.

Cuba's range of threats to the United States demand an updated maritime security strategy in the form of a MSA. The Coast Guard and other agencies' continued reliance on a reactive, unilateral posture that permits only limited information sharing should be viewed as untenable. Such a posture may have been appropriate in the past, but is inappropriate for the rapidly evolving threat of TOC. The U.S. government should capitalize on President Obama's commitment to engagement and seek a MSA with Cuba, before the TOC threat in Cuba emerges—ninety miles south of Florida.

Appendix A: Proposed Maritime Security Agreement: United States and Cuba

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF CUBA CONCERNING COOPERATION IN MARITIME LAW ENFORCEMENT

The Government of the United States of America and the Government of the Republic of Cuba (hereinafter, "the Parties");

BEARING IN MIND the complex nature of the problems of transnational organized crime, illicit trafficking in narcotics and psychotropic substances by sea and air; the unsafe transport and smuggling of migrants; and trafficking in persons.

RECALLING the International Convention for the Safety of Life at Sea, 1974, with annex (hereinafter, "the SOLAS Convention") and the 1982 United Nations Convention on the Law of the Sea (hereinafter, "the 1982 Law of the Sea Convention");

HAVING REGARD to the urgent need for international cooperation in suppressing transnational organized crime, as reflected in the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000;

HAVING FURTHER REGARD to the urgent need for international cooperation in suppressing illicit trafficking in narcotics and psychotropic substances, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1982 Law of the Sea Convention, and in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, "the 1988 Convention");

HAVING FURTHER REGARD to the urgent need for international cooperation in preventing trafficking in persons, as reflected in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, signed at Palermo, December 12-15, 2000 (hereinafter, "the Trafficking Protocol").

HAVING FURTHER REGARD to the urgent need for international cooperation in suppressing the smuggling of migrants by sea, as reflected in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, signed at Palermo, December 12-15, 2000 (hereinafter, "the Smuggling Protocol") and in United Nations General Assembly Resolution 48/102, adopted December 20, 1993; and in suppressing the unsafe transport of migrants, as reflected in International Maritime Organization (IMO) Circular MSC/Circ.896, December 16, 1998; in IMO Resolutions A.867(20), adopted November 27, 1997, and A.773(18), adopted November 4, 1993;

ACKNOWLEDGING the international obligations of the Parties under the 1963 Vienna Convention on Consular Relations, and noting the principle of non-refoulement contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereinafter, "the Refugee Convention and Protocol") and in the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

RECALLING that Article 17 of the 1988 Convention and Article 17 of the Smuggling Protocol provides, inter alia, that the Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea in conformity with the international law of the sea and shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of Article 17;

FURTHER RECALLING that paragraph 9 of IMO Circular MSC/Circ. 896 and Article 17 of the Smuggling Protocol call on Parties to consider the conclusion of bilateral agreements, or operational arrangements or understandings, aimed at establishing the most appropriate and effective measures respectively to prevent and combat unsafe transport of migrants, and to prevent and combat smuggling of migrants;

RECALLING ALSO that the Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba of Sept. 4, 1994 provides that the United States of America and Republic of Cuba are committed to directing Cuban migration into safe, legal, and orderly channels;

DESIRING to promote greater cooperation between them to combat transnational organized crime; illicit trafficking in narcotics and

psychotropic substances by sea and air; the unsafe transport and smuggling of migrants; and trafficking in persons; and

BASED ON the principles of international law, respect for the sovereign equality of States and in full respect of the principle of the right of freedom of navigation consistent with the 1982 Law of the Sea Convention

Have agreed as follows:

Article 1
Purpose and Scope

The Parties shall cooperate to the fullest extent possible in combatting the illicit trafficking of narcotic drugs and psychotropic substances by sea and air, the unsafe transport and smuggling of migrants, and the trafficking in persons, consistent with domestic and international law related thereto. This shall include the sharing of information between the Parties concerning specific instances of illicit trafficking by sea and air, the unsafe transport of migrants, the smuggling of migrants, and the trafficking of persons.

Article 2
Definitions

For the purposes of this Agreement, unless the context otherwise requires:

1. "Illicit activities" include illicit traffic, the unsafe transport of migrants, migrant smuggling, and trafficking in persons.

2. "Illicit traffic" has the same meaning as in Article 1(m) of the 1988 Convention and includes illicit traffic by air.

3. "Unsafe transport of migrants" means, with regard to transport by sea, the carriage of migrants on board a vessel that is:

a. obviously operating in conditions which violate fundamental principles of safety of life at sea, including but not limited to those of the SOLAS Convention, or

b. not properly manned, equipped or licensed for carrying passengers on international voyages, and that thereby constitutes a serious danger

for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation.

4. "Smuggling of migrants" has the same meaning as in Article 3(a) of the Smuggling Protocol.

5. "Trafficking in persons" has the same meaning as in Article 3(a) of the Trafficking Protocol.

6. "Migrant" means a person attempting to enter illegally, or being transported for the purpose of entering illegally, into the territory of a Party of which the person is not a national or permanent resident.

7. "Territorial sea" is defined consistent with Section 2 of the 1982 Law of the Sea Convention.

8. "International waters" means all parts of the sea not included in the territorial sea and internal waters of a State.

9. "International airspace" means the airspace situated over international waters.

10. "Law enforcement authorities" means:

a. For the Government of the Republic of Cuba, the Tropas Guarda Fronteras and

b. For the Government of the United States of America, the United States Coast Guard.

11. "Law enforcement officials" means:

a. For the Government of the Republic of Cuba, uniformed members of the Tropas Guarda Fronteras; and

b. For the Government of the United States of America, uniformed members of the United States Coast Guard.

12. "Law enforcement vessels" means vessels, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, including any boat or aircraft embarked on such vessels, of the United States Coast Guard, Tropas Guarda Fronteras, and

other vessels of the Parties as may be agreed upon, on which law enforcement officials of either or both Parties are embarked.

13. "Law enforcement aircraft" means aircraft of the Parties, clearly marked and identifiable as being on government non-commercial service and authorized to that effect on which law enforcement or other officials of either or both Parties are embarked, engaged in law enforcement operations or operations in support of law enforcement activities.

14. "Suspect vessel" means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in illicit activities.

15. "Suspect aircraft" means an aircraft used for commercial or private purposes in respect of which there are reasonable grounds to suspect that it is engaged in illicit activities.

16. "Vessel" means any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

17. "Shiprider" means a law enforcement official of one Party authorized to embark on a law enforcement vessel or aircraft of the other Party.

Article 3
General Principles

1. Operations to suppress illicit activities, in the territorial sea or airspace of a Party are the responsibility of, and subject to the authority of, that Party.

2. Except as authorized by this Agreement, nothing in this Agreement shall be construed as authorizing a law enforcement vessel or law enforcement aircraft of one Party to unilaterally patrol within the territorial sea or airspace of the other Party.

3. Neither Party shall conduct operations to suppress illicit activities in the territorial sea and airspace of the other Party without its permission as provided in this Agreement.

Article 4
Cases of Suspect Vessels and Aircraft

Law enforcement operations to suppress illicit activities, pursuant to this Agreement, shall be carried out only against suspect vessels and suspect aircraft.

Article 5
Operations in International Waters

1. Whenever the law enforcement officials of one Party (the "first Party") encounter a suspect vessel, flying the flag of, or claiming to be registered in, the other Party, located seaward of any nation's territorial sea, and have reasonable grounds to suspect that the vessel is engaged in an illicit activity, the first Party may request, in accordance with Article 10 of this Agreement, the Party which is the claimed flag State to verify the claim of registry and if verified, to authorize the boarding and search of the suspect vessel, cargo and persons found on board by the law enforcement officials of the first Party. Any such request shall be supported by the basis on which it is claimed that the reasonable grounds for suspicion exist.

2. Where permission to board and search the vessel is granted and evidence is found of an illicit activity, the flag State shall be promptly informed of the results of the search, including the names and claimed nationality, if any, of the persons on board, and requested to give directions as to the disposition of the vessel, cargo and persons on board. Such requests shall be answered expeditiously. Pending receipt of such instructions, the vessel, cargo and persons on board may be detained.

3. Boardings and searches conducted pursuant to this Agreement shall be carried out by law enforcement officials from law enforcement vessels.

4. When conducting a boarding and search, law enforcement officials shall take due account of the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo, or to prejudice the commercial and legal interests of the flag State or any other interested State. Such officials shall also bear in mind the need to observe norms of courtesy, respect and consideration for the persons on board the suspect vessel.

5. Where a vessel of one Party is detained seaward of any State's territorial sea, that Party shall have the right to exercise jurisdiction over the vessel, its cargo and persons on board, but that Party may, subject to its laws,

waive its right to exercise jurisdiction and authorize the other Party to enforce its laws against the vessel, its cargo and persons on board. Nothing in this Agreement shall be construed as a waiver by a Party of its right to exercise jurisdiction over its nationals.

Article 6
Operations in and over the Territorial sea of a Party

1. When there are reasonable grounds to suspect that a vessel or aircraft is engaged in an illicit activity, a Party (the "first Party"), in accordance with Article 10 of this Agreement, may make a request to the other Party for permission for its law enforcement vessel to follow the suspect vessel or aircraft into the other Party's territorial sea or airspace or to enter the other Party's territorial sea in order to maintain contact with the vessel or aircraft, and to investigate, board and search the vessel. Any such request shall be supported by the basis on which it is claimed and that there are reasonable grounds for the alleged suspicion.

3. The Requested Party shall decide expeditiously whether to grant the permission sought and in granting such permission may give such directions and attach any conditions it considers appropriate to such permission.

4. All boardings and searches of suspect vessels shall be conducted in accordance with the laws of the Requested Party.

5. Where, as a result of a boarding and search under this Article, evidence is found of illicit activities, the Requested Party shall be promptly informed of the results of the search, and the suspect vessel, cargo and persons on board shall be detained. Following such boarding and search, all law enforcement action shall be under the control and direction of the law enforcement officials of, and conducted in accordance with, the laws of the Requested Party.

7. Nothing in this Article authorizes the boarding and search, or detention, of a vessel flying the flag of the Party within whose territorial sea the vessel is located.

8. Nothing in this Article shall be construed to permit a law enforcement vessel of one Party to unilaterally patrol within the territorial sea of the other Party.

Article 7
Other Boardings Under International Law

Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels, conducted in accordance with customary international law, including vessels without nationality and vessels assimilated to vessels without nationality, by officials of either Party.

Article 8
Aircraft Support for Suppression of Illicit Activities

1. When there are reasonable grounds to suspect that a vessel or aircraft is engaged in an illicit activity and that vessel or aircraft is located in or over, or is entering the territorial sea or airspace of one Party (the "First Party"), the law enforcement officials of the other Party ("the Second Party") shall provide such information regarding the suspect vessel or aircraft to the person designated by the law enforcement authority of the First Party, and pursuant to the procedures detained in Article 10, a request may be made by the Second Party for its aircraft to:

a. overfly the territory and territorial sea of the Second Party in pursuit of the suspect vessel or aircraft fleeing into or located within its territorial sea and airspace; and

b. maneuver to maintain visual and electronic contact with the suspect vessel or aircraft; and

c. subject to the laws of each Party, with due regard for its laws and regulations for the flight and maneuver of aircraft, relay orders from its law enforcement authorities to suspect aircraft to land in the territory of the second Party.

2. With regard to the overflight requested in paragraph (a) above, the procedures to be observed shall involve a notification to the law enforcement authority and the appropriate civil aviation authorities, and compliance with all air navigation and flight safety directions of the Party within whose airspace the overflight is taking place.

3. Where the request relates to maneuvering the aircraft to maintain contact with the suspect aircraft or vessel as provided for in paragraph (b) above, the procedures to be observed shall involve:

a. the express approval of the law enforcement authority of the requested Party; and

b. notification to, and compliance with, all air navigation and air safety directions of the Party within whose airspace the maneuvering is taking place.

4. The Party conducting such overflight and maneuvering shall also maintain contact with the designated law enforcement officials of the other Party and shall keep them informed of such actions so as to enable them to take such action as may be appropriate.

5. When maneuvering to maintain contact with a suspect aircraft, the Parties shall not endanger the lives of persons on board or the safety of civil aircraft.

6. Nothing in this Agreement shall authorize activities in relation to aircraft engaged in legitimate scheduled or charter operations for the carriage of passengers, baggage or cargo.

7. Nothing in this Agreement shall be construed to authorize aircraft of either Party to enter the airspace of any third State.

8. Nothing in this Article shall be construed to permit an aircraft of one Party to unilaterally patrol within the airspace of the other Party.

Article 9
Shiprider Program

1. The law enforcement authority of one Party ("the First Party") may, in appropriate circumstances, designate shipriders who, on behalf of the First Party's government, and in accordance with the First Party's law, shall be empowered to grant the law enforcement vessels and aircraft of the other Party ("the Second Party") on which they are embarked, authority to:

a. enter the First Party's territory, waters, and airspace to assist law enforcement officials of the Second Party to board and search suspect vessels, and if evidence is found of violations of the First Party's law, to assist the shiprider in carrying out the disposition instructions of the First Party's law enforcement authorities in respect of the vessel, cargo, and persons on board.

b. assist the shiprider in boarding and searching suspect vessels flagged in the First Party located seaward of any nation's territorial sea and within 200 nautical miles from the baselines from which the territorial sea of the First Party is measured, and if evidence of violations of the First Party's law is found, to assist the shiprider in carrying out the disposition instructions of the First Party's law enforcement authorities in respect of the vessel, cargo, and persons on board.

2. Law enforcement officials of one Party may assist shipriders of the other Party conducting operations pursuant to this Article only if expressly requested to do so by the shiprider, and only within the limits of such request and in the manner requested. Such request may only be made, agreed to, and acted upon in accordance with the laws and policies of both Parties.

Article 10
Procedures for Requesting Authorization to Board and Search Suspect Vessels

1. Requests for verification of registration of vessels claiming registration of one of the Parties; requests for permission to follow a suspect vessel or aircraft into the other Party's territorial sea or airspace or to enter the other Party's territorial sea in order to maintain contact with the vessel or aircraft; and requests for authorization to board and search such vessels, shall be processed by and between the law enforcement authorities of the Parties.

2. Each request shall be conveyed orally and confirmed in writing, and shall contain, if possible, the name of the vessel, registration number, homeport, basis for suspicion, and any other identifying information. If there is no response from the flag State within three (4) hours of its receipt of the confirmation in writing, the requesting Party shall be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.

Article 11
Other Assistance

1. Each Party, after authorization by its law enforcement authority, may permit, on the occasions and for the time necessary for the proper performance of the operations required under this Agreement, law enforcement aircraft operated by the other Party to land and temporarily remain at international airports in accordance with international norms and to the extent permitted by domestic law for the purposes of resupplying fuel and provisions, medical assistance, minor repairs, weather, and other logistics and related purposes.

2. The law enforcement authority of one Party (the "first Party") may request, and the law enforcement authority of the other Party may authorize, law enforcement officials of the other Party to provide technical assistance to law enforcement officials of the first Party for the investigation, boarding, and search of suspect vessels located in the territory or territorial sea of the first Party.

3. Nothing in this Agreement precludes a Party from otherwise expressly authorizing other assistance in suppressing illicit activities.

Article 12
Suspect Vessels and Aircraft

1. Operations to suppress illicit activities pursuant to this Agreement shall be carried out only against suspect vessels and aircraft.

Article 13
Exchange of Information and Notification on the Results of Enforcement Action

1. The law enforcement authorities of both Parties shall, where practicable, exchange operational information on the detection and location of suspect vessels or aircraft and to make best efforts to communicate with each other.

2. Each Party shall, on a periodic basis and consistent with its laws, inform the other Party on the stage which has been reached of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this Agreement where evidence of illicit activities was

found. In addition, the Parties shall provide each other information on the results of such prosecutions and judicial proceedings.

Article 14
Use of Force

1. All use of force by a Party pursuant to this Agreement shall be in strict accordance with applicable laws and policies of the respective Party and shall in all cases be the minimum reasonably necessary and proportionate under the circumstances, except that neither Party shall use force against civil aircraft in flight.

2. The boarding and search teams may carry standard small arms.

3. All use of force by a Party within the territorial sea of Cuba or the United States pursuant to this Agreement shall be in strict accordance with the laws and policies of the Party within whose territorial sea the force is used.

