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MILITARY LAW REVIEW

Volume 229 Issue 4

LAW AND ITS LIMITS "LEFT OF LAUNCH"

CHRISTOPHER A. FORD*

I. Introduction

Passion is not invariably a fuel conducive to insight and cogency in either legal or policy analysis. To be sure, passion can unlock the availability of nearly endless reservoirs of energy, hard work, and dedication in those it animates, and it is obviously of great value in any effort to make the world a better place. Without great care, however, passion can lead one over the line into abandoning the perspective and the rigor that is essential to good analysis and improved understanding.

With apologies to the vipassana teacher and author Jack Kornfield—who popularized the term in a very different context—one might say that the "near enemy" of *passion* is *fixation*: an error that looks and feels perilously close to its twinned virtue, and into which it can be terribly easy to slip when earnestly pursuing the good. (Such an error is probably especially tempting in an era, such as our own, that seems not merely to reject the possibility of achieving real objectivity, but indeed to be increasingly contemptuous even of those who merely valorize its *pursuit* as a means to encourage honesty and clarity, and to distinguish between weaker and stronger lines of argumentation.) Questions of socio-political direction that elicit great passion are therefore not only essential and

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inescapable subjects for public policy debate, but also topics about which responsible leaders need to be constantly careful and self-aware precisely *because of* and *in proportion to* the passion that such matters elicit.

In this author's professional experience in the public policy community, at least, few topics elicit as much passion as the role, morality, and future of nuclear weaponry. Far too often, debate on such critical questions tends to cluster into mutually unintelligible "silos" of solipsistic argumentation that do not merely discount and dismiss contrary perspectives, but in some sense even deny their existence by assuming *a priori* that opposing views are not really legitimate perspectives at all, but rather crass rationalizations driven by discreditable or even sinister ulterior motives (e.g., ugly and atavistic warmongering or mindlessly craven appeasement and civilizational self-hatred, as the case may be) and thus not really worth even the oxygen expended in expressing them. If we are truly to deal with these questions—not just finding sensible answers today, but in fact developing approaches to handle such grave challenges that will be effective and sustainable over time—we need to do better than simply talking past each other in reciprocal incomprehension and disgust.

To date, much scholarly work skeptical or dismissive of the legality of nuclear weaponry has had something of an aspirational air, as if seeking less to understand and describe international law than to find whatever legal arguments it can to buttress antecedent conclusions in pursuit of the longstanding policy objective of nuclear disarmament. (The *lex ferenda* of what it is felt the law should be in the future, in other words, is pervasively mistaken for the *lex lata* of what the law actually is.) For its part, work defending nuclear weapons possession sometimes slips into analogously axiomatic axe-grinding about the purportedly inevitable logics of geopolitical threat and nuclear response, and the corresponding impossibility that the law would, or could, decree anything at odds with such elemental realities.

For both sides—though it must be admitted that this is a particularly common failing in the disarmament community, in its efforts to use ostensibly legal discourse as a policy cudgel—the factor of "legality" sometimes seems to be viewed as having almost magical value, as if the Gordian knot of nuclear weapons and disarmament policy could be cut simply by the talismanic invocation of "the law" as a tool before which

opponents must perforce cower in submission. To truly find a way forward, however, we need to do better than this.

In this article, I will take a view that both sides may find somewhat contrarian. I do not aim precisely to sidestep questions of legality, for as will be seen, I have clear views thereupon. What I hope to do, however, is to draw out how it is that fetishizing a definitive, all-solving "legal" answer to the nuclear weapons problem can lead us to miss the true challenge. I hope, also, to point to how we may be able to make more progress—specifically, toward the secure and stable nuclear weapons-free world that most participants in these debates claim to desire—by putting aside the framing of "legality," at least for now. In its place, we should concentrate directly upon trying to ameliorate the *substantive* security challenges that drive real-world national leaders to feel that it is still, at the very least, *premature* to abandon direct or indirect reliance upon nuclear weaponry, irrespective of what various passionate legal writers and advocates may argue.

II. Legality of the Threat of Nuclear Weapons Use

On one level, it is almost surprising to ask the question that is the central subject of this conference.[1] In essence, given that Article 2(4) of the United Nations (U.N.) Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,"[2] we are asked: "If it is illegal to issue a first nuclear strike, is it similarly illegal to *threaten* to issue a first strike?"[3] This might certainly be said to be a foundational question for

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[1] University of Pennsylvania Carey Law School, *Rethinking U.S. and International Nuclear Policies*, YOUTUBE (Apr. 23, 2021), https://youtu.be/Y_gaKQnwAgc.

[2] U.N. Charter art. 2, ¶ 4.

[3] *Left of Launch: Communication & Threat Escalation in a Nuclear Age*, UNIV. OF PENN. L. SCH., https://archive.law.upenn.edu/institutes/cerl/conferences/sovereigncommunications/keynote.php (last visited Nov. 8, 2021). Questions central to the conference included the following:

> Do the traditional methods of analyzing a State's compliance with Articles 2(4) and 51 of the U.N. Charter apply in the context of threat-making when those threats explicitly or implicitly implicate the use of nuclear weapons?
>
> Does the inherent right of self-defense include the right to use nuclear weapons?

the entire enterprise of nuclear deterrence—which, of course, has for many decades revolved in large part around being willing to threaten nuclear attack, not merely in response to a nuclear strike, but also potentially in order to forestall devastating conventional or other non-nuclear attack or invasion.

Yet for the most part, the basic legal questions in play here have already been asked and answered, as it were, fully a quarter century ago by the International Court of Justice (ICJ) in its advisory opinion of July 1996.[4] Moreover, the question as presented in this conference also encodes a conditional statement—assuming that "it is illegal to issue a first nuclear strike"—that is itself not supported by the ICJ's decision or any actual source of law. There being no reason to think the ICJ misunderstood the law in 1996 and no reason to think the law has changed, it is hard to imagine a *legal* reason to revisit the matter. The following pages will outline these points in more detail.

To begin, it is worth remembering what the ICJ actually said in its non-binding advisory opinion and what it did not. The question it had been asked was straightforward: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[5] After an extensive evaluation of the arguments and briefs submitted by various parties, the Court reached a number of formal conclusions.

Most importantly, the ICJ declared that there was "in neither customary nor conventional international law" *either* "any specific authorization of the threat or use of nuclear weapons" *or* "any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[6] Having thus

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> Is nuclear war so different from other forms of warfare that traditional legal doctrines no longer apply, or must they be applied in substantially different ways?
> What does the expanding set of complications portend for nuclear non-proliferation and nuclear disarmament?
> Given the current state of rhetoric by leaders of nuclear sovereigns, are such goals even within the realm of possibility?
> What roles will strategic communications and the rule of law play in de-escalating nuclear tensions?

Id.

[4] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

[5] *Id.* at 228.

[6] *Id.* at 266, ¶ 105(2)(A)–(B).

ruled out such a direct answer to the question presented, the Court declared that any threat or use of nuclear weapons *would* be unlawful if it did not comply with Article 2, paragraph 4, of the U.N. Charter, or if it failed to meet the requirements of Article 51.[7] It also made clear that any threat or use of nuclear weapons needed to be compatible with the requirements of the international law applicable in armed conflict, "particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons."[8]

In what has turned out to be its most controversial holding, the ICJ then opined that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[9] Nevertheless—and crucially—the ICJ's 1996 advisory opinion also declared that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[10]

In light of the passions aroused by the case, this careful phrasing was notably diplomatic, even to the point of disingenuousness. To see this, one must recall the longstanding understanding in international law that unfettered freedom of action for sovereign states is the default mode of the system, and that such freedom will only be limited where a clear legal rule can be identified to that effect. To international law experts, therefore, the ICJ's holding was thus crystal clear, even if its wording may have helped to lead laymen to conclude that something remained ambiguous or unsettled.

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[7] *Id.* ¶ 105(2)(C). Article 51 of the Charter provides that

> [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

[8] *Legality of the Threat or Use of Nuclear Weapons*, at 266, ¶ 105(2)(D).

[9] *Id.* ¶ 105(2)(E).

[10] *Id.*

Since in international law anything not specifically prohibited is legal,[11] to say that one "cannot conclude definitively" that the threat or use of nuclear weapons would be unlawful in cases of existential threat is thus *precisely the same thing* as declaring that the threat or use of nuclear weapons *is legal* in such cases.

Notably, moreover, in light of the question presented for this conference—which seems to assume that "a first nuclear strike" would be unlawful—the Court said nothing to support this view. (One would search the 1996 opinion in vain, for instance, for the phrase "first strike" or references to concepts such as "preemption.") To the contrary, as we have seen, the ICJ went out of its way to specify that nuclear weapons were subject to the *same* legal rules that *all* uses of force are subject.

Accordingly, it follows that there is also nothing special, in legal terms, about a nuclear strike being "first." Its legality does not stand or fall depending on its "firstness," as it were, but rather upon all the "regular" legal criteria involved in assessing the lawfulness of a use of force. Significantly, the law is not generally understood to preclude striking "first" in any use-of-force context, provided that appropriate criteria are met (e.g., the presence of an imminent threat), and under the ICJ's 1996 holding this would be no different in the nuclear realm.

To be sure, some scholars have tried to argue that the enactment of Article 51 of the U.N. Charter erased prior understandings permitting anticipatory self-defense in case of imminent threat—such as the so-called *Caroline* formula, named after a nineteenth-century diplomatic dispute

[11] *See, e.g.*, Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7). The authority of a sovereign state to take actions under the law of war comes from its inherent rights *as* a sovereign state rather than from the existence of any sort of legal rule giving it "permission." In this sense, the law of war is merely "prohibitive law," in that where it exists and acts, it *prohibits* rather than *authorizes*. *See, e.g.*, OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.2.1 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL]. The International Court of Justice (ICJ), therefore, was being disingenuous to the point of actually being misleading in using phrasing designed to make the legality of nuclear weapons use in extreme circumstances of self-defense seem unclear because it could not find "any specific authorization" for such use. Particularly given its *ultra vires* excursion into dicta about Article VI of the Nuclear Nonproliferation Treaty, this was not, to say the least, the Court's finest hour.

involving a vessel by that name.[12] Mary Ellen O'Connell, for instance, reads Article 51 as having entirely superseded earlier understandings.[13] She relies in making this argument, however, upon an ICJ case that she herself concedes did not actually consider the question of when self-defense actually begins,[14] and admits that her argument is not consistent with the actual text of Article 51 describing the right of self-defense as being "inherent"—an inconvenient fact that she dismisses with the offhand comment that the existence of a *genuinely* "inherent" right to self-defense would be "at odds with the Charter's design"[15] as she interprets it.[16]

The stronger position, by contrast, is that prior understandings of anticipatory self-defense did *not* evaporate with the adoption of the U.N. Charter, which merely supplemented the traditional law of self-defense with some additional rules applying to and between U.N. Member States (e.g., that one must report one's use of force in self-defense to the Security Council). As noted, the text of Article 51 clearly describes the right to self-defense as being "inherent," thus making clear that such a right already existed *before* and independent of the adoption of the U.N. Charter, and indeed arguably signaling that, *as* an "inherent" right, the Charter was powerless to abridge it in any event.

As we have seen, it is a foundational concept of international law that states enjoy a basic sovereign freedom that shall only be deemed to have been restricted where some clear rule of international law can be shown. Critics of anticipatory self-defense have not carried this burden, however, and the customary legal rule articulated in the *Caroline* principle clearly survives to the present day—a conclusion buttressed by references to the *Caroline* in both the Nuremburg and Tokyo war crimes trials held even "at the very time the [U.N.] Charter was drafted and entering into force."[17]

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[12] *See generally, e.g.*, *British-American Diplomacy: The Caroline Case*, AVALON PROJECT, https://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Nov. 17, 2021).
[13] MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 5 (2002).
[14] *Id.* at 8.
[15] *Id.* at 13.
[16] Instead of legal arguments, O'Connell spends most of her article offering expressly *policy*-based reasons to favor of her view of Article 51. *See id.* at 15–20.
[17] Terry D. Gill & Paul A.L. Ducheine, *Anticipatory Self-Defense in the Cyber Context*, 89 INT'L L. STUD. 438, 455 (2013).

As Terry Gill and Paul Ducheine thus summarize it:

> In both the nineteenth century and at the time the Charter was adopted, armed attack [giving rise to a right of self-defense] was considered to include clear and manifest preparations, even the intention to attack in the proximate future, when their existence was supported by clear evidence.
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> . . . .
>
> . . . [T]here is ample evidence that the right of self-defense contained an anticipatory element at the time the Charter was adopted and that it continues to do so now. In the absence of conclusive evidence that the law has been altered since the Charter entered into force, there is no reason to assume that anticipatory self-defense when exercised within the confines of the *Caroline* criteria has become unlawful.
>
> In short, an armed attack was considered to have "occurred" at a time it was evident an attack was going to take place in the near future, even though this was well before any forces ever crossed the frontier, or even concrete measures—as opposed to preparations—had been taken to initiate an attack . . . .[18]

Accordingly, "a State need not wait idly as the enemy prepares to attack. Instead, a State may defend itself once an armed attack is 'imminent'" pursuant to international legal principles dating back at least to the *Caroline* precedent, which "has survived as the classic expression of the temporal threshold."[19] (This is also the view of U.S. and British law-of-war authorities.[20])

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[18] *Id.* at 456–59.

[19] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 350–51 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL].

[20] *See, e.g.*, LAW OF WAR MANUAL, *supra* note 11, § 1.11.5.1; NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 6–7 (2021); Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense*

It is incorrect, therefore, to argue that a "first" nuclear strike would be *per se* unlawful, since there remains at least some potential scope for anticipatory self-defense here as in any other use-of-force context. Nor, in fact, would there be any requirement that an imminent threat justifying a first blow actually have to be a *nuclear* threat. (A nuclear weapons policy of "no first use" cannot intelligibly be shoehorned in here!) To the contrary, a sufficiently grave *non-nuclear* threat or combination of threats might also be perfectly adequate to justify nuclear use, provided that they actually rose to the specified level of creating an "extreme circumstance of self-defence, in which the very survival of a State would be at stake."[21]

There is thus nothing here that would preclude nuclear weapons policies such as those adopted by the United States over successive presidential administrations since the 1996 case. Significantly, U.S. official statements of nuclear weapons declaratory policy in recent decades have closely tracked the 1996 formulation describing the ICJ's understanding of when nuclear weapons use would be lawful, making clear that nuclear weapons use would only be considered in "extreme circumstances" to defend the vital interests of the United States or its allies. This, for instance, is the position expressed in both the Obama Administration's *Nuclear Posture Review* of 2010[22] and the Trump Administration's similar 2018 *Review*.[23] Nuclear weapons policy statements by both Britain and France use this basic formulation as well,[24] and even Russian, Pakistani, and Indian formulations tend to use analogous terms.[25] All thirty countries that make up the NATO

Against an Imminent or Actual Armed Attack by Nonstate Actors, 106 AM. J. INT'L L. 1, 2–3 (2012) (quoting Lord Goldsmith on 21 April 2004).

[21] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266, ¶ 105(2)(E) (July 8).

[22] U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, at viii–ix, 16–17 (2010).

[23] U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT, at ii, viii, xvi, 21, 68 (2018).

[24] *See, e.g.*, U.K. PRIME MINISTER, GLOBAL BRITAIN IN A COMPETITIVE AGE: THE INTEGRATED REVIEW OF SECURITY, DEFENCE, DEVELOPMENT AND FOREIGN POLICY 76 (2021) ("We would consider using our nuclear weapons only in extreme circumstances of self-defence, including the defence of our NATO Allies."); REPUBLIC OF FR., FRENCH WHITE PAPER: DEFENCE AND NATIONAL SECURITY 73 (2013) ("The use of nuclear weapons would only be conceivable in extreme circumstances of legitimate self-defence. In this respect, nuclear deterrence is the ultimate guarantee of the security, protection and independence of the Nation.").

[25] *See, e.g.*, *The Military Doctrine of the Russian Federation*, EMBASSY OF THE RUSSIAN FED'N TO THE U.K. OF GREAT BRITAIN & N. IR. (June 29, 2015), https://rusemb.org.uk/press/2029 ("The Russian Federation shall reserve the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and/or its allies, as well as in the event of aggression against the Russian Federation with the use of conventional

alliance, moreover, use such language in describing their reliance upon nuclear deterrence,[26] while even China's supposed "no first use" nuclear weapons policy[27] inherently implies the possibility of *responsive* use—which is certainly not inconsistent with the ICJ's "extreme circumstances" formulation but would be unlawful if nuclear weapons use were *per se* illegal. From the perspective of customary international law formation, therefore, it is surely significant that essentially *all* of the "States who are specially affected"[28] by the question of nuclear deterrence clearly endorse the "extreme circumstances" concept of lawful use; there is thus not even a whisper of new customary law formation here.

It follows, furthermore, that if the actual *use* of nuclear weapons in such extreme cases is not prohibited, it is necessarily not unlawful to *threaten* such use—provided, presumably, that one only threatens to use them in

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weapons when the very existence of the state is in jeopardy."); *Arms Control and Proliferation Profile: Pakistan*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/pakistanprofile (last visited Nov. 17, 2021) (noting that Pakistani officials "have claimed that nuclear weapons would be used only as a matter of last resort in . . . a conflict with India"); *Arms Control and Proliferation Profile: India*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/indiaprofile#bio (last visited Nov. 17, 2021) (noting that Indian officials have claimed that India "would not use nuclear weapons against states that do not possess such arms and declared that nuclear weapons would only be used to retaliate against a nuclear attack" and that the government also "reserved the right to use nuclear weapons in response to biological or chemical weapons attacks").

[26] *See, e.g.*, *NATO Nuclear Deterrence*, NATO, https://www.nato.int/nato_static_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf (last visited Nov. 17, 2021) (declaring that "the circumstances in which NATO might contemplate the use of [nuclear weapons] are extremely remote" but could include circumstances in which "the fundamental security of any Ally were to be threatened").

[27] *See, e.g.*, *Chinese Government Statement on the Complete Prohibition and Total Destruction of Nuclear Weapons*, MINISTRY OF FOREIGN AFFS. OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18055.shtml (last visited Nov. 17, 2021).

[28] "Specially affected" states have been said to be those "with a distinctive history of participation in the relevant matter":

> States that have had a wealth of experience, or that have otherwise had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed a greater quantity and quality of State practice relevant to the law of war than States that have not.
>
> For example, "specially affected States" could include, depending upon the relevant matter, the nuclear powers[or] other major military powers . . . .

LAW OF WAR MANUAL, *supra* note 11, § 1.8.2.3.

circumstances, or in a fashion, that would not contravene the U.N. Charter, law of armed conflict principles, or any other applicable rules, as noted by the ICJ. And indeed, as we have seen, the Court's own phrasing also did not distinguish threat and use in any such way, speaking in its holdings of "the threat or use of nuclear weapons" together.[29]

There is, therefore, no real question about whether the use of nuclear threats is a lawful way to deter either nuclear or non-nuclear aggression of a sort that could create the aforementioned "extreme circumstances." Nor is there any reason to think the ICJ misunderstood the law in 1996. If anything, the Court actually *overreached* by going as far as it did, for it exceeded its authority in its final holding,[30] addressing the meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[31]

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[29] See NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW (2007), for more on whatever legal distinction there may be between the *use* of force and its mere *threat*.

[30] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 267, ¶ 105(2)(F) (July 8).

[31] This author has described the problem elsewhere, noting that:

> the question of the meaning of Article VI was not actually before the court, making that portion of its opinion, as Judge Stephen Schwebel observed, a mere "*dictum*." The ICJ had originally been asked by the World Health Assembly to render an advisory opinion on the question: "Would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO [World Health Organization] Constitution?" But the court determined that because the issue lay outside the WHO's scope, the question had been improperly asked. The U.N. General Assembly, however, had also requested that the ICJ render an advisory opinion on essentially the same question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The court accepted this second attempt to pose the question. In neither case, however, was the meaning of Article VI something that the ICJ was formally asked to consider.
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> In the Anglo-American tradition, *obiter dictum* refers to a comment made in a legal opinion on matters not actually raised in the case at hand. As comments on extraneous matters, *dicta* generally are regarded as having minimal authority or value as precedent. The ICJ's comments on Article VI are clearly such. Worse still, because the court was not asked to give any advice on Article VI, its pronouncement on the subject may in fact have been *ultra vires*—beyond its powers. After all, the ICJ is only authorized to give an advisory opinion upon request from a properly authorized body. The ICJ's statute also requires that "questions upon which the advisory opinion of the Court is asked shall be laid before the

Furthermore, there is no reason today to think that the law has changed in the intervening years. To be sure, a sizeable community of civil society activists and disarmament-minded governments has certainly been trying to *create* new rules under which nuclear weaponry would be flatly outlawed. This is the purpose, for instance, of the Treaty on the Prohibition of Nuclear Weapons (TPNW).[32] To date, however, no nuclear weapons possessor has joined the TPNW, nor has any country that relies even indirectly upon nuclear weaponry for its security (e.g., a member of an alliance such as NATO that has a policy of nuclear deterrence).

So far, in fact, TPNW signatories include *no* state with any experience with or background in nuclear weapons questions whatsoever, with the arguable minor exceptions of South Africa (the government of which was carefully denied the opportunity to possess nuclear weapons by the apartheid regime's dismantlement of such weapons before the transfer of power in 1994), Kazakhstan (which relinquished Soviet-era nuclear weapons that had been stranded in its territory by the collapse of the USSR, but which it could not maintain or likely actually employ in combat anyway), and Brazil and Libya (both of which in the past undertook nuclear weapons development efforts, in the latter case in violation of Article II of the NPT, but never actually manufactured a nuclear device). As noted, essentially *all* "specially affected States" in effect agree with the ICJ that nuclear weapons use can be lawful in extreme circumstances of self-defense.

In effect, therefore, the TPNW so far amounts to no more than a collection of states that have come together to promise in a new instrument to do what they were all already obliged to do by Article II of the NPT: namely, not to have nuclear weapons.[33] (Most TPNW signatories, moreover,

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> Court by means of a written request containing an exact statement of the question upon which an opinion is required." Since no one had actually asked the ICJ to interpret Article VI, its eagerness to pronounce upon the subject may have led it to exceed its authority.

Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 NONPROLIFERATION REV. 401, 402 (2007) (citations omitted).

[32] Treaty on the Prohibition of Nuclear Weapons, *opened for signature* July 7, 2017 (entered into force Jan. 22, 2021).

[33] Treaty on the Non-Proliferation of Nuclear Weapons art. II, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) ("Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control

are also already signatories to one of the various Nuclear Weapons Free Zone Treaties,[34] making the "ban" instrument *doubly* superfluous in legal terms.) Furthermore, all the nuclear weapons states and their allies have stated repeatedly and clearly not only that they will not join the new instrument, but also that they do not agree with the idea of a nuclear weapons ban in the first place (at least at this time) and that they feel there to be no legal obligation upon them in such respects[35]—thus undermining any basis for concluding that a norm of customary international law might be emerging. As a result, the TPNW changes precisely nothing with respect to the continuing validity of the ICJ's 1996 opinion.

III. Teleology and Subjectivity in International Law

Despite the clarity of the abovementioned conclusions, however—or perhaps precisely *because* of that clarity—disarmament activists in the legal community have spent a great deal of time working to revisit and to close

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over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.").

[34] The author is indebted to Tobias Vestner of the Geneva Centre for Security Policy for pointing this out. E-mail from Tobias Vestner, Head of Sec. & L., Geneva Ctr. for Sec. Pol'y, to author (Apr. 26, 2021).

[35] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, The Treaty on the Prohibition of Nuclear Weapons: A Well-Intentioned Mistake (Oct. 30, 2018), https://2017-2021.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/the-treaty-on-the-prohibition-of-nuclear-weapons-a-well-intentioned-mistake/index.html. The United States has declared that

> the proposed Treaty would neither make nuclear weapons illegal nor lead to the elimination of even a single nuclear weapon. Contrary to what its supporters might wish, it makes no impact that would support any new norm of customary international law that would in any way be binding on any state having nuclear weapons today. In particular, all NPT nuclear-weapon States consistently and openly oppose the "Ban," along with their military allies around the world. The text of the treaty *itself* is inconsistent with creation of any norm of non-possession of nuclear weapons, inasmuch as it does not actually prohibit States from joining while still having nuclear weapons, and only envisions them relinquishing such devices at an unspecified future date and under unspecified future circumstances. Far from contributing to some kind of non-possession norm, the Treaty seems itself to prove there's no such thing.

Id.

the supposed "loophole" in the Court's "extreme circumstances" holding in order to be able to declare nuclear weapons *per se* "illegal" after all. That they might imagine this "look again and try harder" approach to be a potentially promising one is perhaps not surprising.

International law has long had a flavor to it of both aspiration and improvisation. Many of its proponents, in fact, often seem to feel themselves part of a great teleological movement of law-creation and law-improvement—a world-historical progression that will in time end international law's inferiority complex vis-à-vis domestic jurisprudence by closing the gap between the "thickness" and detail of domestic legal rule-sets and the (so far) still much sparser landscape of international jurisprudence.

The Finnish legal scholar Martti Koskenniemi memorably described this phenomenon in the E.H. Carr Memorial Lecture at Aberystwyth University in 2011, noting the "persistence of teleology" in international legal thinking ever since the field of international law was first established as a distinct professional practice in European law schools in the early nineteenth century. In his characterization, international law was from the outset infused with "the idea of progressive history" and retains this flavor even in today's more cynical postmodern era, with international lawyers these days being "about the only group of human beings who still use the vocabulary of progress."[36]

The spirit of the international bar, as it were, is thus suffused with deep assumptions of progress in an "intrinsic teleology expressed by and accomplished through international law," and in which legal practice "possesses an inbuilt moral direction to make human rights, justice and

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[36] Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L RELS. 3, 3–4, 5 (2011). So pervasive does the "teleological impulse" seem to be in international legal circles that the panel of legal experts who drew up the *Tallinn Manual* on cyberspace operations law apparently felt it necessary to distinguish their project from the field's general instinct to press the law forward in desired policy directions. The introduction to the *Tallinn Manual* takes pains to emphasize that it "does not represent 'progressive development of the law', and is policy and politics neutral. In other words, *Tallinn Manual 2.0* is intended as an objective restatement of the *lex lata* [current law as it is]. Therefore, the Experts involved . . . assiduously avoided including statements reflecting *lex ferenda* [future law, or law as it aspires to be]." Michael Schmitt, *Introduction* to TALLINN MANUAL, *supra* note 19, at 3.

peace universal."[37] To "do" international law, Koskenniemi contends, is often assumed to mean that one "operate[s] with a teleology that points from humankind's separation to unity."[38]

> [I]nternational lawyers . . . tend to be united in our understanding that legal modernity is moving towards what an influential Latin American jurist labelled in 2005 a new *jus gentium* uniting individuals (and not states) across the globe, giving expression to "the needs and aspirations of humankind" . . . [and in which] territorial systems are being replaced by intrinsically global, functional ones.[39]

In this telling, the geopolitical tensions and existential rivalries of the Cold War represented something of an uncomfortable and unwelcome *realpolitikal* pause—a hiatus in which "international lawyers were compelled to modesty in their ambitions about international government."[40] Nevertheless, given the enthusiasms in the field for relentless forward movement toward goals that it was everyone's responsibility to help advance, "it was unsurprising when after 1989 they began to dust off the teleologies of the interwar period."[41] Those intervening years of great power competition, it was felt, "had signified only a temporary halt in the liberal progress of humankind"—and the push to build a brave new legal order revived.[42]

Nor was this desire for forward movement, it would seem, just about a perceived need to drive toward some kind of ideologically axiomatic global human end-state. The field of international law has also sometimes seemed to display an almost *arriviste* status desperation, with the relative "thinness" of international jurisprudence being perhaps something of an embarrassment in comparison to the depth and intricacy of the systems of domestic law with which we are all familiar within our own individual countries.

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[37] Koskenniemi, *supra* note 36, at 4.
[38] *Id.* at 3–4.
[39] *Id.* at 4–5 (citations omitted).
[40] *Id.* at 8.
[41] *Id.*
[42] *Id.* at 8.

Moreover, unlike domestic legislation—in democracies, at least—the positivist enactments of sovereign states in broad multilateral conventions have also long quietly suffered from an intrinsic legitimacy deficit. After all, despite its teleological aspiration to unite all of humanity and perhaps supersede the state-territorial construct entirely, the international system has no particularly compelling ethical basis upon which to defend agreements arrived at "democratically" by state sovereign consent when so many of the diplomats who draft and sign international conventions are themselves representatives of regimes that have no actual democratic legitimacy themselves. There are, one imagines, relatively few multilateral agreements and institutions formed exclusively by national governments that can be said genuinely to represent the sovereign peoples over whom they rule and in whose name they purport to speak in international rulemaking.[43]

Perhaps for these reasons, the claims made by legal scholars as to the existence of certain international legal rules in service of the teleology have sometimes advanced as much by willpower and passion as by meticulous demonstration. This can produce a kind of derivational slipperiness, under which international legal thinkers have sometimes been willing to countenance law-creation through mechanisms unlikely to be accepted in a domestic jurisdiction.

Perhaps most prominent of these mechanisms can be seen in international legal doctrines of customary international law, which is said to be "independent of treaty law" and based upon the jurist's conclusions about what appears to be "accepted as law." Specifically, it is said, customary law can arise—considering, importantly but rather imprecisely, "the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found"—where there is "a general practice that is accepted as law."[44]

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[43] The author has elsewhere described this as the "*origins problem* of conventional internationalism—that is, its positivist roots in the decisions of functionaries many of whom lack any right to speak for such purposes on behalf of the sovereign populations whose will and consent necessarily represent the fundamental source of legitimacy for *anything* done in the international arena." Christopher A. Ford, *Democratic Legitimacy and International Society: Debating a "League of Democracies"*, *in* 3 HUMAN RIGHTS, HUMAN SECURITY, AND STATE SECURITY 1, 27 (Saul Takahashi ed., 2014) (emphasis added).

[44] G.A. Res. 73/203, annex, Identification of Customary International Law, at 2 (Dec. 20, 2018); *see, e.g.*, *Customary International Law*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/document/customary-international-humanitarian-law-0

The combination of state practice and *opinio juris*, in other words, creates new law even where no state representatives have ever debated or enacted such a thing. If states *act* in a certain way and seem to think that doing so is legally required—as opposed to it just being a good idea, or simply necessary under the circumstances—then international lawyers deem that practice in fact to *be* mandatory.

This has a certain logic, one supposes, but it certainly is not the kind of thing that one imagines would be easily accepted in a domestic context. In some sense, moreover, customary law doctrine exacerbates the democratic deficit of international rule-making inasmuch as it not only allows the creation of new legal rules simply by aggregating the decisions of states irrespective of the democratic credentials of the decision-makers, but in fact permits such rule-creation to occur *sub silentio*, without express consideration and debate *at all*.

Another example can perhaps be seen in the doctrine of *jus cogens*: the idea that certain "peremptory norms" exist in international law such that countries will be bound by them even in the face of an express agreement to the contrary made through the very mechanisms of state-sovereign law-making that form the traditional default standard for international legal legitimacy.[45] The Vienna Convention on the Law of Treaties describes "a peremptory norm of international law" as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[46] A treaty that conflicts with a *jus cogens* norm will be deemed void.[47]

As for where these supernorms originate, however—and how one is actually to tell what their substantive content is—international legal theory provides little insight. To begin, such norms are not *quite* unchangeable foundational rules akin to natural law, inasmuch as they are said to be amenable to change as broad international conceptions of right and wrong

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(declaring that customary law "fills gaps left by treaty law" with rules that "derive[] from 'a general practice accepted as law.' To prove that a certain rule is customary, one has to show that it is reflected in state practice and that the international community believes that such practice is required as a matter of law").