4. Authorizations to board, search and detain vessels and persons on board include the authority to use force in accordance with this Article to compel compliance.

5. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by the law enforcement or other officials of the Parties.

Article 15
Dissemination

To facilitate implementation of this Agreement, each Party shall ensure that the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force. Each Party shall ensure that all of its law enforcement officials are knowledgeable concerning the applicable laws and policies of both Parties.

Article 16
Asset Sharing

Assets seized in consequence of any operation undertaken in the territory or territorial sea of a Party pursuant to this Agreement shall be disposed of in accordance with the laws of that Party. Assets seized in consequence of any operation undertaken seaward of the territorial sea of either Party pursuant to this Agreement shall be disposed of in accordance with the

laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, the seizing Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party.

Article 17
Settlement of Disputes

In case a question arises in connection with interpretation or implementation of this Agreement, either Party may request consultations between the Parties to resolve the matter. If any loss or injury is suffered as a result of any action taken by the law enforcement or other officials of one Party in contravention of this Agreement, or any improper or unreasonable action is taken by a Party pursuant thereto, the Parties shall, without prejudice to any other legal rights which may be available to the Parties or to any persons or entities affected by any such action, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.

Article 18
Consultations and Review

The Parties shall, on a periodic basis, consult with a view to enhancing the effectiveness of this Agreement.

MUTINY ON THE HIGH C: HOW THE ARMED FORCES REGULATE AND CRIMINALIZE SERVICEMEMBER SPEECH ONLINE

MAJOR MICHELLE E. BORGNINO*

[A]bove all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.[1]

When service members first don their uniforms and pick up their rifles, they do not set aside their citizenship. They reaffirm it, vow to guard it and assume the responsibility to maintain the professionalism of their station.[2]

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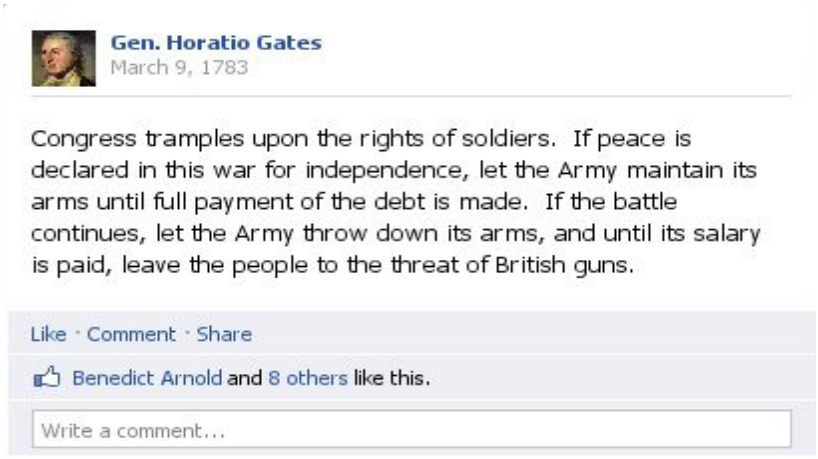
[1] Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[2] *Election Season Calls for Caution, Professionalism Among Military*, DOD LIVE (July 24, 2012), http://www.dodlive.mil/index.php/2012/07/election-season-calls-for-caution-professionalism-among-military/.

I. Introduction



In March of 1783, a letter similar to this fictional *Facebook* post was circulated among the officers of the Confederation Army.[3] After years of failure by the Confederation Congress to pay its soldiers and officers, the Confederation Army was prepared to mutiny. An anonymous letter sent to the Army's officers called for a meeting on March 10, l783.[4] Although the 1783 letter's author had the foresight to remain anonymous, a statement like this could easily appear in a *Facebook* post, a "tweet," or on a blog, where anonymity is not always an option, and where the reader will not only know the name of the poster but potentially his age, location, interests, and whether affiliated with the military.[5] If this were to happen, it would raise delicate issues concerning what a modern-day commander could—and should—do. The protections of the First Amendment to the Constitution are fundamental to the rights enjoyed by every American citizen. But those protections do not apply equally to those who serve,

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[3] It is believed that General Horatio Gates sent this letter, but has never been confirmed. *See George Washington and the Newburgh Conspiracy, 1783*, GILDER LEHRMAN INST. OF AM. HISTORY, https://www.gilderlehrman.org/history-by-era/war-for-independence/resources/george-washington-and-newburgh-conspiracy-1783 (last visited Sept. 2016) ; *Newburgh Conspiracy*, GEORGE WASHINGTON'S MOUNT VERNON, http://www.mountvernonorg/research-collections/digital-encyclopedia/article/newburgh-conspiracy/ (last visited July 25, 2016).

[4] *See George Washington and the Newburgh Conspiracy, 1783*, *supra* note 3; *Newburgh Conspiracy*, *supra* note 3.

[5] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210 (2008).

whether they serve as members of the military or as employees of the Department of Defense (DoD).[6] Those who volunteer to defend this fundamental right surrender the full scope of its protections to the extent necessary to allow the chain of command to function.[7] This necessitates an important balancing act for the military to ensure that reasonable restrictions are placed on speech by servicemembers in order to uphold good order and discipline, while at the same time affording servicemembers their right to free speech, to the greatest extent possible.

The global reach of the World Wide Web, combined with the explosion of social-media tools such as *Facebook* and *Twitter*, disrupt the military rules that restrict free speech.[8] While civilian courts in America have experience applying the First Amendment to online speech,[9] "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian"[10] and therefore faces a distinct set of challenges.

Specifically, commanders' need to maintain good order and discipline in the face of sometimes incredible odds necessitates limiting the right to free speech afforded to servicemembers. The fact that there are limitations is clear; how they apply in the age of the Internet is not. Current DoD guidance is both broad and vague.[11] It outlines terms but does not define them and provides no practical examples of prohibited behavior. Merely

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[6] *See* Parker v. Levy, 417 U.S. 733 (1974).

[7] Gene Policinski, *In the Military, Speech can be Punishable Conduct*, FIRST AMENDMENT CENT. (Apr. 16, 2012), http://www.firstamendmentcenter.org/in-the-military-speech-can-be-punishable-conduct.

[8] *Id.*

[9] *See* Bell v. Itawamba County School Bd., 799 F.3d. 379 (5th Cir. 2015) *petition for cert. filed*, 84 U.S.L.W 3304 (U.S. Nov. 19, 2015) (No. 15-666) (holding that in the *Tinker* rule conduct by a student that materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the First Amendment and applies when a student intentionally directs, at the school community, speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when the speech originated off campus (video posted to the Internet)) (citing Tinker v. Des Moines Independent County School District, 393 U.S. 503 (1969); Rideout v. Gardner, No. 14-cv-489-PB, 2015 WL 4743731 (D. N.H. Aug. 11, 2015) *appeal docketed*, No. 15-2021 (1st Cir. Sept. 9, 2015) (holding that a state statute prohibiting voters from taking and disclosing digital or photographic copies of their completed ballots violated the First Amendment because the statute was content based and did not survive a strict scrutiny analysis).

[10] Parker, 417 U.S. 733.

[11] *See, e.g.*, U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES para. 4 (19 Feb. 2008) [hereinafter DoDD 1344.10].

adding additional regulation to supplement that which is currently available promises only to complicate an already complicated issue.

Further confusing the matter are rules regarding limitations on servicemember speech, which differ depending on the context in which the speech is uttered. For example, a servicemember serving in a deployed environment is subject to greater restrictions when it comes to his speech than he would be in a non-deployed environment.[12] But the fact that *Facebook* is one of the few methods (perhaps the only) by which he can reach out to family only exacerbates the problem.

Servicemembers have begun to see the effect of free-speech limitations on their online activities. For instance, Marine Sergeant (Sgt.) Gary Stein paid for his misunderstanding of the current state of the law with his career.[13] In 2010, Sgt. Stein co-founded a *Facebook* page called *Armed Forces Tea Party Patriots*.[14] After identifying himself as an active-duty marine,[15] he posted, "Screw Obama. I will not follow all orders from him."[16] Based on this comment, Sgt. Stein was administratively separated from the Marine Corps[17] with an other-than-honorable discharge, which is authorized when a particular action "constitutes a significant departure from the conduct expected of a [m]arine."[18] Troops may still express private views, but Sgt. Stein's case "highlights the potential for . . . opinions to go global as tech-savvy service members post personal details, videos[,] and pictures that can hurt the military's image at home and abroad."[19]

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[12] Carlson v. Schlesinger, 511 F.2d. 1327, 1332 (1975).

[13] *Marine's Facebook Page Tests Military Rules*, FIRST AMENDMENT CENT. (Mar. 8, 2012), http://www.first amendmentcenter.org/marine's-facebook-page-tests-military-rules; Brian Rooney, *Sgt. Gary Stein, Discharged for Obama Criticism, "Scared," Not Backing Down*, CBS NEWS (May 4, 2012), www.cbsnews.com/news/sgt-gary-stein-discharged-for-obama-criticism-not-backing-down/.

[14] *See supra* note 13 and accompanying sources.

[15] Brian Rooney, *supra* note 13.

[16] Marissa Taylor, *Marine Faces Other Than Honorable Discharge Over Anti-Obama Facebook Comment*, ABC News (Apr. 15, 2012), http://abcnews.go.com/US/marine-stg-gary-stein-honorable-discharge-anti-obama/story?id=16216279.

[17] It appears that Sergeant (Sgt.) Stein was separated for the comments he made, though his failure to remove the site in response to a lawful order to do so may also have played a part. Rooney, *supra* note 13.

[18] U.S. MARINE CORPS, Order 1900.16, SEPARATION AND RETIREMENT MANUAL subsec. 1004(c)(2) (26 Nov. 2013) [hereinafter MARCORSEPMAN].

[19] FIRST AMENDMENT CENT., *supra* note 13.

It is not merely sharing one's own views that can lead to adverse administrative action, or even court-martial. In an environment where smartphones abound,[20] it is impossible to predict who will later share posted experiences and opinions with others online, or post pictures or videos of you online without your knowledge. In 2012, Army Corporal (CPL) Jesse Thorsen, while wearing his Army Combat Uniform, took the stage with Ron Paul at a political rally.[21] While mainstream media captured CPL Thorsen's actions, any member of the crowd using a smartphone could have just as easily uploaded them to the Internet.[22]

Beneath the glossy surface of the Internet lies a miasma of First Amendment rules and regulations, which servicemembers can violate without knowing they exist, destroying their careers in the process. The Supreme Court has "reject[ed] the view that freedom of speech . . . as protected by the First . . . Amendment" is absolute.[23] But servicemembers have a right to know where and when certain speech is allowed and where the First Amendment pitfalls lie.[24] The number of individuals accessing social media increases daily, and its use is becoming more and more

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[20] Sixty-four percent of Americans own a smartphone. Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENT. (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/. A smartphone is a "mobile phone which includes functions similar to those found on personal computers. Smartphones are a one-stop solution for information management, mobile calls, email sending, and Internet access." *Smartphone*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/smartphone.html (last visited Sept. 8, 2016).

[21] *Soldier Who Took Stage at Ron Paul Rally Could Face Legal Trouble*, FIRST AMENDMENT CENT. (Jan. 6, 2012), http://www.first amendmentcenter.org/soldier-who-took-stage-at-ron-paul-rally-could-face-legal-trouble. Corporal Thorsen received a letter of reprimand, which was placed in his Official Military Personnel File for his conduct. Ryan J. Foley, *Ron Paul Backer Jesse Thorsen Reprimanded by Army Reserve for Participating in Political Rally*, HUFFINGTON POST (May 30, 2012), http://www.huffingtonpost.com/2012/03/30/ron-paul-jesse-thorsen-soldier-army-reserve_n_1391647.html.

[22] Smartphone "must-haves" include a great camera, lots of storage and the ability to transmit data to other phones and tablets in the vicinity. Kim Komando, *10 smartphone must-have feature*, USA TODAY (Dec. 13, 2013, 7:00 AM), http://www.usatoday.com/story/tech/columnist/komando/2013/12/13/smartphone-battery-processing-display camera/3921399/.

[23] Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

[24] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 897 (2001).

integrated into American's daily lives,[25] making the task of regulating servicemember speech a daunting undertaking.

The military does not need more regulation. Currently, the limitations on servicemember speech are varied and found in multiple sources. But the articles of the Uniform Code of Military Justice (UCMJ) already provide the framework necessary to regulate servicemembers' speech and to punish speech that is unprotected because it is harmful and contrary to good order and discipline.[26] A thoughtful and comprehensive look at the UCMJ can expose these requirements so servicemembers may exercise their constitutional right of free speech to the greatest extent possible under the law. This article, rather than drawing on the UCMJ as a baseline, recommends adapting the UCMJ to accommodate the changes in technology by acknowledging that servicemembers' ability to communicate on a global scale has an effect on the way the military justice system functions. The military justice system is a commander's tool for maintaining morale, mission readiness, and good order and discipline.[27] Approaching online misconduct from the perspective of the UCMJ, rather than through a jumble of regulations, policies, and handbooks, will create a uniform set of expectations across the services.[28]

II. A Culture of Social Media

> *We don't have a choice on whether we do social media, the question is how well we do it.*[29]

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[25] Sixty-five percent of adults use social media, up from seven percent in 2005. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CENT. (Oct. 8, 2015), www.pewinternet.org /2015/10/08/social-networking-usage-2005-2015/.

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM].

[27] *See* Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. OF COMP. & INT'L L. 169 (2006).

[28] Executing fair, prompt military justice reinforces command responsibility, authority and accountability. This is true across the Services, and underscores the uniformity and jointness of the military justice system. DEFENSE LEGAL POLICY BOARD SUBCOMMITTEE REPORT, MILITARY JUSTICE IN COMBAT ZONES 25 (2013).

[29] Erik Qualman, *Quotable Quotes*, GOOD READS, http://www.goodreads.com/quotes/new?quote%5B author.name%5D=Erik+Qualman (last visited July 25, 2016). Erik Qualman is the author of *Socialnomics* and *Digital Leader*. *See* SOCIALNOMICS, http://socialnomics.net/erik-qualman/ (last visited Oct. 17, 2016).

Over the past decade, the personal and professional lives of many Americans have become inseparable from social-media platforms.[30] Broadly speaking, social media is "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0,[31] and that allow the creation and exchange of user generated content."[32] One prominent type of social-medial platform is described as a social networking site. Social networking sites (SNSs) are "web-based services that allow individuals to (1) construct a public or *semi-public* profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system."[33] *Facebook*, *Twitter*, *LinkedIn*, and *Google+* are examples of this type of social-media platform.[34] So ubiquitous are these websites that sixty-five percent of American adults use them.[35] Young adults (ages eighteen to twenty-nine—more than half the military fits this demographic[36]) make up the greatest number of users: nearly ninety percent of this age group uses social media.[37] In addition, the average junior-enlisted member or junior officer

> does not remember a time when there was no Internet, no camera cell phone, and no text messaging. In that []she is a "digital native." This means of communication is as natural to . . . her as a letter home was to . . . [sic] previous generations. The status symbol today for the "wired

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[30] *See* JOSÉ VAN DIJK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 174 (2013).

[31] The World Wide Web, invented in 1989, provided an essentially one-way street of communication. Web 2.0 refers to the Internet as it came to be shortly after the beginning of the millennium, which offers channels for networked communication to become an interactive, two-way vehicle. *See* Lev Manovich, *The Practice of Everyday (Media): From Mass Consumption to Mass Cultural Production?*, 35 CRITICAL INQUIRY 2 (2009).

[32] Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUSINESS HORIZONS 2, 59, 60 (2009).

[33] Boyd & Ellison, *supra* note 5.

[34] Many separate and distinct social networking sites (SNS) exist. Also, different forms of social medial platforms, including user-generated content platforms exist. This article focuses primarily on *Facebook* and *Twitter* usage.

[35] Perrin, *supra* note 25.

[36] OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE (MILITARY COMMUNITY AND FAMILY POLICY), 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 33 (2014).

[37] *Id.*

> generation" is how many friends you have on your . . . *Facebook* page.[38]

In an attempt to keep up with these young servicemembers and maintain positive communication with both the force and the public, the military has created thousands of official *Facebook* pages and *Twitter* feeds. As of the date of this article, the Army has 1448 official *Facebook* pages and 355 *Twitter* feeds;[39] the Navy has 881 official *Facebook* pages and 210 *Twitter* feeds;[40] the Air Force 530 official *Facebook* pages and 203 *Twitter* feeds;[41] the Marines have 404 official *Facebook* pages and 72 *Twitter* feeds;[42] and, bringing up the rear, the Coast Guard with 116 official *Facebook* pages and 19 *Twitter* feeds.[43] Each of these official sites is registered with its service-specific registry and, when approved, is also added to the DoD registry.[44] Each service also provides social-media handbooks on how social media can, and should, be used in an official capacity.[45] *Facebook* has even created a guide for military organizations in an attempt to help "military branches, units, and bases join the conversation, by sharing their stories and building a meaningful dialogue with their citizens and constituents."[46]

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[38] United States v. Wilcox, 66 M.J. 442, 462 (C.A.A.F. 2008) (citing John Keenan, *The Image of Marines*, MARINE CORPS GAZETTE, May 2008, at 3).

[39] *The U.S. Army on Social Media*, ARMY.MIL, http://www.army.mil/media/socialmedia/ (last visited July 25, 2016).

[40] *U.S. Navy Social Media*, NAVY.MIL, http://www.navy.mil/CommandDirectory.asp?id=0 (last visited July 25, 2016).

[41] *Social Media Sites*, AF.MIL, http://www.af.mil/afsites/socialmediasites.aspx (last visited Sept. 13, 2016).

[42] *Marine Corps Social Media*, MARINES.MIL, www.marines.mil/News/SocialMedia.aspx (last visited July 25, 2016).

[43] *Official Sites*, COAST GUARD COMPASS: OFFICIAL BLOG OF THE U.S. COAST GUARD, http://coastguard.dodlive.mil/official-sites/ (last visited July 25, 2016).

[44] U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/Sites/Register-A-Site (last visited July 25, 2016). The DoD provides service-specific online forms, where the link to the proposed official website is submitted. *Id.* The site is then reviewed and approved by the Office of the Chief of Public Affairs. *See The U.S. Army on Social Media*, *supra* note 39.

[45] *See* U.S. DEP'T OF ARMY, THE UNITED STATES ARMY SOCIAL MEDIA HANDBOOK, v. 3.2 (2014) [hereinafter ARMY HANDBOOK]; U.S. DEP'T OF NAVY, NAVY COMMAND LEADERSHIP SOCIAL MEDIA HANDBOOK (2012) [hereinafter NAVY HANDBOOK]; U.S. DEP'T OF AIR FORCE, AIR FORCE SOCIAL MEDIA GUIDE (2013) [hereinafter AIR FORCE HANDBOOK]; U.S. MARINE CORPS, THE SOCIAL CORPS: THE U.S.M.C. SOCIAL MEDIA PRINCIPALS [hereinafter MARINE CORPS HANDBOOK]; U.S. COAST GUARD, SOCIAL MEDIA HANDBOOK (2015) [hereinafter COAST GUARD HANDBOOK].

[46] Facebook, *Building your presence with Facebook Pages: A guide for military organizations*, DOD LIVE (Nov. 2011), http://marines.dodlive.mil/files/2011/11/Facebook

Military leadership's extensive use of social media sites like *Facebook* and *Twitter* suggests that it is also appropriate for members of the services to maintain their own presence on social media. In many ways, it has become the way that the military communicates, including how servicemembers communicate with each other and their families, and how the military as a whole communicates with the American people. But in order to see the true influence of social media, it is necessary to have a baseline understanding of the most popular forms used by the military and its members, namely *Facebook* and *Twitter*.

A. *Facebook*

"Founded in 2004, *Facebook's* mission is to give people the power to share and make the world more open and connected. People use *Facebook* to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them."[47] Founder and chief executive officer Mark Zukerberg told *Time* that *Facebook's* mission was to build a Web where the "default is social," in order to "make the world more open and connected."[48] To create a *Facebook* account, users must initially provide their name, email address or phone number, password, birthday, and gender.[49] Users will then be prompted to create a profile. Both a profile picture and cover photo can be added, as well as a work and education history, the places the user has lived, contact information, family and relationship information, along with other "Details About You."[50] Every time a user's *Facebook* page is viewed by others (depending on the privacy settings) they see a snapshot of the individual: where he lives and works, what his favorite music is, who his friends are, and so on.

Fully seventy-two percent of online American adults use *Facebook*.[51] The majority of those users, eighty-two percent, are between the ages of

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GuideMilitaryOrgs.pdf.

[47] *About Facebook*, FACEBOOK, https://www.facebook.com/facebook/info/?tab=page_info (last visited July 25, 2016).

[48] Dan Fletcher, *How Facebook Is Redefining Privacy*, TIME (May 20, 2010), http://www.time.com/time /magazine/article/0,9171,1990789,00.html.

[49] *Creating Your New Account*, FACEBOOK, https://www.facebook.com/help/345121355559712/ (last visited July 25, 2016).

[50] *About Facebook*, *supra* note 47.

[51] Maeve Duggan, *The Demographics of Social Media Users*, PEW RESEARCH CEN. (Aug. 18, 2015), www.pewinternet.org/2015/08/19/the-demographis-of-social-media-users/.

eighteen and twenty-nine.[52] As discussed above, such a demographic is significant because this age group also makes up the majority of active duty servicemembers.[53] It is reasonable to assume that a majority of the population of the U.S. military uses *Facebook* and is accustomed to its policy of social transparency.

B. *Twitter*

Twitter, a micro blogging platform, was launched in 2006.[54] It is an "information network made up of 140-character messages flagged by a hashtag (#) called Tweets."[55] *Twitter* allows users to gather information by finding and following other Twitter accounts.[56] Messages from followed accounts will appear in the user's "Timeline" or personal *Twitter* homepage.[57] The company states that its mission is to "give everyone the power to create and share ideas and information instantly, without barriers."[58] This ideal is similar to that of *Facebook* and includes an implicit push for transparency in social media. Individual users can write their own tweets, retweet messages, or reply with a reaction to a tweet.[59] Unlike *Facebook*, only twenty-three percent of American adults use *Twitter*,[60] and seventy-nine percent of all accounts originate outside the United States.[61] *Twitter* is a truly global format for online commentary,[62] which allows for global interaction.[63]

Through *Facebook* and *Twitter*, people share the details of their lives, to include their political leanings, ideas about world events, and opinions on just about anything. All of this content, in words, pictures, videos, "Likes," and "Retweets" is speech,[64] as defined by case law, and is

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[52] *Id.*
[53] DEMOGRAPHICS PROFILE, *supra* note 36.
[54] Boyd & Ellison, *supra* note 5.
[55] *Getting Started with Twitter*, TWITTER, https://support.twitter.com/articles/215585?Lang=en (last visited July 25, 2016).
[56] *Id.*
[57] *Id.*
[58] *About Twitter*, TWITTER, https://about.twitter.com/company (last visited Jan. 16, 2016).
[59] *Getting Started with Twitter*, *supra* note 55.
[60] Duggan, *supra* note 51.
[61] *About Twitter*, *supra* note 58.
[62] VAN DIJK, *supra* note 30, at 76.
[63] *Twitter* has more than 320 million monthly active users. *About Twitter*, *supra* note 58.
[64] Texas v. Johnson, 491 U.S. 397, 404 (1989).

therefore protected by the First Amendment to the Constitution of the United States. Members of the military and DoD employees must understand, however, that this protection is not without its limits.

III. Legal Limits on Servicemember Speech

To understand limits on a servicemember's protected speech, it is necessary to examine the basics of First Amendment jurisprudence. The goal of such an examination is to reach an understanding of what is speech, what delineates protected from unprotected speech, and the reason behind any distinction; this examination will also include a brief discussion of statutory limitations on the speech of federal employees.

A. First Amendment Jurisprudence

Congress shall make no law . . . abridging the freedom of speech.[65]

The First Amendment to the Constitution appears, on its face, to protect from government regulation any speech that is uttered anywhere, at any time. However, its plain language actually gives little indication what the Framers intended.[66] Historically, the amendment was meant to prevent the restraint on speech that had been imposed on the colonies by England, i.e., the requirement to obtain licenses for publication, and punishment for seditious libel.[67] Due to this lack of information as to the Framers' intent, the Supreme Court has set out the basic framework for

> The First Amendment literally forbids the abridgment of only speech, but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intents thereby to express an idea, we have acknowledged that conduct may sufficiently imbued with elements of communication to call within the scope of the First . . . Amendment.

Id. (internal citations omitted); *see also* R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382 (1992); Virginia v. Black, 538 U.S. 343, 358 (2003).

[65] U.S. CONST. amend. I.

[66] CHEMERINSKY, *supra* note 24 at 896.

[67] *Id.* "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." Citizens United v. Federal Election Com'n., 588 U.S. 310, 340 (2010).

determining what speech the First Amendment protects from government interference.

As with any right guaranteed by the Constitution, the Supreme Court balances the benefit of speech against the harm. The Court declared,

> The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[68]

Yet, despite the (declared) importance of free speech, the Court has also found that the protections of the First Amendment are neither plain in their meaning nor intended to impose "absolute" prohibitions on the government, by also declaring:[69]

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from

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[68] Thornhill v. State of Alabama, 310 U.S. 88, 101 (1940).

[69] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). Justice Black took the view that the Bill of Rights are plain in their meaning and "chastised those who rejected an absolute reading of the Bill of Rights by factoring the public interest into judicial review of rights as embracing the English doctrine of legislative omnipotence." Marci A. Hamilton, *Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960)*, 75 N.Y.U. L. REV. 1525 (2000) (internal citations omitted).

> them is clearly outweighed by the social interest in order and morality.[70]

The basic tenets used to determine the constitutionality of legislation that regulates speech come from *Schneck v. United States.* In *Schneck*, members of the Socialist Party mailed pamphlets[71] to men who had been called into military service for the purpose of causing insubordination in the military and obstructing recruitment and enlistment.[72] The Court stated that "in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[73] The Court then identified the test that would become the framework for determining whether speech is protected under the First Amendment: "[W]hether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[74]

In 1967, the Court of Military Appeals applied the clear and present danger test to the prohibitions on speech contained in, expressly, Article 88 and, implicitly, Article 133 of the UCMJ.[75] In *United States v. Howe*, the court recognized that up until that point, the effort to define the outer limit of the right of free speech had been restricted to the civilian community.[76] Applying the *Schenck* test, the court held that "the

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[70] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) (citations omitted).

[71] The document had printed on it the first section of the Thirteenth Amendment and stated that the idea embodied in that amendment was violated by the conscription act, and that a conscript is little better than a convict. Schenck v. United States, 249 U.S. 47 (1919). It said, "Do not submit to intimidation," but emphasized peaceful means of protest. *Id.* On the other side, the document encouraged men to refuse to recognize the draft and stated, "If you do not assert and support your rights, you are helping to deny or disparage right which it is the solemn duty of all citizens and residents of the United States to retain." *Id.* at 51. Mr. Schenck and his co-conspirator (both private citizens) were convicted of the charges against them and the Court affirmed the convictions. *Id.*

[72] *Id.* at 48–49.

[73] *Id.* at 52.

[74] *Id.* (emphasis added). This test could be used to determine pre-publication restraint or post-publication punishment. In some cases, the circumstances in which the words would be used can be determined prior to their utterance and determined to be unprotected. *Id.* (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911)).

[75] United States v. Howe, 37 C.M.R. 429 (1967).

[76] *Howe*, 37 C.M.R. at 429 (citing Dennis v. United States, 341 U.S. 494 (1951)); *Schenck*, 249 U.S. 47; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State . . . in the present times and circumstances . . . constitutes a clear and present danger to discipline within our armed services."[77]

The clear and present danger test is relatively straight-forward, and it would have been easy enough to continue its application in both the civilian and military context. But in 1974, the Supreme Court created a slightly different test applicable to the military in *Parker v. Levy*.[78] *Parker* acknowledged that the sweep of First Amendment protections is less comprehensive in the military.[79] The Court reasoned that a deviation from the *Schenck* standard—really, a lesser standard—was warranted by the idea that the military is, by necessity, a specialized society separate from civilian society.[80] "Its law is that of obedience"[81] and the consequent necessity to impose discipline may render speech regulation permissible within the military that would be constitutionally impermissible outside it.[82] Put another way, some restrictions exist in the armed forces for reasons that have no counterpart in the civilian community,[83] because speech that is protected in a civilian context may undermine the effectiveness of command. If it does that, the Court held, it is constitutionally unprotected.[84]

Thus dangerous—and therefore, unprotected—speech in the military context is that which "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops."[85] Consequently, if such speech also violates the UCMJ, a servicemember may be punished by court-martial. In addition to those cases, DoD policy and service-specific regulations also limit speech. Political speech, in particular, is an area where multiple sources of law and regulation limit what political activities a servicemember or DoD employee may engage in.

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[77] *Howe*, 37 C.M.R. at 437.
[78] Parker v. Levy, 417 U.S. 733 (1974).
[79] *Id.*
[80] *Id.* at 743.
[81] *In re* Grimley, 137 U.S. 147, 153 (1890).
[82] *Parker*, 417 U.S. at 758.
[83] United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972). Some examples include operational security; handling of classified information; command and control; and the good order and discipline of the force.
[84] United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970).
[85] United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996).

B. Regulation of Political Speech and Activities

Political speech lies at the core of the First Amendment,[86] but due to the position of the armed forces in the executive branch of the government, it is also imperative that no servicemember or employee be seen to officially endorse any political ideal or candidate. Yet, the importance of political speech to American citizenship requires the allowance of political speech to the greatest extent possible. Consequently, the DoD encourages "members of the Armed Forces . . . to carry out the obligations of citizenship" as long as that participation is in "keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement."[87] This is as true for DoD civilian personnel as it is for those who serve on active duty, and may be more important for those civilian employees who also serve in the reserve components and will fall under different restrictions, at different times, depending on their status. It is due to these principles that laws and regulations have been enacted to outline the limits of political speech. These will be discussed in turn.

1. Department of Defense Directive 1344.10

The DoD regulates the political activities of active duty servicemembers, including the National Guard, in DoD Directive (DoDD) 1344.10 and the service-specific policies that stem from it.[88] The directive lists out a number of actions that may and may not be taken by servicemembers.[89] While too numerous to be listed here, it is important

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[86] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[87] DoDD 1344.10, *supra* note 11, para. 4.

[88] *See* U.S. DEP'T OF ARMY, REG., ARMY COMMAND POLICY para. 5-3 (18 Mar. 2008) (RAR 22 Oct. 2014) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE, INSTR. 51-902, POLITICAL ACTIVITIES BY MEMBERS OF THE US AIR FORCE (12 Nov. 2010) [hereinafter AFI 51-902]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5720.44C, DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS para. 0103 (14 Oct. 2014) [hereinafter SECNAVIST 5720.44C].

[89] DoDD 1344.10, *supra* note 11. A member of the Armed Forces on active duty may: register to vote; vote; encourage others to vote; write a letter to the editor under certain circumstances; and display a political bumper sticker on the member's private vehicle. The member may not: participate in partisan political fundraising activities, rallies, or conventions; allow or cause to be published partisan political writings soliciting votes for or against a partisan political party, candidate or cause; serve in any official capacity with

to understand that at the basic level, partaking[90] in partisan activities in an official capacity is prohibited.[91] Servicemembers must also ensure that they do not act in a manner that "could reasonably give rise to the inference or appearance of official sponsorship, approval or endorsement,"[92] and that they do not participate in political activities while in uniform.[93] Although servicemembers may express personal opinions on political candidates and issues, they may not do so as a representative of the United States.[94]

The use of online forms of communication make violating this policy easier. When an individual participates in an in-person discussion, while wearing civilian clothes, it is easier to disassociate that person's job from their political views. When an opinion is expressed on *Facebook*, however, "friends of friends" who see that opinion next to a photograph of a soldier in uniform may infer an endorsement.[95] Additionally, when a superior non-commissioned officer or commissioned officer posts a political opinion, their subordinates may mistake it as an endorsement or, perhaps, even a command.