[45] *Jus Cogens*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[46] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

[47] *Id.*

evolve over time. Yet they *do* expressly prohibit states from "contracting out" of their strictures by the mechanisms of agreement that give rise to *other* international legal rules.

Precisely how *jus cogens* norms arise, what their content is at any given point in time, and how (and when) they can be said to have changed has never fully been explained. As one jurist described things at the time, for the drafters of the Vienna Convention, "the concept of *jus cogens* expressed some higher social need. . . . Ultimately, it was more society and less the law itself which defined the content of *jus cogens*."[48]

This conception of a "higher social need" that conjures up new, unbreakable legal rules (apparently simply because they are needed) suggests how close to the mark is Koskenniemi's description of the international legal project as being motivated by teleological "progress of history" thinking—rather than, say, by rigorous principles of doctrinal stability, derivational rectitude, and procedural legitimacy. Ultimately, despite their benevolent intentions, peremptory norms thus necessarily remain somewhat mysterious, for they are

> creatures without definable legal pedigree or doctrinal grounding; we may not be able to explain them yet we think—to borrow a phrase—that we know them when we see them.
>
> Ultimately, rules of *jus cogens* may derive from no conventional doctrinal "source" other than the "conscience" of the international community.[49]

Yet, for all that, international lawyers defend their existence as the strongest and most urgent rules in the global system.

While it is certainly the case that domestic legal systems have themselves occasionally had recourse to analogously slippery and subjective standards even in interpreting foundational law—such as the U.S. Supreme Court's occasional employment of a "shocks the conscience" standard in

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[48] *Summary Records of the 685th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER.A/1963.

[49] *See generally, e.g.*, Christopher A. Ford, *Adjudicating* Jus Cogens, 13 WIS. INT'L L.J. 145, 152 (1994).

"substantive due process" cases under the United States Constitution[50]—such excursions into doctrinally unmoored subjectivity are invariably controversial, and are a surprising path for an international legal system that aspires to close its legitimacy deficit vis-à-vis the rigors of domestic jurisprudence. It would certainly seem strange to adopt as a general principle the view that things become illegal simply when one badly enough *wants* them to be, and it is not necessary to go as far as Anthony D'Amato—who suggests caustically that *jus cogens* may be essentially nothing more than a scam and a confidence game[51]—to suspect that something in the peremptory norms construct is at least *slightly* off.

Moreover, in contrast to domestic legal systems such as that of the United States—where activist movement of legal rules toward broad overall goals by unelected jurists is at least controversial—mechanisms for adding to the corpus of international law *outside* strict principles of state-sovereign consent are explicitly built into the international canon. The Statute of the International Court of Justice, for instance, explicitly provides its jurists with the opportunity to turn to sources of law beyond simply international conventions and even beyond customary law. Specifically, Article 38 of the Statute also allows judges to draw upon—and, impliedly, empowers them to make decisions about what qualifies as—"the general principles of law recognized by civilized nations"[52] and "the teachings of the most highly

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[50] *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (declaring that the police actions against a defendant constituted "conduct that shocks the conscience" and were "methods too close to the rack and the screw to permit of constitutional differentiation").

[51] Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens*!*, 6 CONN. J. INT'L L. 1, 1 (1990) (arguing that "the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power," and that if anyone were actually able to articulate an intelligible theory of *jus cogens*, that person would deserve an "International Oscar").

[52] Statute of the International Court of Justice, art. 38(1)(c). The subtext here that some subset of "civilized" nations is empowered to establish legal standards binding upon the rest of humanity is unmistakable. Nevertheless, despite international law's origin in Western, European, and Christian ethico-religious traditions, modern progressives—though otherwise notably quick to try to exorcise the baleful influence of "dead White males" from educational curricula and historical memory—have been intriguingly slow to condemn international law as a presumptively illegitimate relic of a racist and imperialist age. Even though the seminal instruments and concepts of international humanitarian law were indeed primarily the handiwork of such dead White males, and seem to have grown quite directly out of Christian "just war" thinking and chivalric notions of martial honor and the protection of innocents, there would appear to be an implicit recognition that to "decolonize" the law of war might open the legal door to notably *uncivilized* behavior. Perhaps for this reason, the modern

qualified publicists of the various nations," albeit only as "subsidiary means for the determination of rules of law."[53] Such ambitiously broad identification of potential "sources" for international law certainly sits strangely in a system doctrinally grounded in state-sovereign consent, and in which even decisions by international *courts* are not generally binding on states, or even binding as precedent upon such tribunals themselves.[54]

Indeed, jurists even in *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have sometimes flexed these muscles in filling gaps left by more conventional sources of law, as Alexandra Adams has detailed in her analysis of ICTY and ICTR jurisprudence concerning

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academy has tended to focus more upon augmenting or improving the law of war rather than upon delegitimizing and erasing it. There is perhaps a salutary lesson here.

[53] *Id.* art. 38(1)(d). In explaining this provision, the U.S. Defense Department's authoritative *Law of War Manual* offers the caution that "[t]he writings ['of the most highly qualified publicists'] should only be relied upon to the degree they accurately reflect existing law . . . ." LAW OF WAR MANUAL, *supra* note 11, § 1.9.2. This formulation merely begs the question, however, by presupposing that one knows existing law. One should certainly not rely upon the writing of publicists who do *not* accurately reflect existing law, of course, since doing so would undermine the law's rootedness in state sovereign decisions and would make a mockery of the very *idea* of international legality by reducing its demonstration to a mere matter of arbitrarily picking and choosing from among counterpoised assertions and policy preferences. Yet if one already knows the legal answer—which is the only sure way to avoid reliance upon an incorrect publicist—there would be no need to resort to "subsidiary means" in the first place. Ultimately, one struggles to find much useful meaning *at all* in Article 38's comment about reliance upon publicists. Interestingly, the *Law of War Manual* seems to distrust some of the legal writings of the International Committee of the Red Cross on just such grounds, hinting that they may have substituted the policy advocacy of *lex ferenda* for the legal description of *lex lata*. *Cf. id.* § 1.9 ("[T]he United States has said that it is not in a position to accept without further analysis the conclusions in a study on customary international humanitarian law published by the ICRC.").

[54] *See generally, e.g.*, LAW OF WAR MANUAL, *supra* note 11, § 1.9.1 ("Judicial decisions are generally consulted as only persuasive authority because a judgment rendered by an international court generally binds only the parties to the case in respect of that particular case. The legal reasoning underlying the decisions of the International Court of Justice is not binding on States. Similarly, the decisions of . . . the International Criminal Tribunal for Rwanda cannot, as a strictly legal matter, 'bind' other courts. The legal principle of *stare decisis* [settled, binding precedent] does not generally apply between international tribunals, *i.e.*, customary international law does not require that one international tribunal follow the judicial precedent of another tribunal in dealing with questions of international law. Moreover, depending on the international tribunal, a tribunal may not be bound by its [own] prior decisions." (citations omitted)).

how to handle issues of sexual assault.[55] The problem for these courts in that respect was that "in international criminal law, no sexual abuse offenses exist" apart from the more specific crime of rape. Rather than merely draw attention to this gap and urge states to amend relevant conventions in order to permit prosecution for sexual assault that *did not* meet the definition of actual rape—thus "let[ting] it go unpunished" in the cases specifically before the tribunals—the ICTY and ICTR judges improvised, "letting go of dogmatically 'clean' solutions in favour of 'feasible' justice."[56] In one case, Adams recounts, the chamber actually ended up adopting a legal definition that derived from no antecedent source of law at all: instead, the tribunal "had basically invented it itself."[57]

It may be difficult to fault the judges too much for such improvision under the circumstances, of course, and Adams indeed seems to approve. While criticizing the specific definitions adopted, for instance, she nonetheless applauds the ICTY, in particular, for developing "an important law-finding method, which allows the under-developed international criminal law to prove certain crimes" by letting judges "fill gaps in the *actus reus* of rape" by devising rules at least inspired by definitions used in various countries' domestic law.[58] All the same, it is also difficult not to be struck by the degree to which a remarkable amount of international legal thinking appears to be little more than bootstrapping of a sort that its proponents defend as creativity in service of the noblest of ends but that critics would also not be too far wrong to characterize as "making up the rules you want."

Returning to the topic of nuclear weaponry, therefore, it might seem entirely natural that dissatisfaction with the ICJ's "incomplete" ruling against nuclear weapons in 1996 would lead to sustained calls to revisit the question. After all, in *dicta* in that case, even the ICJ *itself* had already engaged in at least a small excursion in support of disarmament objectives, by reading words into Article VI of the NPT beyond what its text actually said.[59] As described earlier, the meaning of Article VI had been neither

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[55] Alexandra Adams, *The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape*, 29 EUR. J. INT'L L. 749 (2018).
[56] *Id.* at 767.
[57] *Id.* at 761.
[58] *Id.* at 763.
[59] The ICJ declared that Article VI created a "twofold obligation to pursue *and to conclude* negotiations" on disarmament. Legality of the Threat or Use of Nuclear Weapons, Advisory

briefed nor argued, and the ICJ had not been asked to examine the question; as a result, the Court was actually acting *ultra vires*—beyond its statutory authority—to address this at all.[60] In effect, therefore, the Court was improperly freelancing in deliberately misreading Article VI's "obligation of conduct" as an "obligation of result."[61] The ICJ's judges, however, appear not much to have minded a bit of free-form inventiveness in a good cause: that holding was unanimously agreed.

So—one imagines the argument running today—why *not* today just opt to re-examine the 1996 question, improvise a bit further, and simply declare any threat or use of nuclear weaponry unlawful? Why scruple about cutting doctrinal corners when one can use the "law" as a solvent with which to wipe clean the stains of humanity's *mésalliance* with nuclear weapons?

Opinion, 1996 I.C.J. 226, 264, ¶ 100 (July 8) (emphasis added). The actual treaty, however, rather carefully says merely that the Parties are obliged "to pursue [such] negotiations in good faith." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, art. VI. This is, to be charitable, an odd excursion, since classically, obligations to negotiate are obligations to exert best efforts—and not, for instance, obligations to reach an agreement irrespective of its substantive merits, the good faith of one's counterparty, or even whether there is any party who has proven willing to negotiate at all.

[60] *See* Ford, *supra* note 31.

[61] *Cf.* TALLINN MANUAL, *supra* note 19, at 289 ("Obligations of conduct generally require States to undertake their 'best efforts' to comply by a means of their choice. Such obligations do not impose a duty on States to succeed in their efforts . . . ."). Indeed, it would surely be perverse to find State *A* in violation of Article VI because State *B* refused its good faith efforts to negotiate. It is also worth remembering that Article VI applies not just to nuclear weapons states but to *all* states and that it requires them to pursue negotiations not just on nuclear disarmament but also "on a treaty on general and complete disarmament under strict and effective international control." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, art. VI. If the ICJ were correct that Article VI contains an obligation of result rather than simply one of conduct, *every* State party to the NPT must have been in violation ever since that treaty entered into force in 1970. (There has not been an actual effort to negotiate general disarmament since the Preparatory Commission for the World Disarmament Conference pursued under League of Nations auspices in the 1920s, much less agreement upon any such treaty. *See generally, e.g.*, DICK RICHARDSON, THE EVOLUTION OF BRITISH DISARMAMENT POLICY IN THE 1920S, at 52–95 (1989) (recounting debates at the Preparatory Commission).) It is easy to see, therefore, why although the disarmament community frequently *invokes* the ICJ's Article VI excursion, no one has yet offered an intelligible defense of its logic.

IV. Reframing the Issue

To that question—and even if one does not find it in some sense offensive for lawyers to invent the legal rules they want when these cannot be found in accepted legal sources, conjuring them out of nothing on the fly precisely *because* they would not otherwise exist—this article would suggest at least two answers. The first relates to the integrity of the international legal system and the other to the *actual* prospects for nuclear disarmament.

A. Law and its Legitimacy

First, reliance upon such bald invention risks damaging the legitimacy of an international legal system that already sometimes struggles to defend itself against charges that it is animated not by real respect for the rule of law but rather by a teleological political agenda that disregards its own doctrines whenever they get in the way of progress.

Nor is this just about potential risks to the legitimacy of international law at the margin, for on *this* issue—nuclear weaponry—such a judicial excursion would amount to meddling in strategic policy questions felt by some of the most powerful and consequential states of the international system, and their many allies, to have implications of existential importance. Indeed, precisely to the extent that the ICJ was *correct* in 1996 that the only really conceivable use for nuclear weaponry would be in "extreme circumstance[s] of self-defence, in which the very survival of a State would be at stake," this is an arena in which international law would *most* delegitimize itself with a further teleological excursion against nuclear deterrence.

By purporting to tell those states that nonetheless rely upon such weapons that they must refuse to protect themselves from existential threats as they feel they must, such a doctrine would tend to pit "the law" against efforts to ensure national survival through deterring aggression. Can asking the latter to give ground to the former really foster the advance of international law?

From the perspective of those of a teleological bent who might hope that the Court would take the additional step of trying to "close" the remaining legal "loophole" and declare nuclear weapons entirely impermissible, the

ICJ's 1996 legal standard is thus, in effect, almost self-confounding. To the degree that states that still rely directly or indirectly upon nuclear weapons a quarter century after the 1996 opinion in fact agree with the Court's assessment of the law, the very fact of their continued reliance necessarily signals that they feel these questions to have existential security implications. In this context, a "legal" pronouncement purporting to declare nuclear weapons illegal risks delegitimizing itself—and the broader corpus of international law—more than it stigmatizes those weapons themselves. The nuclear weapons problem, one might say, is insoluble by mere legal decree in direct proportion to the extent to which the ICJ was right in 1996 about the exigencies of those "extreme circumstances."

This problem, moreover, has only gotten worse in the years since the ICJ case. The timing of that opinion, in fact, may not have been entirely coincidental. After all, that case was argued, and the decision rendered, in that happy post-Cold War period when so many of the world's leaders seem to have imagined that great power strategic rivalry had become forever a thing of the past. The mid-1990s were a period in which the nuclear arsenals of the two former Cold War adversaries were being dramatically reduced as Washington and Moscow shed huge numbers of weapons that had become surplusage as a result of the relaxation of Cold War tensions and then the collapse of the USSR. At least in the U.S. case, in fact, these reductions continued through the first decade of the 2000s, even being accelerated to bring the U.S. nuclear arsenal down to less than one-quarter of its size at the end of the Cold War, and indeed to its lowest point since the Eisenhower administration.[62]

As any who lived through them will remember, the post-Cold War years were a heady time for proponents of an optimistic, globalizing, progressive internationalism—a sort of "emancipatory cosmopolitanism"[63] that saw itself as both saving the world and building a new one. It was an especially buoyant time for disarmament activists, who had waited out the U.S.-Soviet arms race and the long decades of nuclear confrontation in sometimes all

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[62] *See, e.g.*, Christopher A. Ford, *A New Paradigm: Shattering Obsolete Thinking on Arms Control and Nonproliferation*, ARMS CONTROL ASS'N, https://www.armscontrol.org/act/2008-11/features/new-paradigm-shattering-obsolete-thinking-arms-control-nonproliferation (Nov. 5, 2008).

[63] The phrase is that of Samuel Moyn and Andrew Sartori. *See, e.g.*, Samuel Moyn & Andrew Sartori, *Approaches to Global Intellectual History*, *in* GLOBAL INTELLECTUAL HISTORY 3, 24 (Samuel Moyn & Andrew Sartori eds., 2013).

but indescribable fear and anxiety, but who now saw the superpowers' Cold War arsenals plummeting, and a raft of new arms control and arms-prohibitory agreements being negotiated.

To be sure, even at that point, no nuclear weapons possessor that actually relied upon nuclear weapons for its security was willing to give them up. (Four ultimately did, but these exceptions tend to demonstrate the challenge. As noted above, South Africa relinquished a small extant nuclear arsenal not out of strategic benevolence but because its collapsing apartheid regime did not wish the African National Congress to inherit atomic weaponry, while three former Soviet republics relinquished weapons stranded on their soil by the Soviet collapse that they could neither maintain nor really use operationally.) Nevertheless, in the mid-1990s, optimism about the strategic availability of nuclear disarmament was very much in the air, and strategic competition felt like it could be ever thereafter viewed in the rear-view mirror. Under the circumstances, one might be forgiven for a willingness to have a conversation about the viability of full prohibition—or for leavening one's judicial reasoning with a pinch of teleology.

A comparison to the present day, however, is therefore instructive. Unfortunately, contemporary circumstances—in this era of revived great power competition and emergent strategic instabilities and arms race pressures—seem almost tailor-made to support a case that the sort of "extreme circumstances" referred to by the ICJ in 1996 are all too imaginable. This seems true, furthermore, not merely for the direct competitors in today's great power struggles, but also for smaller states who rely upon nuclear deterrence indirectly, through the military alliances they need for their security against the threats they face from the increasingly well-armed, assertive, and geopolitically revisionist authoritarian powers of Xi Jinping's China and Vladimir Putin's Russia.

The expansion of Russian and Chinese nuclear arsenals highlights this point simply. Moscow, for instance, is expanding its arsenal of non-strategic weapons—including weapons it retained despite dismantlement promises made to the United States in the 1990s, as well as the missiles it originally built in violation of the Intermediate-Range Nuclear Forces Treaty[64]—and

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[64] *See generally, e.g.*, U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 12–21, 23–26 (2020).

it is now also openly bragging about the new types of strategic delivery system it is developing.[65] (The Kremlin has also done much to undermine confidence in the ability of arms control negotiations to address strategic challenges, by violating most of the arms control agreements of the of the post-Cold War era.[66]) For its part, Beijing is engaged in a dramatic full-scope expansion both in the diversity of the strategic and non-strategic systems and in China's overall stockpile numbers.[67] It also recently announced a major new program for producing massive new quantities of plutonium that could easily be diverted to expand its rapid nuclear build up even further,[68] even while continuing contemptuously to reject U.S. calls to engage in arms control discussions.[69]

Perhaps even more dramatically, at least from the perspective of smaller countries located much closer to the scene than American leaders find themselves, the growing military might and geopolitical self-assertiveness of the Russian and Chinese regimes have revived threats and fears of direct attack and territorial invasion in ways not seen for decades. As of today, China has illegally occupied and militarized large areas of the South China Sea[70] claimed by its neighbors, issued ever more bellicose threats against Taiwan,[71] and seized hundreds of square miles of Bhutanese territory

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[65] *See, e.g.*, Laurel Wamsley, *Putin Says Russia Has New Nuclear Weapons That Can't Be Intercepted*, NPR, https://www.npr.org/sections/thetwo-way/2018/03/01/589830396/putin-says-russia-has-nuclear-powered-missiles-that-cant-be-intercepted (Mar. 1, 2018, 9:55 AM).
[66] CHRISTOPHER A. FORD, RUSSIAN ARMS CONTROL COMPLIANCE: A REPORT CARD, 1984–2020, at 3–10 (2020).
[67] *See, e.g.*, OFF. OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 92 (2021) ("Beijing has accelerated its nuclear expansion, which may enable the PRC to have up to 700 deliverable nuclear weapons by 2027 and likely intends to have at least 1,000 warheads by 2030."); *see also, e.g.*, Christopher Ford, China's Nuclear Weapons Buildup, Geopolitical Ambition, and Strategic Threat (Oct. 17, 2021), https://www.newparadigmsforum.com/china-s-nuclear-weapons-buildup-geopolitical-ambition-and-strategic-threat.
[68] *See, e.g.*, NONPROLIFERATION POL'Y EDUC. CTR., CHINA'S CIVIL NUCLEAR SECTOR: PLOWSHARES TO SWORDS? (Henry D. Sokolski ed., 2021).
[69] *See, e.g.*, Jon Xie, *China Rejects US Nuclear Talks Invitation as Beijing Adds to Its Arsenal*, VOICE OF AM. (July 13, 2020, 3:38 PM), https://www.voanews.com/east-asia-pacific/voa-news-china/china-rejects-us-nuclear-talks-invitation-beijing-adds-its-arsenal.
[70] *See, e.g.*, *In re* South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086.
[71] *See, e.g.*, Paul D. Shinkman, *China Issues New Threats to Taiwan: 'The Island's Military Won't Stand a Chance'*, U.S. NEWS (Apr. 9, 2021, 11:14 AM), https://www.usnews.com/news/world-report/articles/2021-04-09/china-issues-new-threats-to-taiwan-the-islands-

through the secret establishment of a network of villages and military outposts.[72]

Most of all, Vladimir Putin's operations to invade and seize territory from his neighbors in 2008 and 2014—in the latter case breaking the very promises Russia made to safeguard Ukraine's territorial integrity in the Budapest Memorandum of 1994 *as part of the agreement under which Ukraine agreed to relinquish its Soviet-era nuclear weapons*[73]—highlight just how existential the threats arising out of modern geopolitics are again becoming, as well as their entanglement with nuclear deterrence. Such deterrence, alas, is nowadays steadily more, rather than less, salient to the security interests of many nations.

However instrumentally malleable and subjective international lawyers might wish the law to be in support of the integrationist teleology referred to by Martti Koskenniemi, this arena of existential concern by an array of states up to and including the most powerful countries on the planet would seem to be notably unwise terrain for a new judicial excursion. In contrast to the seemingly benign strategic environment of the 1990s when the ICJ last addressed the question, the threats and challenges of today's world make it all the less likely that any such bootstrapping would in fact have the desired effect of *actually* solving any nuclear problems—and all the *more likely* that such overreaching in support of a policy agenda would damage the legitimacy of the Court itself, and perhaps the entire international legal project. Especially with there being no actual doctrinal basis for thinking the core 1996 holding incorrect, discretion should surely be the better part of valor here.

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military-wont-stand-a-chance; *Taiwan: 'Record Number' of China Jets Enter Air Zone*, BBC (Apr. 13, 2021), https://www.bbc.com/news/world-asia-56728072.

[72] *See, e.g.*, Robert Barnett, *China Is Building Entire Villages in Another Country's Territory*, FOREIGN POL'Y (May 7, 2021, 4:02 PM), https://foreignpolicy.com/2021/05/07/china-bhutan-border-villages-security-forces.

[73] Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons para. 2 (Dec. 5, 1994) (reaffirming that signatories, including the Russian Federation, promise "to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine"), http://www.pircenter.org/media/content/files/12/13943175580.pdf.

B. A Better Way

The second reason to resist the urge for juridical improvision in this area, however good the cause might be felt to be, has already been suggested: namely, that approaching disarmament through such a "legal" prism is unlikely to produce the desired results. More importantly, there may be a much better—and less juridically destructive—way to help address the disarmament concerns that have animated the abolitionist project. The principal message of this article is that it would be far more productive to shift our focus away from "legality" entirely, at least for the moment, and to direct attention to where the real nuclear problems lie.

Ultimately, whatever legal arguments one might or might not make about nuclear deterrence, the problem of nuclear weapons cannot, and will not, be solved by declaratory legal means. Instead, what is needed is attention to the messier and more difficult work of effecting substantive change in the security environment in order to lessen (and hopefully ultimately eliminate) the security incentives that real-world leaders feel to retain nuclear weapons to deter grave threats from nuclear or other forms of aggression.

If anything, fetishizing the "legal" here—as if a more congenial ICJ holding or a brace of additional signatures on a piece of paper in an international meeting hall could magically resolve the security challenges created by the interaction of real-world military postures, doctrines, foreign policies, and strategic ambitions—will at the very least distract from the hard work needed to truly meet these challenges. Worse still, such a focus might actually make resolution of these problems more difficult, adding a moralistic entrenchment around mutually antagonistic legalisms to the many global divides and tensions that will need to be overcome in order for real and sustained progress to be had.

In truth, the principal obstacles to a secure and stable world free of nuclear weapons have little or nothing to do with any lack of "law" on the subject, nor would even a superabundance of relevant legal declarations solve those problems. Instead, something further is needed—an approach

that can speak intelligibly about issues of disarmament in the language of security.[74]

To their credit, some in the disarmament community have in the last few years at least started to recognize the need to address disarmament thinking more clearly and systematically to the security challenges that actually stand in the way of disarmament progress—especially in this era of revived great power competition and military rivalry. Beginning in 2017, U.S. officials have led the development of a new initiative to help draw attention to the need to address the substantive security concerns that impede disarmament progress and to reframe global disarmament discourse in order to focus more upon trying to solve these problems.[75]

Inspired, among other things, by the emphasis placed in the preamble to the NPT upon the fact that it is "the easing of international tension and the strengthening of trust between States" that is needed "in order to facilitate" disarmament,[76] this effort matured into the "Creating an Environment for Nuclear Disarmament" initiative. By late 2020, it had come to involve delegations from forty-two countries, meeting in three working groups, each exploring a critical series of substantive questions[77] about how to help bring about substantive change in the security environment in order to explore ways to overcome security-related obstacles to disarmament progress.[78]

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[74] This has been an interest of the author for some years. *See, e.g.*, Christopher Ford, Learning to Speak Disarmament in the Language of Security (Sept. 29, 2009), https://www.newparadigmsforum.com/p117. Unfortunately, the particular disarmament approach discussed in those 2009 remarks did not prove viable. *See* CHRISTOPHER A. FORD, NUCLEAR WEAPONS RECONSTITUTION AND ITS DISCONTENTS: CHALLENGES OF "WEAPONLESS DETERRENCE" (2010).

[75] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, From "Planning" to "Doing": CEND Gets to Work (Nov. 24, 2020), https://www.newparadigmsforum.com/p2884.

[76] Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 33, pmbl. (declaring that States party desire "to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control").

[77] *See, e.g.*, Christopher Ford, Assistant Sec'y of State, Reframing Disarmament Discourse, (Sept. 3, 2020), https://www.newparadigmsforum.com/p2755.

[78] *See generally, e.g.*, CHRISTOPHER A. FORD, FOUR YEARS OF INNOVATION AND CONTINUITY IN U.S. POLICY: ARMS CONTROL AND INTERNATIONAL SECURITY SINCE JANUARY 2017, at 19.

It should imply no disrespect for the world's jurists, nor for the broader international legal system, to suggest that the solutions for such problems of strategic stability, geopolitical rivalry, and military competition are beyond their professional ken and beyond their effective reach. If there are such solutions, they will require at least as much—and perhaps more—from statesmen, legislators, scholars, military professionals, educators, and ordinary citizens who comprise the extant democratic polities of the world than from lawyers and judges. Effective work on such solutions, moreover, will require engagement through a discourse that is not principally, and perhaps not even secondarily, "legal" in nature.

From a legal perspective, doctrinal questions about the legality of the threat or use of nuclear weapons have already been asked, and they have already been answered. They will be answered no better, moreover—and will most likely be answered far worse, and more dangerously both from the perspective of substantive security and from that of "the law" itself—if the policy community indulges in the fundamental category mistake of seeing existential security questions as ones amenable to resolution merely by legal-technocratic pronouncement, however well-intentioned.

Instead, it is now time for a more productive engagement on how to solve real-world problems. Now that, with Creating an Environment for Nuclear Disarmament and other such efforts, the disarmament community has finally begun to focus upon how to resolve or at least lessen the global security challenges that impede disarmament progress, we should not imperil such progress by returning to the sort of distracting and counterproductive magical thinking pursuant to which the problems of the world can be solved by a judge's pen.

RESTORING DUE PROCESS AND STRENGTHENING PROSECUTIONS: MAKING THE ARTICLE 32, UCMJ, HEARING BINDING

MAJOR MATTHEW L. FORST*

I. Introduction

The military justice system affords Service members a plethora of rights, usually exceeding those in the civilian criminal justice system.[1] One such right is the right to be present with an attorney during the military equivalent of a grand jury hearing before a commander can refer charges to a general court-martial.[2] This process is governed by Article 32, Uniform

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[1] For example, the Supreme Court held in *Miranda v. Arizona* that when a person is subject to a custodial interrogation, the Fifth Amendment requires law enforcement to inform that person of their constitutional rights to remain silent, to not make any self-incriminating statements, and to an attorney. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Conversely, the military uses Article 31(b), Uniform Code of Military Justice (UCMJ), which requires anyone subject to the code acting in an official capacity to apprise an accused as to the nature of the accusation, their right to remain silent, and their freedom from having to make any statements. UCMJ art. 31(b) (1950). The questioner need not be a member of law enforcement, and the rights-warning requirement attaches irrespective of whether there is a custodial interrogation. *E.g.*, United States v. Jones, 73 M.J. 357, 360–63 (C.A.A.F. 2014) (explaining the rubric used to determine whether a questioner needs to warn an accused).

[2] United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988) (commenting that the Article 32, UCMJ, investigation is the military's version of a grand jury); 1 MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 296–97 (2015) (explaining that when a

Code of Military Justice (UCMJ),[3] and was historically conducted as an investigation during which the accused could request evidence, examine witnesses, and conduct discovery.[4] The process changed in fiscal year (FY) 2014,[5] regressing from an evidence-rich inquiry rife with witness testimony and production of evidence to a mere paper drill. The Article 32, UCMJ, hearing no longer has investigative value or develops the facts for the referral authority, and the independent legal recommendation carries no weight. In turn, it has essentially become an ode to a process that used to serve as a bulwark against baseless charges in a system dominated by commanders.[6]

But to argue that the Article 32, UCMJ, hearing is toothless and needs reform out of fundamental fairness misses the bigger picture. The Article 32, UCMJ, hearing needs to change because cases are being sent to court-martial that lack probable cause and cannot sustain a conviction. Lieutenant

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person is charged in the Federal civilian system, either a magistrate will review the criminal complaint at a pretrial preliminary hearing or prosecutors will secure an indictment from a grand jury; military prosecutors, however, cannot bypass the Article 32, UCMJ, preliminary hearing for felony offenses because there is no grand jury system); FED. R. CRIM. P. 6(d) (omitting any requirement that the accused or the accused's counsel be present during the proceedings); *see* Parker v. Levy, 417 U.S. 733 (1974) (finding that military jurisprudence is its own body of law that exists separate and apart from the Federal civilian system).

[3] UCMJ art. 32 (2019).

[4] An Article 32, UCMJ, preliminary hearing is required only for cases referred to a general court-martial, at which felony-grade offenses are typically tried. *Id.* art. 32(a)(1)(A); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601 (2019) [hereinafter MCM]. There are also special courts-martial and summary courts-martial, both of which are limited in terms of potential punishments adjudged. *See id.* arts. 18–20. Special courts-martial are sometimes referred to a military judge-only proceeding or one with a military judge and four-member jury. *Id.* art. 16. A commissioned officer, not necessarily an attorney, presides over summary courts-martial, which are considered a non-criminal forum at which a finding of guilty does not constitute a criminal conviction. *Id.* art. 20. Congress has barred some offenses, such as those in Article 120, UCMJ, from referral to any court lower than a general court-martial. *Id.* art. 18(c).

[5] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a)(1), 127 Stat. 672, 954–55 (2013) (codified as amended at 10 U.S.C. § 832).

[6] The Article 32, UCMJ, hearing was also amended in fiscal years 2015 and 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5203(a)–(d), 130 Stat. 2000, 2905–06 (2016) (codified as amended at 10 U.S.C. § 832); David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 49–50 (2017) (outlining briefly how the Article 32, UCMJ, hearing has changed from year to year).