The DoD issued guidance for the 2016 election season, which supplements Directive 1344.10.[96] This policy attempted to provide more specific rules with regard to the use of social media.[97] Active duty members could generally express personal views on public issues or political candidates using social media, as this act is similar to writing a

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or be listed as a sponsor of a partisan club; or speak before a partisan political gathering. *Id.* para. 4.1.

[90] Participation includes more than mere attendance as a spectator. *Id.* para. 4.1.2.1

[91] *Id.* para. 4.1.2.

[92] *Id.* para. 4.1.4.

[93] *Id.*

[94] *Id*. para. 4.1.1.6. If the individual is identified as a servicemember on active duty, or if the member is otherwise reasonably identifiable as a member of the Armed Forces, the a statement that the views expressed are those of the individual only and not of the Department of Defense or Department of Homeland Security must be included. *Id*.

[95] If you comment on a post by another person, anyone who can see that post will see your comment. Only the person making the post has the ability to control the audience. *Privacy Basics: What Others See About You*, FACEBOOK, https://www.facebook.com/about/basics/what-others-see-about-you/ (last visited July 25, 2016).

[96] Memorandum from Office of the Secretary of Defense to Department of Defense, et al., subject: 2016 DoD Public Affairs Guidance for Political Campaigns and Elections (25 Aug. 2015) [hereinafter Public Affairs Memo].

[97] *Id.*

letter to the editor of a newspaper.[98] However, if that social-media site "identifies the member as on active duty (or if the member is otherwise reasonably identifiable as an active duty member)," the member must "clearly and prominently state that the views expressed are those of the individual" and not those of the DoD or Department of Homeland Security.[99] The problem with this guidance is that it does not provide servicemembers with enough information to know what makes them reasonably identifiable as an active-duty member. Is it necessary that the individual list their position in the active service on their profile? Or, is a picture of that individual in uniform enough?

The public affairs guidance makes it clear that active duty servicemembers "may not post or make direct links to a political party, partisan political candidates, campaign, group, or cause,"[100] because such acts are akin to distributing literature on behalf of those entities or individuals.[101] A servicemember may, however, "like" or "become a friend" of the very same entities or individuals as long as the member refrains from engaging in any activities[102] with regard to the "liked" or "friended" social media account.[103]

Even with this direction regarding how active duty servicemembers may participate in the online discussion of politics,[104] it remains unclear how much information is needed on a *Facebook* or *Twitter* profile to reasonably identify an individual as an active duty member, and therefore, whom the rules apply to. As in so many situations, the appearance of association or endorsement can cause as much harm as actual association or endorsement.[105] Therefore, it behooves an active duty servicemember

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[98] *Id.* para. 9.4.2. No letter to the editor of a newspaper may be part of a letter writing campaign. DoDD 1344.10, *supra* note 11, para. 4.1.1.6. This prohibition may be interpreted to include any action on social media where a user is asked to "Share/post/retweet this post/tweet to show your support."

[99] Public Affairs Memo, *supra* note 96, para. 9.4.2.

[100] *Id.* para. 9.4.2.

[101] *Id.*

[102] "Activities" is defined to include suggesting that others like, friend, or follow the political party, partisan political candidate, campaign, group, or cause or forwarding an invitation or solicitation from said entities to others. *Id.* para. 9.4.3.

[103] *Id.*

[104] Because these documents are policies that provide guidance and rely on subordinate commands for their application, their terms are not directly enforceable through the Uniform Code of Military Justice. *See infra* sec. V.D. for further discussion.

[105] *See* U.S. DEP'T. OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993) (C7, 17 Nov. 2011) (containing additional information on how the appearance of a violation is as important to avoid as an actual violation).

to refrain from detailed discussions of partisan political activities or candidates in a partisan political race. "As all of us know, we are always a spokesman . . . always, even when we are not in uniform or are off duty. Credibility is our most important asset."[106]

Because DoDD 1344.10, regarding servicemember political speech is not punitive,[107] the only way to potentially punish any violation of the policy would be to first order a servicemember to cease committing violations of the policy, and then punish that individual for non-compliance using either Article 90 or 91 of the UCMJ, depending on who gave the cease and desist order.[108] Active duty members of the military are not the only government employees who must be cautious when discussing politics on social media. The rules for DoD civilians are just as complicated and, unfortunately, also lacking in detailed guidance.

2. The Hatch Act

Civilian employees make up almost twenty-five percent of the DoD.[109] Although commanders and supervisors need to understand how these regulations are different from those that regulate uniformed servicemembers, most do not.

The Hatch Act of 1939 restricted the partisan political activity of civilian executive branch employees of the federal government, District of Colombia government, and some state and local employees.[110] Its predecessor, the Pendleton Civil Service Reform Act of 1883,[111] laid the groundwork for Congress to restrict the political actions of government

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[106] Naval Air Facility, Washington, D.C., *Political Activities & Policies*, FACEBOOK (Oct. 4, 2012, 2:13 PM), https://m.facebook.com/notes/naval-air-facility-washington-dc/political-activities-policies/10151129119898 145.

[107] *See infra* Section V.D.

[108] Article 90 of the UCMJ punishes (in part) the willful disobedience of a superior commissioned officer. 10 U.S.C. § 890. *See infra* Section V.C. for further discussion of Article 91.

[109] DEMOGRAPHICS PROFILE, *supra* note 36.

[110] Hatch Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767 (1940).

[111] Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883). In the wake of President Garfield's assassination by a public office seeker, the act provided for the open selection of government employees and guaranteed the right of citizens to compete for federal appointment without regard to politics, religion, race, or national origin. *Pendleton Civil Service Act*, BRITANNICA, http://www.britannica.com/topic/Pendleton-Civil-Service-Act (last visited July 25, 2016).

employees.[112] The enactment of the 1939 Act was meant to ensure the political neutrality of government workers by barring partisan political activities of government employees, in order to prevent partisan elected officials from using government employees for their personal political purposes.[113] It also prevented public employees' loyalty from going to a single party or official, and insulated public employees from politically motivated employment actions.[114]

Although not addressing the Hatch Act directly, *Pickering v. Board of Education* is instructive for government (local, state, or federal) employees in understanding the government's interests behind the Hatch Act.[115] In *Pickering*, a public school teacher was removed from his position for writing a letter to the editor of a newspaper criticizing the school board's use of funds for athletes.[116] The Supreme Court, in reversing the removal, set forth a balancing test to weigh any conflict between personal and government interests:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon *matters of public concern* and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees.[117]

The Hatch Act, specifically, survives this test.[118] In *U.S. Civil Service Commission v. National Association of Letter Carriers*, the Court identified four

> [O]bviously important [government] interests [which the Hatch Act is meant to uphold]: the impartial execution of the laws; maintaining public confidence in the system of

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[112] Shannon D. Azzaro, *The Hatch Act Modernization Act: Putting the Government Back in Politics*, 42 FORDHAM URB. L. J. 781, 788 (2015).
[113] James S. Bowman & Jonathan P. West, *State Government "Little Hatch Acts" in an Era of Civil Service Reform: The State of the Nation*, 29 REV. PUB. PERSONNEL ADMIN. 20, 21 (2009).
[114] *Id.*
[115] Pickering v. Board of Education, 391 U.S. 563 (1968).
[116] *Id.* at 564.
[117] *Id.* at 568 (emphasis added).
[118] U.S. Civil Serv. Comm'n, v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (holding that the Hatch Act does not prohibit speech on political matters; it only prohibits employees from being a partisan candidate, which is not a fundamental right); United Pub Workers v. Mitchell, 330 U.S. 75 (1947).

> representative government; not allowing the government workforce to be employed to build a powerful, invincible and perhaps corrupt political machine; and ensuring that advancement in the government service not depend on political performance.[119]

The Hatch Act Modernization Act (HAMA) passed in 2012,[120] after several constitutional challenges and attempts at incremental reform of the 1939 act,[121] was designed to reduce restrictions on federal employees, but still prohibit the use of "official authority or influence for the purpose of interfering with or affecting the result of an election," "knowingly solicit[ing], accept[ing], or receiv[ing] a political contribution" from certain persons, "run[ning] for the nomination or as a candidate for election to a partisan political office," or "solicit[ing] or discourag[ing] the participation in political activity of" certain persons.[122] Additionally, certain employees "may not take an active part in political management or political campaigns."[123] One of the changes the HAMA makes is the institution of penalties for federal employees, including "removal, reduction in grade, debarment from [f]ederal employment for a period not to exceed [five] years, suspension, reprimand, or an assessment of a civil

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[119] Briggs v. Merit Systems Protection Bd. 331 F.3d. 1307 (2003) (citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565–66, 93 S. Ct. 2880 (1973)). In *Briggs*, a social studies teacher for District of Columbia (D.C.) Public Schools was removed after he filed a Declaration of Candidacy to run on the D.C. Statehood Green Party slate for the Ward Two seat on the D.C. Council, in violation of the Hatch Act. *Briggs*, at 1310.

[120] Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616.

[121] *See* Azzaro, *supra* note 112. The Supreme Court explored what interest the federal government has in its own employees and state employees, and whether this interest interferes with an employee's First Amendment rights. *See also* United Pub Workers v. Mitchell, 330 U.S. 75 (1947) (rejecting the argument that Congress may not constitutionally regulate the political activities of industrial workers to the same extent as administrative workers because the former are not in positions where impartiality in public matters is required); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947) (affirming the action of the Commission withholding federal funds from the state until the state ordered suspension a member of the Oklahoma Highway Commission for Hatch Act violations).

[122] 5 U.S.C.A. § 7323 (2016).

[123] *Id.*

penalty not to exceed $1000.[124] Since this change, several federal employees have been removed based on violations of the HAMA.[125]

Recognizing that the HAMA's prohibitions are not always clear, the United States Office of Special Counsel (OSC) released "Frequently Asked Questions" (FAQ) to address how civilian employees may use social media and email in the context of political activity.[126] Most specifically, the OSC guidance outlines prohibitions against engaging in political activities while on duty, defining that status as: when the employee is "in a pay status, other than paid leave, or [is] representing the government in an official capacity."[127] The FAQ also provides some helpful examples of which actions are allowed and not allowed on social media.[128]

3. Crossover

It is important for those members of the Reserve component of the military who are also federal, state, or local government employees to understand the distinction between restriction of political speech for military members on active duty (or otherwise reasonably identifiable as an active duty member)[129] and those proscribed by the Hatch Act or any

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[124] Hatch Act Modernization Act of 2012 § 1618.

[125] U.S. Office of Special Counsel, *Press Release, U.S. Office of Special Counsel, MSPB Orders Removal of Employee for Hatch Act Violations*, OFFICE OF SPECIAL COUNSEL (June 18, 2015), https://osc.gov/News/pr15-13.pdf.

[126] U.S. Office of Special Counsel, *The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media*, OFFICE OF SPECIAL COUNSEL, https://osc.gov/Pages/Hatch-Act-Social-Media-and-Email-Guidance.aspx (last visited July 25, 2016). *See also* Joe Davidson, *Hatch Act do's and dont's for federal employees*, WASH. POST (Oct. 30, 2014), https://www.washingtonpost.com/news/federaleye/wp/2014/10/30/hatch-act-dos-and-donts-for-federal-employees/; *Hatch Act Advisory Opinions*, OFFICE OF SPECIAL COUNSEL, https://osc.gov/pages/advisory-opinions.aspx (last visited July 25, 2016).

[127] *Id.*

[128] *Id.*

[129] It is not impossible for a member of the reserve component to take part in partisan political activities. One of the most prominent examples of a U.S. Senator who was also an Air Force Judge Advocate is Sen. Lindsay O. Graham. *See* Craig Whitlock, *Sen. Graham Moved up in Air Force Reserve Ranks Despite Light Duties*, WASH. POST (Aug. 2, 2015), https://www.washingtonpost.com/world/national-security/for-lindsey-graham-years-of-light-duty-as-a-lawmaker-in-the-air-reserve/2015/08/02/c9beb9fc-3545-11e5-adf6-7227f3b7b338_story.html. *See also* Niels Lesniewski & Megan Scully, *Why Won't the Senate Let Joe Heck Become a General?*, ROLL CALL (Aug. 30, 2013, 3:00 PM), http://blogs.rollcall.com/wgdb/why-wont-senate-let-joe-heck-become-general-army-

similar state or local statute.[130] For civilian employees of the federal government, it is permissible to display a political party, campaign logo, or candidate photograph as their cover or header photo.[131] The same action may or may not be acceptable for that individual while in their military status.[132] None of the permissible political speech of federal employees may take place "while on duty or in the work place," because to do so would show support for a partisan group or candidate in a partisan race.[133] While a member of the federal civilian workforce may engage more freely in political discussion in a personal capacity when not at work or on duty, a servicemember in an active status does not remove his status when he takes off his uniform at the end of the day. Members of the reserve components must be aware of this distinction (as well as the fact that they may be reasonably identifiable as an active duty member on social media even when they are not in an active status), and proceed with caution when deciding to use political banners for their cover or header photos or to post information about their political ideals or leanings using social media.

IV. Where Does This Leave Us?

The intersection where free speech meets military interests is lately a topic of much discussion,[134] and with good reason: as a contentious

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reserves/. A review of Representative Heck's Official *Facebook* page reveals no indication that he also serves in a military capacity. *Rep. Joe Heck, Government Official*, FACEBOOK, https://www.facebook.com/RepJoeHeck/timeline (last visited July 25, 2016).

130 For a discussion of the various state "Little Hatch Acts" *see* Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 791–96 (2000).

131 U.S. Office of Special Counsel, *supra* note 123.

132 Whether or not it is acceptable is unclear, given the current guidance. *See* Public Affairs Memo, *supra* note 96, para. 9.4.2.

133 U.S. Office of Special Counsel, *supra* note 126.

134 Mitch Shaw, *Air Force Warns Airmen Against Talking Politics on Social Media*, MILITARY, http://www.military.com/daily-news/2016/02/09/air-force-warns-airmen-talking-politics-social-media.html (last visited July 25, 2016); Douglas Yeung & Olga Oliker, *Loose Clicks Sink Ships*, U.S. NEWS & WORLD REPORT (Aug. 14, 2015, 12:00 PM), http://www.usnews.com/opinion/blogs/world-report/2015/08/14/when-social-media-meets-military-intelligence; Brian Adam Jones, *The Sexist* Facebook *Movement The Marine Corps Can't Stop: The story of women in the military you haven't heard, and the Marine Corps doesn't want you to know*, TASK AND PURPOSE (Aug. 20, 2014), http://taskandpurpose.com/ sexist-facebook-movement-marine-corps-cantstop/?utm_source=internal&utm_medium=internal&utm_ campaign=speech; Brian Adam Jones, *4 Ridiculous Ways the Military Limits Freedom of Speech*, TASK AND PURPOSE (Aug. 22, 2014), http://taskandpurpose.com/4-ridiculous-ways-military-limits-freedom-speech/.

election has come and gone, and future elections appear to be similarly adversarial, it is imperative that servicemembers understand what political commentary on social media is permissible. But elections are not the only need for worry. The proliferation of official military social media sites and its continued use by senior military leadership makes sites like *Facebook* and *Twitter* part of a servicemember's daily life. In a world where social media users are conditioned to transparency and accustomed to posting their every thought and opinion to social media, it is unfair for the military to hold servicemembers accountable for their speech when it is unclear what speech is (specifically) prohibited, and what is not.

In an attempt to clarify the issue, each of the services has addressed online conduct through their respective social-media handbooks. Of course no two are the same, each provides some generalized insight for servicemembers on the appropriate use of social media. For example, the Coast Guard handbook lays out the difference between official, unofficial, and personal use of social media.[135] The Air Force social media guide refers airmen to Air Force Instruction 1-1 and reiterates the idea of personal responsibility for anything said or posted on social media.[136] The Navy guide, while mostly geared toward commanders and official use, reminds sailors to add a disclaimer that the opinions being shared are their own and do not represent the command or the Navy's viewpoints. However, there is no explanation of when such a disclaimer must be used.[137] The Marine handbook provides much of the same general information, as well as a reminder that violations of regulations or policies may result in disciplinary action under the Uniform Code of Military Justice (UCMJ).[138] The current Army guide only relates to official use of social media.[139] Each service attempts to provide some guidelines and remind servicemembers that improper use of social media may result in action under the UCMJ, but only the Air Force mentions any specific article of the code (Article 88) and none describe what types of speech

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[135] COAST GUARD HANDBOOK, *supra* note 45. "Official: Engaging on social media *is* your job and you are doing it on behalf of the Coast Guard. Unofficial: Engaging on social media *is related* to your job, but you are doing so in a personal capacity. What you are posting online mentions the Coast Guard, your job or your experience. Personal: Engaging on social *is not related* to our job. What you are posting does *not* mention the Coast Guard *in any way*. *Id.* at 3 (emphasis added).

[136] AIR FORCE HANDBOOK, *supra* note 45, at 4. *See also* U.S. DEP'T OF AIR FORCE, INSTR. 1-1, AIR FORCE STANDARDS para. 2-15 (7 Aug. 2012) [hereinafter AFI 1-1].

[137] NAVY HANDBOOK, *supra* note 45, at 6.

[138] MARINE CORPS HANDBOOK, *supra* note 45, at 7.

[139] ARMY HANDBOOK, *supra* note 45.

may cause issues in any detail.[140] Even when cobbled together, these handbooks do not provide a clear picture of the acceptable ways servicemembers can use social media.

Perhaps in an attempt to fill the gap in guidance on the appropriate use of social media, the Army issued All Army Activities (ALARACT) Message 122/2015[141] and has produced a plan for the promotion of professional online conduct,[142] the discussion of which follows.

A. All Army Activities Message 122/2015

The ALARACT Message 122/2015 provides some helpful information to all servicemembers (not just soldiers) as to what type of behavior is unacceptable in an online setting, by providing some key definitions. It defines online conduct as well as online misconduct and electronic communication which helps to clarify the context of the speech to be regulated.[143] Online conduct is the use of electronic communication in an *official or personal* capacity that is consistent with the Army Values and standards of conduct.[144] Online misconduct is defined as the use of electronic communication to inflict harm.[145] The examples provided in the ALARACT describing what constitutes online misconduct cover a wide range of conduct,[146] but does not cover all the actions that might cause a soldier to run afoul of the UCMJ. Most of the actions described are prohibited by regulation rather than by statute, and the "harm" described seems to be focused toward preventing harm to other individuals, rather than any potential harm that statements may have on the chain of command or the Army's ability to maintain good order and

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[140] The Air Force guide, after stating that all regulations that "normally apply" to airmen apply, explains that "speaking disrespectful words in violation of the UCMJ" is problematic. AIR FORCE HANDBOOK, *supra* note 45, at 4.

[141] All Army Activities Message, 122/2015, 271301Z Jul 15, U.S. Dep't of Army, subject: ALARACT Professionalization of Online Conduct [hereinafter ALARACT 122/2015].

[142] Memorandum from Sec'y of Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Implementation Plan—Professionalization of Online Conduct (16 June 2015).

[143] ALARACT 122/2015, *supra* note 141, para. 3A.

[144] *Id.* para. 3B.

[145] *Id.* para. 3C.

[146] Examples given include harassment, bullying, hazing, stalking, discrimination, retaliation, or any other types of misconduct that undermine dignity and respect. *Id.* para. 4.

discipline.[147] Furthermore, the message itself is not punitive and does not actually create new misconduct; it merely reminds soldiers of some of the ways that online speech may be problematic. The Army's plan for the regulation of and training about professional online behavior, discussed in the next section, may be an attempt to fill the remaining gap.

B. Secretary of the Army Memorandum—Professionalization of Online Conduct

On June 16, 2015, the Secretary of the Army published a memorandum providing an implementation plan assigning primary and supporting roles in the "Army effort to promote professional Online Conduct by current and future [s]oldiers, Army civilians, contractors, and [f]amily members."[148] In addition, the memorandum lays out the Army's view of how social media is affecting the force.

> The evolution of the Internet, social media, and other electronic communications media over the last decade has altered how people communicate and interact. Protected by a sense of anonymity and lack of accountability, some individuals in society are participating in inappropriate and potentially harmful interactions using electronic communications. For organizations, this type of behavior undermines trust within and damages their public reputation. The Army must take the initiative to clarify its standards for Online Conduct. As members of the Army Team, our individual interactions offline and online reflect on the Army and our values. Therefore, it is crucial that we act responsibly and understand that Army standards of conduct apply to all aspects of our life, including Online Conduct. Harassment, bullying, hazing, stalking, discrimination, retaliation, and any other type of misconduct that undermines dignity and respect are not consistent with the Army Values. Individuals who participate in or condone misconduct, whether offline or

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[147] "Hazing, bullying and other behaviors that undermine dignity and respect" are prohibited by regulation and made punishable under the UCMJ. AR 600-20, *supra* note 88, para. 4-19.

[148] ALARACT 122/2015, *supra* note 141.

> online, may be subject to criminal, disciplinary, and/or administrative action.[149]

The plan's goal is to clarify standards for online conduct through three lines of effort: Policy/Regulation, Training, and Awareness.[150] The awareness campaign, "Think, Type, Post" was launched in 2015 and is designed to educate and inform the Army family on the proper use of electronic communications.[151] The policy/regulation aspect of the plan calls for updating current policies, regulations, contracts and agreements, as well as creating a tracking system for online-related incidents.[152] The plan for training is to update existing "treatment of persons," Equal Opportunity, and Equal Employment Opportunity policies, as well as computer user training.[153] While the object of the training update is to "train current and future [s]oldiers, Army [c]ivilians, and contractors how to protect themselves, identify and prevent inappropriate behavior, and report online-related incidents,"[154] the focus of the implementation plan is clearly meant to deal with online behavior surrounding and incident to the Army's current battle to end sexual assault and sexual harassment within the ranks. Such a focus, while timely and appropriate, is nevertheless too narrow and leaves soldiers to deal with other types of online misconduct on their own. Any training related to online conduct must necessarily address what types of conduct to refrain from, but should also include information for soldiers on how they can protect themselves online by managing privacy settings.[155]

C. A Step in the Right Direction?

The efforts by the services to inform their members of the acceptable limits for online conduct are laudatory, but, taken together, they do not present a complete picture of the current state of the law that regulates servicemember speech. Additionally, the regulation the Secretary of the

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[149] *Id.*
[150] *Id.*
[151] *STAND TO!: Online Conduct—Think, Type, Post*, ARMY (June 16, 2015), http://www.army.mil/standto/ archive_2015-06-16/.
[152] ALARACT 122/2015, *supra* note 141. An "online-related incident" is one where an electronic communication is used as the primary means for committing misconduct, or the electronic communication, standing alone, constitutes the most serious offense among a number of offenses. *Id.*
[153] *Id.*
[154] *Id.*
[155] *See* App. A, *infra* for training recommendations.

Army describes in his memorandum would be encompassed in Army regulations only,[156] and would not affect the regulation of speech by the other services: each service would need to create its own regulation and policy, which would undoubtedly differ from one another. Today's military operates in a mostly joint environment,[157] and social media use occurs throughout the DoD. The creation of an Army regulation does not assist the other services, and each service will likely handle the issue of online misconduct in a slightly different fashion.

If the goal is to clarify what acceptable online behavior is, simple and straightforward is better. Soldiers, sailors, airmen, marines, and coast guardsmen should be able to consult a single source to determine what conduct is prohibited. Rules regarding bullying, hazing and sexual harassment should not vary between services. Judges should not have to grapple with whether a regulation is actually punitive, as it may purport to be.[158] Many of the provisions of the UCMJ are applicable to online conduct in their current form,[159] and others can be easily modified to incorporate online misconduct.[160]

V. Wave-Tops and Undertows

Each of the articles of the UCMJ discussed in the following section are either currently applicable to online misconduct or should be amended to allow for its incorporation. No discussion of the current state of the UCMJ is complete without reference to the recommendations made by the Military Justice Review Group (MJRG).[161] For each of the articles discussed, the MJRG used the UCMJ as the baseline for reassessing the statute's effectiveness and applicability to current military practice, and has made recommendations to Congress as to whether any change should

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[156] ALARACT 122/2015, *supra* note 141.

[157] JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015 (2015).

[158] *See* discussion of Article 92, *infra* Sect. V.D.

[159] *See* 10 U.S.C. §§ 889, 891, 894, 933 (2012).

[160] Use of the term "online misconduct" in this paper is not an adoption of the definition provided in ALARACT 122/2015. The term is meant to encompass a broader scheme of misconduct. ALARACT 122/2015, *supra* note 141.

[161] The Military Justice Review Group (MJRG) was formed at the direction of the Secretary of Defense, on the recommendation of the Joint Chiefs of Staff, to complete a holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline. REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 5 (2015) [hereinafter MJRG REPORT].

be made.[162] Where the MJRG made relevant recommendations regarding statutory changes, those recommendations are also discussed here.

A. Contemptuous Words

Article 88 of the UCMJ prohibits commissioned officers from using contemptuous words against certain senior government officials.[163] Contemptuous words are those which are insulting, rude, disdainful, or otherwise disrespectfully attribute to another a quality of meanness, disreputableness, or worthlessness.[164] Historically, this provision dates back to the British Articles of War, which were largely adopted at the beginning of the Revolutionary War.[165] Under the Continental Congress's Articles of War in 1775, any officer or enlisted person behaving with "contempt or disrespect toward the general or general's, or commanders in chief of the continental forces, or [] speak[ing] false words, tending to his or their hurt or dishonor" could be punished by a court-martial.[166] While the persons against whom contemptuous speech is prohibited has

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[162] *Id*. at 5–8 (2015). In some cases, they recommended no change to the position of the statute within the UCMJ, to a provision's language, or both. *Id*. In reaching their conclusions, the MJRG was guided by five principles, set out by the DoD General Counsel:

> 1. Use the current UCMJ as a point of departure for baseline reassessment;
> 2. Where they differ with existing military practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice;
> 3. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services;
> 4. Consider any recommendations, proposals, or analysis relating to military justice by the Response Systems Panel; and
> 5. Consider, as appropriate, the recommendation, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in a Combat Zone.

Id. at 5–6.

[163] 10 U.S.C. § 888 (2012).

[164] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK para. 3-12-1*d* (1 Sept. 2014) [hereinafter DA PAM 27-9]. *See also* Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW. July 1999.

[165] United States v. Howe, 37 C.M.R. 429 (1967).

[166] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 953–54 (photo reprint 1920) (2d ed. 1896).

changed,[167] the purpose behind the statute remains the same: it promotes the military's interest in ensuring a qualified, effective force.[168]

Only one appellate case has involved this particular charge,[169] but the facts of the case are informative as to why the charge remains relevant in the age of social media. In *United States v. Howe*, a Second Lieutenant (Lt.) in the U.S. Army joined in a rally against the Vietnam War, carrying a sign that read, "Let's have more than a choice between petty ignorant facists [sic] in 1968" on one side, and "End Johnson's facist [*sic*] aggression in Viet Nam" on the other.[170] At the time of the rally, Howe was off-duty and in civilian clothes, but was recognized as a member of the military due to a lieutenant's rank emblem and Army sticker on his vehicle.[171] A military policeman who was present at the demonstration testified that he recognized three or four other servicemembers at the scene.[172]

The fact that the appellee in *Howe* was recognized as affiliated with the Army, even though he was not present in uniform or acting in an official capacity, lends this provision of the UCMJ its continued usefulness. On this point the court noted, "There is no means of knowing the number of other servicemen who may have been present, not in uniform, and not identified by the [military police officer]; nor the number of servicemen who may have seen the petitioner marching, on the films broadcast by the television stations."[173] Consequently, the article prevents such conduct from harming the morale and discipline of those other servicemembers.

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[167] Prior to the enactment of the 1950 Uniform Code of Military Justice, Article 62 of the Articles of War applied to both officers and "any other person subject to military law." Articles of War 62 of 1920.

[168] MJRG REPORT, *supra* note 161, at 718.

[169] *Id.* at 717.

[170] *Howe*, 37 C.M.R. at 432. Lieutenant Howe was convicted under Article 88 and also Article 133, UCMJ, Conduct Unbecoming an Officer and a Gentleman, and sentenced to a dismissal, total forfeitures, and confinement at hard labor for two years, which the convening authority reduced to one year. The appellate court affirmed his conviction. *Id.*

[171] Matthew B. Tully, *Watch what you say: Speech limitations under UCMJ*, ARMY TIMES (Aug. 27, 2007, 12:22 PM), http://archive.armytimes.com/article/20070827/BENEFITS 08/708270305/Watch-what-you-say-Speech-limits-under-UCMJ.

[172] *Howe*, 37 C.M.R. at 433.

[173] *Id.* The demonstration was recorded by at least two local television stations. *Id.*

Facebook, *Twitter*, and even *YouTube*[174] broadcast information to a much larger audience than a local television station did in 1967. "Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by [the] article, or the utterance of such contemptuous words in the presence of military inferiors" aggravates the nature of the offense.[175] Posting words like those used by Lt. Howe on a *Facebook* page or *Twitter* account would make that opinion known to anyone with access to the page. This might include junior members of the military or direct subordinates. To make matters worse, any individual present at a demonstration or similar event taking place in 2016 could record the event on a smartphone and post it to *Facebook* or *Twitter* without the knowledge of the participating servicemember (this essentially happened to Howe, who could be seen on the television broadcast of the rally[176]).

The current text of the statute reads:

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth or possession in which he is on duty or present shall be punished as a court-martial may direct.[177]

With one minor change, the article could better serve its purpose. Specifically, the language "in which he is on duty or present" when referring to contemptuous words against the governor or legislature of any state is unnecessarily limiting in light of the ability of an officer to post, tweet, or retweet from anywhere in the world.

The *Congressional Record* discussing the creation of the UCMJ does not directly address the requirement of physical presence in a state or

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[174] "Launched in May 2005, *YouTube* allows billions of people to discover, watch, [sic] and share originally-created videos. *YouTube* provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small." *About YouTube*, YOU TUBE, https://www.youtube.com/yt/about/ (last visited July 25, 2016).

[175] *Howe*, 37 C.M.R. at 444 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 167 (1951)). The current version of the *Manual for Courts-Martial* contains similar language. *See* MCM, *supra* note 26, pt. IV, ¶ 12c.

[176] *Id.* at 433.

[177] 10 U.S.C. § 888 (2012).

territory, though the provision has been part of the Articles of War since the Continental Congress adopted them in 1776.[178] It is relatively clear, however, from the language of the statute that the purpose is to preserve the authority of a Governor or legislator within their territory. Keeping that official's constituents from hearing insulting, rude, or disdainful language uttered about their governmental leaders in a non-political or private context helps maintain the respect and dignity of these officials. Yet, the possibility of an individual's contemptuous words coming to light and having an effect on the local community grows, depending on the number of social media sites used, the number of friends or followers an officer has and the privacy settings used by that individual. Transparency on such a global scale requires that the text of the statute be modified to bring the code in line with the ability of modern technology to widely disseminate information.[179]

B. Disrespect of a Superior Commissioned Officer

The prohibition against disrespecting a superior commissioned officer is an obvious and necessary restriction of servicemember speech,[180] but not all types of disrespectful speech regarding a superior commissioned officer are actionable under this statute. The language, action, or failure to act must be directed at the officer, and the accused must know that the individual is a superior commissioned officer.[181] The disrespect contemplated by the statute is more than discourtesy or rudeness and must be that which detracts from the respect due to the authority and person of a superior commissioned officer.[182] Additionally, the words must be conveyed to, against, or in reference to the officer in question.[183] The disrespect may come in the form of gestures or actions, so long as those actions are directed toward a superior commissioned officer,[184] and the

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[178] *Howe*, 37 C.M.R. 429, (citing WINTHROP, *supra* note 168).
[179] *See infra* App. B.
[180] 10 U.S.C. § 889 (2012).
[181] MCM, *supra* note 26, pt. IV, ¶ 13.b(2)(4).
[182] U.S. v. Sorrells, 49 C.M.R. 44, 45 (C.M.A. 1974) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶168 (1969) (Revised edition)).
[183] *Sorrells*, 49 C.M.R. at 45 (citing WINTHROP, *supra* note 168, at 467–68). Private Sorrells's conviction under Article 89 was overturned because, though he yelled and used profanity in an altercation with a captain, that officer was not the subject of his rant. *Id.*
[184] United States v. Van Beek, 47 C.M.R. (C.M.A. 1973). Sergeant Van Beek was convicted under Article 89 for detonating a chemical hand grenade on the windowsill of Captain Reams's quarters. *Id.*

context in which the speech occurs may also be taken into account in determining whether it qualifies as disrespect.[185]

This provision has the flexibility to be useful in the social-media context, because the officer at which the words are directed need not necessarily be present to hear them. Rather than saying the words directly to the officer, posting the same to the officer's social-media account is likely sufficient to satisfy the "directed at" requirement. Posting about a superior commissioned officer on a personal page,[186] or on the unit page, would also likely meet the requirement. Additionally, the officer at whom the speech is directed need not be in the execution of her office at the time of the disrespectful behavior.[187] Therefore, any disrespectful posting, be it words, pictures, or other content that is directed at any superior commissioned officer in the service, could be punishable under this article.[188]

It is unlikely that a single act of disrespect would cause a servicemember to face a court-marital, but it is not unreasonable to fathom non-judicial consequences under Article 15, UCMJ,[189] or administrative action flowing from online acts of disrespect. The proliferation of senior leader *Facebook* and *Twitter* accounts, combined with a culture of transparency of thought, requires servicemembers to be more guarded with their thoughts about senior leaders on social media. An ill-placed post on a senior leader page, containing "opprobrious epithets or other

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185 United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000).