General Charles Pede, the fortieth Judge Advocate General of the Army, has stated that, "as good as our justice system is, we can never take for granted its health or its fairness. It requires constant care."[7] Congress needs to change the military justice system to make the Article 32, UCMJ, hearing determination binding, meaning that the general court martial convening authority (GCMCA) cannot refer any charge to trial if the preliminary hearing officer (PHO) determines there is no probable cause to support it. This change will bring a threshold requirement for the quantum of evidence to proceed to a criminal trial.

This opinion emanates from the empirical data that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) collected, analyzed, and reported in October 2020.[8] The DAC-IPAD formed a "case review subcommittee" (CRSC) comprised of seven members of diverse backgrounds.[9] One was a civilian district attorney with nearly four decades of experience, another was a civilian defense attorney with thirty years' experience, and others were former judge advocates with extensive experience at courts-martial.[10] The CRSC analyzed 1,904 cases of "penetrative sexual offenses"[11] from across the Armed Forces.[12] Of these 1,904 cases, 517 resulted in at least 1 preferred penetrative sexual offense against the accused.[13] The report revealed that more than 13% of adult penetrative sexual offense cases preferred across the Armed Forces failed to establish probable cause.[14] Equally disconcerting, 41.2% of the cases preferred were determined to lack sufficient evidence to obtain and sustain a conviction.[15] For the 235 cases that went to verdict, the

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[7] Terri Moon Cronk, *Top Legal Officers Address Racial Disparity in Military Justice*, DOD NEWS (June 16, 2020), https://www.defense.gov/Explore/News/Article/Article/2222417/top-legal-officers-address-racial-disparity-in-military-justice.

[8] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 (2020) [hereinafter DAC-IPAD REPORT].

[9] *Id.* at 25–26, apps. C–D.

[10] *Id.*

[11] The DAC-IPAD's report uses the term "penetrative sexual offenses" to refer to the offenses of rape, sexual assault, and forcible sodomy. *Id.* at 1. This article also uses that term.

[12] *Id.*

[13] *Id.* at 54.

[14] *Id.* at 55.

[15] *Id.*

CRSC determined that 89.4% had enough evidence to establish probable cause for the penetrative sexual offense, but only 68.9% had sufficient evidence to obtain and sustain a conviction.[16] The overall acquittal rate for just the penetrative sexual offense charges in those 235 cases was 61.3%; yet the acquittal rate dropped to 45.1% when the evidence available at preferral was sufficient to obtain and sustain a conviction.[17] Evidence matters and so does legal scrutiny. The military justice system should not be immutable to change in the wake of empirical data when it affects the rule of law and its application.[18]

The data shows that the system is allowing cases to reach trial that never should.[19] It is undesirable (and unjust) for cases that are factually insufficient to reach trial because it inhibits professionalism, fairness, and efficiency in military justice. Changing the Article 32, UCMJ, hearing as a determinative safeguard will help to correct this negative trend. However, there are arguments to the contrary. This article will discuss the three most prominent: (1) that the Article 32 hearing is too limited in scope and function for the PHO's decision to be binding; (2) that the Staff Judge Advocate (SJA) who currently makes the probable cause determination in his or her Article 34, UCMJ,[20] advice is the most experienced and best suited person to render such advice; and (3) that PHOs are too inexperienced to make such an important determination. These arguments are faulty considering the data from the DAC-IPAD study; the second part of this article will discuss specifically why. Lastly, this article will examine what other changes should occur if the Article 32, UCMJ, hearing does in fact become binding.

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[16] *Id.* at 58.
[17] *Id.*
[18] *How to Confront Bias in the Criminal Justice System*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/how-to-confront-bias-in-the-criminal-justice-system (last visited Nov. 19, 2021).
[19] While the data from the DAC-IPAD study focused specifically on penetrative sexual offenses, the argument for amending the Article 32, UCMJ, hearing applies to all general courts-martial.
[20] UCMJ art. 34 (2019).

II. The Committee and Its Report

A. Mission and Focus

The DAC-IPAD conducted an in-depth review of 1,904 cases across the Armed Forces involving "a penetrative sexual offense against an adult victim."[21] It was the byproduct of Federal legislation trained on the issue of sexual assault in the military with an eye towards making recommendations through the Department of Defense to Congress on how to improve the investigation, prosecution, and defense of such cases.[22] Focused on a narrow and distinct category of courts-martial, the DAC-IPAD collected, reviewed, and analyzed raw data about adult penetrative sexual offenses.[23] Of those 1,904 cases, 517 resulted in a commander preferring charges.[24] To further evaluate this subgroup of cases, the CRSC[25] analyzed these cases using pretrial documentation such as the military criminal investigative organizations' (MCIO) reports, Article 32, UCMJ, reports, and Article 34, UCMJ, advice related to each case.[26]

The CRSC qualitatively reviewed these cases to determine whether the commander's initial disposition of charges was reasonable and whether the evidence was sufficient to advance the case to trial.[27] The latter assessment was further subdivided. First, the CRSC sought to understand if there was probable cause to believe the accused committed the alleged penetrative offense. The second determination was whether the pretrial evidence was sufficient to "obtain and sustain" a conviction at court-martial.[28] The CRSC

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[21] DAC-IPAD REPORT, *supra* note 8, at 2.
[22] *Id.* at 1; *see generally* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3362–66 (2014) (codified as amended at 10 U.S.C. § 830a).
[23] DAC-IPAD REPORT, *supra* note 8, at 3, 26, 28. The DAC-IPAD requested information from all the services, focusing only on cases that involved the penetrative offenses of rape, sexual assault, or sodomy (i.e., Articles 120 and 125, UCMJ, and attempts thereof under Article 80, UCMJ), were closed in FY 2017, involved an adult victim, and were committed by a military member on active duty at the time of the alleged offense.
[24] *Id.* at 5–6.
[25] *Id.* at 25.
[26] *Id.* at 1, 34.
[27] *Id.* at 25–27.
[28] *Id.* at 2, 53.

did not answer the question of whether a guilty verdict was likely or probable, just "whether sufficient admissible evidence . . . was *present* in the investigative files, such that if the evidence was admitted at trial, proof beyond a reasonable doubt was an achievable result."[29]

The CRSC took this approach to understand the prosecutorial decisions and the attrition of sexual assault cases in the military.[30] Bifurcating its focus between probable cause and the Government's ability to obtain and sustain a conviction was derived from the evidentiary measures used in civilian criminal justice systems.[31] The military justice system assigns a PHO (rather than a grand jury or magistrate) to make a formal probable cause determination before a case may proceed to a general court-martial.[32]

As for making the latter assessment on ability to sustain a conviction, Article 34, UCMJ, only requires advice on whether there is "probable cause to believe that the accused committed the offense charged,"[33] and the SJA is not bound by the PHO's recommendation on probable cause.[34] If the SJA determines no probable cause exists for a charge, the GCMCA may not refer it to trial.[35] While the responsibilities of a PHO and an SJA overlap in terms of assessing probable cause, the DAC-IPAD report showed that a significant number of charges lacking probable cause proceeded to trial, and even more lacked sufficient evidence to sustain a conviction. The DAC-IPAD spent considerable time endeavoring to understand the systemic breakdown, ultimately concluding that the military justice process would best be served revising the Article 32, UCMJ, hearing and Article 34, UCMJ, advice.[36]

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[29] *Id.* at 59.
[30] *Id.* at 53.
[31] *Id.*
[32] MCM, *supra* note 4, R.C.M. 405 (2019).
[33] UCMJ art. 34(a)(1)(B) (2019).
[34] MCM, *supra* note 4, R.C.M. 406 discussion (explaining that the Article 34, UCMJ, advice does not require that Staff Judge Advocates (SJAs) give convening authorities "the underlying analysis or rationale" of their conclusions and that, while the Article 32, UCMJ, hearing report and other documents normally accompany the advice, "there is no legal requirement to include such information, and failure to do so is not error").
[35] UCMJ art. 34(a).
[36] DAC-IPAD REPORT, *supra* note 8, at 58 ("Finding 101: The requirements and practical application of Articles 32 and 34, UCMJ, and their associated Rules for Courts-Martial did not prevent referral and trial by general court-martial of adult penetrative sexual offense charges in the absence of sufficient admissible evidence to obtain and sustain a conviction,

B. Probable Cause and the Preliminary Hearing

The DAC-IPAD data revealed that most cases contained sufficient evidence on the threshold question of probable cause. In 446 of 517 cases (86.3%), the criminal investigation surmounted the probable cause hurdle with relative ease.[37] Put differently, the CRSC found that sixty-eight cases (13.2%) lacked sufficient evidence to meet the probable cause standard.[38] The *Manual for Courts-Martial* provides that, before relying on reports of others in determining whether probable cause for pretrial confinement exists, the commander must have a "reasonable belief" that the information is both "believable and has a factual basis."[39]

This standard is flexible and cannot be quantitatively calculated. In *Brinegar v. United States*, the Supreme Court defined probable cause as practically applied based on "factual and practical considerations of everyday life on which reasonable and prudent men . . . act."[40] Reasonable minds may differ on what constitutes a reasonable belief based on how one prioritizes the factual and practical considerations before them.

To demonstrate how reasonable minds may differ regarding whether evidence reaches the threshold of probable cause, consider the following

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to the great detriment of the accused, the victim, and the military justice system. Finding 102: The data clearly indicate that no adult penetrative sexual offense charge should be referred to trial by general court-martial without sufficient admissible evidence to obtain and sustain a conviction on the charged offense, and Article 34, UCMJ, should incorporate this requirement.").

[37] *Id.* at 54.

[38] Of the sixty-eight cases that the CRSC determined lacked probable cause, fourteen were Army cases, twelve were Marine Corps cases, twelve were Navy cases, twenty were Air Force cases, and two were Coast Guard cases. *Id.*

[39] MCM, *supra* note 4, R.C.M. 305(h)(2) discussion.

[40] Brinegar v. United States, 338 U.S. 160, 174 (1949); *see* United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007) ("The threshold for probable cause is subject to evolving case-law adjustments, but at its core it requires a factual demonstration or reason to believe that a crime has or will be committed. As the term implies, probable cause deals with probabilities. It is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false; there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present." (citations omitted) (quoting *Brinegar*, 338 U.S. at 175)).

hypothetical. Imagine that a Service member has been accused of committing a sexual assault outside of a nightclub near post, a popular weekend destination for hundreds of club-goers. The victim recounted the Service member making several vulgar statements throughout the night about his wanting to record having sex with the victim in a public place. The victim rebuffed all the Service member's crass sexual overtures and told him it would never happen. The Service member cut his usual late night socializing short at 2330, telling his friends that he would walk the mile from the club to his apartment. Coincidentally, just minutes later, the victim also left and walked about a block from the club to wait for a taxi away from the masses of people. Suddenly and without warning, the victim was grabbed from behind, pulled into some nearby bushes, and sexually assaulted. The victim never saw her attacker's face and was only able to relay to the police, who she called immediately after the attack, that the assailant was between 5'8" and 5'10"; had short, dark hair; and was an average build. The Service member is 5'11" with short, dark hair and a medium build. The victim told the police officers about his lewd comments in the club and said that he could be her attacker. The victim stated that it seemed the attacker recorded the event on a phone or a pocket-sized device. Satisfied with the preliminary investigation, the police raced to the Service member's apartment, where they knocked on the door and announced themselves. They heard someone inside exclaim and then the sound of a glass-like object smashed on the floor. The Service member answered the door in a towel after having just showered. On the entryway table was a smart phone with a smashed screen seemingly beyond repair. Security cameras showed him arriving home a few minutes before midnight, enough time for him to have committed the assault and made the short walk home.

This scenario presents a conundrum of sorts as it relates to probable cause. The Service member made multiple sexually suggestive comments to the victim and the victim never reciprocated. The sexual assault was in public and recorded, matching two of the Service member's self-professed sexual proclivities. He was in the vicinity of the attack, matched the victim's description of her attacker, and appeared to be covering his tracks. However, this was a popular club, he left before the victim did, and he showered after returning to his home, as is common following interactions in crowded places. The police may have startled him with their knock, causing him to drop his phone, but one may see this as both an attempt to destroy evidence and as consciousness of guilt. Making a probable cause determination as to whether the Service member was the alleged attacker may come down to

how one values the evidence presented, possibly leaving reasonable minds to differ. The Court of Appeals for the Armed Forces has acknowledged this, noting that "probable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself."[41]

The CRSC compared its review of the sixty-eight cases it believed lacked probable cause for the penetrative offense charged with the decisions of the PHOs who presided over the preliminary hearings in those cases. Only forty cases (58.8%) proceeded to an Article 32, UCMJ, hearing.[42] Preliminary hearing officers issued written recommendations in thirty-four cases, finding probable cause in twelve cases but no probable cause in twenty-two others.[43] Overall, PHOs recommended referral to courts-martial in only ten of the thirty-four cases; nine cases resulted in acquittal and the lone exception that resulted in conviction was overturned on appeal for factual insufficiency.[44] The CRSC noted in the DAC-IPAD report that its assessment of these cases was not always an easy decision and that differing minds could assess the evidence differently.[45]

While determining probable cause is not an exact science, the PHOs and CRSC were more consistent with each other than not. The CRSC was comprised of well-practiced and experienced military justice attorneys, presumably with years more trial and military justice experience than the PHOs in the thirty-four cases considered. The PHOs were more liberal in finding probable cause than the sagely hands of CRSC. Put differently, PHOs leaned towards finding probable cause if the evidence was close, meaning that had their respective recommendations been binding on GCMCAs, the prosecution received the benefit of the doubt to advance the case. One could also interpret these numbers, albeit statistically quaint in size, to mean that had the GCMCAs heeded the PHOs' respective recommendations, military prosecutors would have suffered fewer acquittals, and more victims would arguably have been spared the heartache of a trial.

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[41] *Leedy*, 65 M.J. at 213.
[42] DAC-IPAD REPORT, *supra* note 8, at 55.
[43] *Id.*
[44] *Id.*
[45] *Id.* (failing to cite specific instances).

III. Objections

The DAC-IPAD study asked each military service's respective Judge Advocate General's Corps whether PHO determinations should be binding. All objected to this idea for three general reasons: (1) the Article 32, UCMJ, hearing has a limited evidentiary scope; (2) the Government continues to develop evidence after the Article 32, UCMJ, hearing; and (3) the SJA's military justice experience and expertise is far and away superior to that of the PHO.[46] These reasons appear mostly anecdotal and perhaps logically self-defeating.

A. Limited in Scope

Military justice representatives of each service harbor the view that the Article 32, UCMJ, hearing is too "limited," in that it does not consider the panoply of evidence available at referral, thereby making it an inappropriate venue for a binding probable cause determination.[47] The services seem resigned to the idea that the PHOs do not receive enough evidence because evidence is constantly being developed throughout the process; because the victim cannot be enjoined to testify and therefore the PHO may never assess his or her credibility; because there is no discovery or fact finding component to it anymore; and because "it reflects as much evidence, frequently in documentary form, that the government believes necessary to demonstrate probable cause . . . ."[48] These arguments are problematic for several reasons.

First, an Article 32, UCMJ, hearing need not be a "comprehensive evaluation of all the available evidence"[49] for the purposes of a probable cause determination. As the American Bar Association and the Department of Justice (DoJ) explain, probable cause is the jumping off point that allows

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[46] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES 1–5, https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set11_20190515_Questions_Answers_20191204.pdf (last visited Dec. 1, 2021).
[47] *Id.*
[48] *Id.* at 5.
[49] *Id.* at 1.

an attorney to advance a case to trial ethically and legally.[50] In Federal cases, the prosecutor uses witnesses and other evidence to present an outline of the Government's case to the grand jury, which decides if sufficient evidence exists to establish probable cause.[51] The amount and type of evidence the grand jury hears is the Government's prerogative. Moreover, prosecutors at a grand jury are not conducting discovery or developing their case. Federal prosecutors are encouraged when they believe there is probable cause in a case to first consider whether additional investigation is necessary before making a charging decision.

Similarly, trial counsel and commanders control which charges to prefer and when to prefer them, with the statute of limitations being one of the few bars to these considerations.[52] Because the Article 32, UCMJ, hearing is no longer a discovery tool,[53] trial counsel neither can nor should rely on it to produce more evidence to refine the Government's case.[54] Trial counsel have wide latitude over what the defense receives in discovery before referral.[55] In addition, with military law enforcement investigators as a

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[50] *See Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Dec. 1, 2021) ("Minimum Requirements for Filing and Maintaining Criminal Charges—(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice. (b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt. . . .").

[51] U.S. Dep't of Just., Just. Manual § 9-11.101 (2017) [hereinafter Justice Manual].

[52] UCMJ art. 43 (2019).

[53] 159 Cong. Rec. 18296 (2013) (statement of Senator Levin) ("The bill will do the following that will be hopefully coming here next week: Make the Article 32 process more like a grand jury proceeding. . . . [C]urrently the proceeding that is taken under Article 32 is more like a discovery proceeding rather than a grand jury proceeding, and it has created all kinds of problems, including for victims of sexual assault who would have to appear and be subject to cross-examination by the defense.").

[54] *E.g.*, *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD): 13th Public Meeting*, U.S. DEP'T OF DEF. 71 (Aug. 23, 2019), https://dacipad.whs.mil/images/Public/05-Transcripts/20190823_DACIPAD_Transcript_Final.pdf [hereinafter *13th Public Meeting*] (quoting Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice).

[55] MCM, *supra* note 4, R.C.M. 404A (directing only that the trial counsel furnish statements and evidence the Government controls, intends to use at the Article 32, UCMJ, hearing, and

resource, trial counsel have carte blanche to seek out evidence, interview witnesses, and confer with the chief of justice and expert consultants, unencumbered by judicial or procedural deadlines. All this is to say that trial counsel have time to prepare, outline, and develop their cases in anticipation of the preliminary hearing, much like civilian prosecutors.

Indeed, the CRSC found that reviewing only MCIO investigative files and other pretrial documents established probable cause in 86.3% of the 517 cases preferred.[56] That number jumped slightly, to 89.4%, amongst the 235 cases that went to verdict.[57] The CRSC only found twenty-five of the cases tried lacking enough evidence to establish probable cause.[58] All of those cases eventually resulted in an acquittal for the penetrative offense.[59] Based on the near-perfect acquittal rate, one can extrapolate that these cases never benefited from late-arriving evidence that would have made the evidentiary assessment at referral any different from at the preliminary hearing. If anything, it highlights potentially defective Article 34, UCMJ, advice.

There is no rule barring trial counsel from presenting evidence at the Article 32, UCMJ, hearing. The service representatives noted that victims cannot be forced to testify and that neither defense nor trial counsel are required to present evidence. The same can be said for a Federal prosecutor; the Federal rules of criminal procedure do not enjoin them to present evidence. Trial counsel notifies the PHO and defense counsel about the evidence they intend to introduce at the Article 32, UCMJ, hearing. The trial counsel can produce witnesses, documentary evidence, reports, video evidence, and so on, yet trial counsel tend not to do this.[60] The PHO may

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any matters provided to the convening authority directing the hearing); *id.* R.C.M. 701(a) (directing dissemination of documents, reports, and papers accompanying the charges being served on the defense after referral).

[56] DAC-IPAD REPORT, *supra* note 8, at 54.

[57] *Id.* at 56.

[58] *Id.*

[59] *Id.*

[60] Before the DAC-IPAD, Retired U.S. Navy Captain Payton-O'Brien testified that in her experience that

> the problem with the preliminary hearing currently is it's almost a foregone conclusion, because the government's obligation is to walk in—and while I agree with the probable cause standard, how they are meeting it generally in the Navy is to walk in with an investigation and give it to the preliminary hearing officer and say, here you go. No cross-

reject evidence that is irrelevant or violates a privilege or some other Military Rule of Evidence.

The preliminary hearing has essentially been whittled to a paper drill in recent years, usually doing little to explain the minimal evidence presented or to give the SJA and GCMCA greater context about the facts than what is in the MCIO report.[61] The MCIO report is a law enforcement product that, even in its final form, is merely one interpretation of evidence collected by one specific source. The Article 32, UCMJ, hearing is not too limited in scope that there cannot be at least some testimony to better contextualize the documentary evidence and perhaps "present some . . . defense evidence that might go to that determination of probable cause."[62] In a sense, trial counsel who try to present the most barebones case possible are encumbering the SJA and GCMCA in the later determination as to whether the case should go forward. The Article 32, UCMJ, hearing is not so limited in scope that trial counsel cannot present some testimony, even if from only an investigator. To fix this, the military simply needs to change trial counsels' orientation to the hearing, not necessarily create or change any of the rules.

The alleged victim not having to testify at the Article 32, UCMJ, hearing has a limited effect on meeting the probable cause standard. The trial counsel can meet the legal standard by introducing the alleged victim's written or video statement. In FY 2017, of the 517 preferred cases, the victim

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> examination of witnesses. No testimony. They just drop a paper case on the preliminary hearing officer. . . . Most witnesses aren't testifying, because the government's position . . . in most cases is we don't have to bring in testimony because it's cumulative with that report. Despite defense counsel asking for witnesses to come, in many cases the witnesses aren't because either they are civilians and they decline or the government's position is that their testimony is cumulative with the paper. So are you really vetting a case out based on paper? I would submit that maybe not.

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD): 16th Public Meeting, U.S. DEP'T OF DEF. 54–55 (Feb. 14, 2020), https://dacipad.whs.mil/images/Public/05-Transcripts/20200214_DACIPAD_Transcript_Final.pdf [hereinafter *Judges' Testimony*] (quoting Captain (Retired) Bethany Payton-O'Brien, U.S. Navy).

[61] *13th Public Meeting*, *supra* note 54, at 72.

[62] *Judges' Testimony*, *supra* note 60, at 67 (quoting Captain (Retired) Bethany Payton-O'Brien, U.S. Navy).

made a statement to law enforcement 99.6% (515 of 517) of the time.[63] The alleged victim's statement alone was sufficient to establish probable cause in 428 of 515 (83.1%) cases.[64] Conversely, the alleged victim's statement was insufficient on its own in 81 (15.7%) of cases.[65] It might behoove trial counsel to encourage alleged victims to testify more often for the benefit of trial, but the absence of a victim's testimony does not, for the most part, hinder the Government from establishing probable cause.[66] Moreover, if the alleged victim does testify, the PHO, not the SJA, would have the real time benefit of judging the witness's demeanor.[67] That said, when witnesses do not testify, they cannot be cross-examined, which alleviates the risk of weakening the Government's evidence. This remains a key difference between the Article 32, UCMJ, and Federal grand jury in that the latter does not allow the accused or defense counsel to attend.[68]

B. Staff Judge Advocate's Legal Experience and Expertise

Representatives of all services agree that the Article 32, UCMJ, hearing should not be binding because, in part, the SJA has more experience and expertise than any PHO.[69] While true that SJAs are virtually always senior in rank to the PHO and have more time in service, that does not automatically impute to their criminal law expertise. The breadth of legal practice in the military ranges from national security to environmental law.[70] Some SJAs have a wealth of military justice experience, but it is not

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[63] DAC-IPAD REPORT, *supra* note 8, at 50.
[64] *Id.* at 51.
[65] *Id.*
[66] *Judges' Testimony*, *supra* note 60, at 13 ("[The Article 32] was a good opportunity as a prosecutor to see how that individual would fare under cross-examination. They don't have that opportunity anymore. Most victims will assert their rights to not come to an Article 32. Thus, they come into court, it seems sometimes, unprepared for what is going to happen and how the questions will come at them.").
[67] *13th Public Meeting*, *supra* note 54, at 79 (quoting Colonel Julie Pitvorec, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force).
[68] FED. R. CRIM. P. 6.
[69] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 1.
[70] David Roza, *The Major Flaws in the Air Force Justice System that Let Generals Go Unpunished*, TASK & PURPOSE (Nov. 24, 2020, 8:26 PM), https://taskandpurpose.com/news/william-cooley-air-force-sexual-assault (discussing the relative inexperience of judge advocates at courts-martial); Cully Stimson, *Army and Air Force JAG Corps Need*

a prerequisite to becoming an SJA.[71] Regardless, the Committee's data suggests that having the SJA make an objective probable cause determination and then advocate to the GCMCA about disposition is not ideal.

Some argued that the SJA has the benefit of getting advice from not just the PHO, but a litany of senior legal advisers. Theoretically, the trial counsel advises the senior trial counsel, special victim prosecutor,[72] and the chief of justice. The chief of justice then advises the SJA, either directly or through the Deputy Staff Judge Advocate. The commonality amongst all these people is that they advocate for the Government and its interests. Because these actors are not neutral and detached, the Government runs the risk of creating an echo chamber effect in which probable cause is evaluated through rose-colored glasses. The United States Marine Corps wrote, "If all of those more experienced attorneys are advising that there is probable cause, there is no reason to believe the PHOs['] opinion to the contrary is more likely correct."[73] The data from the DAC-IPAD does not bear this out.

The data indicates that the Article 34, UCMJ, advice is perhaps too liberal in construing probable cause. The CRSC found that 10.6% of the 235 cases reaching verdict lacked sufficient evidence to establish probable

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Career Litigators Now, DAILYSIGNAL (May 2, 2016), http://dailysignal.com/2016/05/02/army-and-air-force-jag-corps-need-career-litigators-now.

[71] *Judges' Testimony*, *supra* note 60, at 33. In discussing the relative lack of military justice expertise in the Judge Advocate General's Corps, U.S. Army Colonel (Retired) Andrew Glass said, "We need people with military justice experience as SJAs. You don't need that much experience. I've been an SJA. I can tell you in an hour what you need to know to be an SJA and advise people." *Id.*

[72] In the Army, special victim prosecutors are assigned to the Trial Counsel Assistance Program as part of the United States Army Legal Services Agency, with duty at a specific installation. The Trial Counsel Assistance Program has three highly qualified experts, who are civilian attorneys with significant civilian prosecutorial experience. OFF. OF THE JUDGE ADVOC. GEN., U.S. ARMY, U.S. ARMY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2019, *in* REPORTS OF THE SERVICES ON MILITARY JUSTICE FOR FISCAL YEAR 2019 1, 3 (2020), https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Report%20-%20FY19%20-%20All%20Services.pdf?ver=2020-07-22-091702-650. Special victim prosecutors have the benefit of being able to consult with these experts on cases, drawing even greater legal insight from learned counsel on special victim and high-profile prosecutions. *Id.*

[73] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 3.

cause.[74] Nearly every single one of those cases resulted in an outright acquittal on the penetrative sexual offense charge.[75] The one case that did result in a conviction was overturned on appeal for factual insufficiency.[76] The DAC-IPAD study explored a very parochial subset of military justice cases. One service representative touted at least one occasion where a PHO found no probable cause, the SJA disagreed, and the case ultimately proceeded to a conviction.[77] While notable, anecdotal examples are not proof of legal sufficiency.

By design, the SJA is generally ill suited to make the probable cause determination. This is because the SJA, as the command's primary legal adviser, is not impartial. The PHO, on the other hand, views a case only through the charges brought and the evidence adduced at the preliminary hearing. Reasons for a PHO's disqualification include having played a role in the prosecution or defense of the accused, serving as the Deputy Staff Judge Advocate, and any time the PHO's objectivity can reasonably be questioned.[78] The SJA, however, has a statutory duty to make a recommendation as to disposition to the GCMCA after working with the chief of justice and a cadre of attorneys who have been helping the trial counsel perfect the case against the accused and to offer advice to subordinate commanders on disposition.[79]

It cannot be ignored that the legal adviser to a GCMCA is evaluated by a general officer whose military justice philosophy may be impacted by ulterior considerations. Lieutenant General Susan Helms granted clemency to an Airman convicted of a sex offense in accordance with the rules.[80]

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[74] DAC-IPAD REPORT, *supra* note 8, at 56.
[75] *Id.*
[76] *Id.*
[77] *13th Public Meeting*, *supra* note 54.
[78] United States v. Lopez, 42 C.M.R. 268 (C.M.A. 1970); United States v. Parker, 19 C.M.R. 201 (C.M.A. 1955); United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981) (investigating officer was close friend of accuser and vacationed with accuser two days prior to the preliminary hearing); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (investigating officer was defense counsel's supervisor).
[79] UCMJ art. 34(a)(2) (2019).
[80] Craig Whitlock, *General's Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASH. POST (May 6, 2013), https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/

When she was subsequently considered for promotion, she found herself under congressional scrutiny for her decision.[81] Her promotion never came to pass, and she retired shortly thereafter.[82] Some GCMCAs might be inclined to advance a case because of persistent congressional efforts to remove commanders from the military justice process.[83] Speaking candidly about how an SJA's advice can be motivated by optics, one service representative recognized that "convening authorities are not going to be second guessed if they send a case to court-martial. They will be if they don't, especially if you have a willing participant in a court-martial case."[84] A retired military judge and former SJA more starkly asserted, "[T]he problem is . . . little generals want to be bigger generals, generally. They want to get promoted."[85]

The DAC-IPAD inquiry showed that even seasoned legal advisers sometimes scrutinize non-evidentiary factors in favor of others. One former SJA said,

> I know the Air Force is the outlier on this because we work at the probable cause standard, and the referral standard, and take into consideration the wants of the victim . . . .
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> . . . .

ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html. Lieutenant General Helms granted clemency contrary to her legal adviser's recommendation. *Id.*

[81] *Id.*

[82] David Alexander, *Female U.S. General Who Overturned Sex-Assault Ruling to Retire*, REUTERS (Nov. 8, 2013), https://www.reuters.com/article/us-usa-defense-sexualassault/female-u-s-general-who-overturned-sex-assault-ruling-to-retire-idUSBRE9A800A20131109.

[83] *See* S. 4049, 116th Cong. § 539 (2020) (proposing to give judge advocates authority to decide what cases are brought to trial through an Office of the Chief Prosecutor instead of through commanders); Leo Shane III, *Plan to Remove Handling of Military Sexual Misconduct from Chain of Command Sees New Momentum*, MIL. TIMES (Feb. 24, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/02/24/plan-to-remove-handling-of-military-sexual-misconduct-from-chain-of-command-sees-new-momentum; Lolita C. Baldor, *End Commanders' Power to Block Military Sexual Assault Cases, Pentagon Panel Says*, MIL. TIMES (Apr. 22, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/04/22/end-commanders-power-to-block-military-sex-cases-pentagon-panel-says.

[84] *13th Public Meeting*, *supra* note 54, at 109.

[85] *Judges' Testimony*, *supra* note 60, at 37.

> . . . And so, if . . . you have a credible, reliable victim that wants to participate, we feel strongly that the probable cause standard allows us to go forward in that case . . . .[86]

Her point, while compassionate, demonstrated how Article 34, UCMJ, advice can be contorted into a self-granting permission slip to achieve policy ends.

One need only consider the Air Force's numbers from the DAC-IPAD study to see how pervasive the mindset is. Of the 235 cases that were tried to verdict across the services, the Air Force contributed 68.[87] The CRSC found that thirteen of sixty-eight cases (19.2%) in the Air Force lacked sufficient evidence to establish probable cause, compared with five of ninety-four cases (5.3%) in the Army, two of twenty-six cases (7.7%) in the Marine Corps, five of forty cases (12.5%) in the Navy, and zero of seven cases (0%) in the Coast Guard.[88] The CRSC calculated that thirty-nine of sixty-eight (57.4%) cases the Air Force tried to verdict had sufficient evidence to sustain a conviction at trial. Unsurprisingly, the acquittal rate was fifty of sixty-eight cases (73.5%), outpacing every other service by at least ten percentage points. Assuming *arguendo* that a PHO with a binding probable cause determination had blocked those thirteen cases from being referred, the acquittal rate would have dropped to 67% (i.e., thirty-seven of fifty-five cases).