186 It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable for what was said or done in a purely private conversation. MCM, *supra* note 26, pt. IV, ¶ 13.c(4). If the only audience to the conduct were not members of the military, for example a *Facebook* page with only a few specific members, then an analysis of the surrounding facts and circumstances would need to determine whether the conversation was truly private.

187 MCM, *supra* note 26, pt. IV, ¶ 13.c(1)(c).

188 The MJRG recommended incorporating "assaulting a superior commissioned officer," which is currently codified in Article 90, UCMJ, into Article 89. The proposal "would align similar offenses under Article 89." These two offenses use the same definition of superior commissioned officer; however, assault of a superior commissioned officer under Article 90 currently requires the officer to be in the execution of his office. The assault or offer of assault as described in the language of the current Article 90 is unlikely to take place online; nevertheless, it is important for military justice practitioners to be aware of the potential change. In the near future, the posting of disrespectful words followed by a physical assault on a superior officer (or vice-versa) could result in the charging of both under a modified version of Article 89. MCM, *supra* note 26, pt. IV, ¶ 14.b(1)(d). Assumedly, the technical amendments discussed by the MJRG would include a syncing of this element. MJRG REPORT, *supra* note 161, at 720.

189 10 U.S.C. § 815 (2012).

contumelious or denunciatory language"[190] regarding that leader, could easily land a servicemember in hot water, and likely spell the end of that individual's career in the military.

C. Insubordination

The conduct prohibited by Article 91, UCMJ, is similar to that which is prohibited under Article 89, except that it proscribes insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.[191] The provision is broken into three parts, two of which are relevant to the current discussion.[192] Both the willful disobedience of a warrant officer, noncommissioned officer, or petty officer, and contemptuous or disrespectful language or deportment towards those persons are prohibited,[193] and each is relevant to the regulation of servicemember conduct on social media.

For the violation of an order to be punishable, it must be a lawful order that the accused has a duty to obey, and the accused must know that the individual giving the order is a warrant officer, noncommissioned officer, or petty officer.[194] Additionally, the order cannot be one to perform the general duties of a servicemember, but must be directed toward the "performance or nonperformance of some *special function*."[195] Any such order must also "relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline and usefulness of members of a command, and directly connected with the maintenance of good order in the service."[196] Interestingly, there need not be a superior-subordinate relationship between the accused and his victim for a violation of Article 91. A sergeant (E-5) can be the victim of disrespect from a staff sergeant (E-6).[197]

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[190] U.S. v. Sorrells, 49 C.M.R. 44, 45 (C.M.A. 1974).
[191] 10 U.S.C. § 891 (2012).
[192] The statute also addresses the assault of a warrant officer, noncommissioned officer, or petty officer. 10 U.S.C. § 891(1) (2012).
[193] 10 U.S.C. § 891(2)(3) (2012).
[194] MCM, *supra* note 26, pt. IV, ¶ 15.b(2).
[195] United States v. Bratcher, 18 U.S.C.M.A 125, 128 (C.M.R. 1969).
[196] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F 2002) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14.c(2)(a)(iii)(2000)).
[197] United States v. Diggs, 52 M.J. 251 (C.A.A.F. 2000).

While willful disobedience of a warrant officer, noncommissioned officer, or petty officer does not require the officer to be acting in the execution of his office, any contemptuous treatment or disrespectful language or deportment toward the same individual does require that he be executing his official position.[198] An individual is "in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[199] Some contemptuous treatment or disrespectful deportment must certainly take place in a face-to-face situation; however, it is easy to see how the use of disrespectful language need not be so. A warrant officer or enlisted member of a service could post all manner of disrespectful content to their own social media accounts (which are likely to have an audience including others subordinate to or who work with the victim), on the social media account of the victim, or to the unit's official social media sites (where the audience is sure to know the victim and such statements would have a direct effect on the morale or good order and discipline of the unit).[200]

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[198] MCM, *supra* note 26, pt. IV, ¶ 15.b(3)(e). A "language only" specification for disrespect does not exist. United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000) (overruling United States v. Wasson, 26 M.J. 894 (A.F.C.M.R. 1988)). *Najera* dealt with an Article 89 offense, but *Wasson* was an Article 91(3) case, so it is reasonable to believe that the reasoning from *Najera* applies to Article 91(3) offenses. *See* DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 5.10[5][a] n.497 (2d ed. 2012). *See also* Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW. (April 2001).

[199] MCM, *supra* note 26, pt. IV, ¶ 14.c(1)(b).

[200] One limitation to this provision is the requirement that the victim be in the execution of duties. The limitation is unfortunate in the face of military efforts to stop retaliation against sexual assault victims. *See* Sara Childress, *How the Military Retaliates Against Sexual Assault Victims*, FRONTLINE (May 18, 2015), www.pbs.org /wgbh/frontline/artile/ how-the-military-retaliates-against-sexual-assault-victims/. Some fifty-two percent of women who officially reported sexual assaults in 2014 perceived some form of social retaliation. SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY, VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 93 (Andrew R. Morral, et al. eds., 2015). Many report being harassed, physically attacked, or threatened by *their peers*. *Embattled: Retaliation against Sexual Assault Survivors in the U.S. Military*, HUMAN RIGHTS WATCH (May 18, 2015), https://www.hrw.org/report/2015/o5/18/embattled/retaliation-against-sexual-assault-survivors-us-military (emphasis added). The ability to charge warrant officers and enlisted members who disrespect victims who report sexual assault—who are their peers in a social media context—would provide greater deterrence than the current system, where such actions are punishable only as a violation of a lawful regulation under Article 92, UCMJ. AR 600-20, *supra* note 88, ch. 8; *see also* Judicial Proceedings Panel Request for Information Set #3, Question 81, 82, http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150519/05_JPP_RFI_Set3Q67-88_201505.pdf (last visited Oct. 17, 2016).

D. Violation of a Lawful General Order or Regulation

Any person subject to the UCMJ who violates or fails to obey any lawful order or regulation may be charged under Article 92, UCMJ.[201] A general order or regulation is presumed lawful so long as there is a valid military purpose, which is expressed in a clear, specific, narrowly drawn mandate.[202] The order or regulation must be directed at a group that includes the accused,[203] and it must also be punitive.[204]

Currently, Article 92 is the mechanism by which the military punishes hazing, bullying, and sexual harassment[205]—all of which can take place in an online setting. This use of a regulation as the middleman to punish behavior can lead to issues, because whether a regulation is punitive or not is a matter on which reasonable minds can differ. "No single characteristic of a general order determines whether it applies punitively to members of a command.[206] In *United States v. Green*, the Army Court of Criminal Appeals lays out how courts should analyze orders and regulations to determine their punitive nature.[207] First, a court must determine whether the directive is merely a guideline for conduct, or intended to regulate the conduct of individual servicemembers.[208] Second, the application of sanctions for violations of an order or regulation must be self-evident.[209] Third, the order or regulation cannot rely on subordinate commanders for implementation to give its effect as a code of conduct.[210] Regulations that do not meet these requirements cannot be enforced using Article 92.

Each service has its own policies when it comes to hazing, bullying, and sexual harassment through the use of social media. Army Regulation 600-20, paragraph 4-19, prohibits bullying and hazing, while Chapter 7

Written retaliation could also be potentially punished with a charge under Article 134, Indecent Language. *See infra* Section I.1.

[201] 10 U.S.C. § 892 (2012).

[202] MCM, *supra* note 26, pt. IV, ¶ 14.c(2)(a)(iii).

[203] United States v. Jackson, 46 C.M.R. 1128 (A.C.M.R. 1973) (finding that a regulation was intended to guide military police rather than individual soldiers).

[204] *See* United States v. Pope, 63 M.J. 68 (C.A.A.F. 2006); *see generally* Captain John B. DiChiara, *Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations*, 17 A.F. L. REV. 61 (1975).

[205] *See* United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990); United States v. Hecker, 42 M.J. 640 (A.F. Ct. Crim. App. 1995).

[206] United States v. Nardell, 45 C.M.R 101, 103 (A.C.M.R. 1972).

[207] United States v. Green, 58 M.J. 855 (A. Ct. Crim. App. 2003).

[208] *Id.* at 857.

[209] *Id.*

[210] *Id.*

deals exclusively with the prevention of sexual harassment.[211] While paragraph 4-19 is clearly punitive, whether or not Chapter 7 is punitive is not clear.[212] The Navy proscribes sexual harassment and hazing (but does not address bullying) through two separate policies, both of which are clearly punitive.[213] The Air Force also uses two policies to prohibit sexual harassment and hazing.[214] The regulation addressing sexual harassment purports to make harassment based on sexual orientation punitive, but no other section of that regulation is specified as punishable under the UCMJ.[215] The Marine Corps orders are explicitly punitive,[216] but neither of the Coast Guard instructions are likely punitive.[217] Within the current state of the law, very few actions of sexual harassment and hazing can be punished by the services under Article 92.[218]

The only other current option comes in the form of Article 93, UCMJ, but that application is extremely limited. Article 93 of the UCMJ proscribes the "cruelty toward, or oppression or maltreatment of, any person *subject to his orders*."[219] This means that any act of sexual harassment, hazing, or bullying that occurs between peers, by a subordinate to a superior, or is directed toward a civilian cannot be charged under this statute. The limited application of Article 93, along with the

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[211] AR 600-20, *supra* note 88, para. 4-19, ch.7.

[212] *Id.* Recently, an Army military judge found Chapter 7 of Army Regulation (AR) 600-20 failed to meet the requirements set out by *Green*, and dismissed a charge of sexual harassment under Article 92. United States v. Patterson, at 37 (1st Armored Div., Ft. Bliss, TX, Aug. 20, 2015) (on file with author).

[213] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5300.26, DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT (3 Jan. 206) [hereinafter SECNAVIST 5300.26]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1610.2A, DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY ON HAZING (15 Jul. 2005) [hereinafter SECNAVIST 1610.2A].

[214] AFI 1-1, *supra* note 133; U.S. DEP'T OF AIR FORCE, INSTR. 36-2706, EQUAL OPPORTUNITY PROGRAM MILITARY AND CIVILIAN (5 Oct. 2010) [hereinafter AFI 36-2706].

[215] AFI 36-2706, *supra* note 213, para. 1.1.3. Cyber-bullying also takes place in the form of "slut-shaming," which is often encountered by victims of sexual assault as a form of retaliation. *See* Emily Poole, *Hey Girls, Did You Know? Slut-Shaming on the Internet Needs to Stop*, 48 U.S.F. L. Rev. 221 (2013).

[216] U.S. MARINE CORPS, ORDER 1000.9A, SEXUAL HARASSMENT (30 May 2006) [hereinafter MCO 1000.9A]; U.S. MARINE CORPS, ORDER 1700.28B, HAZING (20 May 2013) [hereinafter MCO 1700.28B].

[217] U.S. Coast Guard, Commandant Instr. M5350.4C, Coast Guard Civil Rights Manual (May 2010) [hereinafter COMDTINST M5350.4C]; U.S. Coast Guard, Commandant Instr. 1610.1, Hazing Awareness Training (23 Jan. 1991) [hereinafter COMDTINST 1610.1].

[218] For a more detailed discussion of the services bullying and hazing regulations *see* Major Stephen M. Hernandez, *A Better Understanding of Bullying and Hazing in the Military*, 223 MIL. L. REV. 415 (2015).

[219] 10 U.S.C. § 893 (2012).

inability to punish under Article 92, left huge gaps in the services' current ability to enforce their policies to discourage sexual harassment and hazing.[220] Currently, only the Army has any regulation against bullying.[221]

Like so many of the issues that come with the wide-spread use of social media, the potential that servicemembers will bully, haze, and harass using *Facebook* or *Twitter* calls for a unified approach to the regulation of these offenses across the services. The most straightforward way to accomplish that is by adding these offenses to the UCMJ.[222] Because any statute would regulate the speech of servicemembers who still have the right to say mean things about each other in certain contexts, the best place for a provision would be a specified offense under Article 134, UCMJ.[223] Placing these offenses within Article 134 would require any Internet posting that harasses, is harmful, uses demeaning language, or contains content as part of a rite of passage or hazing to have a military nexus;[224] therefore, it would be less likely to run afoul of the First Amendment.

E. Mutiny

Mutiny is a term that many associate with the Navy of yesteryear, or perhaps with the 1962 film *Mutiny on the Bounty*, starring Marlon Brando.[225] In reality, mutiny is still a charge under the UCMJ,[226] and it is still in use.[227] There are two types of mutiny that can be committed.[228] Because it is not a charge seen often, it is worth setting out the elements in full:

([1]) *Mutiny by refusing to obey orders or perform duty*

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[220] *See also supra* note 199 and accompanying sources.
[221] AR 600-20, *supra* note 88, para. 4-19.
[222] *See infra* App. C–E.
[223] 10 U.S.C. § 934 (2012); *see also infra* Section I.
[224] Under Article 134, UCMJ, conduct must either be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934 (2012).
[225] MUTINY ON THE BOUNTY (Metro-Goldwin-Mayer 1962).
[226] There are also several federal laws that prohibit similar acts. *See* MJRG REPORT, *supra* note 161, at 741.
[227] In 2013, a case was decided at the Army Court of Criminal Appeals regarding a charge of mutiny, among other things. United States v. Savage, 72 M.J. 560 (A.C.C.A. 2013).
[228] United States v. Duggan, 15 C.M.R. 396, 398 (C.M.A. 1954).

> (a) That the accused refused to obey orders or otherwise do the accused's duty;
>
> (b) That the accused in refusing to obey orders to perform duty acted in concert with another person or persons; and
>
> (c) That the accused did so with the intent to usurp or override lawful military authority.[229]
>
> ([2]) *Mutiny by creating violence or disturbance*.
>
> (a) That the accused created violence or a disturbance; and
>
> (b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.[230]

The first type of mutiny may be committed by a refusal to obey orders from a proper authority, if the necessary intent to override military authority and concerted action are present.[231] In the second type, a person with a similar intent, either acting alone or with others, creates violence or disturbance may commit mutiny.[232]

The first type of mutiny must be committed in a group, and it is this form of mutiny, one which does not always end in violence, that is most applicable to the social media context. In order to meet the elements of the statute, both a collective intent and a collective action are necessary.[233] The action itself need not be violent; it may consist of a persistent and concerted refusal or omission to obey orders.[234] To return to the hypothetical *Facebook* post by General Gates at the beginning of this paper: imagine that the day after the post appeared, a group of officers met to discuss the issue, and that after that discussion, they refused to pick up their arms and fight when ordered to do so. Such action would likely

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[229] MCM, *supra* note 26, pt. IV, ¶ 18.b(2). The elements for the two types of mutiny are listed in the *Manual* in the opposite order listed here, however, to remain consistent with the analysis in *Duggan*, they have been reversed for this discussion.
[230] *Id.* pt. IV, ¶ 18.b(1).
[231] *Duggan*, 15 C.M.R. at 398.
[232] *Id.*
[233] United States v. Woolbright, 31 C.M.R. 36 (C.M.A. 1961).
[234] *Duggan*, 15 C.M.R. 396.

be a mutiny of the first type, if the act were done with the proper intent.[235] If the officers never met, but merely made positive responses to the post and then took the same concerted action, the discussion on *Facebook* would—at the very least—serve as evidence of their collective intent. To illustrate with a modern-day example, if Lieutenant Colonel Terrance Lakin had a *Facebook* page, he might have called other soldiers to join him in refusing a lawful order to deploy.[236]

It is possible that in the second type of mutiny, communications on social media by individuals involved in a violent plot to overthrow military authority could be used to prove intent that the overthrow was the purpose behind an action. This could also be true for information posted to an individual's *Facebook* page, as this second form of mutiny does not require a collective.[237]

F. Provoking Speech

There are certain well-defined and narrowly-limited classes of speech that have never been thought to raise constitutional issues when prevented and punished. These classes include speech that is lewd and obscene; profane; libelous; insulting; or "fighting words"—speech, which, by its very utterance, inflicts injury and tends to incite an immediate breach of

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[235] A collective intent to defy authority would fall short of a collective intent to usurp or override military authority. United States v. Snood, 42 C.M.R. 635, 640 (A.C.M.R. 1970).