C. Inexperienced Preliminary Hearing Officers

The other concern the services put forth was the perceived inexperience of the PHO. The sentiment was that more junior judge advocates are too inexperienced to make a probable cause determination as compared to their "litigation qualified" and senior counterparts, despite the fact that junior judge advocates have already made probable cause determinations for the purposes of FBI fingerprinting, DNA indexing, pretrial confinement legal reviews, search authorizations, etc.[89] The convening authority is responsible

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[86] *13th Public Meeting*, *supra* note 54, at 105.
[87] DAC-IPAD REPORT, *supra* note 8, at 56.
[88] *Id.*
[89] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 3.

for picking the PHO,[90] almost always with the help of the SJA, meaning that through training and legal mentorship, the GCMCA and SJA can offset the lack of experience and expertise to ensure the PHO can competently execute the duties assigned.

A tenable solution that would both assuage concerns about inexperienced PHOs and build expertise in the respective services is to grow fulltime magistrates.[91] As Colonel (Retired) Jeffery Nance has suggested, these magistrates would be senior majors who would do "nothing but magistrate duties and do [Article] 32s. They would supervise part-time magistrates, and they could help the actual military judges with important rulings on controversial motions."[92] Colonel (Retired) J. Wesley Moore explained that military judges in the Air Force "do almost all the Article 32 hearings for sexual assault cases"[93] and that they have overcome the logistical imposition of excessive travel from base to base by conducting these hearings via video teleconference.[94] It is unclear how long the Air Force has been using military judges in this capacity, how it has affected the number of cases referred to trial that lack probable cause, and how it has overcome likely defense objections to PHOs not conducting hearings in person.[95]

The idea of creating full-time magistrates whose primary duty would be presiding over Article 32, UCMJ, hearings would accomplish several things. First, assuming members of the judiciary evaluated full-time magistrates who are untethered from the victim's or accused's chain of command, the PHO would become truly impartial—more so than they currently are. Second, convening authorities and their legal advisers would be assured that the probable cause determination came from a PHO who was handpicked

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[90] UCMJ art. 32(a) (2019).
[91] UCMJ art. 26a (2019) (detailing the qualifications and duties of magistrates); Schlueter, *supra* note 5, at 39–40 (explaining that the change was meant to bring the military closer paralleling the Federal magistrates' program).
[92] *Judges' Testimony*, *supra* note 60, at 49–50.
[93] *Id.* at 53.
[94] *Id.*
[95] Pol'y Memorandum, Headquarters, Dep't of Air Force, subject: Department of the Air Force Guidance Memorandum to AFI 51-201, *Administration of Military Justice* para. 7.2.1.2 (15 Apr. 2021) (stating, without further requirement or advice only that the PHO "may be a military judge"); MCM, *supra* note 4, R.C.M. 405(f), (j)(4) (referencing the accused and counsel having the right to be present during the presentation of evidence).

based on their experience and expertise in military justice. Third, charging the judiciary with this responsibility alleviates commanders of shouldering public, congressional, or victim backlash for failing to advance a weak case. Lastly, under the tutelage of military judges, PHOs would receive training and mentorship that will make for consistent opinions, provide a pool for future judges, and ultimately create a stronger judiciary.[96]

IV. Ripple Effects

If the Committee's recommendation to make the Article 32, UCMJ, hearing binding comes to fruition, other changes will be necessary. This section explores some of those required changes and potential effects on the services in practice.

A. Article 34, UCMJ, Reform

Putting the probable cause determination in the hands of a full-time magistrate or judge is not by itself the panacea. The Committee recommends changing the Article 34, UCMJ, advice to include whether, in the SJA's opinion, there is sufficient admissible evidence to obtain and sustain a conviction.[97] Their recommendation makes sense if working smarter trumps simply working harder.

Consider the acquittal rates detailed in the DAC-IPAD study. Of the 235 cases that went to verdict, 144 (61.3%) cases resulted in acquittal of the penetrative offenses. The CRSC determined that 24 of 144 (16.7%) cases resulting in acquittal lacked probable cause.[98] If the military had not

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[96] *Judges' Testimony*, *supra* note 60, at 51.

[97] DAC-IPAD REPORT, *supra* note 8, at 16 ("Finding 111: The review of 1,904 adult penetrative sexual offense investigative cases files closed in FY17 reveals, however, that there is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense. . . . DAC-IPAD Recommendation 32: Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.").

[98] *Id.* at 58 tbl.V.3.

tried those 24 cases, only 120 of 211 (56.8%) cases would have ended in acquittal. Going one step further, 71 of 144 (49.3%) cases ending in acquittal lacked sufficient evidence in the investigative file to sustain a conviction.[99] If the SJAs and GCMCAs only advanced cases in FY 2017 that had enough evidence to sustain a conviction, the acquittal rate would have fallen to approximately 44% (73 of 164 cases) from 61.3%. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States."[100] It is difficult to argue that such a high acquittal rate achieves these ends.

Changing Article 34, UCMJ, as the DAC-IPAD recommended would obligate the SJA to make an assessment about whether a case can prevail to conviction, inviting consideration about whether bringing it to trial is in the military's interest. Moreover, because the PHO would determine probable cause, it would alleviate the due process implications of the Article 34, UCMJ, advice.[101] Currently, failure to render proper advice does not jurisdictionally preclude referral of a case, but it can be defective and possibly cause prejudice to the accused.[102] In a system where the SJA does not make the probable cause determination, the extent to which their advice could be defective and infringe upon an accused's due process rights would be even more limited.

The DoJ prioritizes success at trial in its prosecutorial analysis as a preliminary step, even before deciding whether a Federal interest compels prosecution.[103] This is partly because of Federal Rule of Criminal Procedure

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[99] *Id.*

[100] MCM, *supra* note 4, pt. I-1.

[101] United States v. Henderson, 23 M.J. 860, 861 (A.C.M.R. 1987).

[102] United States v. Murray, 25 M.J. 445, 449 (1988). In *United States v. Meador*, the military judge found the SJA's Article 34, UCMJ, advice defective because the PHO found no probable cause, and the Government was successful in reversing the judge on an interlocutory appeal; the appellate court agreed that the PHO's determination was not binding. United States v. Meador, 75 M.J. 682 (2016).

[103] Justice Manual, *supra* note 51, § 9-27.230.

> In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including:

29(a).[104] In a motion for judgment of acquittal, the judge "must" grant it if "the evidence is insufficient to sustain a conviction."[105] Federal courts not only evaluate the evidence in a light most favorable to the Government but go a step further and, in examining the totality of the evidence, determine if the evidence presented at trial "gives equal or nearly equal support to a theory of guilt and a theory of innocence, because in that event, a reasonable trier of fact must necessarily entertain reasonable doubt."[106]

The DoJ's evidence-based approach is reflected in its results. In FY 2015, there were 925 felony sexual abuse cases adjudicated in Federal district courts, of which 812 were guilty or nolo contendere pleas and 47 were dismissed without a verdict.[107] There were sixty-six contested trials with fifty-seven (86.3%) ending in conviction and only nine acquittals.[108] Overall, the DoJ had a 93.9% conviction rate for felony sexual abuse cases.[109] During that period, the DoJ declined to prosecute 26,624 cases: 19 (0.1%) declinations were due to grand juries returning "no bills," whereas

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

Id.

[104] FED. R. CRIM. P. 29(a).

[105] *Id.*

[106] United States v. Santillana, 604 F.3d 192, 195 (5th Cir. 2010) (citations omitted); *but see* MCM, *supra* note 4, R.C.M. 917(d) ("A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.").

[107] MARK MOTIVANS, BUREAU OF JUST. STAT., NCJ 251771, FEDERAL JUSTICE STATISTICS, 2015 – STATISTICAL TABLES, 20 tbl.4.2 (2020).

[108] *Id.*

[109] *Id.*

16,626 (62.4%) declinations were due to prosecutors' determination that there was insufficient evidence to prevail at trial.[110] While it is difficult to compare these numbers with courts-martial given all the variables that separate the two, Federal prosecutors tend to have more success at trial, which appears, at least anecdotally, on their prosecutorial philosophy of putting forward stronger cases versus weaker ones.

The UCMJ already beseeches commanders because of the Military Justice Act of 2016[111] to consider certain non-binding disposition guidance, including "whether admissible evidence is likely to be sufficient to obtain and sustain a conviction in a trial by court-martial."[112] This guidance was imposed through congressional will, but is simply one of many factors to consider. Others relate to the seriousness of the offense, whether the offense happened in wartime, the harm caused, the willingness of witnesses to testify, and the truth-seeking function of a court-martial, among others.[113] The ability to prevail at court-martial with admissible evidence carries no greater weight than any other factor and may be non-binding so as not to impede the ease of referral.

Amending Article 34, UCMJ, could have a trickledown effect that alters the current mindset of some judge advocates (i.e., that if there is a "credible, reliable victim that wants to participate . . . the probable cause standard allows us to go forward in that case and give the victim the opportunity to say what they want to say in court before the military judge and members, and whoever else happens to be present.").[114] The discussion between legal advisers and commanders would be reset to more strongly consider success at trial, not dissimilar to assessing risk when attacking a military target: there is a difference between having enough resources to

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[110] *Id.* at 12 tbl.2.3.

[111] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2000, 2894–968 (2016) (codified as amended at 10 U.S.C. §§ 801–946a). The changes did not take effect until 1 January 2019. *See* Exec. Order. No. 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

[112] UCMJ art. 33 (2019) (requiring that commanders dispose of cases in accordance with the Attorney General's guidance to Government attorneys so that Federal criminal cases result in "fair and evenhanded administration of Federal criminal law"); MCM, *supra* note 4, app. 2.1(h).

[113] MCM, *supra* note 4, app. 2.1.

[114] *13th Public Meeting*, *supra* note 54, at 106.

mount an offensive—that being probable cause—versus winning the battle and the war—that being a conviction.

B. Diminished Waiver

The Article 32, UCMJ, hearing changed in form and function with the passage of the National Defense Authorization Acts for Fiscal Years 2014[115] and 2015.[116] Notably, it changed from a truth-seeking "investigation" about the underlying factual basis of the charges to a preliminary hearing narrowly focused in large part on probable cause.[117] The hearing was indispensably valuable to defense attorneys because it allowed for liberal access to discovery, which otherwise was restricted until referral.[118] Accused and their counsel had fairly liberal access to witnesses, with Rule for Courts-Martial (R.C.M.) 405(g)(1)(A) providing that "any witness whose testimony would be relevant to the investigation . . . shall be produced if reasonably available."[119] "Any witness" included alleged victims, which allowed defense attorneys to challenge the credibility of accusers under oath. Testimony was generally limited when the alleged victim was unavailable or in the case of special arrangements made for children. The rules gave the accused the right to "[p]resent anything in defense, extenuation, or

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[115] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–55 (2013).

[116] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3362–66 (2014).

[117] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(g) discussion (2012) [hereinafter 2012 MCM] ("The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case."); Humphrey v. Smith, 336 U.S. 695 (1949) (explaining that the precursor to the Article 32, UCMJ, hearing afforded the accused an opportunity to prepare for trial, guarded against ill-conceived charges, and prevented trivial cases from reaching a general court-martial).

[118] United States v. Chestnut, 4 M.J. 642 (A.F.C.M.R. 1977); *see generally* MCM, *supra* note 4, R.C.M. 701.

[119] 2012 MCM, *supra* note 117 ("A witness is 'reasonably available' when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance.").

mitigation for consideration by the investigating officer," even if it exceeded the question of probable cause.[120]

When the Article 32, UMCJ, hearing changed, access to the alleged victim, evidence, and wide latitude to investigate the truth of the charges dissipated, and the number of accused Service members who waived the hearing increased.[121] In FY 2015, the DAC-IPAD calculated that for sexual assault offenses, both penetrative and contact, the accused only waived the Article 32, UCMJ, hearing in 9.7% of cases.[122] In FY 2016, that rate shifted to 21.1%.[123] Fiscal years 2017 and 2018 saw an increased number of waivers, but only marginally.[124] Because waivers are sometimes a condition of a plea agreement, it is worth noting that from FY 2015 to 2016, the percentage of accused who waived their right to an Article 32, UCMJ, hearing jumped from about 52% to nearly 70%, rebounding back towards 57% in FY 2017 and then trending to 61% in 2018.[125] The DAC-IPAD's findings show that an accused is more likely to waive the hearing if the allegation is for a penetrative offense rather than a contact offense.[126]

The reasons to waive the hearing depend on the circumstances and cannot be captured in the limited statistical data above. "[T]he overall consensus is that there is still little or no incentive to [submit post-hearing matters] since the PHO's probable cause determination is not binding. Defense counsel are more apt to hold on to favorable evidence until trial rather than give the government an opportunity to undermine this evidence."[127] For example, the defense may know about a cooperative

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[120] *Id.* R.C.M. 405(f)(11).
[121] UCMJ art. 32(a)(1)(B) (2019) (allowing accused to waive the preliminary hearing).
[122] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 2019, at 16 (2019).
[123] *Id.*
[124] *Id.* at 16–18.
[125] *Id.* at 17.
[126] *Id.* at 16–18.
[127] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 13; UCMJ art. 32(g) (2019) (explaining that the hearing is required, that failure to follow the requirements does not constitute jurisdictional error, and that a defect in the PHO's report to the convening authority is not a basis for relief as long as it is in substantial compliance with the rules); 2012 MCM, *supra* note 117, R.C.M. 405(a) ("[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule."); United States v. Frederick, 7 M.J.

witness who military law enforcement and trial counsel never interviewed who could testify as to the complaining witness's character for truthfulness as well as what they witnessed of the alleged offense. In that scenario, waiving the hearing and requesting speedy trial may limit the Government's ability to mollify such exculpatory evidence. Stated differently, the defense may be disinclined to reveal its possible trial strategy when the PHO's determination cannot cause the charges to be dismissed. Still there are other reasons to waive the hearing, including where the evidence is overwhelming or where the Government under-charged its case.

C. Newly Discovered Evidence

The biggest concern among some is that a binding Article 32, UCMJ, hearing would potentially obstruct the Government from proceeding on cases where the PHO's conclusions are incorrect, the trial counsel failed to present enough evidence, or that more evidence was discovered after the hearing. Others have expressed concern making the case binding could nullify the alleged victim's right not to testify at the hearing. These concerns are more an issue of advocacy than procedure.

If the Article 32, UCMJ, hearing transforms into a binding proceeding akin to a Federal grand jury, a remaining procedural question is whether the Government can re-prefer charges a PHO dismisses. One suggestion has been to allow re-preferral in the event of newly discovered evidence.[128] The standard for what constitutes "newly discovered evidence" should follow the standard established in R.C.M. 1210.[129] It should require that re-presenting evidence at a preliminary hearing that originally found no probable cause shall not be granted on the grounds of newly discovered

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791, 796–97 (N.C.M.R. 1979) ("We would be remiss at this point in not laying to rest certain misconceptions regarding the proper procedural role of the Article 32 investigation in those cases where an original conviction has been overturned by any reviewing entity. While it is true that the pretrial investigation is 'not a mere formality,' but rather a substantial right afforded a military accused ultimately facing trial by general court-martial, and as such has come to be regarded as 'an integral part of the court-martial proceedings,' its inherent procedures should effect a substantial, meaningful benefit to the parties and not be invoked as an empty legalistic ritual." (citations omitted)).

[128] *Judges' Testimony*, *supra* note 60.

[129] MCM, *supra* note 4, R.C.M. 1210 (establishing a standard to petition for a new trial based on newly discovered evidence or fraud).

evidence unless, the trial counsel can show that: (1) the evidence was discovered after the preliminary hearing determination was made; (2) the evidence is not such that it would have been discovered by the Government at the time of the preliminary hearing in the exercise of due diligence; and (3) the newly discovered evidence, if considered, by the preliminary hearing officer, would probably meet the probable cause threshold.[130] The trial counsel would also need to seek approval from the Office of The Judge Advocate General for permission to re-present the same charge or a similar one at a second hearing.[131]

Federal prosecutors are not enjoined from presenting the same case and same facts to a second grand jury after the first votes "no bill."[132] The DoJ's *Justice Manual* does, however, instruct Federal attorneys that a second attempt at the grand jury should only come with concurrence from the overseeing U.S. Attorney.[133] Whether it be a resource, overzealous, or policy concern that spurred this directive, Federal prosecutors are not stuck after a failed attempt. The grand jury process has its own challenges for Federal prosecutors. For example, Federal prosecutors need to convince at least twelve grand jurors of potentially twenty-three to indict.[134] Also, it can be time consuming to represent a case at a different grand jury. Grand juries sit until discharged (for up to eighteen months or more, if warranted),[135] making re-presentment with the same evidence on the same charge a

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[130] *See id.* R.C.M. 1210(f)(2).

[131] Because a preliminary hearing does not adjudicate whether an accused is guilty, double jeopardy issues would not arise should the Government re-present a charge to a PHO. However, it would be advisable to include an admonishment in the new rule prohibiting reconsideration of any offense if it stems from the same conduct as the previously charged offense. *See id.* R.C.M. 307(c)(4) ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997) (explaining that under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), a greater offense "is treated as the same as any logically lesser-included offense with some but not all of the formal 'elements' of the greater offense—in other words, *Blockburger* treats two offenses as different if and only if each requires an element the other does not.").

[132] Justice Manual, *supra* note 51.

[133] *Id.* The policy is most likely a prophylactic against an overzealous prosecution to ensure that there is a factual basis that will serve a Federal interest. Federal attorneys, Assistant U.S. Attorneys included, may file charges in accordance with their statutory duty with such specific oversight.

[134] FED. R. CRIM. P. 6.

[135] *Id.*

potentially flat strategy. It is better to over-advocate at the grand jury than get a flawed indictment or a "no bill."

In the military, the preliminary hearing does not involve as many people and there is not the same volume of potential cases. However, unlike the military, the DoJ does not deploy to fight the Nation's wars, nor does an Assistant U.S. Attorney typically work in the same organization as a defendant, something that happens routinely with trial counsel and the convening authorities. If the cornerstone of military law is the promotion of good order, discipline, efficiency, and effectiveness, multiple attempts at an Article 32, UCMJ, hearing does nothing to afford the military or accused the finality necessary for the organization or individual to succeed in an effective fighting force.

Ultimately, the issue is not a procedural one. There will be arguments about whether something qualifies as "newly discovered evidence," but this misses the renewed importance of competent trial advocates at all stages of a case. Like Federal prosecutors who call witnesses, present documentary evidence, and have limited subpoena power to compel both, the trial counsel does much the same.[136] Moreover, the purpose of both hearings is to determine probable cause, not to investigate for the truth.[137] The Federal prosecutor needs to espouse a theory and demonstrate how the evidence presented supports the charges submitted well enough for laymen to agree that the defendant committed a specific offense.[138] Conversely, the PHO is a single person who will presumably have some, if not much, trial experience, something that can be advantageous in more complex or counterintuitive fact patterns. Even so, the trial counsel will

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[136] Justice Manual, *supra* note 51, § 9-11.000.

[137] *Id.* § 9-11.101 ("While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a 'no-bill.' . . . At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees.").

[138] FED. R. CRIM. P. 7.

need to be especially focused on the type and amount of evidence they present to the PHO.

D. Facts and Theory

The Article 32, UCMJ, hearing has devolved from a robust investigation to a shell of its former self. The hearing does not have a truth-seeking function, but rather focuses narrowly on probable cause. Still, like a grand jury, the prosecution at a preliminary hearing must connect the evidentiary dots for the PHO. Failure to present a cogent theory and explain how the facts satisfy the elements could prove fatal; the same applies to presenting (or having) too little evidence or misunderstanding the elemental standards.

On this point, one need only consider the growing infrequency with which witnesses testify at preliminary hearings. In FY 2014, at least one witness testified in 418 of 425 preliminary hearings (98%), whereas witness testimony occurred in only 116 of 318 hearings (36%) in FY 2018.[139] Senior judge advocates need to employ a new set of best practices with trial counsel and invite genuine, complete feedback from the PHO.[140] Considering the extremely low number of trials that each trial counsel has the opportunity to prosecute, supervisory judge advocates should see the preliminary hearing as an opportunity for trial counsel to practice advocacy skills in a low-threat environment.

A binding Article 32, UCMJ, hearing will inculcate professionalism and force both defense and trial counsel to advocate to a truly independent and impartial arbiter. The preliminary hearing and the Federal grand jury are

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[139] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, POLICY SUBCOMMITTEE ARTICLE 32, UCMJ, PRELIMINARY HEARING ASSESSMENTS 10 (2020) [hereinafter PRELIMINARY HEARING ASSESSMENTS].

[140] *13th Public Meeting*, *supra* note 54, at 101 ("And there's nothing wrong with adding more evidence and letting people consider more evidence in an Article 32 investigation. And we really should be beefing that up I think internally making those requirements."); *id.* at 72 ("Talking to some SJAs in the field, they are frustrated, as some of it is just a paper review and they do last as little as 15 minutes, where they just hand in, literally, the record of investigation. So from that standpoint, I don't think it's very helpful. . . . I don't want to not highlight that there is some level of a paper shuffle. And I don't know how much more informed the convening authority and SJA are because of it because they can read the [report of investigation] as well.").

similar in that neither fall within the purview of the prosecution.[141] The latter belongs to the courts and the former, assuming the PHO works for the trial judiciary, will not be beholden in any capacity to either side. This will impact advocacy because the PHO is required to be impartial and to avoid becoming an advocate for either side.[142] Pursuant to R.C.M. 405(j), "[t]he preliminary hearing officer shall not call witnesses sua sponte."[143] In fact, the role is limited to determining whether the evidence or testimony offered by either side is relevant, not cumulative, or unnecessary to the purposes of the hearing.[144]

Either side's failure to bring evidence to the PHO's attention could affect the outcome. For trial counsel, an alleged victim's statement may omit details germane to establishing a key element of the gravamen offense. The PHO may not be inclined, like a judge during a suppression motion, to ask if the trial counsel intends to introduce specific evidence. For defense counsel, it may be an error not to ask for production of evidence obtainable via a pre-referral subpoena that the PHO may agree would capture relevant evidence.[145]

E. Victims' Rights

A looming question about a binding preliminary hearing is certainly the potential impact on a victim's right not to testify. In the DAC-IPAD's study, an Air Force representative argued that R.C.M. 306(e) requires the convening authority to consider the alleged victim's preference and,

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[141] Justice Manual, *supra* note 51, § 9-11.120 ("The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. Nor can the grand jury be used solely for pre-trial discovery or trial preparation." (citations omitted)).

[142] MCM, *supra* note 4, R.C.M. 405(d)(1)(D).

[143] *Id.* R.C.M. 405(j)(1)

[144] *Id.* R.C.M. 405(h)(2)(A)(iii), (h)(2)(B)(iii), (h)(3)(A)(ii), (h)(3)(B)(iii).

[145] Currently, the closest a PHO may get to ordering production of evidence or witnesses is upon the determination that the trial counsel should issue a pre-referral investigative subpoena for documents, data, electronically stored information, and so on. The trial counsel cannot be forced to issue said subpoena. *Id.* R.C.M. 405(h)(3)(B)(iii) discussion. The PHO, however, can make a notation in their report that the "Government refused to issue a pre-referral subpoena that was directed by the preliminary hearing officer and the counsel's statement of the reasons for such refusal . . . ." *Id.* R.C.M. 405(l)(2)(F).

therefore, a binding preliminary hearing potentially conflicted with this right.[146] That rule is about initial disposition of an offense and an alleged victim's preference as to whether the military or civilian authorities should prosecute the case; the preliminary hearing comes later in the process, and R.C.M. 306 does nothing to restrict the referral authority. It is legally incorrect to argue that it conflicts with Article 32, UCMJ. It is correct that the UCMJ recognizes the rights of all victims to be reasonably protected from the accused, to receive notice about certain actions and decisions, to be heard on certain matters during different procedural steps in the military justice process, and to assert their rights with limited standing in the court-martial process.[147]

Nothing in the preliminary hearing, if changed as argued, would impinge upon those rights. The disconnect is the belief that prosecuting courts-martial will positively impact the military culture and curb criminal behavior.[148] To increase the number of successful victim-based prosecutions, prosecutors need more alleged victims willing to testify at trial, which means, as some may believe, expanding procedural protections for victims. The truth of this proposition is immaterial. What is true is that since the implementation of the right to refuse to testify at the preliminary hearing, the number of testifying alleged victims has plummeted. In FY 2014, alleged victims testified at Article 32, UCMJ, hearings in 392 of 425 (92%) cases; it dropped to 62% in FY 2015, precipitously fell to 78 of 430

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[146] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 5; MCM, *supra* note 4, R.C.M. 306(e)(2) (explaining that, where at least one sex-related charge has been preferred, the convening authority shall provide the victim of that offense "an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court.").

[147] UCMJ art. 6b (2019).

[148] Brian W. Everstine, *Military Sexual Assault Review Aims to Change Culture*, AIR FORCE MAG. (Mar. 24, 2021), https://www.airforcemag.com/military-sexual-assault-review-aims-to-change-culture; *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services* 113th Cong. 17 (2013) (statement of General Raymond Odierno) ("Sexual assault and harassment are unacceptable problems within our military and our society. We cannot, however, simply prosecute our way out of this problem. Sexual assault and harassment are issues of discipline that require a change in our culture. I need our commanders to instill that culture change as they continue to train our soldiers to prevent and to respond to issues of sexual assault and harassment.").

(18%) cases in FY 2016, steadily waned to 28 of 368 (8%) cases in FY 2017, and finally bottomed out at 9 of 318 (3%) cases in FY 2018.[149]

The salient focus for the practitioner should be how best to present one's case. The preliminary hearing can accept hearsay evidence, meaning that an investigator can testify about the alleged victim's statement; the trial counsel can introduce a video-recorded statement from the alleged victim; or the alleged victim could reduce their account to writing.[150] The alleged victim need not testify in those instances, assuming their statement includes all the evidence the trial counsel needs for the charged offenses.

The issue truly manifests in cases in which the alleged victim's testimony is the only evidence substantiating the charged offense(s). The alleged victim's credibility may drive or sink the Government's case. In her job as a Federal prosecutor, one CRSC member noted that she prefers getting an alleged victim's testimony at the grand jury hearing, as jurors find that evidence important.[151] Others disagree, believing it is not necessary to advance the case beyond the grand jury.[152] An obvious distinction between the Federal grand jury and Article 32, UCMJ, hearing is that the former is usually conducted without the defendant or defense counsel present.[153]

Regardless, whether an alleged victim testifies is an immersive decision that cross-pollinates the trial counsel's strategy at the hearing with the alleged victim's personal elections. The trial counsel must determine if a witness's testimony helps to advance the Government's theory and the evidence to satisfy the probable cause standard. That decision is inherently strategic; it could be a means to boost credibility or even with a forward-leaning view that the experience would inure to the witness's confidence at trial. Military justice practitioners with experience at pre-FY 2014 Article 32, UCMJ, hearings can attest that there are times when victim testimony is beneficial because cross-examination can be difficult to simulate.[154] It could be necessary due to the facts of the case and the need to assure that the

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[149] PRELIMINARY HEARING ASSESSMENTS, *supra* note 139.
[150] MCM, *supra* note 4, R.C.M. (i) (providing that only certain Military Rules of Evidence apply to preliminary hearings).
[151] PRELIMINARY HEARING ASSESSMENTS, *supra* note 139, at 9.
[152] *Id.*
[153] FED. R. CRIM. P. 7.
[154] *Judges' Testimony*, *supra* note 60, 13–14.

probable cause standard is met. Alternatively, there are times when defense counsel is ill prepared for a truly effective cross-examination because of the limited time they have had with the case material.

The other part is the alleged victim's decision of whether to exercise the rights the UCMJ affords. All of the services have some variation of a special victims' counsel available in certain cases.[155] If a victim retains counsel, they have someone who can explain the process and help their client make a decision that accords with their goals and priorities.[156] The interplay between a trial counsel, who believes the alleged victim should testify at the hearing, and the alleged victim and counsel forces all parties to discuss the strength of the Government's case earlier in the process, setting expectations for both sides going forward. If anything, these situations may prove cathartic and rife with differences of opinion, but the reality is that the alleged victim still retains the right of refusal.

A change in the determinative outcome of the Article 32, UCMJ, hearing is unlikely to usher in a deluge of alleged victim testimony. The preliminary hearing is an evidence-friendly proceeding with few restrictions.[157] While the only person allowed to offer unsworn testimony is the accused,[158] this does not restrict a law enforcement officer who interviewed a witness from testifying about that person's sworn statement (i.e., via hearsay). Likewise, the alleged victim could submit a supplemental

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[155] 10 U.S.C. §1044e; U.S. DEP'T OF DEF., DTM 14-003, DOD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT (USD(P&R), 12 Feb. 2014) (C3, 15 Dec. 2016).

[156] Joseph Lacdan, *Army to Widen Scope of Legal Counsel Program for Victims of Sexual Assault*, WASH. HEADQUARTERS SERV. (Dec. 28, 2020), https://www.whs.mil/DesktopModules/ArticleCS/Print.aspx?PortalId=75&ModuleId=14820&Article=2457833 (citing the explanation of victim benefits provided by Lieutenant Colonel Elliott Johnson, Special Victim Counsel Deputy Program Manager: "It's almost like a foreign language. For you to be sitting in a courtroom and you hear a judge, defense attorney, a prosecutor speaking this legal language that is unfamiliar to you, and you kind of want to know what they're talking about or thinking about your case."). The Special Victim Counsel Program now extends its services to victims of domestic violence who are otherwise eligible for military legal assistance under 10 U.S.C. § 1044. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 548, 133 Stat. 1198, 1378–79.

[157] MCM, *supra* note 4, R.C.M. 405(i) (specifying the narrow list of evidentiary rules that apply); *e.g.*, Costello v. United States, 350 U.S. 359 (1956) (holding that an indictment can be sustained where only hearsay evidence is presented to a grand jury).

[158] MCM, *supra* note 4, R.C.M. 404a, 405(c).

sworn statement in anticipation of the hearing or offer a sworn videotaped statement. As identified in the DAC-IPAD report, case materials failed to establish probable cause in 68 of 517 (13.2%) cases.[159] Witness testimony could have bridged the evidentiary divide in the distinct minority of cases that are likely to raise the issue of whether the alleged victim should testify at the Article 32, UCMJ, hearing.

F. White Hat

The preliminary hearing would become more consequential if it were binding. In a sense, it would move the military justice system closer in construction and efficacy to the grand jury of the Federal civilian system and create a professional magistrate's bar in the Armed Forces. Federal prosecutors have the DoJ-directed duty to introduce exculpatory evidence at the grand jury.[160] This is partly because the defendant and the defense counsel have no right to attend the grand jury, unless otherwise invited, which procedurally juxtaposes the Article 32, UCMJ, hearing, which the accused and counsel have a right to attend.[161] The question is whether that the trial counsel will incur the same duty through practice.

While many SJAs train their counsel to wear the proverbial white hat in representing the Government, the preliminary hearing is an odd pretrial enclave for the trial counsel.[162] The Army's preliminary hearing guide

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[159] DAC-IPAD REPORT, *supra* note 8, at 54.

[160] Justice Manual, *supra* note 51, § 9-11.233 ("In *United States v. Williams*, the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.").

[161] FED. R. CRIM. P. 6(d); MCM, *supra* note 4, R.C.M. 405(f).

[162] MCM, *supra* note 4, R.C.M. 701(a)(1) discussion ("Discovery in the military justice system is intended to eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial. Parties to a court-martial should consider these purposes when evaluating pretrial disclosure issues."); Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38, 43 (2017)

explains that the PHO "must not seek legal advice from the Government counsel. The Government counsel will be allowed to present evidence, cross-examine witnesses, and argue for a disposition of the matter appropriate to the interest of the Government."[163] The inference is that trial counsel, as the Government's representative,[164] will present the case in the light most favorable to the Government. In fact, both R.C.M. 404A[165] and R.C.M. 405[166] abandon the title "trial counsel," instead using "Government counsel." The right to discovery attaches after referral, at which point the trial counsel is required to disclose evidence favorable to the defense, such as evidence that adversely affects the credibility of any prosecution witness or evidence.[167]

There is reason to question whether making the preliminary hearing binding will require Government counsel to disclose evidence that substantially negates the guilt of the accused prior to the hearing. First, even while serving as an advocate at an adversarial hearing, the rules of professional responsibility require candor to grand juries.[168] The Army Rules of Professional Responsibility require judge advocates to conduct themselves with candor to tribunals[169] and with respect to the special

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(discussing how western films have historically portrayed the protagonist as a sheriff in a white hat and the antagonist as a villain in a black hat, which eventually morphed into the prosecutor being a champion for the community by choosing the side of truth over all else).

[163] U.S. DEP'T ARMY, PAM 27-17, PROCEDURAL GUIDE FOR ARTICLE 32 PRELIMINARY HEARING OFFICER para. 1-4*f* (18 June 2015).

[164] MCM, *supra* note 4, R.C.M. 405(d)(2).

[165] *Id.* R.C.M. 404A.

[166] *Id.* R.C.M. 405.

[167] *Id.* R.C.M. 701(a)(6).

[168] *See Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Dec. 1, 2021) ("A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.").

[169] *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 3.3 (28 June 2018). In the Army, "'[t]ribunal' denotes a court, an Article 32, Uniform Code of Military Justice investigation, administrative separation boards or hearings, boards of inquiry, disability evaluation proceedings, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity." *Id.* r. 1.0*(w)*.

function as a prosecutor.[170] The trial counsel has the responsibility not only to serve as an advocate but also to administer justice.[171] Second, sometimes probable cause is determined in either the affirmative or the negative based on the reliability and credibility of pivotal evidence.[172] Federal courts have dismissed indictments based on the unsworn assertions of prosecutors. In these cases, the courts took issue with the prosecutor presenting hearsay evidence as if it was a firsthand account of an eyewitness.[173] Misleading statements as to the paucity and credibility of critical evidence may veer trial counsel toward robbing the PHO of making an independent credibility determination based on the evidence. In *United States v. Provenzano*, the prosecutor presented the grand jury testimony of a witness who had made a private recantation to the prosecutor.[174] The court believed the prosecutor duped the grand jury and dismissed the indictment as a result.[175]

If the preliminary hearing becomes binding in its determination, the ethical role of the trial counsel as applied to the rules of professional responsibility may become more applicable. Given that the PHO would continue to be an impartial and more independent fact-finder, like a grand jury, the trial counsel, too, begins to function more like a Federal prosecutor.

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[170] *Id.* r. 3.8.

[171] *Id.* cmt. 1; *see also id.* cmt. 6 ("The 'ABA Standards for Criminal Justice: The Prosecution Function,' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide Trial Counsel in the prosecution of criminal cases." (citations omitted)).

[172] United States v. Burton, No. ACM 36296, 2007 WL 2300788 (A.F. Ct. Crim. App. July 16, 2007). Following the preliminary hearing in *United States v. Burton*, the Government dismissed and re-preferred the original charges with additional charges based on its discovery of possible additional misconduct. *Id.* at *1. The Government relied upon the initial Article 32, UCMJ, hearing and rejected defense's call to reconvene it because it had discovered new evidence regarding the credibility of one of the adverse witnesses. *Id.* at *2. The court agreed the hearing should have been reopened, though it deemed the error harmless because the SJA had noted the credibility issues in the Article 34, UCMJ, advice to the convening authority. *Id.* at *3–4.

[173] *E.g.*, United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).

[174] United States v. Provenzano, 440 F. Supp. 561, 564 (S.D.N.Y. 1977).

[175] *Id.* at 566.

V. Conclusion

The Article 32, UCMJ, hearing has devolved from a robust investigatory tool to a hearing that is narrowly focused on probable cause. While the impetus for change might have emanated from a desire to protect victims from extensive cross-examination, the result has been far more drastic and expansive. The hearing is now relegated to what is essentially a paper shuffle, wherein an outsider looking in would be right to question whether the preliminary hearing serves any purpose at all.[176] The PHO is powerless to prevent the Government from referring to trial a case that lacks probable cause, an arguably unjust occurrence that the DAC-IPAD data indicates occurs fairly consistently.

While this might be the result of congressional scrutiny of the military's referral decisions and perhaps of the military justice system at large, the perils of referring felony-grade cases to trial absent a preliminary hearing conducted by an impartial party could put the accused in jeopardy with a lack of due process, provide false hope to victims, and derail prosecutors from focusing on difficult, yet winnable, cases. While conviction and acquittal rates are not a direct measure of justice, one should take notice when the acquittal rate for a particular type of offense soars past 61%. The military justice process cannot be a purveyor of good order and discipline if the system appears broken or anemic.

Congress should change the Article 32, UCMJ, hearing to help stem the tide of weak cases that advance well beyond their viability. The GCMCA should not be permitted to refer any charge a PHO has determined is not supported by probable cause. Those opposed to such a change generally argue that the hearing is too limited in scope and function, that the SJA is the most experienced and best-suited person to render such advice, and that PHOs are too inexperienced for such a change. These arguments are logically flawed and not supported by the DAC-IPAD data. The reality is that rules do not limit the amount of evidence that can the Government can present; the transmogrified paper drill has wholly been a trial counsel prerogative and one that can be easily reversed. If the Article 32, UCMJ, hearing is changed, trial counsel will likely put forth more evidence.

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[176] *Judges' Testimony*, *supra* note 60, at 72 ("What public benefit is there to a paper case? And what does it do to the presumption in society that this really isn't a justice system?").

It is untenable to continue the legal fiction that the SJA—the GCMCA's legal adviser—should be the one who makes a binding probable cause determination. The testimony and statistics that comprise the DAC-IPAD study paint SJAs as fallible humans rather than immutable experts. Their focus would be better placed on advising GCMCAs whether the evidence available can sustain a conviction. Congress should thus also amend Article 34, UCMJ, to make this the SJA's focus.

As for PHOs' lack of military justice experience, the real issue is instilling professionalism and impartiality into the process. The DAC-IPAD study suggests that PHOs have been more likely to find probable cause when the call is close than when it is not. It therefore makes sense to create a corps of full-time magistrates under the control of the judiciary. This corps would gain valuable experience, rule consistently, serve impartially, and prepare qualified candidates for future service on the bench.

The changes suggested in this article will legitimize the Article 32, UCMJ, hearing as a grand jury-equivalent wherein serious charges are scrutinized before they are able to proceed to trial. Commanders and SJAs will be insulated from congressional pressure and will together ensure that tough, viable cases are tested at trial. Trial counsel will need to become more discerning as to the amount and type of evidence to present at the hearing. Defense counsel may then elect to challenge the integrity of the Government's prima facie case, which could reveal exculpatory evidence that otherwise would have been saved for trial. Victims' rights will not be impinged, as none are implicated by the changes proposed.

Military justice is an organic system that has evolved over time. It cannot remain stagnant or else it runs the risk of becoming an unfair, unjust system. When the Article 32, UCMJ, hearing changed in FY 2014 and FY 2015, it did so to protect victims; yet, in that process, it became a toothless tiger. The DAC-IPAD study shows that the Article 32, UCMJ, hearing has become ineffective. It is again time to rejuvenate the military justice process to prevent injustice; it is time to make the Article 32, UCMJ, hearing binding.

IT IS ALL ABOUT RISK: THE DEPARTMENT OF DEFENSE SHOULD USE THE ARMY MATERIEL COMMAND'S AGENCY-LEVEL BID PROTEST PROGRAM AS ITS NEW RISK MANAGEMENT TOOL

MAJOR BRUCE L. MAYEAUX*

I. Introduction

In recent years, the U.S. Department of Defense (DoD) has been intently focused on what it considers abuses in the bid protest process at the Government Accountability Office (GAO) as it tries to manage its risk to its procurement system and the delivery of its critical capabilities. Until its repeal in section 886 of the National Defense Authorization Act (NDAA) for Fiscal Year 2021,[1] Congress seemed to share the DoD's concerns as evidenced through its legislatively created "loser pays" bid protest pilot program, which it enacted in section 827 of the fiscal year 2018 NDAA.[2] However, likely because of a recent RAND Corporation study[3] that suggested many of the DoD's concerns about bid protests at the GAO may not actually amount to abuses, Congress seems to have changed its position

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[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, sec. 886, § 827, 134 Stat. 3387, 3791.

[2] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017).

[3] *See generally* RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS [hereinafter RAND STUDY].

about whether bid protests are a cause of program performance risk for the DoD.

With its repeal of the "loser pays" provision, the leading questions it is asking the DoD to investigate regarding bid protests in general, and its endorsement of a recent report on agency-level bid protest reforms by the Administrative Conference of the United States (ACUS), Congress seems to be shepherding the DoD to take a different perspective on bid protests. Specifically, Congress now seems to point the DoD away from considering bid protests as causes of risk, toward considering them as a means of risk management with an agency-level bid protest program as the risk management tool. The Army Materiel Command's (AMC) agency-level bid protest program would be the DoD's best model to develop a central agency-level bid protest program or to standardize the service programs within its purview, as many of the recommended reforms included in the ACUS report are fully or partially in practice (and those partially in practice can be fully implemented rather easily).

In an effort to explain why and how the DoD can use an agency-level bid protest program as a risk management tool, this article (1) describes the DoD's current position that bid protest abuses at the GAO are causing increased program performance risk and the history behind Congress's enactment of the "loser pays" bid protest pilot program to help the DoD manage this risk; (2) explains how data in a recently published RAND study suggests that the DoD's concerns regarding bid protest abuse at the GAO may not be completely supported and, therefore, likely changed Congress's view towards bid protests as a cause of the DoD's risk; (3) explains the likely reasons Congress seems to be shepherding the DoD to consider a bid protest program as a risk management tool in its leading inquiries for the Acquisition Innovation and Research Center (AIRC); (4) explains how Congress's endorsement of the ACUS report on agency-level bid protest reforms signals to the DoD that it thinks an agency-level bid protest program would be an effective risk management tool; and (5) suggests that the AMC's agency-level bid protest program would be an effective model for the DoD to use as a risk management tool because many of the ACUS report recommendations are fully or partially in practice.

II. The Department of Defense's Recent Efforts at Program Performance Risk Management Are Intently Focused on Practices It Considers as Abuses in the Bid Protest Process at the GAO

For years, the DoD has intently focused on practices it considers abuses of the GAO's bid protest system instead of its true concern: the bigger picture of managing its program performance risk. Before discussing why the DoD sees the bid protest process at the GAO as an end—rather than a means to an end—an explanation of a bid protest and a Competition in Contracting Act (CICA) stay of award/performance is necessary. The term "bid protest" refers to the written objection by an interested party over a solicitation or award of a contract by the Federal Government.[4] Currently, three fora are available to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are the Federal agency soliciting the requirement, the Court of Federal Claims (COFC), and the GAO.[5] Of these fora, the GAO hears the majority of reported bid protests,[6] likely due to two unique characteristics of a GAO protest: the 100-day decision and the CICA automatic statutory stay of contract award/performance.[7] The CICA automatic statutory stay of contract award/performance prevents the Government from awarding a contract or proceeding to perform a contract after a party has timely filed a bid protest at the GAO.[8]

The DoD's concerns in the bid protest process, specifically the CICA stay at the GAO, have been issues of controversy in both industry and the DoD for years.[9] Nonetheless, the DoD—and, until recently, Congress—

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[4] *See* FAR 33.101 (2019).

[5] *See id.* 33.103–.105; Major James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 611 (2014).

[6] ANDREW E. SHIPLEY ET AL., BID PROTESTS: A GUIDE TO CHALLENGING FEDERAL PROCUREMENTS 14 (2021).

[7] *See* Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175; 31 U.S.C. § 3553(c)–(d); FAR 33.104(b)–(c), (f).

[8] *See* 31 U.S.C. § 3553(d); FAR 33.104(b)–(c).

[9] *See* Marcia G. Madsen et al., *Independent Review of Procurements Is Worth It: There Is No Support for Hamstringing the GAO Bid Protest Process*, 19 FEDERALIST SOC'Y REV. 4, 7 (2018); *see also* Mila Jasper, *Microsoft President Calls for Bid Protest Reforms*, NEXTGOV (Feb. 23, 2021), https://www.nextgov.com/cio-briefing/2021/02/microsoft-president-calls-bid-protest-reforms/172248 (statement of Brad Smith, President of Microsoft) ("We all want to ensure fairness, and that includes a fair right to be heard. But we could definitely benefit from an accelerated timeline to do so.").

especially seems to focus on its concerns with the bid protest process (and arguably bid protests in general) as a major cause of program performance risk.[10] While there are likely many variations of the DoD's concerns as to the bid protest process at the GAO, some of the most prevalent are that (1) generally bid protests at the GAO unreasonably slow down or inhibit the DoD's ability to meet operational or mission needs across the board, (2) there is an increasing amount of frivolous bid protests (i.e., challenges without merit) at the GAO that slow down or inhibit the DoD's ability to meet operational or mission needs, and (3) incumbent contractors file task order bid protests at the GAO as a matter of course—instead of for a valid basis—in order to secure a bridge contract while the procurement is under a CICA stay.[11]

To combat these practices the DoD considers abuses, Congress has made efforts (albeit in an incongruent fashion) to help the DoD manage its program performance risk in recent years. In 2016, Congress directed the RAND Corporation to conduct a study to "inform Congress and U.S. defense leaders about the effectiveness of current procurement policies and processes to reduce bid protests" in section 885 of the fiscal year 2017 NDAA.[12] The RAND study was likely a deliberate attempt by Congress to determine whether the DoD's concerns in the bid protest process were truly a cause of increased program performance risk for the DoD. In section 827

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[10] As used in this article, "program performance risk" means all risk a program faces during its lifetime in delivering the object of the program on time, within budget, and which performs as intended. *See generally* OFF. OF THE DEPUTY ASSISTANT SEC'Y OF DEF. FOR SYS. ENG'G, DEP'T OF DEF., RISK, ISSUE, AND OPPORTUNITY MANAGEMENT GUIDE FOR DEFENSE ACQUISITION PROGRAMS 3 (2017) ("*Risks* are potential future events or conditions that may have a negative effect on achieving program objectives for cost, schedule, and performance."). It also includes risk that is specifically and generally applicable to the procurement system that effects the risk outlined above.

[11] *See generally* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885, 130 Stat. 2000, 2319 (2016); Memorandum from Acting Under Sec'y of Def. for Acquisition, Tech. & Logistics, to Sec'ys of the Mil. Dep'ts et al. (Aug. 24, 2007) [hereinafter Young Memo] ("[P]rotests [sic] actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability; strain relations with our industry partners and stakeholders; and create misperceptions among American citizens."); *see also* RAND STUDY, *supra* note 3, at 17 ("[S]ome [Department of Defense (DoD)] contracting officers indicated that they were concerned that a bid protest would delay their ability to meet program contracting milestones and risk program funding reductions if they could not meet obligation and expenditure benchmarks.").

[12] RAND STUDY, *supra* note 3, at iii. *See* Steven L. Schooner, *Bid Protests: The RAND Study of DoD Protests at the GAO and the COFC*, 32 NASH & CIBINIC REP. 26, 27 (2018).

of the fiscal year 2018 NDAA, however, Congress summarily (and abruptly) imposed what was essentially a "loser pays" provision before the RAND study was completed and delivered. The rushed nature of the addition of this provision suggested that Congress was no longer interested in analyzing whether the DoD's concerns regarding the bid protest process at the GAO were actually a cause of the DoD's program performance risk problem; rather, Congress summarily decided they were. The background and construct of these efforts provide context for what Congress is likely suggesting the DoD do to manage risk as the "loser pays" provision has been repealed.

A. The Department of Defense's Risk Problem and the Origins of the RAND Study

For the past couple of years, certain members of Congress and the DoD have primarily maintained that "frivolous or unnecessary bid protests are impairing the procurement process," thereby unnecessarily delaying the delivery of critical capabilities within the DoD.[13] While some of these individuals have gone as far as to argue all bid protests are "extremely detrimental" to the DoD's mission, most allege that the unreasonable delay in capability delivery ostensibly stems from these "unwarranted" or frivolous bid protests at the GAO.[14] These individuals believe that these "frivolous" bid protests at the GAO significantly slow the DoD's ability procure new weapon systems and services because of the CICA stay.[15]

Most of the program performance risk concerns these individuals have seem to originate from their belief that large defense contractors—usually incumbents—file bid protests at the GAO as a matter of course when they fail to receive a contract award in order to trigger the CICA automatic statutory stay.[16] In other words, these contractors are believed to file bid

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[13] *See* Madsen et al., *supra* note 9; William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 489–91 (1995).
[14] Daniel H. Ramish, *Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function*, 48 PUB. CONT. L.J. 35, 53 (2018) (citing Young Memo, *supra* note 11); Madsen et al., *supra* note 9, at 4–5.
[15] Madsen et al., *supra* note 9, at 4, 7, 11.
[16] *E.g.*, Ramish, *supra* note 14; Christian Davenport, *Senate Proposes Measure to Curb Protests over Pentagon Contract Awards*, WASH. POST (Oct. 8, 2017), https://www.washingtonpost.com/business/economy/senate-proposes-measure-to-curb-protests-

protests at the GAO for illegitimate business reasons, such as to continue to work a requirement during the pendency of the CICA stay or to simply frustrate the award of a contract to a competitor, regardless of whether there is a valid basis for a bid protest, thereby slowing the DoD's procurement process, needlessly delaying capability delivery, and increasing actual and transactional costs to the DoD.[17]

In the 2016 legislative cycle, the Senate Armed Services Committee considered adding a "loser pays" provision to the NDAA for fiscal year 2017 that would change the GAO's bid protest process to indirectly help the DoD manage this specific concern, which the DoD contended increased its program performance risk.[18] This "loser pays" provision would have required "a large contractor filing a bid protest on a defense contract with GAO to cover the cost of processing the protest if all of the elements in the protest are denied in an opinion issued by GAO."[19] However, this attempt to add a "loser pays" provision failed in the committee; instead, Congress created a requirement for "an independent research entity . . . with appropriate expertise and analytic capability to carry out a comprehensive study on the prevalence and impact of bid protests on [DoD] acquisitions . . . ."[20] Congress required this study, which became the RAND study, to cover, among other things:

> [T]he extent and manner in which the bid protest system affects or is perceived to affect [various aspects of the procurement process];
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> . . . .
>
> A description of trends in the number of bid protests filed, . . . the effectiveness of each forum for contracts and task or delivery orders, and the rate of such bid protests

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over-pentagon-contract-awards/2017/10/08/9cf61060-a842-11e7-b3aa-c0e2e1d41e38_story.html ("The big five defense contractors file a bid protest on autopilot whenever they lose. And this is targeted to help curb that behavior . . . .").

[17] *See* Madsen et al., *supra* note 9, at 11.

[18] S. REP. NO. 114-255, at 211 (2016).

[19] *Id.*

[20] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885(a), 130 Stat. 2000, 2319 (2016).

> compared to contract obligations and the number of contracts[; and]
>
> An analysis of bid protests filed by incumbent contractors, including (A) the rate at which such protesters are awarded bridge contracts or contract extensions over the period that the protest remains unresolved; and (B) an assessment of the cost and schedule impact of successful and unsuccessful bid protests filed by incumbent contractors on [some] contracts . . . ."[21]

However, before RAND completed its study and presented it to Congress on 21 December 2017, a new "loser pays" pilot program provision was added to section 827 of the fiscal year 2018 NDAA.[22]

B. The Section 827 "Loser Pays" Pilot Program

To help the DoD manage its risk, Congress ultimately decided merely to give the DoD a tool to manage its concern that incumbent contractors are abusing the bid protest process at the GAO. In the 2018 legislative cycle, Congress seemingly disregarded the fact that it had recently asked RAND to evaluate the DoD's concerns regarding abuses of the GAO bid protest process and decided to add a "loser pays" provision to deter what it thought were abusive or frivolous bid protests.[23] As an initial matter, the GAO had warned Congress in the past that a process to determine whether a bid protest was frivolous would be administratively burdensome and would add substantial costs and delay to the protest process.[24] Nevertheless, among other considered changes, Congress directed the DoD to craft a pilot program that required large defense contractors that completely lost in their bid protest challenges to reimburse the DoD for costs incurred in litigating

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[21] *Id.* § 885(b).
[22] *See* Madsen et al., *supra* note 9, at 7–8; National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017).
[23] *See* Madsen et al., *supra* note 9, at 5.
[24] U.S. GOV'T ACCOUNTABILITY OFF., B-401197, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS 2 (2009) ("[M]aking . . . a determination [that a bid protest is "frivolous"] could add substantial costs to the protest process and have unintended consequences . . . .").

the protest at the GAO.[25] This "loser pays" provision was designed to dissuade this perceived automatic (and thus frivolous) bid protest filing practice by the large defense contractors.[26]

In this most recent "loser pays" provision, found in section 827 of the NDAA for fiscal year 2018, Congress required the DoD to "carry out a pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests."[27] Additionally, Congress directed the DoD to confine this pilot program to bid protests filed at the GAO between 2 October 2019 and 30 September 2022 by parties with revenues in excess of $250 million the previous year.[28]

Interestingly, the pilot program's omissions suggest that the provision might have been rushed and not fully considered. Specifically, it ignored those protests filed at a DoD agency, one of its subordinate military services, or the COFC.[29] The pilot program also failed to mention key definitions, such as what costs the DoD could recover should the case arise.[30] The hasty addition of this pilot program during the RAND study suggests that Congress may have wanted an easy win by developing something it thought the DoD could use for risk management immediately instead of waiting to craft a long-term and deliberate risk management tool for the DoD that is informed by the RAND study's results.[31]

By directing the Secretary of Defense to establish this "loser pays" pilot program risk management tool first and subsequently requiring the DoD to produce another report that merely assessed "the feasibility of making permanent [the "loser pays" provision],"[32] Congress seemed to be losing sight of its goal: to determine what was truly the cause of the DoD's program

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[25] National Defense Authorization Act for Fiscal Year 2018 § 827.
[26] *See* Ramish, *supra* note 14.
[27] National Defense Authorization Act for Fiscal Year 2018 § 827(a).
[28] *Id.* § 827(d).
[29] *See generally* H.R. REP. NO. 115-404, at 872 (2017) (Conf. Rep.) (focusing solely on protests at the GAO).
[30] *See* Ramish, *supra* note 14.
[31] *See* Madsen et al., *supra* note 9, at 4–5 ("At the time Section 827 was proposed and enacted, there was relatively little data on bid protests. . . . There was no data supporting the notion that protests of large acquisitions are hampering procurement efforts . . . .").
[32] National Defense Authorization Act for Fiscal Year 2018 § 827(c).

performance risk and to help the DoD manage it. Therefore, it seemed that enactment of the section 827 bid protest pilot program would render the RAND study moot. However, after taking the time to consider the results of the RAND study—and likely industry's objections to the "loser pays" provision[33]—Congress again took drastic action by repealing the bid protest pilot program.

III. A House of Cards Falls—The Likely Effect of the RAND Study on the Section 827 Bid Protest Pilot Program and Congress's Perception of the Department of Defense's Risk

The RAND study was likely the impetus behind the repeal of the section 827 "loser pays" bid protest pilot program and Congress's seeming shift in its view of the effect bid protests have on the DoD's program performance risk. This is because the RAND study demonstrated that the DoD's focus on bid protests at the GAO as a major cause of its risk may be misplaced, as the data did not support many of its concerns.

First, RAND found that bid protests at the GAO are not as ubiquitously detrimental to the DoD's capability delivery as the DoD considered because bid protests are rare. Second, RAND found that the DoD's low rate of CICA stay overrides was not consistent with the DoD's assertion that there is an overabundance of "frivolous" bid protests at the GAO. Third, though many incumbents do file bid protests at the GAO, the DoD's effectiveness rate suggest that those protests are largely filed on meritorious grounds rather than to secure a bridge contract or simply frustrate a competitor. Finally, the DoD did not have the supporting data in four key areas to determine whether bid protests in general—or even just "frivolous" ones—are needlessly increasing its program performance risk. Consequently, likely because of the RAND study, Congress repealed the section 827 "loser pays" bid protest pilot program.

Insofar as the DoD considers they are detrimental to overall capability delivery at the macro level, RAND discovered that bid protests of DoD

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[33] *E.g.*, Madsen et al., *supra* note 9; Ramish, *supra* note 14 ("In short, the loser pays provision will not penalize frivolous protests, may deter worthwhile protests, and could actually result in greater cost and delay if it drives large defense contractors to file their bid protests at the Court of Federal Claims.").

procurements are rare. In its study, RAND evaluated bid protest data at the GAO and the COFC from fiscal year 2008 to fiscal year 2016.[34] During this period, the number of procurements the DoD conducted that were protested at the GAO or the COFC was very low.[35] Specifically, in raw numbers covering both pre-award and post-award bid protests of DoD procurements, 11,459 bid protests were filed at the GAO and 475 were filed at the COFC.[36] While these bid protest numbers seem significant, they amounted to less than 0.3% of all DoD procurements, leading RAND to conclude that bid protests at both the GAO and the COFC are "exceedingly uncommon for DoD procurements."[37] This finding suggested that insofar as the DoD considers bid protests at the GAO as inhibiting its capability delivery—and therefore are needlessly increasing its program performance risk—it is not done systematically, as some officials suggest.[38] Therefore, the DoD's assertion that bid protests in general are increasing its program performance risk at the macro level is likely misplaced.

Next, insofar as the DoD considers frivolous individual bid protests as needlessly inhibiting capability delivery and increasing actual and transactional costs, its uses of CICA stay overrides are rare, which does not support its concern. RAND found that the DoD infrequently issues CICA stay overrides for protests filed at the GAO.[39] A CICA stay override is a process in which an agency may decide to continue with the award or performance of a contract that has been timely protested at the GAO.[40] To justify an override, an agency must make a determination that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the [GAO]," or that "performance of the contract is in the best interests of the United States."[41]

Here, if individual frivolous bid protests were needlessly inhibiting the DoD's vital capabilities or increasing its program performance risk such that Congress needed to act, one would presume that the DoD would use this

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[34] *See* RAND STUDY, *supra* note 3, at xv tbl.S.1.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 26.
[38] *See* Young Memo, *supra* note 11.
[39] *See* RAND STUDY, *supra* note 3, at 32.
[40] 31 U.S.C. § 3553(c)(2)(A), (d)(3)(C).
[41] *Id.* § 3553(d)(3)(C)(i); *see* FAR 33.104(a), (c) (2019).

authority more often.[42] However, RAND found that the DoD issues a CICA stay override only in 1.5% to 2% of procurements protested at the GAO.[43] While the RAND study posited various other questions policymakers within the DoD should consider as to the reason the CICA stay override rate was so low, the low rate is still significant in this context.[44] Specifically, the rate seems to suggest that it is not apparent on its face that the DoD is actually experiencing substantial amounts of frivolous bid protests at the GAO. Therefore, the facts do not support the assertion that individual frivolous bid protests are needlessly inhibiting capability delivery and increasing costs.

Further, the bid protest effectiveness rates suggest that recent increases in bid protest numbers for the DoD—as well as the higher amount of incumbent contractor task order protests—are due not to frivolous purposes but rather to protesters' legitimate business decisions.[45] As an initial matter, RAND noted how the GAO tracks protesters' success through its sustained and effectiveness rates.[46] The sustained rate "is the number of actions for which GAO sustains the protester's claim divided by the number of protest actions that go to decision."[47] In contrast, "[t]he effectiveness rate is the number of protest actions that are either sustained or are subject to corrective action relative to all protest actions."[48] An agency's voluntary action to fix a flaw in the procurement before the GAO issued a decision is "corrective action."[49]

In its analysis of the data from fiscal year 2008 to fiscal year 2016, RAND found that the sustained rate, or the rate capturing the percentage of cases where the protester wins, was very low: 2.6% of all cases and 12.2%

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[42] *See* RAND STUDY, *supra* note 3, at 32.
[43] *Id.* tbl.4.3.
[44] *Id.*
[45] *See generally* Schooner, *supra* note 12, at 29.
[46] *See* RAND STUDY, *supra* note 3, at 24.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 21, 24. Corrective action can also occur because of a sustained GAO decision. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 27 (2018) [hereinafter GAO DESCRIPTIVE GUIDE].

for cases that went to a merits decision.[50] At first blush, these sustained rates would seem to suggest that many bid protests are frivolous, and there is evidence to support such an assertion because protesters are losing at such a high rate: 97.4% and 87.8%, respectively.[51] However, when RAND combined the sustained cases with those that resulted in corrective action, it found that over that same period, 40% of all bid protest actions in the DoD consistently resulted in some change to the "initial procurement decision or terms."[52] In other words, RAND discovered that the effectiveness rate of bid protests of DoD procurements from fiscal years 2008 to 2016 was stable at about 40%. The stability of the effectiveness rate seems to refute—insofar as the DoD has experienced increases in amounts of bid protests at the GAO during this timeframe—the DoD's concerns that those increases were a result of frivolous bid protests.[53] That is because if those increases were due to frivolous or baseless bid protest grounds, the effectiveness rate would have decreased, which was not the case.[54]

Additionally, the data does not support the DoD's concern that incumbent contractors—that are not the anticipated awardees on follow-on task order procurements—file bid protests merely to cause a CICA stay to trigger a bridge contract or to simply frustrate their competitors' business prospects.[55] Though RAND found that one quarter of task order bid protest actions were associated with an incumbent and that "incumbents are more likely to protest task orders when it may be to their economic advantage if they get a bridge contract during the CICA stay," incumbent contractors are also more likely to file bid protests for legitimate business reasons.[56] In making this assessment, RAND pointed to the 70% effectiveness rate of

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[50] RAND STUDY, *supra* note 3, at 32 tbl.4.3; *see generally* 4 C.F.R. § 21.5 (2019) (implying a merits decision at the GAO is one where the GAO reaches a conclusion on the substance of a protester's bid protest grounds).
[51] RAND STUDY, *supra* note 3, at 32 tbl.4.3.
[52] *Id.* at 32.
[53] *Id.* at 33.
[54] *Id.*
[55] *See generally id.* at 66; Richard B. Oliver & David B. Dixon, *Changes for Bid Protests in FY 2018 NDAA*, PILLSBURY (Nov. 16, 2017), https://www.pillsburylaw.com/en/news-and-insights/changes-bid-protest-2018-ndaa.html (noting that the GAO task order bid protest threshold changed—and therefore limited the amount of bid protests that could be brought and analyzed—during the timeframe the data for the study was collected from $10 million to $25 million for the DoD).
[56] RAND STUDY, *supra* note 3, at 60; *see* Schooner, *supra* note 12, at 29.

incumbent contractors that file bid protests on DoD task orders at the GAO.[57] This effectiveness rate was "much higher than average and statistically significant," as it demonstrated that "while incumbents may protest task orders more frequently, [they] are also much more likely to be successful."[58] As a result, RAND found that the data did not support the DoD's concern that incumbent contractors' protests are disproportionately frivolous.[59]

Finally, the DoD could not actually determine whether frivolous bid protests or bid protests generally at the GAO were needlessly increasing its program performance risk because of the lack of data in four areas that the DoD generally considers to affect its procurements. When Congress selected RAND to conduct the study in the NDAA for fiscal year 2017, it set out fourteen elements to evaluate.[60] These elements were generally considered to encompass "aspects of how the bid protest system affects or is perceived to affect DoD procurements, trends in bid protests, and differences in procurement characteristics."[61] In other words, those fourteen elements constituted what Congress believed the DoD considered the underlying reasons that all, or just frivolous, bid protests at the GAO were needlessly increasing its program performance risk.