[236] *See* Jerome R. Corsi, *Officer Imprisoned for Challenging Obama Tells Story*, WND (Aug. 10, 2012, 9:21 PM), www.wnd.com/2012/08/officer-imprisoned-for-challenging-obama-tells-his-story/. In 2008, after questioning President Obama's eligibility for office, then-Lieutenant Colonel (LTC) Terry Lakin refused orders to deploy to Afghanistan, stating, "I don't know who my commander-in-chief is." Sharon Rondeau, *Dr. Terry Lakin: Congressmen Admitted They Did Not Know Who Obama Is*, BIRTHER REPORT, http://www.birtherreport.com/2015/02/dr-terry-lakin-congressman-admitted.
html. Thus, LTC Lakin was charged with missing movement (Article 87, UCMJ) and four specifications of failure to obey a lawful order (Article 92). United States v. LTC Terrence Lakin, No. 20100995, at Charge Sheet (Walter Reed Army Medical Center, Washington, D.C., Dec. 16, 2010). He pleaded guilty to some of the charges, was convicted of others, and was sentenced to a dismissal from the service and six months in prison. Huma Khan, *'Birther' Dismissed from Army for Refusing Deployment, Sentenced to Six Months in Prison*, ABC NEWS (Dec. 10, 2010), http://abcnews.go.com/Politics /birther-terry-lakin-dismissed-army-sentenced-months-prison/story?id=12414886.

[237] *See* Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857 (1951). Today, the Communist Political Association could post information to a website or official *Facebook* page in order to further their goals.

peace.[238] Article 117 of the UCMJ is the military's codification of this principle.[239]

The military's attempts to prevent the use of violence by a person to whom such speeches or gestures are directed, and forestall the commission of an offense by an otherwise innocent party, predates the Court's carving out of the "fighting words" doctrine by several hundred years.[240] Because the regulation of speech walks a thin line between what is protected speech and what is not, the speech and gestures proscribed by Article 117 must be made in the presence of the person to whom they are directed; however, that person need not be conscious of them.[241] Additionally, the speech or gestures—by their very utterance—must be of a nature that a reasonable person would respond violently or turbulently[242] or, because of its nature, likely to lead to quarrels, fights, or other disturbances.[243] Such a reaction must be of an immediate nature.[244] The right to use abusive epithets has been held to be of slight social value,[245] which is outweighed by a state's interest in order. The military's interest in maintaining morale and good order and discipline is stronger still.

The requirement that the speech occur in the presence of the individual toward whom it is directed and provoke an immediate response makes it difficult to use this provision to charge online conduct, but it may not be impossible. In *Nebraska v. Drahota*, the Nebraska Supreme Court analyzed whether the fighting-words doctrine could be applied to personally abusive speech when conveyed in a targeted, one-on-one fashion.[246] The *Drahota* court looked specifically at an email exchange between a college student and his former professor.[247] The court ultimately ruled that Drahota's emails did not constitute fighting words; they concluded that the words would have provoked an immediate and

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[238] Chaplinsky v. New Hampshire, 314 U.S. 568, 571–72 (1942).

[239] The military courts use an objective test to identify provoking speech—whether a reasonable person would expect the words to induce a breach of the peace. *See* United States v. Killion, No. S32193, 2015 WL 430323, at *5 (A.F. Ct. Crim. App. Jan. 28, 2015) *review granted* 75 M.J. 14 (C.A.A.F. June 3, 2015).

[240] *See* DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 5.38[2] (2d ed. 2012).

[241] *Id.* at § 5.38[3][b][i].

[242] United States v. Nicolas, 14 C.M. R. 683 (A.F.B.R. 1954).

[243] United States v. Davis, 37 M.M 152, 155 (C.M.A. 1993).

[244] *See* Cantwell v. State of Connecticut, 310 U.S. 296, 309–10 (1940); *Chaplinsky*, 314 U.S.at 571–72; DA PAM 27-9, *supra* note 166, para. 3-42-1*d.*

[245] State v. Broadstone, 233 Neb 595, 447 N.W. 2d 30 (1989).

[246] State v. Drahota, 280 Neb. 627, 629-30 (2010).

[247] *Id.*

turbulent response, but despite this, found they were political speech.[248] The court also discussed the fact that the professor could not have retaliated, because he did not know who the sender was, and therefore would not have known against whom to retaliate.[249]

Applying this concept to social media, *Drahota* could criminalize situations where words expressed on one-on-one online platforms (i.e., email, text, *Facebook Messenger*) are sufficiently inflammatory as to incite violence or turbulence, because the words would be directed at a particular individual who could readily know both the identity of the sender and where to locate that person. Such a case under Article 117 would be very fact-specific and a charge under this Article should be used sparingly, if ever. A slight amendment to this statute, to include the reality of posting inflammatory speech to social media, would give this statute greater relevance.[250]

G. Cyber-stalking

Twenty-six percent of young women aged eighteen to twenty-four have been stalked online,[251] and social media is the most common place to encounter this type of harassment.[252] The military's current statute proscribing stalking does not encompass cyber-stalking.[253] The MJRG has recommended that cyber-stalking be added to the statute, along with provisions for threats to intimate partners.[254] Additionally, the MJRG has recommended moving the statute away from Article 120, UCMJ, recognizing that stalking is not necessarily sexual in nature, though it can be.[255]

The language proposed by the MJRG is very similar to that of the current federal statute criminalizing cyber-stalking,[256] with one significant exception. The statute recommended by the MJRG addressed only courses of conduct that would cause or induce a reasonable fear of death or bodily

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[248] *Id.* at 638.
[249] *Id.*
[250] *See infra* App. F.
[251] Maeve Duggan, *Online Harassment*, PEW RES. CENT. (Oct. 22, 2014), http://www .pewinternet.org. 2014/10/22/online-harassment.
[252] *Id.*
[253] 10 U.S.C. § 920 (2012).
[254] MJRG REPORT, *supra* note 161, at 878.
[255] *Id.*
[256] 18 U.S.C.A. § 2261A (2013).

harm (including sexual assault),[257] leaving a course of conduct that would cause or reasonably be expected to cause substantial emotional distress unaddressed.[258] The report further identified actions that might cause emotional distress, or that target professional reputation, as uniquely military; therefore, they determined such conduct is more appropriately dealt with through regulation, or as an enumerated offense under Article 134.[259] However, this drafting fails to address what could be serious misconduct.

Not every case of stalking will cause the victim to be in fear of bodily harm, but it may cause the victim to be unable to work or function on a day-to-day basis. Causing severe emotional distress is not necessarily a military-specific offense. Additionally, while such conduct may be contrary to good order and discipline, or service discrediting in some cases, that may not always be true, and need not be to make the conduct punishable. Recent cases out of the federal circuit courts have held that because 18 U.S.C. § 2216A proscribes harassing and intimidating conduct, it is not facially invalid under the First Amendment.[260] Specifically, because the statute criminalizes a "course of *conduct* that . . . causes . . . substantial emotional distress," the proscribed acts are tethered to the underlying criminal conduct, and not to speech.[261] Finally, "because the statute requires both malicious intent on the part of the defendant and substantial harm to the victim, it is difficult to imagine what constitutionally protected speech would fall under these statutory prohibitions."[262] "It has rarely been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[263] Following this reasoning, causing substantial emotional distress should be included in any update to the UCMJ stalking provision

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[257] MJRG REPORT, *supra* note 161, at 879. The intent to cause or reasonably expect to cause substantial emotional distress is specifically provided for in the federal statute. 18 U.S.C.A. § 2261A(2)(B) (2013). The MJRG report notes that "substantial emotional distress" may be addressed under Article 134, a uniquely military offense. MJRG Report, *supra* note 158, at 881. The language present in the federal statute suggests that it is not uniquely military in nature and, therefore, should be addressed in a broader form.

[258] *Id.* at 880–81.

[259] *Id.*

[260] United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014) (citing United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012)).

[261] *Osinger*, 753 F.3d at 944 (emphasis in original) (internal citation omitted).

[262] *Petrovic*, 701 F.3d at 856; *see also* United States v. Sayer, 748 F.3d 425, 434 (1st Cir. 2014) (rejecting a facial challenge to 18 U.S.C. § 2261A(2)(A) on similar grounds).

[263] United States v. Stevens, 559 U.S. 460, 471 (2010).

in order to make such conduct punishable, and cause the language to mirror the federal statute.[264] Anything less would necessarily fall short of upholding the standards of conduct expected of military members.

H. Conduct Unbecoming an Officer and Gentleman

Conduct that occurs in an official capacity that is disgraceful or dishonors a person as an officer, seriously compromises an officer's character as a gentleman, or that occurs in an unofficial or private capacity but dishonors or disgraces an officer personally, and therefore seriously compromises the person's standing as an officer, is conduct unbecoming of an officer and a gentleman in violation of Article 133, UCMJ.[265] The given definition for conduct unbecoming is extremely broad and lends itself easily to the regulation of online conduct by commissioned officers. Though the statute is imprecise, it has been upheld against a void-for-vagueness challenge on several occasions.[266] As explained by the courts, the statute may proscribe any conduct that a reasonable person under the circumstances would understand to be proscribed.[267]

Case law provides samples of unbecoming conduct that could foreseeably occur in an online setting. In *United States v. Hartwig*, for instance, Captain Hartwig responded to a "Dear Soldier" letter, which was delivered to him during Operation Desert Storm.[268] His response was overtly sexual in nature and asked the fourteen-year-old girl who sent the letter to send him her fantasies, and a nude photograph, and asked whether she would like to visit a nude beach.[269] The Court of Military Appeals found that such private speech can constitute a violation of Article 133,[270] and that speech need not be published before it can be punishable.[271] This exchange could easily have taken place over email or using an instant messaging service; or, rather than a "Dear Soldier" letter, CPT Hartwig

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[264] *See infra* App. F for the statute proposed by the MJRG, plus the additional language which would cover substantial emotional distress.
[265] MCM, *supra* note 26, pt. IV, ¶59.c(2).
[266] *See* Parker v. Levy, 417 U.S. 733, 743 (1974); United States v. Zander, 46 M.J. 558 (N-M. Ct. Crim. App. 1997).
[267] United States v. Van Steenwyk, 21 M.J. 795, 801–02 (N.M.C.M.R. 1985).
[268] United States v. Hartwig, 39 M.J. 125, 127 (C.M.A. 1994).
[269] *Id.*
[270] *Id.* at 128. *See also* United States v. Norvell, 26 M.J. 477 (C.M.A. 1988) (upholding a conviction under Article 133 for language from an officer to an enlisted woman that described how to avoid detection of marijuana use in a urinalysis).
[271] *Hartwig*, 39 M.J. at 128.

might have met the young woman on *Facebook*. If that were the case, the information on her *Facebook* page could be used to show a lack of mistake of fact as to her age.[272] *Hartwig* is also instructional in that its holding makes clear the prosecution need not prove actual damage to the reputation of the military, but rather only the tendency of the language to cause damage.[273]

In a second case, *United States v. Boyett*, the appellant was convicted of engaging in an unprofessional social relationship, including sexual intercourse, with an enlisted servicemember.[274] Communications between the parties to the relationship that occurred offline could have easily taken place using an instant messenger or other social media platform, especially if one member was deployed. While unprofessional relationships between officers and enlisted personnel can be charged (with respect to the officer) under Article 133, all members of the services must also be aware of their own policies against fraternization between the ranks so as not to violate the customs of their service.[275]

I. Article 134, the Catch-All

The general article of the UCMJ covers all other "disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons . . . may be guilty."[276] Any act that a servicemember commits, or fails to commit, that is prejudicial to good order and discipline, or is of a nature to bring discredit upon the armed forces[277] may be charged under this article, unless it is addressed in a more specific statute.[278] The specified offenses laid out in Article 134 are created by Executive Order.[279] Two of the specified offenses are of particular relevance to efforts to regulate online misconduct: indecent language and communicating a threat.

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[272] A mistake of fact as to age was part of Hartwig's defense. *Id.* at 130.
[273] *Id.*
[274] United States v. Boyett, 42 M.J. 150 (C.A.A.F. 1995).
[275] MCM, *supra* note 26, pt. IV, ¶ 60.b(1)(2).
[276] 10 U.S.C. § 934 (2012).
[277] MCM, *supra* note 26, pt. IV, ¶ 60.b(1)(2).
[278] *Id.* at pt. IV, ¶ 60.c(5)(a).
[279] *Id.* at 1.

1. Indecent Language

The First Amendment does not protect obscenity.[280] "Indecent" is synonymous with "obscene," and such language is not afforded constitutional protections.[281] Language that is communicated, either in writing or orally, by an accused to another person that is indecent and either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces can be charged under the current version of Article 134, UCMJ.[282] "Indecent language" is words that are grossly offensive or shock the moral sense,[283] or which reasonably tend to corrupt morals or incite libidinous thoughts.[284]

Indecent language that is communicated in an online forum is punishable under this article. In *United States v. Lambert*, the Air Force Court of Criminal Appeals addressed whether speech conveyed in a *private* chat room could still be regulated.[285] The appellant's argument that indecent language between two consenting adults is constitutionally protected was unpersuasive to the court in light of *United States v. Moore*, where the Court of Military Appeals held that while "the personal relationship existing between a given speaker and his auditor,"[286] is a factor in determining whether the language is indecent it does not otherwise provide constitutional protection to language that "was demeaning vulgarity interwoven with threats and demands for money and sex."[287]

If language of an indecent nature is not constitutionally protected when spoken between consenting adults, it is certainly not protected when broadcast to a greater audience on social media. Additionally, any

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[280] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).
[281] United States v. French, 31 M.J. 57, 59 (C.M.A. 1990).
[282] MCM, *supra* note 26, pt. IV, ¶ 89.b.
[283] United States v. Lambert, No. 38291 2014 WL 842966, at *2 (A. F. Ct. Crim. App Feb. 24, 2014).
[284] MCM, *supra* note 26, pt. IV, ¶ 89.c.
[285] *Lambert*, No. 38291 2014 WL at *1. *See also* United States v. Moore, 38 M.J. 490 (C.M.A. 1994) (holding that the indecent remarks of the appellant were not protected by the First Amendment and that indecent language, even between two consenting adults, is not constitutionally protected by the right of privacy).
[286] United States v. French, 31 M.J. 57, 59 (C.M.A. 1990).
[287] *Moore*, 38 M.J. at 492–93.

indecent language communicated via *Facebook Messenger*,[288] even to another consenting adult, may be punishable.

The types of language that could be charged using this provision are numerous, but because of the requirement that the words tend to incite libidinous thoughts, disrespectful or contemptuous language is not appropriate for a charge under this section of the code. Such language would need to be addressed by Article 91 (for a noncommissioned, warrant or petty officer in the execution of her officer) or Article 89 (for an officer). A wide gap in the ability of the military to punish language directed at senior enlisted members or used in retaliation in a social media context still exists.

2. Communicating a Threat

The government's efforts to criminalize the communication of a threat have seen substantial attention in the last year.[289] Currently, the elements of this offense are as follows:

> (1) That the accused communicated certain language expressing a present determination to intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) That the communication was made known to that person or to a third person;
>
> (3) That the communication was wrongful; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of goo order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[290]

In *Elonis v. United States*, the Supreme Court looked at a similar federal statute that made a communication in interstate commerce of a

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[288] *Messenger* is a *Facebook* mobile application that allows for sending text-type messages, photos, videos, and more. *Facebook Mobile Apps*, FACEBOOK, https://www.facebook.com/help/237721796268379 (last visited Sept. 12, 2016).