After completing its study, though, RAND found that there was insufficient data on four of the DoD's concerns to even address them.[62] These four elements were the effects of protests on procurements, the time and cost to the Government to handle protests, the frequency with which a protester is awarded the disputed contract, and agency-level bid protest trends.[63] Without fully analyzing these four key elements, the DoD could not actually determine whether its concerns regarding the effect bid protests at the GAO have on its program performance risk are genuine.[64]

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[57] RAND STUDY, *supra* note 3, at 60.
[58] *Id.*
[59] *See* Schooner, *supra* note 12, at 29.
[60] RAND STUDY, *supra* note 3, at xii.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See generally* Young Memo, *supra* note 11 (implying that the RAND study was unable to assess due to lack of data).

Ultimately, Congress repealed the section 827 bid protest pilot program in section 886 of the fiscal year 2021 NDAA.[65] While Congress pointed to the small pool size of "bid protests captured by the pilot criteria and lack of cost data" as the reason for the repeal, it is likely that Congress's decision was based on *post hoc* consideration of the results of the available data the RAND study discusses, as well as the lack of meaningful data in the four key areas.[66] Nonetheless, while likely lauded by industry, the RAND study and the repeal of the section 827 "loser pays" bid protest pilot program did leave the DoD still in need of a way to manage or assess what is actually causing its program performance risk. However, Congress may have tipped its hand in section 886 as to what it thinks the DoD can use to make the assessment and how it can manage any risk it finds: the agency-level bid protest.

IV. Congress's Signals and Department of Defense Program Performance Risk Management—Does the ACUS Report on Agency-Level Bid Protests Provide the Roadmap for a Replacement Risk Management Solution for the Department of Defense?

In section 886 of the fiscal year 2021 NDAA, Congress likely signaled that it thinks a type of agency-level bid protest program is the solution to the DoD's program performance risk management problem. First, potentially inspired by the work of Mr. Dan Gordon, Congress seems to be leading the DoD to the reason it should consider using a bid protest program as a risk management tool and not as a cause of risk in the inquiries it required AIRC to examine. Second, through its direction to the DoD that it should consider the ACUS's recommendations on agency-level bid protest reform, Congress seems to suggest that the DoD can manage its program performance risk with a modified agency-level bid protest program. In any event, the "congressional perspective" pendulum seems to be swinging back towards viewing bid protests as a solution to, instead of a cause of, risk.

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[65] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, sec. 886, § 827, 134 Stat. 3387, 3791.

[66] *Id.*; *see* ACQUISITION REFORM WORKING GRP., 2018 LEGISLATIVE PACKET 24 (2018) (covering a combination of industry's recommendations relating to the "loser pays" provision based on the RAND study).

As a threshold matter, Congress repealed the section 827 "loser pays" bid protest pilot program in section 886 of the fiscal year 2021 NDAA.[67] In its place, Congress only posited more questions, which, on its face, has left a risk management tool vacuum for the DoD where the "loser pays" provision once stood. However, through those questions, Congress may be signaling what it thinks would be a pathway to filling that vacuum. Specifically, in the conference report to section 886 of the fiscal year 2021 NDAA, Congress directed the Secretary of Defense "to undertake a study through the [AIRC], to examine elements of Section 885 of the National Defense Authorization Act for Fiscal Year 2018 . . . for which [RAND] was unable to obtain full and complete data during its analysis."[68]

This new study, the purpose of which is styled as filling the information gaps in the earlier RAND study, is interesting not for what it specifically directs AIRC to investigate, but for the implicit recommendation and explicit direction it provides to the DoD. For example, Congress also directed AIRC to examine the "potential benefits of a robust agency-level bid protest process."[69] This is interesting for two reasons. First, most of the questions Congress posited in furtherance of this direction seem to be inspired by the work of Mr. Daniel I. Gordon, a prominent Government procurement scholar and practitioner who, in a rather famous article, explained the key decisions all governments must make if they want an effective bid protest system.[70] If Congress was indeed inspired by Mr. Gordon's work in its construction of the AIRC inquiries in section 886, this suggests Congress is changing its perspective on bid protests as they relate to the DoD's program performance risk. In other words, Congress seems to now want the DoD to consider viewing bid protests as a means to manage—not as a cause of—risk. Second, because Congress is also explicitly directing the DoD to consider reforming its agency-level bid protest programs in section 886, it seems to further signal the DoD to consider the use of agency-

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[67] *See* discussion *supra* Part III.
[68] *See* H.R. REP. NO. 116-617, at 1708 (2020) (Conf. Rep.).
[69] *Id.*
[70] *See generally* Daniel I. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427 (2006).

level bid protest programs as the risk management tool that will fill the gap left by the repeal of the section 821 "loser pays" bid protest pilot program.[71]

A. Congress's Leading Questions to the Acquisition Innovation and Research Center: "Why" the Department of Defense Should Consider Using Bid Protests as a Risk Management Tool

Apparently inspired by an earlier work by Mr. Daniel Gordon, Congress appears to be signaling why it thinks the DoD should consider the use of bid protests as a program performance risk management tool instead of viewing them as a cause of risk. Among other things, in the conference report on section 886 in the fiscal year 2021 NDAA, Congress directed AIRC to examine the "prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such [agency-level bid] protest processes."[72] However poignant these AIRC inquires may be, Congress failed to define what it meant by those terms,[73] thus seemingly leaving up to AIRC the scope of these inquires. Interestingly, however, most of these AIRC inquires seem to be remarkably similar to the common bid protest forum considerations across government procurement systems that Mr. Gordon, former Administrator for Federal Procurement Policy,[74] examined in a well-known paper.[75]

In his paper, Mr. Gordon outlines various key decisions governments must make regarding bid protest fora.[76] While not the primary purpose of the paper, he ostensibly details "why" these fora can be used to manage procurement system risk and by extension program performance risk.[77] As

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[71] *See* H.R. REP. NO. 116-617, at 1708; *see generally* CHRISTOPHER YUKINS, STEPPING STONES TO REFORM: MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE FOR AGENCIES AND BIDDERS BY BUILDING ON BEST PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT (2020) [hereinafter ACUS REPORT].
[72] H.R. REP. NO. 116-617, at 1708.
[73] *See generally id.*
[74] *Daniel I. Gordon*, OFF. OF MGMT. & BUDGET, https://obamawhitehouse.archives.gov/omb/procurement_bio_gordon (last visited Dec. 20, 2021).
[75] Gordon, *supra* note 70.
[76] *See generally id.*
[77] *See generally id.* (explaining the positive and negative effects each of the key decisions governments make regarding the bid protest system have on a procurement system).

an initial matter, Mr. Gordon posits that overarching all of the key decisions he analyzes are various competing goals of every bid protest system.[78]

On one side of these competing goals, Mr. Gordon suggests, are the enhancement of the accountability of procurement officials and government agencies, as well as the protection of the integrity of the procurement system.[79] On the other side of this equation is the need for the procurement system to run efficiently so that it can timely procure the goods or services that a government needs.[80] With this balancing test, Mr. Gordon essentially describes not only a government's need to keep these goals in balance, but the spectrum of how a bid protest system manages its varying types of risk. To accomplish this balance, and therefore effectively manage this risk, Mr. Gordon lays out the various key decisions any government must make regarding its bid protest fora.[81] These key decisions appear to directly inspire the section 886 AIRC inquires. Therefore, Congress is apparently signaling not only to AIRC to use Mr. Gordon's analysis to inform or scope its approach to the inquires, but also to the DoD regarding its approach to bid protests and risk management.

First, the key decision on a "bid protest forum's jurisdiction," or the AIRC inquiry on bid protest "prevalence." In his paper, Mr. Gordon asserts, among other things, that a bid protest forum that has jurisdiction over the challenges to all procurements by an agency it covers "may facilitate uniformity in the system's procurement[s]," which will therefore ensure transparency over all of an agency's procurements.[82] Mr. Gordon does not suggest that the benefit of this transparency is limited to the public but also includes agency decision-makers. As such, he seems to suggest that an expansive view of a bid protest forum's jurisdiction, which includes all of an agency's procurements, provides oversight and accountability over an agency's procurements. In other words, from a risk management perspective, he suggests that agency management could potentially use this transparency brought on by an expansive view on bid protests with data to

[78] *Id.* at 429.
[79] *Id.* at 429–30.
[80] *See id.* at 430.
[81] *Id.* at 432.
[82] *See id.* at 433–34.

identify issues and trends to better manage an agency's procurement system and its program performance risk.[83]

Second, the key decision on a "bid protest forum's time limits," or the AIRC inquiry on bid protest "timeliness." Here, Mr. Gordon suggests that affixing a time limit for bid protests—especially in cases where a stay of award/performance is available—helps agency leadership manage risk because it informs the agency players in a procurement system that there is a limit to "how long the forum will take to decide the [protest]."[84] The agency can program this time limit into an acquisition planning timeline to account for the potential of a bid protest without causing an unplanned delay.[85] In other words, Mr. Gordon suggests that this could help to manage program performance risk by providing a means for an agency to backwards plan and to prepare for a bid protest that reduces or eliminates "surprise" delay lengths brought on by flexible bid protest fora timelines to decision.[86]

Third, the key decision on a "bid protest forum's outcomes," or the AIRC inquiry as to a bid protest forum's "ability to provide meaningful relief." While this section of Mr. Gordon's paper primarily explains the benefit a protester could receive insofar as it is successful at a bid protest, what is important from a risk management perspective is how an agency determines success.[87] Specifically, as Mr. Gordon notes, is that meaningful relief must at a minimum be an opportunity for a contractor (protester) to compete for a contract in a situation where the Government has made some error in the procurement process.[88]

In other words, this minimal meaningful relief serves to facilitate the management of an agency's program performance risk because the grant of

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[83] *See* ACUS REPORT, *supra* note 71, at 26 (suggesting expanded agency-level bid protest jurisdiction ensures oversight and accountability and therefore manages an agency's program performance risk when using new procurement methods).
[84] *See* Gordon, *supra* note 70, at 438. The term "players" in this context includes contracting officials, agency legal counsel, and agency program/requiring activity decision-makers.
[85] Interview with Jessica Mayeaux, Cont. Specialist, U.S. Dep't of Def., in Burke, Va. (Mar. 19, 2021) (providing that some period of time can be included in an acquisition timeline to account for bid protests and, to some extent, some agencies already do so).
[86] *See* RAND STUDY, *supra* note 3, at 53 (providing that the Court of Federal Claims bid protest timeline to decision is flexible and varied greatly, with an average of 133 days and a median of 87 days); *see also* Interview with Jessica Mayeaux, *supra* note 85.
[87] *See* Gordon, *supra* note 70, at 442–43.
[88] *Id.* at 443.

relief itself to a protester signals to agency personnel that the integrity of the procurement process has been violated and changes is required to ensure the agency gets its supply/service at the best value to the agency.[89] Therefore, such a grant of relief upfront during the competition phase of a procurement arguably helps to manage risk by saving an agency time and additional costs in the long term by correcting certain situations such as the use ambiguous terms in a solicitation that could prevent the Government from ultimately getting what it wants, or making an award to a contractor that will deliver sub-optimal supplies or services.[90] This "meaningful relief"—or corrective action—provides an agency the mechanism to identify and correct errors at a lower actual and transactional cost than would be incurred if a flawed procurement were allowed to continue.

Fourth, the key decision of "standing to protest," or the AIRC inquiry as to a bid protests forum's "availability." In this part of his paper, Mr. Gordon explains that if a bid protest helps to protect the integrity of the procurement process—and, by extension, helps to manage an agency's program performance risk—standing to protest should be expansive.[91] However, he also implies that such an expansive view may be too disruptive to the procurement process; thus, by providing standing to an aggrieved vendor as it is generally now throughout the U.S. bid protest system—also known as the "interested party" standard—"has logic to it" and provides balance.[92] A bid protest forum that establishes a minimum level of standing at an actual aggrieved vendor that is flexible and could change as the procurement system changes and evolves serves to also facilitate the management of program performance risk for an agency. This is because as an agency develops new and inventive ways to procure supplies and services, the interested parties will likely also change; therefore, ensuring

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[89] Steven L. Schooner, *Protests Protect Procurement System (Part 2)*, FCW (Mar. 7, 1999), https://fcw.com/articles/1999/03/07/protests-protect-procurement-system-part-2.aspx.

[90] *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 694 (2001).

[91] *See* Gordon, *supra* note 70, at 435 (defining "standing" generally as having the right to call on the bid protest forum for investigation and relief).

[92] *Id.*; FAR 33.101 (2019) (defining an "interested party" as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract). *See also* FAR 33.103(d)(2)(vii); 4 CFR § 21.1(a) (2019) ; 28 U.S.C. § 1491(b)(1) (providing the use of the interested party standard at all three bid protest fora).

a continual balance of external "private attorneys general" are reviewing procurements for errors.[93]

Finally, the key decision on "publishing of decisions," or the AIRC inquiry as to the "reliability of data on protests." Without great detail, Mr. Gordon addresses the effects of publishing bid protest decisions on the procurement system in his analysis. In particular, he provides that, "[a]s a general matter, publishing [bid protest] decisions increases transparency and extends the benefits of the protest system to a wider public."[94] In other words, what Mr. Gordon is likely alluding to are two benefits to the publishing of decisions.

First, as he has separately indicated, these bid protest decisions provide guidance to both agency and vendor legal counsel—and their clients—on the application of the procurement laws and rules to the specific facts surrounding a procurement.[95] This legal guidance facilitates the accurate development of requirements, the responsive preparation of solicitations and offers, the correct understanding of the process in which procurements are conducted, and the reduction of error and litigation instances.[96] Second, the data those decisions contain help to inform the public, industry, and even other agencies of both the effectiveness of the bid protests and error trends in both Government solicitations and vendor offers/bids/quotes.[97] Both of these benefits serve as a means to facilitate the management of an agency's program performance risk through tracking error trends and teaching individuals how to correct the errors before they happen saving both actual and transactional cost and time for an agency.

In section 886 of the fiscal year 2021 NDAA, Congress seems to signal to the DoD that it should consider the use of bid protests as a program performance risk management tool through the leading questions it directed AIRC to investigate. By drafting the AIRC inquires similar to the key decisions that governments must consider when developing their bid protest

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[93] *See* ACUS REPORT, *supra* 71, at 28; *see also* Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970) (describing the role of "private attorneys general"—or industry—in monitoring compliance with Federal procurement law).
[94] *See* Gordon, *supra* note 70, at 443.
[95] *See* Dan Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 444–45 (2013).
[96] *See* Ross L. Crown, *Legal Insights: What Bid Protests Can Teach Us About Preparing Better Contract Proposals*, PACA PULSE, Winter 2018, at 1.
[97] ACUS REPORT, *supra* 71, at 51.

fora as discussed by Mr. Gordon, Congress seems to break from the DoD regarding its view on bid protests and shift toward a view that Congress is part of a risk management solution. Nevertheless, Congress does not stop there. Through its endorsement of the ACUS report, it also seems to tip its hand as to which bid protest forum it thinks the DoD should use to manage risk: agency-level bid protests.

B. Congress is Signaling to the Department of Defense "How" It Can Use Agency-Level Bid Protests as a Risk Management Solution

In section 886 of the fiscal year 2021 NDAA, Congress also seems to suggest to the DoD how it can use a reformed agency-level bid protest program to help manage its risk by endorsing the ACUS report on agency-level bid protest reform and by directing the DoD to consider the recommendations contained within it.[98] At first glance, it may seem that Congress's endorsement of the ACUS report was meant merely to suggest to the DoD ways it could improve its agency-level bid protest programs' "expediency, timeliness, transparency, and consistency."[99] However, the specific statutory construction of section 886 begs the question, "Why is Congress directing the DoD to examine its agency-level bid protest programs and improvements to those programs in the same section in which it is likely inferring that the DoD should consider bid protests as a risk management tool?" The likely answer is that Congress believes an agency-level bid protest program is the forum it wants the DoD to examine to develop a solution to its risk management problem.[100] This is not surprising, as the ACUS report incorporates and analyzes the data it collected through

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[98] *See* H.R. REP. NO. 116-617, at 1708 (2020) (Conf. Rep.). The Administrative Conference Act established the Administrative Conference of the United States. 5 U.S.C. §§ 591–596. The Administrative Conference of the United States studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements. *Id.* § 594(1).

[99] H.R. REP. NO. 116-617, at 1708.

[100] *See generally* LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2014) (providing that the Supreme Court has generally expressed that "a statute be read as a harmonious whole whenever reasonable").

the lens of Mr. Gordon's key elements of a bid protest system from an agency-level bid protest perspective.[101]

The ACUS report analyzed agency-level bid protest trends since the program's inception in 1995 by drawing on best practices across the Federal Government.[102] The George Washington University Law School's Professor Christopher Yukins led the study, which involved interviewing a multitude of Federal agency and private vendor counsel actively involved in bid protests and focused on potential areas of bid protest reform.[103] The gravamen of the study were eight recommended reforms intended to make agency-level protests procedures "more simple, transparent, and predictable" so they can "work better for both vendors and the agencies they serve."[104]

These recommended reforms were: (1) formalize the role of the "agency protest official" (APO); (2) clarify jurisdiction of the agency-level bid protest programs; (3) retain the connection to the GAO's "interested party" standard for standing at the agency fora; (4) clarify and standardize the decision-making process for agency-level bid protests; (5) clarify the record

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[101] *See* ACUS REPORT, *supra* note 71, at 15.

[102] *Id.* at 5; *see* Christopher Yukins, *Agency-Level Bid Protests*, PUB. PROCUREMENT INT'L, https://publicprocurementinternational.com/agency-level-bid-protests (last visited Dec. 21, 2021).

[103] *See* ACUS REPORT, *supra* note 71, at 5. Professor Yukins currently serves as Co-Director of the Government Procurement Law Program at the George Washington University Law School, where he has taught classes on contract formations and performance issues in public procurement, bid protests and claims litigation, state and local procurement, anti-corruption issues, foreign contracting, procurement reform, and comparative and international law. *Christopher R. Yukins*, GEO. WASH. UNIV. L. SCH., https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Christopher%20Yukins_CV_2019.pdf (last visited Dec. 21, 2021). He has testified on issues of procurement reform and trade before committees of the U.S. Congress and the European Parliament, and he has spoken as a guest lecturer at institutions around the world. *Id.* He is an active member of both the Public Contract Law Section of the American Bar Association and the Procurement Roundtable, an organization of senior members of the U.S. procurement community. *Id.* He has worked on a wide array of international projects on capacity-building in procurement, and he was an advisor to the U.S. delegation to the working group on reform of the United Nations Commission on International Trade Law. *Id.*

[104] *See* Emily Bremer, *ACUS Publishing Six New Recommendations and One Statement (ACUS Update)*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 21, 2021), https://www.yalejreg.com/nc/acus-publishing-six-new-recommendations-and-one-statement-acus-update; ACUS REPORT, *supra* note 71, at 5.

in which an agency-level bid protest will be decided; (6) share that record with protesters; (7) clarify when a regulatory stay of award/performance is put into place and whether it continues to any follow-on GAO protest; and (8) publish data on agency-level protest outcomes, including corrective action.[105] While the ACUS report was written from a reforming agency-level bid protest program perspective, the recommended reforms also provide a list of reasons "how" the DoD could successfully use an agency-level bid protest program as a program performance risk management tool.

First, the formalization of the role of an APO. In the ACUS report, Professor Yukins describes the current two-level decision structure present in most agency-level bid protest programs across the Federal Government: (1) decision at the contracting officer level or (2) decision at a higher-level official or APO.[106] The ACUS report found that some agency legal counsel felt that the ability to exercise oversight over bid protests—specifically regarding agency-level bid protests—at the APO level led to the identification of error trends in procurements and gives "managers and attorneys more information on problems emerging in the procurement system."[107] The ACUS report goes on to note that emerging best practice among the agency-level bid protest programs shows that "by centralizing oversight over agency-level protests, agencies would be better able to draw on lessons learned from agency protests, to improve management and training."[108]

This suggests that the establishment of a central DoD APO—or at least the consistent establishment of a central APO at each of the military services and activities under the DoD—would help the DoD manage its program performance risk. Specifically, the DoD could use an agency-level bid protest program as a mechanism to identify data on weaknesses in procurement techniques, management oversight, and training. The DoD could then use this data to address those weaknesses on a systematic level as opposed to simply relying on a "higher-level official" that is only one level above the procuring contracting officer to identify error trends and make corrections locally. Especially since at some contracting activities

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[105] *See* ACUS REPORT, *supra* note 71, at 5.
[106] *Id.* at 23.
[107] *Id.* at 23–24.
[108] *See id.* at 24.

within the DoD, information is widely disseminated inconsistently, if at all, after a contracting officer agency-level bid protest.[109]

Second, the clarification of agency-level bid protest jurisdiction. In the ACUS report, Professor Yukins describes how many Federal agencies have "taken divergent and *ad hoc* approaches to defining the scope of jurisdiction in their agency-level bid protest functions."[110] Specifically, he posited that because it is unclear whether new methods of procurement—such as the DoD's recently expanded other transaction (OT) prototype authority (OTA)—will be covered by either GAO or COFC bid protest jurisdiction, agencies should "take an expansive approach to agency-level bid protest jurisdiction, to ensure oversight and accountability (and thus contain agencies' [program performance] risks) regarding new procurement methods."[111]

Implementation of this recommendation would facilitate the management of program performance risk on those nontraditional procurement methods that would otherwise not have bid protest oversight, such as OTs. In recent years, the DoD's use of prototyping OTs under 10 U.S.C. § 2371b has exploded, rising 715% from 2015 to 2019.[112] Right now, this nontraditional procurement method lacks consistent oversight, as traditional bid protest fora have limited or no jurisdiction to hear bid protests

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[109] This assertion is based on the author's professional experiences as Command Judge Advocate, 409th Contract Support Brigade, June 2018 to August 2020; Branch Chief, Cross Functional Team Legal Support Branch, Army Futures Command Task Force, January 2018 to June 2018; and Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency, June 2016 to January 2018 [hereinafter Professional Experiences] (finding that, in many cases, contracting officers in the Army would report results of lower-level agency-level bid protests to their supervisors and senior technical chain by briefing or using reporting tools, but that that data was not consistently disseminated within the local contracting activity, to other sister contracting activities within the Army, or at any level to sister service contracting activities as lessons learned). *But see* Interview with Senior Agency Legal Couns., U.S. Army (Mar. 17, 2021) (providing that in some contracting activities within the Army, data in the form of lessons learned are shared locally after every agency-level bid protest and that eventually some agency-level bid protest data is shared with the Army acquisition workforce through what are known as "business intelligence reports").

[110] *See* ACUS REPORT, *supra* note 71, at 26.

[111] *See id.*; 10 U.S.C. § 2371b. This recommendation presumes that there is a tracking system for agency-level bid protest data.

[112] *See* Sydney J. Freedberg Jr., *OTAs Soar & Army Leads the Way: CSIS Report*, BREAKING DEF. (Dec. 9, 2020, 4:12 PM), https://breakingdefense.com/2020/12/otas-soar-army-leads-the-way-csis-report.

over those actions.[113] Some practitioners, such as Mr. Rick Dunn, the first General Counsel for the Defense Advanced Research Projects Agency, have proffered that clarifying that the DoD's agency-level bid protest program(s) have jurisdiction over all types of procurements would provide the DoD some level of bid protest oversight on these OTs and other non-traditional contracting methods, and would facilitate the management of its related program performance risk.[114] In other words, the DoD could use that oversight to collect data, track trends, and make procurement or programmatic adjustments that could prevent or reduce incidents that could increase its actual or transactional cost or delay, and thus help the DoD manage its risk.[115]

Third, protecting the "interested party" status quo. Here, in the ACUS report Professor Yukins notes that "[t]he soundest course appears to maintain the status quo: to continue to link standing for purposes of agency-level bid protests to general principles of standing at GAO and the Court of Federal Claims."[116] As Mr. Gordon discusses in his paper, the concept of an "interested party," or what amounts to standing in bid protests, provides the access for a vendor to challenge a procurement error at a bid protest forum.[117] Professor Yukins discovered that Federal agencies, to include the DoD, generally have linked this concept to GAO or COFC decisions on "interested party" status.[118] In other words, the concept of standing at the DoD's agency-level bid protest programs would adjust in concert with the concept at the GAO/COFC as those fora would adjust to the U.S. procurement system.

This recommendation would facilitate the management of the DoD's program performance risk by continuing to allow the concept of standing to evolve on par with the procurement system and future innovative procurement methods—such as OTs in the DoD or the new Electronic

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[113] Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018); Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019); MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).

[114] GW Law Government Procurement Law Program, *An "Ideas Forum" on Other Transactions (OTs)*, YOUTUBE (Mar. 20, 2021), https://youtu.be/BCoRnvMqxrY?t=3170.

[115] *See* ACUS REPORT, *supra* note 71, at 26.

[116] *Id.* at 28.

[117] FAR 33.101 (2019).

[118] *See* ACUS REPORT, *supra* note 71, at 28.

Marketplace that the General Services Administration manages.[119] This recommendation serves to facilitate risk management by allowing an agency-level bid protest program to effectively grow at the speed of innovation without requiring a deliberate action by the DoD and, therefore, would remain a viable risk management tool.

Fourth, clarifying the agency-level bid protest decision-making timeline and process. Under this recommendation, Professor Yukins suggests, among other things, that agencies should establish a certain and transparent timeline in which agency-level bid protests are decided.[120] To this end, he posits that agencies should adopt procedural milestones and processes similar to those established in Part 33 of the Federal Acquisition Regulation (FAR) for resolving disputes under the Contracts Disputes Act of 1978 (CDA).[121] This would require the DoD to standardize its process and method for deciding bid protests and would require the APO and contracting officer to adhere to these defined timelines.[122]

In support of his recommendation, Professor Yukins points to the opinions of various agency and vender counsel interviewed for the ACUS report. The consensus was that in framing the agency-level bid protest decision-making process as similar to the CDA dispute process, an agency would "bring certainty and legitimacy to the agency-level protest process."[123] This, Professor Yukins suggests, "would encourage more vendors to use agency-level protests, which should reduce costs and disruption for agencies overall."[124] As Professor Yukins notes, the benefit to clarifying the agency-level bid protest decision-making process not only affects protesters, but also agencies. Specifically, clarification would provide a reliable process and timeline on which the DoD could plan and program into its acquisition planning to reduce unplanned delays.[125] Further, because the agency-level bid protest process should be short—best efforts

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[119] *Id.* at 28; *see* Christopher R. Yukins, *U.S. Government to Award Billions of Dollars in Contracts to Open Electronic Marketplaces to Government Customers—Though Serious Questions Remain*, GOV'T CONTRACTOR, Oct. 16, 2019, at 1.
[120] ACUS REPORT, *supra* note 71, at 30.
[121] *Id.* at 30, 32.
[122] *See id.* at 32.
[123] *See id.* at 33.
[124] *Id.*
[125] *See* Interview with Jessica Mayeaux, *supra* note 85 (providing that some agencies in the DoD already account for bid protest delay in acquisition planning).

to achieve decision within thirty-five days of filing, which is less than half of the time the GAO has to decide a bid protest—the DoD's overall transaction cost for the use of this risk management tool would be lower than what would be "incurred" at the GAO or the COFC.[126]

While some agency counsel are hesitant to support this reform because of potential increased transactional costs related to the establishment and running of such a process, theoretically, the reform would not be overly onerous if the DoD properly staffed for it.[127] Additionally, this recommendation should not increase the agency's transaction cost, as "[a]gencies are already required to make best efforts to deliver a [sic] 'well-reasoned' opinions on agency-level protests within 35 days."[128]

Fifth and sixth, the record on which the decision should be made and its disclosure to protesters. When considering these recommendations together, Professor Yukins essentially suggests that agencies formally establish what documents go into the record that the APO or contracting officer will use to arrive at the final decision and that agencies should afford protesters access to that record under what is ostensibly a protective order.[129] He provides this recommendation because, "[i]n practical terms, the protesting vendor usually will know only of errors that emerge in the agency's requests for bids or proposals, the agency planning and competitive process, or in the debriefing—the aspects of the procurement process disclosed as a matter of course to bidders and offerors."[130]

Professor Yukins posits that by establishing a consistent definition of what documents are contained in the record on which the decision will be

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[126] *See* FAR 33.103(g)–(h) (2019); 4 C.F.R. § 21.9(a) (2019) (requiring the GAO to issue a decision on a protest within 100 days after it is filed); *Anatomy of a Protest at the U.S. Court of Federal Claims*, MORRISON & FOSTER (Apr. 10, 2017), https://govcon.mofo.com/protests-litigation/anatomy-of-a-protest-at-the-u-s-court-of-federal-claims (providing that timelines to decisions at the Court of Federal Claims can exceed 100 days).

[127] *See* Interview with Deputy Chief Couns., 409th Contracting Support Brigade (Mar. 21, 2021) (discussing that lack of personnel available to manage this process could prove too onerous and therefore the DoD would need to staff up to support this recommendation).

[128] ACUS REPORT, *supra* note 71, at 33.

[129] *Id.* at 40. The GAO and other fora use protective orders to control access to proprietary or confidential material that is disclosed during a protest that cannot be released publicly. *See* 4 C.F.R. § 21.3(c) (2019); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-613SP, GUIDE TO GAO PROTECTIVE ORDERS 2 (10th ed. 2019).

[130] *See* ACUS REPORT, *supra* note 71, at 39.

made, and by providing protesters access to that record, it would have "the practical effect of limiting the rounds of protester briefing in an agency-level protest."[131] Alternatively, to the extent the DoD would be concerned with the increased transactional cost that producing the complete record would likely create, it could provide a redacted source selection decision document in post award bid protests to the protester, which is consistent with DoD policy for enhanced debriefings.[132]

Essentially, Professor Yukins suggests that by providing the protesters some record up front, the DoD will see less rounds in a bid protest that it would otherwise see due to newly discovered protest grounds. In general, this would save the agency time and reduce overall transactional cost, therefore, facilitating the management of program performance risk. Additionally, providing protesters access to a standardized record up front would shine a light on the shadow of suspicion that a lack of transparency casts. Frankly, this would reduce the likelihood of follow-on protests at the GAO or COFC because the protester felt the agency was hiding something.[133]

Further, insofar as the DoD seeks the "best value" in its procurements, effectuating this recommendation would serve to help identify—quickly, as agency-level bid protests should take around thirty-five days—issues that DoD officials might have missed. By providing the "private attorneys general" a standardized record up front, the DoD could uncover issues that were not caught by either the procuring contracting personnel or, because the value of the procurement fell under a review threshold, by reviewing contracting personnel or agency counsel.[134] This early identification of issues in a procurement would serve to save the DoD time and reduce

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[131] *Id.* n.139.