[289] *See* Elonis v. United States, 135 S. Ct. 2001 (2015); United States v. Rapert, 75 M.J. 164 (C.A.A.F. Mar. 18, 2016).

[290] MCM, *supra* note 26, pt. IV, ¶110b.

threat to kidnap or injure another person a crime.[291] The statute did not require that the accused have any mental state with respect to the language communicated.[292] The Court found that this lack of mens rea within the statute rendered it unenforceable, because the accused must know that his conduct fits the definition of an offense; therefore, he must have intended his statements as a threat.[293] In response to the decision in *Elonis*, the Joint Services Committee released a recommend change to the explanation portion of the Article 134 offense for public comment.[294]

The MJRG addressed the future of communicating a threat under Article 134, and recommended that it be removed from the Article and combined with a "[t]hreat or hoax designed or intended to cause panic or public fear"—which is also currently a specified offense under 134—and recommended creation of a new offense, Article 115.[295] It is clear from the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Rapert* that the changes proposed by the Joint Services Committee and the MJRG are not necessary to avoid the dilemma presented in *Elonis*.[296] In *Rapert*, the CAAF explained that, as written, Communicating a Threat under Article 134, UCMJ contains both an objective and subject prong.[297] An objective approach is taken when analyzing whether a communication constituted a threat under the first element—the existence of a threat should be evaluated from the point of

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[291] *Elonis*, 135 S. Ct. at 2008; 18 U.S.C. § 875(c).
[292] *Elonis*, 135 S. Ct. at 2008.
[293] *Id.* at 2013.
[294] MCM; Proposed Amendments, 80 Fed. Reg. 63209 (Oct.19, 2015). The proposed change recommended by the Joint Services Committee would amend the explanation to read:

> c. *Explanation*. For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat. However, it is not necessary to establish that the accused actually intended to do the injury threatened. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

Id.
[295] MJRG REPORT, *supra* note 161, at 855.
[296] United States v. Rapert, 75 M.J. 164 (C.A.A.F. Mar. 18, 2016). *See also infra* App. H for the statute proposed by the MJRG.
[297] *Rapert*, 75 M.J. at 168.

view of a reasonable person.[298] The third element of the offense, which requires a threat to be "wrongful" is understood to reference the accused's subjective intent.[299]

Though the CAAF has determined "the infirmities found in 18 U.S.C. § 875(c) are not replicated Article 134, UCMJ,"[300] the Supreme Court decision in *Elonis* provides two helpful insights into the conversation of criminalizing online conduct. First, it shows that what someone posts to *Facebook*, or to another other social media site, if done with the requisite intent, can be the basis of a charge of communicating a threat. In *Elonis*, all of the language—which included photographs—was posted to the appellant's *Facebook* page.[301] Second, it reiterates that threatening speech against others falls outside the realm of First Amendment protections.

VI. Conclusion

Opting out of connective media is not an option.[302] The military has rightly embraced the culture of social media for the benefit of servicemembers. Yet, the creation of new policy in an attempt to regulate the online speech of servicemembers, without acknowledging the applicability of the current statute, and updating of the UCMJ where necessary, is an incomplete measure.

Any plan proposed by the Department of the Army, or any other military department, is woefully inadequate if it does not contemplate how the UCMJ applies. Currently, legal involvement in the proposed implementation plan is minimal; the Office of The Judge Advocate General must be involved in updating regulations where there is a potential for future criminal liability.[303] The focus of the current implementation plan on issues pertaining to sexual harassment, hazing, bullying, and disrespect are too narrow to encompass the broad range of unprotected speech that may be used via electronic means. Additionally, issues persist with current prosecutions of sexual harassment under Article 92, and the creation of new or updated regulations may only exacerbate the problem.

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298 *Id.* (citing United States v. Phillips, 42 M.J. 127, 129 (C.A.A.F 1995).
299 *Id.* at 169.
300 *Id.* at 168.
301 *Elonis*, 135 S. Ct. at 2005–07.
302 VAN DIJK, *supra* note 30, at 174.
303 ALARACT 122/2015, *supra* note 141, encl. 1.

Though the regulation of unprotected speech is a complicated matter, the solution is simple: The creation of a single body of law that is adaptable "to an ever-changing, technological world"[304] will provide guidance to understand the limitations of free speech. The laws that govern the actions of our soldiers, sailors, airmen, marines and coast guardsmen, once amended, would ensure a fair and equal application across services.

The difficult task for leaders is to convince the digital natives that once they put on the uniform, everyone sees them—even if it is through social media—and sees them as representatives of the U.S. military.[305] Having one punitive code with which to enforce this idea, and a comprehensive understanding of how it applies in a digital age, will give commanders the power to maintain the morale and good order and discipline of their units.

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[304] Poole, *supra* note 214, at 260.

[305] United States v. Wilcox, 66 M.J. 442, 462 (C.A.A.F. 2008) (citing John Keenan, *The Image of Marines*, MARINE CORPS GAZETTE, May 2008, at 3).

Appendix A. Training Recommendations

The following are recommended topic areas for training on the use of social media.[306] All servicemembers, regardless of rank should be provided the training outlined in the right-hand column. Any member serving in a leadership role should also be provided the training outlined on the left, as the risk of improper influence is greater in such positions.

Leader Training	Servicemember Training
Do encourage servicemembers to vote. Never imply that they should vote for a particular party or individual.	Remember to register and vote.[307]
Use social media to follow political and military issues. • If you are going to post/share/tweet information first consider your audience—could your action be seen as an endorsement? • Will the things you say reflect poorly on your fellow servicemember? • Will your words be seen as disrespectful of a superior commissioned officer?	Use social media to follow political and military issues. • Before you post/share/tweet information think about your audience. • Will the things you say reflect poorly on your fellow servicemembers? • Will your words be seen as disrespectful of a superior commissioned officer? • Will your words be seen as disrespectful to your senior enlisted leadership?

[306] This training could be integrated into any unit training concerning elections or given as stand-alone training. It is recommended that the public affairs officer, the G-6, or a judge advocate give training on this topic.

[307] The Federal Voting Assistance Program is a great resource for servicemembers who will vote in an absentee status. FEDERAL VOTING ASSISTANCE PROGRAM, https://www.fvap.gov (last visited July 26, 2016). *See also* Military Voter Protection Project, *Listen Up! Are you Election Ready?*, FACEBOOK, https://www.facebook.com/142143492483536/videos/689519355714/ (last visited Sept. 13, 2016).

• Will your words be seen as disrespectful to your senior enlisted leadership? • Are your words about the President or another senior elected official insulting, rude or disdainful? • Can your words be interpreted as directing other members to refuse to obey lawful orders? • Can your words be interpreted as intent to overthrow a lawful military authority?	• Are your words about the President or another senior elected official insulting, rude or disdainful? • Can your words be interpreted as encouraging other members to refuse to obey lawful orders? • Can your words be interpreted as intent to overthrow a lawful military authority?
Understand social media privacy settings.[308] • Update your social media privacy settings and encourage your servicemembers to do the same. • Each time to post/share/tweet, check the audience.	Update your social media privacy settings. • Each time to post/share/tweet, check the audience.
Consider operational security at all times-do clues in the background of photographs or details of travels provide the	Consider operational security at all times-do clues in the background of photographs or details of travels

[308] *Facebook* has tutorials taking the user through what the privacy settings mean and how to adjust them to individual wants and needs. *See Privacy Basics*, *supra* note 95.

location of military forces which should not be shared?	provide the location of military forces which should not be shared?
Disable geotagging on any device used to access social media.[309] • Tagging of a photograph can create threats by providing coordinates to government buildings and training areas.	Disable geotagging on any device used to access social media. • Tagging of a photograph can create threats by providing coordinates to government buildings and training areas.
Have a basic understanding of restrictions on political speech for civilian employees • Encourage them to see their union representative or labor counselor with questions	Be familiar with Hatch Act limitations • Are you also a member of a reserve component? • If so, make sure the information from your social media accounts is appropriate under both civilian and military rules

[309] *See* Yeung & Oliker, *supra* note 134.

Appendix B. Article 88, UCMJ Update Recommendations

The current text of Article 88, UCMJ is as follows.[310] Language recommended for deletion is crossed out.

§ 888. Art. 88. Contempt Toward Officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Territory, Commonwealth, or possession ~~in which he is on duty or present~~ shall be punished as a court-martial may direct.[311]

[310] 10 U.S.C. § 888 (2012).

[311] The textual explanation of the statute located in the MCM should make clear that any of these actions are still punishable if done using an interactive computer service, an electronic communication service, or an electronic communication system, when the words used are intended to lessen the authority of that person or body.

Appendix C. New Provision—Article 134, Hazing

For all offenses under Article 134, UCMJ, the language of the statute is the same.[312] The elements of the proposed addition to Article 134 addressing Hazing are as follows:[313]

(*b*) *Elements*

(1) That the accused committed an act;

(2) That the act of the accused willfully or recklessly created a substantial risk of injury to the physical or mental health of another person;

(3) That the act was done without proper authority;

(4) That the act was done during the course of a person's initiation or affiliation with any formal or informal group or organization; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(*c*) *Explanation.*

(1) Acts that may constitute hazing may result from any form of initiation, rite of passage, or congratulatory act that includes but is not limited to:

(a) Physical brutality, such as whipping, beating, striking, branding, electronic shock, placing a harmful substance on the body, or other similar activity;

(b) Physical activity such as forced calisthenics or exposure to the elements;

(c) Activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the other person

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[312] 10 U.S.C. § 934 (2012).

[313] For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, para. 4-19; TEX. EDUC. CODE ANN. § 37.151-154 (West 2015); N.Y. PENAL Law §120.16-7 (McKinney 2015); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 2015).

to an substantial risk of harm or that adversely affects the mental or physical health or safety of the person;

(d) Extreme mental stress including extended deprivation of sleep or rest or extended isolation.

(*d*) *Consent*

That the person against whom the conduct was directed consented to or acquiesced in the activity is not a defense.

(*e*) *Proper Authority*

When authorized by the chain of command and/or operationally required, the following conduct does not constitute hazing:

(1) The physical and mental hardships associated with operations and operational training;

(2) Lawful punishment imposed pursuant to another Article of the UCMJ;

(3) Administrative corrective measure, including verbal reprimands and command-authorized physical exercises.

(4) Extra military instruction or corrective training that is a valid exercise of military authority needed to correct a member's deficient performance;

(5) Physical training and remedial physical training; and

(6) Other similar activities that are authorized by the chain of command and conducted in accordance with applicable service regulation.

Appendix D. New Provision—Article 134, Bullying

For all offenses under Article 134, UCMJ, the language of the statute is the same.[314] The elements of the proposed addition to Article 134 addressing Bullying are as follows:[315]

(*b*) *Elements*

(1) The accused committed an act by means of written, verbal, or electronic expressions, or physical acts or gestures, or any combination thereof;

(2) The act was directed at a person or group of persons with the intent to exclude or reject that person or persons from inclusion in a group;

(3) The act had the effect of:

(a) Physically harming the person or property of another;

(b) Placing another in reasonable fear of physical harm to the person or their property;

(c) Creating an intimidating or hostile work environment; or

(d) Substantially interfering with the duty performance of the person or the ability of a person to participate in or benefit from services or activities provided by the service; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(*c*) *Explanation*

(1) Acts that may constitute bullying include but are not limited to:

(a) Repeated or pervasive taunting, name-calling, belittling, mocking or use of put-downs, or demeaning humor regarding the actual or perceived race, color, national origin, ancestry, religion, gender identity or

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[314] 10 U.S.C. § 934 (2012).

[315] For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, para. 4-19; NEV. REV. STAT. § 388.122 (West 2011); CAL. EDUC. CODE ANN. § 32282 (West 2011); VA. CODE ANN. § 22.1-279.6 (West 2011).

express, sexual orientation, mental disability of a person, sex or any other distinguishing characteristics or background of a person;

(b) Behavior that is intended to harm another person by damaging or manipulating his or her relationships with others, to include their leadership or chain of command, by conduct that includes but is not limited to the spreading of false rumors; or

(c) Repeated or pervasive nonverbal threats or intimidation such as the use of aggressive, menacing, or disrespectful gestures.

(*d*) *No Proper Authority*

Though this conduct may appear to be corrective training, it is never authorized or permissible.

Appendix E. New Provision—Article 134, Sexual Harassment

For all offenses under Article 134, UCMJ, the language of the statute is the same.[316] The elements of the proposed addition to Article 134 addressing Sexual Harassment are as follows:[317]

(*b*) *Elements*

(1) The accused made unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal or physical conduct of a sexual nature when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job or career;

(b) Submission to or rejection of such conduct by a person is used as a basis or career or employment decisions affecting that person; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment.

(*c*) *Explanation*

(1) Unwelcome behavior is behavior that a person does not ask for and which a reasonable person would consider undesirable or offensive.

(2) Sexual harassment does not only occur in a supervisor-supervisee relationship; the harasser and victim may be of the same rank or coworkers. The harasser may also be junior in rank to the victim.

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316 10 U.S.C. § 934 (2012).

317 For the creation of this proposed Article, several sources were consulted. AR 600-20, *supra* note 88, ch. 7; AFI 36-2706, *supra* note 213, at 150; MCO 1000.9A, *supra* note 215, encl. 1; COMDTINST M5350.4C, *supra* note 216, 2-C.9-11; SECNAVIST 5300.26, *supra* note 215, Encl. 1–2.

Appendix F. Article 117, UCMJ Update Recommendations

The statutory language of Article 117 would remain the same.[318] A paragraph should be added to the *Explanation* portion contained in the MCM.[319] The paragraph would read as follows:

(*c*) *Explanation*

(3) Words or gestures used in the presence of the person to whom they are directed may include those sent from a location where an individual communicating by electronic means would reasonably expect to be confronted with such words.

[318] 10 U.S.C. § 917 (2012).
[319] MCM, *supra* note 26, pt. IV, ¶ 42.c.

Appendix G. MJRG Proposal—Article 130, Stalking

The new Article of the UCMJ proposed by the MJRG to address cyberstalking and threats to intimate partners reads as follows.[320] Recommended additional language designed to bring the UCMJ more in-line with the federal statute is located inside the brackets.

§930. Art. 130. Stalking

(a) IN GENERAL.—Any person subject to this chapter—

(1) Who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

(2) Who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) Whose conduct induces reasonable fear in the specific person of death or bodily harm including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; [or]

[(4) Who wrongfully engages in a course of conduct which causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress to a specific person, a member of his or her immediate family or his or her intimate partner;]

is guilty of stalking and shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

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[320] MJRG REPORT, *supra* note 161, at 878–80.

(2) The term ‘course of conduct’ means—

(A) A repeated maintenance of visual or physical proximity to a specific person;

(B) A repeated conveyance of verbal threat [sic], written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person;

(C) A pattern of conduct composed of repeated acts evidencing a continuity of purpose.

(3) The term ‘repeated’, with respect to conduct, means two or more occasions of such conduct.

(4) The term ‘immediate family’, in the case of a specific person, means—

(A) That person’s spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

(B) Any other person living in his or her household and related to him or her by blood or marriage.

(5) The term ‘intimate partner’ in the case of a specific person, means—

(A) A former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabitates with or has cohabitated as a spouse with the specific person; or

(B) A person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Appendix H. MJRG Proposal—Article 115, Communicating Threats

The new Article of the UCMJ proposed by the MJRG to address communicating threats reads as follows:[321]

§915. Art. 115. Communicating Threats

(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injury the person, property, or reputation of another shall be published as a court-martial may direct.

(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injury the person or property of another by use of (1) an explosive; (2) a weapon of mass destruction; (3) a biological or chemical agent, substance, or weapon; or (4) a hazardous material, shall be punished as a court-martial may direct.

(c) FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive; (2) a weapon of mass destruction; (3) a biological or chemical agent, substance, or weapon; or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term "false threat" means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.

[321] MJRG Report, *supra* note 161, at 855–56.

By Order of the Secretary of the Army:

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