[132] *See generally id.* at 38; *see* Interview with Deputy Chief Couns., *supra* note 127.

[133] *See* ACUS REPORT, *supra* note 71, at 41 (discussing lack of transparency as the result of poor debriefings, of which agency-level protests are the "logical extension").

[134] *E.g.*, Memorandum from Commander, 409th Contracting Support Brigade to 409th Contracting Support Brigade, subject: Legal Services Standard Operating Procedure 6 (May 10, 2017) [hereinafter 409th Legal Policy Document] (providing as an example that legal reviews are conducted on all contracting actions valued at greater than a certain dollar threshold as a matter of course); *see* Interview with Senior Agency Legal Couns., U.S. Army, *supra* note 109 (providing that bid protests can be a tool to uncover issues not caught in the acquisition process for various reasons).

transaction cost up front, as it would allow the DoD to perform corrective action quickly and minimally disturb the acquisition timeline.

Additionally, while some agency counsel have voiced concerns that this recommendation would increase transaction costs too onerously, this recommendation could be structured so it actually would not serve to incur additional transaction costs over what the DoD currently incurs. Specifically, the DoD could give protesters only three days to submit supplemental protests because of errors they find in the record, which is comparable to the peer and legal review timelines already planned into the acquisition timeline.[135]

Seventh, the regulatory stay of award/performance. In the ACUS report, Professor Yukins ostensibly recommends that agencies clarify how and when they will implement a regulatory stay of award/performance.[136] He further suggests that agencies consider voluntarily extending the regulatory stay of award/performance for a period—ten days—if the protester subsequently seeks to file a bid protest on the same procurement at the GAO and promises to support a request for expedited procedures at the GAO to account for the resulting delay to the procurement.[137]

His reasoning for this recommendation stems from the fact that many protester counsel interviewed for the ACUS report felt that it is consistently unclear whether an agency will stay the procurement during an agency-level bid protest.[138] Apparently, this lack of clarity pushes many potential protesters away from using the agency-level bid protest process and toward the GAO for three reasons: (1) the fear that the agency will not stay the procurement, (2) the possibility that the protester would lose the chance at a GAO CICA stay by waiting for the agency to indicate whether it will stay, and (3) the concern that the protester would lose the chance for a CICA stay during any follow-on bid protest at the GAO due to confusion as to when an "adverse agency action"—or a decision denying an agency-level bid protest

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[135] *See* Interview with Jessica Mayeaux, *supra* note 85 (providing that some DoD agency peer and policy office reviews of procurements take between seven and thirty days). Additionally, many legal reviews can take from five to ten days to complete. *See, e.g.*, 409th Legal Policy Document, *supra* note 134, at 4; Professional Experiences, *supra* note 109.
[136] *See* ACUS REPORT, *supra* note 71, at 44–46.
[137] *Id.* at 44, 46.
[138] *See id.* at 45.

in this context—is "noticed" to the protester.[139] Because of this lack of clarity on these points, many potential protesters were deciding to forgo the agency-level bid protest process entirely.[140]

Adopting this recommendation would serve to facilitate the DoD's risk management because it would encourage early use of the agency-level bid protest process over going directly to the GAO and would thus serve to "activate" this process as a risk management tool more frequently.[141] If coupled with more transparent record access discussed above, this increased use of agency-level bid protest procedures would theoretically also reduce the amount of procurements that would receive follow-on protests at the GAO as a matter of course. Further, should a protester decide to file a follow-on bid protest at the GAO, if a protester promised to support a request for expedited procedures, and the GAO granted the request, the entire bid protest process would be only around 100 days, which is the traditional GAO bid protest time to decision.[142]

Nonetheless, many agency counsel interviewed for the ACUS report did raise concerns about the increased transactional cost and delay that would likely result because of this extended stay.[143] Arguably, though, the overall actual and transactional cost risk to the DoD would likely be lower with an extended stay period for follow-on protests to the GAO. This is because the contracting personnel would not need to stop the procurement to stay award/performance because of an agency-level bid protest, then restart it after the decision is issued, only to stop the procurement again a couple of days later as the result of a GAO CICA stay. This process would involve additional transactional costs to the DoD and potentially actual costs should it be required to terminate the awarded contract for convenience of the Government because of a sustained bid protest decision at the GAO.

Finally, the collection and publication of data on agency-level bid protest outcomes. Here, Professor Yukins recommends, among other things, publication of an annual agency-level bid protest report similar to the

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[139] *Id.* n.165.
[140] *See id.*
[141] *See generally id.* at 47–48.
[142] *Id.* at 48 (providing that the agency-level bid protest would take around thirty-five days, with the express option at the GAO taking an additional sixty-five days).
[143] *Id.* at 47.

GAO's annual report to Congress.[144] Specifically, he suggests the use of a report similar to what the U.S. Army requires its heads of the contracting activities (HCAs) prepare with data that describes the effectiveness of the agency-level bid protest program.[145] This data would essentially resemble the type of data that would make up the GAO's effectiveness rate.[146] That is, the combined numbers of sustained decisions and corrective actions compared to the overall number of bid protests filed.[147]

The effectiveness rate in the agency-level bid protest context would ostensibly communicate how often, because of a protest, protesters successfully demonstrate that there is an error in the procurement, either the contracting officer or the APO agrees, and corrective action ultimately results.[148] Further, this data would communicate "an assessment of the causes of the most frequent recurring issues" that would act as a systematic lynchpin in the use of the agency-level bid protest as a risk management tool for the DoD.[149]

Professor Yukins makes this recommendation because it "could increase the transparency of the agency-level protest system and instill more trust in vendors to use the system."[150] Further, this reform would also increase the use of this bid protest forum, as it would "help agency-level bid protests as a transparent and reliable channel for review."[151] Finally, as stated above, the DoD could use this data to analyze procurement error trends, predict errors in the procurement process, and proactively address them with

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[144] *Id.* at 51.
[145] *Id.*
[146] *See id.* at 50.
[147] *See id.*
[148] *See id.* at 51; Interview with Deputy Chief Couns., *supra* note 127 (discussing how one will likely never see a sustained contracting officer agency-level bid protest because of corrective action and that even an APO sustained protest would likely result in corrective action).
[149] *See* ACUS REPORT, *supra* note 71, at 51; E-mail from Major General Paul H. Pardew, Head, Contracting Activity, U.S. Army, to Army Contracting Command Workforce (Apr. 22, 2020, 1:47 PM) (on file with author) ("The purpose of the ACC protest data reporting effort is to establish a Command-wide tool for tracking protests/corrective actions and to identify lessons learned, trends, and systemic issues. Our goal is twofold: to provide AMC and ACC leadership visibility on protest activity and to provide Senior Contracting Officials (SCOs) with information that can help them develop training.").
[150] ACUS REPORT, *supra* note 71, at 50.
[151] *Id.* at 51.

training and other tools, thereby serving as the lynchpin to systematic use of the program in management of its program performance risk.

Congress is leading the DoD to use agency-level bid protests to fill the risk management tool void created with the repeal of the section 827 "loser pays" provision. Through the potential of modeling the AIRC inquires and after Mr. Dan Gordon's key decisions that every government must make regarding a bid protest system, Congress is showing the DoD the reasons it should use bid protests as a risk management tool. Additionally, by endorsing the ACUS report and subsequently directing the DoD to consider its recommended reforms, Congress is pointing to how it thinks the DoD can use an agency-level bid protest program to facilitate with its risk management.

The natural and probable next question is what agency-level bid protest program the DoD should use as a model to develop this replacement to the section 827 bid protest pilot program. The answer? Frankly, go back to the basics and use the first agency-level bid protest program that already incorporates many of the ACUS report reforms as a model: the AMC's agency-level bid protest program.

V. The Army Materiel Command's Agency-Level Bid Protest Program is the Solution to the Department of Defense's Risk Management Problem

The DoD should use AMC's agency-level bid protest program as a model to fill the risk management void that the repeal of the section 827 "loser pays" bid protest pilot program created. First, AMC's program was originally used as the model to develop the program for the entire Federal Government and was originally designed to manage risk. Second, AMC's agency-level bid protest program is a readymade model for the DoD to emulate that already incorporates many of the ACUS report's recommendations.

As a threshold matter, the Federal procurement system and the rules that govern it were not created simply as a means to provide private litigants a right to sue the Federal Government. Instead, the system was originally designed to regulate itself through its contracting officials. In the famous decision of *Perkins v. Lukens Steel Co*., the U.S. Supreme Court held that the Walsh-Healey Public Contract Act of 1936 did not provide a means for

a private party to challenge an agency's award decision in the courts.[152] Instead, the procurement laws of the time encouraged the Government itself—not industry or the "private attorneys general"—to run quality control on its procurements, thereby managing and analyzing its own risk.[153] In the opinion, Justice Black provided:

> [The Public Contract] Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. *It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain*.[154]

While procurement law in this context has significantly changed since *Perkins* to allow GAO and judicial challenges to solicitation and award decisions (i.e., bid protests) with the advent of procurement statutes like CICA and the Administrative Procedure Act, the need for the Government to perform its own quality control and manage its own risk has not.[155] Consistent with Congress's apparent signaling, instead of moving away from bid protests as if they are the cause of its program performance risk, the DoD should consider taking a note from the past and leveraging an

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[152] *See* Letter from Aaron Silberman, Chair, Section of Pub. Cont. L., Am. Bar Ass'n, Section of Public Contract Law, to David Drabkin (May 11, 2018), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/comments-section-809-bid-protest-overall.pdf.

[153] *See* Gordon, *supra* note 95, at 31.

[154] Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (emphasis added).

[155] *See* H.R. REP. NO. 98-861, at 1435 (1984) (Conf. Rep.) (providing that, although Congress did not legislate the purpose of bid protests, "[t]he conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief."); *see also* 3 ADVISORY PANEL ON STREAMLINING & CODIFYING ACQUISITION REGULS., REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS 344 (2019) ("What Congress, the Executive Branch, UNCITRAL, and ABA have said regarding the purpose of protests indicates that the purpose for granting aggrieved persons the ability to protest is to ensure the procurement process remains effective and efficient while maintaining the confidence of participants in the system.").

efficient agency-level bid protest process to manage and analyze its risk.[156] Before discussing why the Army's agency-level bid protest program is the best program for the DoD to model, it is important to contextualize the reason agency-level bid protest programs were initially created: to serve as a risk management tool.

A. The Birth of the Agency-Level Bid Protest Program as a Risk Management Tool

Today's formal agency-level bid protest programs find their origin in a program designed to manage program performance risk in the 1990s. For many years, disappointed offerors or bidders have raised their complaints regarding the procurement process to a contracting officer for resolution.[157] However, it was not until the mid-1990s that the executive branch created the current construct of agency-level bid protest procedures.[158] This new formalized agency-level bid protest concept was the brainchild of AMC and the result of Al Gore's "Reinventing Government" initiative.[159]

The impetus behind former Vice President Gore's initiative was a shared feeling in the U.S. public procurement community in the late 1980s and early 1990s that bid protests were "becoming too confrontational and expensive."[160] Similar to today, contracting officers' view at the time was that bid protests were a source of program performance risk as a result of "needless delay" from protracted bid protest litigation instead of a means to manage the risk.[161] The result was contracting officers' shift from focusing on procuring the "best products and services and toward building thoroughly-papered, 'protest-proof' award files" to address this perceived

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[156] ACUS REPORT, *supra* note 71, at 49 ("One government counsel said agency-level protests are almost never sustained at his agency, but he hastened to explain that, *because an agency-level protest is a management tool*—an opportunity for the agency to identify and correct its own error—a meritorious agency protest is typically resolved through corrective action, rather than a formal decision." (emphasis added)).

[157] *See* JOHN CIBINIC, JR. ET AL., FORMATION OF GOVERNMENT CONTRACTS 1681 (4th ed. 2011).

[158] *See* Exec. Order No. 12979, 60 Fed. Reg. 55171 (Oct. 25, 1995).

[159] *See* Major Erik A. Troff, Agency-Level Bid Protest Reform: Time for a Little *Less* Efficiency? 4 (Apr. 26, 2005), https://apps.dtic.mil/dtic/tr/fulltext/u2/a433545.pdf.

[160] *Id.*

[161] *See id.*

form of program performance risk.[162] In other words, because the Government viewed bid protests themselves as a source of program performance risk, it moved away from communicating with industry, which resulted in "inefficiency, expense, and a stagnancy in the procurement system."[163]

In an effort to address the aspects of bid protests at the GAO and courts that it considered created program performance risk, such as needlessly delaying capability delivery, AMC created a formalized agency-level bid protest pilot program in 1991.[164] By the end of its yearlong pilot, AMC discovered that its program had mitigated many of the issues it theorized were inherent to bid protests at the GAO and courts that resulted in increased program performance risk, such as the length of bid protest litigation and delayed capability delivery.[165] Consequently, AMC made its agency-level bid protest program permanent and, in 1995, the Office of Federal Procurement Policy "identified the AMC protest program as one of the ten best practices in the federal government."[166]

Likely not coincidentally, later that same year, the Clinton Administration issued Executive Order 12979, which directed all Federal agencies to "prescribe administrative procedures for the resolution of protests . . . as an alternative to protests in fora outside of the procuring agencies."[167] In many ways, AMC's agency-level bid protest program was

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[162] *Id.*
[163] *See id.*
[164] *See* HEADQUARTERS, U.S. ARMY MATERIAL COMMAND, FACT SHEET (2020), https://www.amc.army.mil/Portals/9/Documents/Fact%20Sheets/2020%20Fact%20Sheets/HQAMC-FactSheet-25SEP2020.pdf (describing the Army Materiel Command (AMC) as "the Army's primary logistics and sustainment command" and lead materiel integrator responsible for "providing materiel and sustainable readiness" to the entire Army). As the lead materiel integrator, AMC is—and was then—functionally responsible for the Army's procurement efforts and was in the unique position to develop a global view of the effect bid protests had on program performance risk. *Id.*
[165] *See* Troff, *supra* note 159 (stating that AMC personnel "had resolved bid protests in an average of 16 working days (compared to the GAO's 76 day average)").
[166] *Id.* at 5.
[167] Exec. Order No. 12979, 60 Fed. Reg. 55171 (Oct. 25, 1995).

the model for Executive Order 12979 and therefore the father of all agency-level bid protest programs.[168]

Two key concepts the Clinton Administration borrowed from the AMC agency-level bid protest program included providing for an agency protest decision official (or at least a protest decision authority at some level above the contracting officer whose decision was being protested) and the creation of the "regulatory stay," or the prohibition of the award or performance of a contract while a timely filed protest is pending before an agency.[169] The only exceptions to this regulatory stay were when either urgent and compelling reasons or the best interests of the Government would require the procurement to move forward.[170] These concepts, which were smelted in the fires of AMC, are now considered universal concepts in agency-level bid protest programs.[171] Frankly, it is unsurprising that AMC currently has many of the ACUS report reforms fully or partially in practice and therefore would be a great model for the DoD to follow.

B. Army Materiel Command's Agency-Level Bid Protest Program—The Model Program[172]

The DoD should model its agency-level bid protest program after AMC's existing program. Not only is AMC's program award winning but it also already fully incorporates many of the ACUS report's recommendations.[173] For those recommendations that AMC has only partially implemented, its current framework would support any DoD desire for full implementation. Here, the AMC agency-level bid protest program

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[168] *See* Troff, *supra* note 159, at 5 (discussing the key themes of Executive Order 12979 that originated with AMC's agency-level bid protest program).
[169] *See* Exec. Order No. 12979, 60 Fed. Reg. 55171.
[170] *Id.*
[171] *See generally* FAR 33.103(d)(4), (f) (2019).
[172] This section uses the phrase "AMC agency-level bid protest program" throughout. Unless indicated otherwise, that phrase consists of both the upper-level Headquarters (HQ) AMC agency-level bid protest program and the lower-level contracting officer agency-level bid protest program.
[173] The AMC agency-level bid protest program is one of two upper-level agency-level bid protest programs in the U.S. Army. *See* AFARS 5133.103(4)(i)–(ii) (2019). The AMC agency-level bid protest program has jurisdiction over procurements handled under AMC's contracting authority that has been delegated to the Army Contracting Command. *Id.* The U.S. Army Corps of Engineers manages the other upper-level agency-level bid protest program. *Id.* This analysis follows only AMC's agency-level bid protest program.

(1) has an established agency-level bid protest official; (2) can likely hear bid protests related to all of its procurements; (3) will continue to mature consistently with the GAO, to include the legal concept of "standing," as it is tied to the GAO's bid protest decisions; (4) has a formalized process similar to the process to decide a claim submission as described in the Contract Disputes Act of 1978; (5) provides for an administrative report made up of documents consistent with the GAO's agency report; (6) allows sharing of the administrative report, in meaningful situations, with a protester; (7) has a consistent and durable regulatory stay of award/performance; and (8) already compiles the data it needs to analyze and manage its risk. The AMC agency-level bid protest program already follows the AIRC inquiry and ACUS report roadmap for the DoD to leverage in developing the risk management tool Congress seems to envision.

First, the higher-level program, or the Headquarters (HQ) AMC agency-level bid protest program, has an established APO for all protests filed above the contracting officer.[174] The U.S. Army's acquisition regulation supplement refers to AMC's internal agency-level bid protest procedures, which establish the AMC Command Counsel as the "other official" designated to receive protests besides the contracting officer.[175] The AMC Command Counsel delegated this higher-level decision authority to the AMC Deputy Command Counsel in 2013 but has since withheld it.[176] To utilize the HQ AMC agency-level bid protest program, a potential protester considering whether to file an agency-level bid protest above the contracting officer can either file the protest with the contracting officer and ask for a review at a higher level or file it directly with HQ AMC.[177] In an effort to disseminate this information, all AMC contract solicitations include a provision that informs potential protesters of this higher-level agency-level

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[174] *See* AFARS 5133.103(d)(4); *see also* Memorandum from Command Couns. for Record, U.S. Army Materiel Command, subject: Delegation of Authority No. 2013-11 Delegation of Protest Decision Authority (June 20, 2013) [hereinafter AMC Delegation Memo].

[175] *See* FAR 33.103(d)(3); AFARS 5133.103(d)(4)(i); *see generally* U.S. ARMY MATERIEL COMMAND (AMC), AMC BID PROTEST HANDBOOK: OPERATIONS AND PROCEDURES APPLICABLE TO GAO AND AMC PROTESTS 96 (2013) [hereinafter AMC BID PROTEST HANDBOOK]; AMC Delegation Memo, *supra* note 174.

[176] *See* AMC Delegation Memo, *supra* note 174; Professional Experiences, *supra* note 109; *HQ AMC-Level Protest Procedures Program*, *supra* note 185.

[177] AMC BID PROTEST HANDBOOK, *supra* note 175.

bid protest option.[178] This locally tailored provision makes clear to disappointed offerors that a higher-level agency-level bid protest program exists and that the program has established an APO consistent with the recommendation in the ACUS report. Further, not only does the locally tailored provision provide notice of the higher-level program but also that the APO's authority at that level covers all AMC procurements.

Second, the AMC agency-level bid protest program likely has broad jurisdiction to hear bid protests related to all AMC procurements. Generally, the AMC agency-level bid protest program applies the same rules—

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[178] *See* AMC BID PROTEST HANDBOOK, *supra* note 175 (referring potential protesters to AMC's online agency-level bid protest rules); 409TH CONTRACTING SUPPORT BRIGADE, U.S. DEP'T OF ARMY, SUPPLEMENT TO THE ARMY CONTRACTING COMMAND ACQUISITION INSTRUCTION 15–16 (2018) (flowing down the AFARS bid protest provision); *see also* AFARS 5152.233-4002 (providing a locally tailored AFARS provision that is inserted into AMC solicitations). Subpart 5152.233-4002 of the AFARS provides:

> [I]nsert the following provision:
>
> > AMC-LEVEL PROTEST PROGRAM (June 2016)
> > If you have complaints about this procurement, it is preferable that you first attempt to resolve those concerns with the responsible contracting officer. However, you can also protest to Headquarters, AMC. The HQ, AMC-Level Protest Program is intended to encourage interested parties to seek resolution of their concerns within AMC as an Alternative Dispute Resolution forum, rather than filing a protest with the Government Accountability Office or other external forum. Contract award or performance is suspended during the protest to the same extent, and within the same time periods, as if filed at the GAO. The AMC protest decision goal is to resolve protests within 20 working days from filing. To be timely, protests must be filed within the periods specified in FAR 33.103. Send protests (other than protests to the contracting officer) to:
> >
> > Headquarters U.S. Army Materiel Command Office of Command Counsel
> > 4400 Martin Road, Rm: A6SE040.001 Redstone Arsenal, AL 35898-5000 Fax: (256) 450-8840
> >
> > The AMC-level protest procedures are found at: http://www.amc.army.mil/Connect/Legal-Resources
> >
> > If Internet access is not available, contact the contracting officer or HQ, AMC to obtain the AMC-Level Protest Procedures.
>
> AFARS 5152.233-4002.

procedurally and substantively—that apply to GAO protests.[179] This means that it will hear any bid protest "concerning alleged violations of procurement statutes or regulations by [AMC contracting activities and/or the individual contracting officers] in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards."[180] In other words, similar to the GAO, the program has jurisdiction over challenges to the solicitation or award of procurement contracts governed by the FAR. What is not necessarily clear, however, is whether the AMC agency-level bid protest program has jurisdiction to hear non-procurement contract solicitation and award controversies, such as OT contracts awarded under an OTA. Nonetheless, guidance from the DoD may provide that jurisdiction.

In its current OT guide, the DoD provides that its agencies may choose to include language in an OT solicitation describing its agency-level bid protest procedure.[181] The guide goes on to provide that, if an agency includes that language in its solicitation, the OT solicitation would be subject to its agency-level bid protest procedure.[182] Here, as discussed above, Army Federal Acquisition Regulation Supplement (AFARS) 5152.233-4002 is required to be included in *all* AMC contract solicitations.[183] The AMC agency-level bid protest program rules and procedures do not distinguish between a contract in the general sense (which an OT is considered) and a "procurement contract," as contemplated by CICA and which grants the GAO its bid protest jurisdiction.[184] Therefore, because AFARS 5152.233-4002 must be included in all AMC contract solicitations, to include procurement contracts, those for OTs, and other non-procurement contracts,

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[179] *See generally* AMC BID PROTEST HANDBOOK, *supra* note 175; *see also HQ AMC-Level Protest Program*, U.S. ARMY OFF. OF GEN. COUNS., https://ogc.altess.army.mil/ADR/Documents/HQ%20AMC-Level%20Protest%20Program.pdf (last visited Dec. 21, 2021) (clarifying that AMC has adopted the same rules that apply in GAO protests to include jurisdictional limits).

[180] 31 U.S.C. §§ 3551(a), 3552; 4 C.F.R. § 21.1(a) (2019).

[181] *See* DEP'T OF DEF., OTHER TRANSACTIONS GUIDE, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT 27 (2018) [hereinafter DOD OT GUIDE].

[182] *Id.*

[183] *See* AMC BID PROTEST HANDBOOK, *supra* note 175 (referencing AFARS 5152.233-4002).

[184] *See generally id.*; *see* Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018) (discussing the limits of the GAO's bid protest jurisdiction to include review of the award or solicitation of procurement contracts under CICA); DOD OT GUIDE, *supra* note 181, at 38 (providing that an OT is a contract).

the AMC agency-level bid protest program's jurisdiction likely covers the vast majority (if not all) of its procurements. Consequently, although the GAO's bid protest jurisdiction relating to non-procurement contracts—specifically OTs—is limited to only reviewing whether an agency is properly using the authority, AMC's agency-level bid protest jurisdiction is broader, which is consistent with the ACUS report's recommendation on clarifying jurisdiction.[185] While the AMC agency-level bid protest program differs from the GAO in this context, it otherwise will remain consistent with the GAO, both procedurally and substantively.

Third, AMC's agency-level bid protest program, to include its definition of "standing," will mature consistently with the GAO, as the program is generally tied to the GAO's decisions. As mentioned above, the AMC program for the most part uses (or is tied to) the procedural and substantive decisions of the GAO.[186] This allows legal concepts at the program, such as interested party status or "standing," to mature alongside the same concepts at the GAO. This provides consistency in application of the "rules" for potential protesters between the two fora and is consistent with the ACUS report's recommendation on protecting the "interested party" status quo.[187] In continuing with the theme of consistency, the formal, written AMC agency-level bid protest decision process provides a protester notice of any adverse agency action.

Fourth, the AMC's agency-level bid protest process is formal (similar to the procedures used for deciding claims under the CDA) and its decisions provide a clear point in time that triggers the GAO timeliness clock. In addition, AMC's agency-level bid protest process and the protest decision issued under it are similar to the formalized procedure and final decision FAR 32.211 requires in deciding claims. The AMC agency-level bid protest procedures require issuance of a formal, written decision at the conclusion of the bid protest, similar to a contracting officer's final decision (KOFD)

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[185] *See* Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018). The only exception to the AMC agency-level bid protest program's broad jurisdiction is the GAO's $25 million task and delivery order threshold, which AMC specifically adopts as its own. *See HQ AMC-Level Protest Procedures Program*, ARMY MATERIAL COMMAND, https://www.amc.army.mil/Connect/Legal-Resources (last visited Dec. 21, 2021); *see also* ACUS REPORT, *supra* note 71, at 5.

[186] *HQ AMC-Level Protest Program*, *supra* note 179.

[187] *See also* ACUS REPORT, *supra* note 71, at 5–6.

on a claim.[188] As an initial matter, an attorney examines each bid protest decision for advice and assistance. At the HQ AMC level, the APO, who is an attorney, writes these decisions.[189] If the protest is at the contracting officer level, normally the contracting officer writes the decision after receiving advice and assistance from local legal counsel.[190]

Next, these written bid protest decisions resemble KOFDs and have predictable timelines for completion. These decisions include a facts section that states all of the background facts and the protester's bid protest grounds.[191] Further, the written decision references the relevant solicitation terms, applicable legal authority, and the decision authority's analysis on each bid protest ground.[192] Additionally, similar to the CDA's requirement that a contracting officer issue a KOFD within sixty days, the written protest decision is submitted to the protester generally no later than forty-five days from the agency-level protest filing.[193] Also, the decision signals that it is the APO's decision on the protest, which is similar to how a KOFD signals it is a final decision on a claim.[194]

Further, similar to a KOFD, if circumstances surrounding the AMC agency-level bid protest require a longer period to issue a decision, the protester will receive written notice concerning any extension.[195] As a result, the AMC agency-level bid protest program's established process provides

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[188] AMC BID PROTEST HANDBOOK, *supra* note 175; *HQ AMC-Level Protest Procedures Program*, *supra* note 185; *see* FAR 33.211(a)(4) (2019).

[189] *See generally* FAR 33.211(a)(2) (requiring a contracting officer to obtain legal advice before issuing a final decision).

[190] 409th Legal Policy Document, *supra* note 134, at 5 (discussing how local policy of AMC's various subordinate contracting activities govern contracting officer-level bid protest legal assistance); *see generally* FAR 33.211(a)(2).

[191] *See* FAR 33.211(a)(4); AMC BID PROTEST HANDBOOK, *supra* note 175, at 95 ("The contracting officer's written decision should reflect well researched and reasoned legal advice. Letters should not summarily deny or dismiss protests without providing sufficient factual discussion and legal citation, as applicable. The decision's rationale should contain the same degree of detail as though the contracting officer were attempting to persuade an independent forum such as GAO as to the correctness of the decision.").

[192] AMC BID PROTEST HANDBOOK, *supra* note 175, at 95.

[193] *See HQ AMC-Level Protest Procedures Program*, *supra* note 185; AMC BID PROTEST HANDBOOK, *supra* note 175; FAR 33.211(c)(1)–(2). The timeline is applied to the contracting officer agency-level bid protests as well.

[194] FAR 33.211(a)(4)(v).

[195] *See* AMC BID PROTEST HANDBOOK, *supra* note 175; FAR 33.211(c)–(d).

clarity to protesters as to how its agency-level bid protest is proceeding at AMC and provides a formal and complete written bid protest decision that clearly marks the point an adverse agency action is made.[196] This is consistent with the ACUS report's recommendation that the Government clarify the decision-making process for agency-level protests.[197] Additionally, the AMC agency-level bid protest program rules provide clarity as to what consists of the record on which the bid protest decision official must rely.

Fifth, AMC agency-level bid protest program rules and, indeed, AMC's common practice, implicitly outline the record that its subordinate contracting activities must compile for the APO or consider at the contracting officer level. The AMC agency-level bid protest process requires that an "administrative report" be compiled for forwarding to the HQ AMC APO or be considered by the contracting officer when deciding on an agency-level bid protest.[198] While the AMC agency-level bid protest program rules do not define the term "administrative report," contracting officers and AMC legal counsel understand it to consist of the same documents as an "agency report" under the GAO's bid protest rules.[199] While AMC should clarify this point in writing, the AMC practitioner commonly understands what is included in the contents of the AMC agency-level bid protest record. This provides surety that the decision official will have a complete picture of the procurement before issuing a decision and is consistent with the ACUS report's recommendation to clarify the record.[200] Additionally, in meaningful situations, this record provides a complete picture of the protest to a protester.

Sixth, the AMC agency-level bid protest program rules allow for the protester to receive the administrative report in some situations. Generally, the protester does not receive a copy of the administrative report in an AMC

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[196] *See generally* 4 C.F.R. § 21.2(a)(3) (2019); GAO DESCRIPTIVE GUIDE, *supra* note 49, at 10.
[197] *See* ACUS REPORT, *supra* note 71 at 5–6.
[198] *See HQ AMC-Level Protest Procedures Program*, *supra* note 185; AMC BID PROTEST HANDBOOK, *supra* note 175.
[199] *See HQ AMC-Level Protest Program*, *supra* note 179 ("AMC applies the *same rules* that apply in GAO protests," both substantive and procedural); *see also* 4 C.F.R. § 21.3(d) (discussing the contents of the GAO agency report). Further, the AMC community shares this intent in practice. Professional Experiences, *supra* note 109.
[200] *See* ACUS REPORT, *supra* note 71, at 5–6.

agency-level bid protest.[201] However, when the APO or the contracting officer need comments from the protester to make a decision, "it may require sufficient additional copies or portions of the administrative report [be distributed to] the parties."[202] Ostensibly, comments are the protester's position on the administrative report.[203] While these comments are required and have both significant procedural and substantive effects on a bid protest at the GAO, they are discretionary in an AMC agency-level bid protest and a protester may submit them only at the request of the appropriate bid protest decision official.[204]

Here, in cases where the AMC APO or the contracting officer determines that the protester may have useful comments, that person will provide the administrative report to the protester and request comments.[205] While not as broad as the GAO, the AMC agency-level bid protest program rules do allow protesters to access the administrative report when it would be useful and would not needlessly delay the procurement.[206] Further, while this practice does not fully incorporate the recommendation to share the record with the protester, the existing framework may easily be adjusted to incorporate the sharing of the administrative report with the protesters, if the DoD so desired.[207]

Seventh, a certain and durable regulatory stay of performance/award is immediately imposed because of any timely agency-level bid protests filed at HQ AMC or with a contracting officer. Generally, a regulatory stay of performance/award is imposed as soon as HQ AMC or a contracting officer receives an agency-level bid protest that would be timely under the GAO's rules.[208] This requirement is enumerated clearly in the AMC agency-level

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[201] AMC BID PROTEST HANDBOOK, *supra* note 175.
[202] *Id.*
[203] *See* 4 C.F.R. § 21.3(i); GAO DESCRIPTIVE GUIDE, *supra* note 49, at 22; *see also* James F. Nagle & Adam K. Lasky, *A Practitioner's Road Map to GAO Bid Protests*, 30 CONSTR. LAW. 1, 5 (2010).
[204] Nagle & Lasky, *supra* note 203; AMC BID PROTEST HANDBOOK, *supra* note 175.
[205] AMC BID PROTEST HANDBOOK, *supra* note 175.
[206] ACUS REPORT, *supra* note 71, at 39 (discussing the position of agency attorneys on providing access to the administrative report to protesters).
[207] *Id.* at 5–6.
[208] *See* 4 C.F.R. § 21.2(a)(1)–(3); AMC BID PROTEST HANDBOOK, *supra* note 175, at 94, 96; *see also* KATE MANUEL & MOSHE SCHWARTZ, CONG. RSCH. SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 8 (2016).

bid protest program rules, enforced fiercely by agency counsel, and taken seriously by the override authority: the HCA.[209]

As an initial point, while the FAR and AFARS (through the internal AMC agency-level bid protest program rules) provide for a stay override process, it is rarely used.[210] Its use is so rare that the internal AMC agency-level bid protest program rules warn that, "[b]ecause of the rapid decision-making process, *award or lifting of the stop-work order in the face of a HQAMC-Level protest has rarely been granted*."[211] Further, though the FAR only requires the stay override official be "a level above the contracting officer," the internal AMC agency-level bid protest program rules withhold that decision to the HCA: the Commanding General of the U.S. Army Contracting Command, which is a major subordinate command of AMC responsible for oversight of many of AMC's contracting activities.[212]

This established, immediate, and difficult-to-override stay of performance/award process serves to provide certainty at the start of an AMC agency-level bid protest for both a protester and the agency, in that the protested procurement will be stayed pending the protest. This practice is consistent with the ACUS report's recommendation that the Government clarify the regulatory stay to protesters.[213] Further, insofar as the DoD might want to expand the regulatory stay of award/performance over a procurement in a follow-on bid protest at the GAO, the mechanisms to manage such expansion are in place.

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[209] *See* AMC BID PROTEST HANDBOOK, *supra* note 175; *see also* FAR 2.101 ("Head of the contracting activity means the official who has overall responsibility for managing the contracting activity."). In practice, significant reminders are sent to, and training is conducted with, the acquisition workforce by agency counsel concerning the stay of performance for timely filed AMC agency-level bid protests. Professional Experiences, *supra* note 109.

[210] *See HQ AMC-Level Protest Procedures Program*, *supra* note 185 (providing the head of the contracting activity can override a stay "upon a written finding that contract performance will be in the best interests of the United States; or urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision from the HQAMC protest decision authority.").

[211] *See* FAR 33.103(f)(1), (3); AFARS 5133.103(d)(4)(i); AMC BID PROTEST HANDBOOK, *supra* note 175.

[212] *See* FAR 33.103(f)(1), (3); AFARS 5133.103(d)(4)(i); AMC BID PROTEST HANDBOOK, *supra* note 175.

[213] *See* ACUS REPORT, *supra* note 71, at 5–6.

Finally, the Army already collects and compiles agency-level bid protest data that it can analyze and use to manage its risk. Specifically, the Army collects data on both its AMC and contracting officer agency-level bid protests, which it compiles in an annual report for the Office of the Deputy Assistant Secretary of the Army (Procurement) (ODASA-P).[214] The AFARS requires that this report include:

> (a) The number of protests received during the reporting period, to include their disposition;
>
> (b) An assessment of the causes of the most frequently recurring issues . . . ;
>
> (c) The distribution of protests by subordinate contracting offices; and
>
> (d) Any additional information considered necessary to a full understanding of the efficiency and effectiveness of the activity's agency protest procedures.[215]

The data in this report comes from multiple sources. First, at the end of each protest, the various legal offices supporting either the HQ AMC APO or the contracting officer in the context of a contracting officer agency-level protest collect and place the data into a document entitled the "AMC Protest Information Sheet."[216] For contracting officer agency-level bid protests, this document is submitted—within five working days of initial protest, and again within five working days after decision—through legal support technical channels to AMC for consolidation.[217] Administrative data about the agency-level bid protest is added to the document, such as the contract number and award date, estimated personnel costs for defending against the protest, total contract award costs, "lessons learned" or important information revealed as a result of the agency-level bid protest (which

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[214] *See* AFARS 5101.290(b)(1), 5133.103-90; *see also Bid Protests—Agency Level Protests*, WARD & BERRY (Aug. 26, 2020), https://www.wardberry.com/gov-con/bid-protests-agency-level-protests.

[215] AFARS 5133.103-90.

[216] *See* Army Materiel Command, AMC Protest Information Sheet (on file with author) [hereinafter AMC Protest Information Sheet]. A nearly identical version of this information sheet is also used to submit data on GAO bid protests to AMC.

[217] *See id.* at 1.

routinely would include recurring issues), and whether corrective action resulted.[218]

Second, until fiscal year 2019, the various AMC contracting activities would consolidate the data generated throughout the year and submit an AFARS 5133.103-90 report at the end of the fiscal year to AMC, which further consolidated the AFARS 5133.103-90 bid protest data before submitting it to the ODASA-P.[219] After fiscal year 2019, however, the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) and the Army Vice Chief of Staff mandated that all contracting activities use the Virtual Contracting Enterprise module that is included in the Army's Paperless Contract File system to report the AFARS 5133.103-90 bid protest data among the data from other fora.[220] Now, ODASA-P pulls the AFARS 5133.103-90 data directly from Paperless Contract File.[221] While the Army does not publish the data or its bid protest decisions, the framework and substance to implement the ACUS report recommendation on publishing that data is present for the DoD to implement if it so chooses.[222]

Because AMC's agency-level bid protest program already fully or partially incorporates many of the ACUS report's recommendations into its practice, the DoD should look to it as a risk management tool. Insofar as the DoD would want to fully implement the ACUS report's recommendations, the framework and substance already exist in the Army's program to do so.

VI. Conclusion

Policymakers in the DoD should use AMC's agency-level bid protest program as a model if it decides to follow Congress's signals and use a bid

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[218] *Id.* at 1–3; Professional Experiences, *supra* note 109.

[219] *See* E-mail from Deputy Chief Couns., 409th Contracting Support Brigade, to author (Feb. 26, 2021, 9:57 AM) (on file with author). This report included both AMC and contracting officer agency-level bid protest data.

[220] *See* E-mail from Major Gen. Paul H. Pardew, *supra* note 149 (requiring compilation of data from agency-level bid protests, GAO and Court of Federal Claims bid protests, and claims).

[221] This system is different from the Department of Defense's section 827 bid protest tracker, which contains data from all three fora but is geared towards the repealed section 827 bid protest elements. *See Protest Tracker*, U.S. DEP'T OF DEF., https://dodprocurementtoolbox.com/site-pages/protest-tracker (last visited at Dec. 21, 2021).

[222] *See* ACUS REPORT, *supra* note 71, at 5–6.

protest program as a risk management tool instead of viewing bid protests as a cause of risk. Either way, the reader is best situated to advise those policymakers as they have been introduced to the DoD's concerns with the GAO bid protest system, and how Congress initially attempted to help the DoD with the section 827 "loser pays" provision, but RAND discovered that those concerns are not be supported by data, and therefore Congress is now signaling to the DoD it should consider using agency-level bid protests as a risk management tool.

THE POWER IS YOURS: THE JUSTIFICATION FOR MILITARY INTERVENTION TO RESPOND TO AN ENVIRONMENTAL THREAT

MAJOR CHRISTOPHER S. SIMMONS*

I. Introduction

In late December 2019, reports of a new, then-unknown virus began to surface in Wuhan, China.[1] On 20 January 2020, confirmed cases of the coronavirus, known as "COVID-19," arose in Japan, South Korea, and Thailand.[2] The following day, the United States saw its first case.[3] On 23 January 2020, Chinese authorities isolated the city of Wuhan; one week later, on 30 January 2020, the World Health Organization declared a global health emergency.[4] Over the next several months, the virus spread worldwide, infecting and killing millions of people.[5]

During the initial stages of the pandemic's outbreak, the U.S. Department of Homeland Security assessed that "Chinese leaders 'intentionally concealed the severity'" of COVID-19 while stockpiling

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[1] Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* WORLD HEALTH ORG., WEEKLY OPERATIONAL UPDATE ON COVID-19: 14 DECEMBER 2020 (2020), https://www.who.int/docs/default-source/coronaviruse/wou-14december2020.pdf.

medical supplies.[6] China pushed back on this assertion, stating that the report attempted to "divert attention" from the United States' own failures in addressing the virus.[7] Regardless of the true actions of the Chinese government, COVID-19 illustrates the extent to which an environmental threat can spread and raises the question of whether the United States, or any country, could legally intervene in another country's affairs to prevent such a threat from spreading.

For the past two decades, the U.S. military has focused on fighting a global war on terror. Soon, though, it may need to shift its focus to another global concern: the environment. Environmental threats that transcend State borders will become more common in the future.[8] To combat these threats, to preserve its own security, and to maintain international order, the United States needs every option available. While diplomacy and United Nations (U.N.) action should remain the primary methods for combating environmental threats to security, military intervention may be necessary and justified.

International law generally prohibits intervention in another country's affairs.[9] The U.N. Charter codified this principle along with the related, but distinct, prohibition against the use of force.[10] Only authorization from the U.N. Security Council or an act in self-defense allows for deviation from these rules.[11] A few countries and scholars have argued for a third exception, humanitarian intervention, which would allow for State action, independent

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[6] Will Weissert, *DHS Report: China Hid Virus' Severity to Hoard Supplies*, ASSOCIATED PRESS (May 4, 2020), https://apnews.com/article/bf685dcf52125be54e030834ab7062a8. While the report indicated a 95% probability that China's shift in procuring medical supplies was not within a normal range, there is no public evidence to suggest it was an "intentional plot." *Id.* Instead, it may have been due to local officials' fear of reporting bad news to Beijing or other bureaucratic hurdles in China's government. *Id.*

[7] *Id.*

[8] *See* OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION & SUSTAINMENT, REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE 17 (2019) [hereinafter DOD CLIMATE CHANGE REPORT] (noting the "future" for climate effects meant 20 years); *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. on Intel.*, 116th Cong. 31 (2019) [hereinafter *Worldwide Threat Assessment*] (statement of Daniel R. Coats, Dir., Nat'l Intel.).

[9] *See* U.N. Charter art. 2, ¶ 7.

[10] *Id.* ¶¶ 4, 7.

[11] *See id.* arts. 42, 51.

from the U.N., to alleviate human suffering in another country.[12] Most arguments for this theory rely on genocide or serious violations of international law; [13] however, failure to respond adequately to an environmental threat may harm as many people and have a greater chance to spill across borders.[14] A military response may be necessary to contain and extinguish an environmental threat before it spreads and causes death and damage in a region or worldwide.

The United States should be prepared to justify military intervention to minimize, or prevent, damage from environmental threats. This article will explore potential responses to these threats. Part II addresses why environmental threats are a national security concern that may require the ultimate national security response: military intervention. Part III discusses potential justifications for a military response under international law. Part IV discusses military intervention to address environmental threats from the U.S. perspective during great power competition and proposes a test that would allow intervention to combat an environmental threat.

II. Emerging Environmental National Security Threats

In 2019, the Director of National Intelligence of the United States stated to Congress that "[t]he United States will probably have to manage the impact of global human security challenges, such as threats to public health, historic levels of human displacement, assaults on religious freedom, and the negative effects of environmental degradation and climate change."[15] The national security impacts of environmental threats, particularly as the climate changes, are numerous.

As temperatures rise, the Arctic will continue to melt, opening up new sea routes that Russia and China will contest.[16] Rising ocean levels will

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[12] *See* Kenneth Watkin, *Humanitarian Intervention and the Responsibility to Protect: Where It Stands in 2020*, 26 SW. J. INT'L L. 213, 215–16 (2020).
[13] *E.g.*, S.C. Res. 1674 (Apr. 28, 2006).
[14] *See* Watkins, *supra* note 12, at 224; S.C. Res. 1674, *supra* note 13, ¶ 4 (reaffirming "the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity").
[15] *Worldwide Threat Assessment*, *supra* note 8.
[16] *Id.*; *The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects (Dec. 13, 2021) (stating that the Arctic will eventually become ice-free during summer months). Some environmental threats will have national security implications where humanitarian

cause the sea to consume small island nations.[17] Increasing droughts and lack of access to fresh water will cause additional migration and refugee movement.[18] Hurricanes and severe weather events will become more prevalent and intense, battering communities around the world.[19] Disease will spread quicker and into new regions of the world.[20] The U.S. military will need to prepare not only for the domestic effects of these threats (for instance, by preparing bases and personnel for extreme weather and domestic operations), but also the international effects.[21] These impacts may "increase the frequency, scale, and complexity of future missions" and will "affect the operating environment and roles and missions that U.S. Armed Forces undertake."[22] As the 2014 Department of Defense Quadrennial

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intervention is unlikely to be a justification. For example, a loss of Arctic sea ice will increase access, and competition with Russia and China, to sea routes and natural resources that were previously inaccessible. *Worldwide Threat Assessment*, *supra* note 8. While this will create a national security issue that may require military action, such as freedom of navigation operations, military intervention to prevent Arctic ice loss is likely impractical. Regardless, global environmental changes of this type will also "fuel competition for resources, economic distress, and social discontent," which could involve additional military action. *Id.*

[17] *The Effects of Climate Change*, *supra* note 16.

[18] *Worldwide Threat Assessment*, *supra* note 8. Increasing food and water insecurity will also increase "the risk of social unrest, migration, and interstate tension." *Id*. Environmental changes could "generate hundreds of millions of human migrants by the middle of the century due principally to sea level rise, increased frequency and intensity of extreme weather events, drought, and desertification." Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENV'T L. REV. 167, 171 (2013). These refugees are "unlikely to qualify for protection under international law," creating another incentive to intervene to ensure stability. *Id.* at 177. Despite this lack of protection, there is already evidence of climate refugees: as thousands of Guatemalans fled to the United States in 2020 after years of drought and floods and thousands of Syrians fled to Europe due to conditions caused by a civil war and exacerbated by drought. Abrahm Lustgarten, *The Great Climate Migration Has Begun*, N.Y. TIMES MAG. (Aug. 23, 2020), https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html.

[19] *The Effects of Climate Change*, *supra* note 16.

[20] In 2019, prior to the outbreak of COVID-19, the U.S. intelligence community assessed that the United States and the world "remain[ed] vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support." *Worldwide Threat Assessment*, *supra* note 8. Climate change and expansion of international travel and trade could lead to more frequent outbreaks of infectious disease. *Id.* Additionally, in 2017, the United States' national security strategy highlighted that biological threats, to include natural outbreaks, harm U.S. national security by causing death, "economic losses," and a lack "of confidence in government institutions." WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 9 (2017).

[21] U.S. DEP'T OF DEF., 2014 QUADRENNIAL DEFENSE REVIEW, at VI (2014); *see* DOD CLIMATE CHANGE REPORT, *supra* note 8.

[22] DEP'T OF DEF., *supra* note 21, at VI, 8.

Review noted, "these effects are threat multipliers."[23] While some of these environmental threats may take years to materialize fully, others are already being felt.

COVID-19 revealed the widespread destruction and death an environmental threat can cause and that other threats are likely to surface. A State could refuse to address pollution, toxins, or radiation flowing from its borders into another country.[24] Additionally, conflict could arise from water shortages, causing refugees to flow into another State[25] or preventing others from receiving crucial natural resources.[26] This is already occurring to an extent in Mexico. According to a 1944 treaty between the United States and Mexico, Mexico sends 114 billion gallons of water to the United States from the Rio Grande and Rio Conchos, while the United States sends 489 billion gallons of water from the Colorado River.[27] However, in early 2020, Mexico experienced a severe drought and owed the United States approximately 100 billion gallons of water by 24 October 2020.[28] To pay this water debt, Mexico planned to utilize three dams in Chihuahua.[29] The farmers in Chihuahua, already in dire straits due to the drought, fought the Mexican National Guard, seized one of the dams, and led a month-long standoff to

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[23] *Id.* at 8.

[24] For example, in March 2011, a major earthquake caused tsunamis that disabled the power supply and cooling of nuclear reactors in Japan. Claire Wright, *Blueprint for Survival: A New Paradigm for International Environmental Emergencies*, 29 FORDHAM ENV'T L. REV. 221, 226 (2017). In the aftermath, radioactive water entered the Pacific Ocean and while the highest concentrations were contained to the region near Fukushima, testing revealed radiation in seawater and tuna off the coast of California, albeit in small doses. *Id.* at 233. If Japan had refused to address this issue, the international community may have intervened.

[25] The U.S. intelligence community predicted in 2019 that global displacement will "remain near record highs" and refugees are unlikely to return home, "increasing humanitarian needs and the risk of political upheaval health crises, and recruitment and radicalization by militant groups." *Worldwide Threat Assessment*, *supra* note 8. Additionally, record numbers of people are being displaced inside their own countries. *Id.* This "is likely to continue to fuel social and interstate tensions globally." *Id.*

[26] *See Transboundary Waters*, U.N. WATER, https://www.unwater.org/water-facts/transboundary-waters (last visited Dec. 21, 2021).

[27] Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219.

[28] Tony Payan, *Mexico's Water Dispute with the U.S. Is a Symptom of Its Governance Crisis*, WORLD POL. REV. (Oct. 7, 2020), https://www.worldpoliticsreview.com/articles/29112/mexico-s-water-dispute-with-the-u-s-is-a-symptom-of-its-governance-crisis.

[29] *Id.*

prevent their government from routing the water to the United States.[30] Eventually, the United States and Mexico settled the dispute, but a future drought could further exacerbate the situation, and the United States may need to protect its interests in resources or to ensure stability in a region with climate refugees.[31]

These scenarios are acute events that may necessitate an immediate response. In addition to these near-term concerns, it would be prudent to combat the long-term effects of climate change. For example, a country's carbon output may accelerate global climate change, causing severe security issues.[32] But those acts are too attenuated in time and intent from potential State action or inaction to justify military intervention. The more appropriate mechanisms to address longer-term environmental threats are diplomacy and multilateral institutions.

Ideally, diplomacy and multilateral institutions will address even acute, immediate environmental threats, but some States may hide the issue or decline international assistance. There may be economic, political, or military factors that lead a State to attempt to handle a problem within its own territory, only for the world to see that problem to spread.[33] Additionally, once it becomes clear to the international community that there is a problem, a State may still decline offers of international assistance.[34]

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[30] Natalie Kitroeff, *'This Is a War': Cross-Border Fight over Water Erupts in Mexico*, N.Y. TIMES, https://www.nytimes.com/2020/10/14/world/americas/mexico-water-boquilla-dam.html (Oct. 16, 2020).

[31] *See Minute No. 325*, INT'L BOUNDARY & WATER COMM'N: U.S. & MEX. (Oct. 21, 2020), https://www.ibwc.gov/Files/Minutes/Min325.pdf.

[32] *See Worldwide Threat Assessment*, *supra* note 8.

[33] A. Louis Evans, *Confronting Global Pandemics: Responding to a State's Refusal of International Assistance in a Pandemic*, 34 CONN. J. INT'L L. 1, 6–9 (2018). Fear of economic impacts led Peru initially to conceal an outbreak of cholera in 1991. *Id.* Civil strife occurred in India after reports of a pneumonic plague caused the city of Surat to be "on a war footing" within 48 hours of the report as over 200,000 people attempted to flee. *Id.* A military incentive may also exist for countries to keep information hidden. The United States has a reservation to the current International Health Regulations, which require States to report outbreaks within twenty-four hours, stating, "any notification that would undermine the ability of the U.S. Armed Forces to operate effectively in pursuit of U.S. national security interests would not be considered practicable." *Id.* at 21.

[34] *Id.* at 9–13. Both of these situations have occurred in the past as States dealt with environmental or natural disasters. *Id.* at 6–13. The United States declined assistance from

III. The Legality of Military Intervention to Respond to an Environmental Threat

If diplomacy fails and a State refuses international assistance, it may be necessary to take action through other means, to include military intervention. Generally, the principle of non-intervention prohibits States from intervening "directly or indirectly in internal or external affairs of other States."[35] Any intervention violates both this tenant of international law and the prohibition against the use of force and respect for territorial sovereignty.[36] There are, however, exceptions that may allow a State to intervene in another State's affairs.

The Peace of Westphalia in 1648 ended the Thirty Years' War and is credited with creating the concept of State sovereignty.[37] Sovereignty includes "an affirmation of [States' and peoples'] right to shape and determine their own destiny," along with ensuring every State has equal rights under international law.[38] However, sovereignty does not mean a State can take any action. It is accepted that sovereignty "implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."[39] Sovereignty provides the framework for relations among States and is the building block for modern international law.[40]

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the U.N. and other States after 2005's Hurricane Katrina and 2010's BP oil spill, India refused aid after a tsunami in 2004, and China refused international aid after the 1975 Tangshan earthquake and massive flooding in 2007. *Id.* at 10. States may want to avoid "bad publicity" or fear that allowing foreign States to enter their territory will decrease support for their government or provide evidence for damage claims. Wright, *supra* note 24, at 259.

[35] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 205 (June 27).

[36] *Id.* ¶ 251.

[37] *See* Watkin, *supra* note 12, at 218. These fundamental principles, though later enshrined in the U.N. Charter, remain customary international law. *See Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, ¶ 174 ("Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.").

[38] INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 1.34 (2001) [hereinafter ICISS REPORT].

[39] *Id.* para. 1.35.

[40] *Id.* paras. 2.14–.15.

Following the end of World War II, the U.N. codified these principles in the U.N. Charter.[41] In Article 2, the U.N. Charter states all States have the same powers and responsibilities and that the U.N. "is based on the principle of the sovereign equality of all its Members."[42] Additionally, Article 2 prohibits any "threat or use of force against the territorial integrity or political independence of any state"[43] and provides that nothing "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[44]

However, violations of sovereignty may be justified in certain circumstances. First, under Chapter VII of the U.N. Charter, the U.N. Security Council may authorize actions in response to "any threat to the peace, breach of the peace, or act of aggression."[45] Second, Article 51 makes clear that nothing in the Charter will "impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."[46] A third justification, humanitarian intervention, has emerged but is not yet widely accepted as international law.[47] In addition, while not authorizing intervention, there may also be potential remedies through the doctrine of State responsibility, which allows one State to respond to another State's intentional breach of an international obligation.[48] Finally, a State may consent to an intervention, but consent-based interventions do not violate the consenting State's sovereignty. All these principles may allow for a response to environmental threats.

A. Responding to an Environmental Threat Under the United Nations Charter

Any military intervention is presumed prohibited under the U.N. Charter. This includes not only armed attacks but also other less severe forms of intervention, including "organizing, instigating, assisting, or

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[41] *See* U.N. Charter, art. 2.
[42] *Id.* ¶ 1.
[43] *Id.* ¶ 4.
[44] *Id.* ¶ 7.
[45] *Id.* art. 39.
[46] *Id.* art. 51.
[47] *See, e.g.*, Watkin, *supra* note 12, at 215.
[48] *See Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Draft Articles*].

participating in acts of civil strife" in another State, or "acquiescing" to those activities in its territory.[49] However, member States may violate the independence of another State if the Security Council so authorizes.[50]

The Security Council is charged with the primary duty to maintain international peace and security, and the U.N. Charter grants it broad power to execute that mission.[51] Under Chapter VII of the Charter, the Security Council may determine there is a "threat to the peace, breach of peace, or act of aggression" and act appropriately in response.[52] Article 41 provides the first options, allowing for "measures not involving the use of armed force," including interruption of economic relations, severance of diplomatic relations, and interruption of rail, sea, air and communication.[53] If those measures are inadequate, the Security Council may then authorize military intervention.[54] To maintain peace, the Security Council can consider any situation and is not limited to military threats.[55]

The Security Council has authorized military intervention to respond in part to environmental threats. However, when it has authorized force, it has done so only in the context of armed conflict.[56] Additionally, the Security Council has declared an environmental threat a "threat to the peace."[57] In 2014, as Ebola spread through West Africa, the Security Council declared

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[49] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27).
[50] *See* U.N. Charter, arts. 39, 42.
[51] *Id.* art. 24.
[52] *Id.* art. 39.
[53] *Id.* art. 41.
[54] *Id.* art. 42.
[55] The drafters of the U.N. Charter purposefully did not define "threat to the peace," "beach of peace," or "act of aggression" in order to give the Security Council wide latitude to determine what threats may require a U.N. response. Wright, *supra* note 24, at 277.
[56] *See* S.C. Res. 814 (Mar. 26, 1993) (finding a threat to the peace and security in part due to "crippling famine and drought" along with civil strife, violence, and widespread lack of rule of law in Somalia); S.C. Res. 940 (July 31, 1994) (finding a threat to peace and security in Haiti in part due to "the desperate plight of Haitian refugees" along with civil turmoil).
[57] S.C. Res. 2177 (Sept. 18, 2014) (declaring Ebola a "threat to international peace and security" under Chapter VI powers). The Security Council has issued other resolutions dealing with solely humanitarian or environmental concerns but has not gone so far as to label them threats to the peace. *See* S.C. Res. 986 (Apr. 14, 1995) (establishing a program which funded humanitarian relief for Iraqi citizens from Iraqi oil exports under Chapter VII of the U.N. Charter); S.C. Res. 2532 (July 1, 2020) (stating that COVID-19 was "likely to endanger maintenance of international peace and security").

the spread of the virus a threat to peace and security, marking the first time for an environmental threat alone, though no force was authorized.[58]

Authorizing military intervention on the sole basis of an environmental threat would be a departure from the U.N.'s response to these threats.[59] As a resolution has declared an environmental threat a "threat to international peace and security"[60] and others have cited environmental threats to authorize military intervention in the context of conflict, the precedent requires only marginal extension. But Security Council members may disagree on stretching this power further and any one of the five permanent members of the Security Council can veto a resolution.[61] In December 2021, the Security Council considered a resolution under its Chapter VII powers, which would have specifically labeled climate change as a threat to international peace and security.[62] Despite having the support of twelve members of the Security Council, it failed because Russia, a permanent member, vetoed it.[63] However, a U.N. response would likely garner the most support in the international community and be the strongest claim under international law.

B. Responding to an Environmental Threat Under Self-Defense

In addition to the U.N. authorization, States may also have recourse under their "inherent right of individual or collect self-defence."[64] This right of self-defense comes from both the U.N. Charter and customary international law.[65]

By its plain language, the U.N. Charter makes clear that a State can claim self-defense only in response to an "armed attack," and only until the

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[58] S.C. Res. 2177, *supra* note 57.
[59] Evans, *supra* note 33, at 26–27.
[60] S.C. Res. 2177, *supra* note 57
[61] U.N. Charter, art. 27, ¶ 3. The Security Council is comprised of fifteen members of the U.N. with China, France, Russia, the United Kingdom, and the United States as the five permanent members. *Id.* art. 23, ¶ 1. Substantive votes require nine affirmative votes with the concurrence of all the permanent members. *Id.* art. 27, ¶ 3.
[62] *Security Council Fails to Adopt Resolution Integrating Climate-Related Security Risk into Conflict-Prevention Strategies*, UNITED NATIONS (Dec. 13, 2021), https://www.un.org/press/en/2021/sc14732.doc.htm.
[63] *Id.* Russia and India voted against the resolution, while China abstained. *Id.*
[64] U.N. Charter, art. 51.
[65] Wright, *supra* note 24, at 287.

Security Council can respond.[66] By its plain meaning, an environmental threat would not constitute an "armed attack," even if that threat crosses borders or causes physical damage.[67]

Beyond the language in the U.N. Charter, self-defense is also considered jus cogens, which is a norm under customary international law that States cannot violate.[68] In 1937, following a British attack on a U.S. ship, letters exchanged between the countries documented the requirements to claim anticipatory self-defense under customary international law.[69] As long as the two requirements of "necessity" and "proportionality" were met, a State could use force to respond to a threat regardless of the potential of an "armed attack."[70] Nevertheless, the requirement for an armed attack also exists in customary international law.[71] The International Court of Justice (ICJ) has defined the threshold for an "armed attack" under customary international law and ruled actions may qualify because of their "scale and effects" if they would have been classified as an armed attack if carried out by regular armed forces.[72] The actions must be significant, and even some uses of force or intervention in internal affairs of States will not qualify.[73] Finally, there is a consensus that an "imminent armed attack" also qualifies as an "armed attack," though a "pre-emptive attack" cannot be justified.[74]

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[66] *Id.*

[67] While a biological weapon would qualify, an environmental threat for the purposes of this article is neither a State nor a non-State actor.

[68] *Id.* "Jus cogens" is a "peremptory norm" that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

[69] Necessity requires the threat be "instant, overwhelming, leaving no choice of means, and no moment for deliberation," and the response must be proportional and do "nothing unreasonable or excessive, since the act justified by the necessity of self-defense, must be limited by the necessity and kept clearly within it." Michael K. Murphy, *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT'L L. 1181, 1208 (1999).

[70] *Id.*

[71] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

[72] *Id.*

[73] *Id.* (holding that "assistance to rebels in the form of the provision of weapons or logistical or other support" does not constitute an "armed attack").

[74] Wright, *supra* note 24, at 298.

In the few articles that address a military response to environmental threats, most propose self-defense as the preferred invocation to justify a military response.[75] These arguments presume either an environmental threat can constitute an "armed attack" based on its effects or no "armed attack" is required under customary international law.[76] However, as it requires liberal interpretations of self-defense under both Article 51 of the U.N. Charter and customary international law, it is not the best justification to address an environmental threat.

C. Responding to an Environmental Threat Under State Responsibility

There is a "no harm principle" in international law under which States must refrain from activities that cause cross-boundary damage. Generally, this results from a State's failure to prevent activities in its territory, but it can also apply to action taken by a State.[77] The ICJ, in an advisory opinion on the legality of nuclear weapons, stated that the

> environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[78]

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[75] *See* Murphy, *supra* note 69, at 1218–19 (arguing that "military force may only be used in self-defense if the environmental crisis threatens a state with immediate harm on the same level as an armed attack"); José Luis Aragón Cardiel et al., *Modern Self-Defense: The Use of Force Against Non-Military Threats*, 49 COLUM. HUM. RTS. L. REV. 99, 103 (2018) (proposing a test to allow military force in self-defense in response to a non-military threat if the effect is equivalent to an "armed attack"); Craig Martin, *Climate Wars and Jus Ad Bellum: Part II*, OPINIO JURIS (Aug. 13, 2020), http://opiniojuris.org/2020/08/13/climate-wars-and-jus-ad-bellum-part-ii (arguing to expand conditions for self-defense to address climate threats).

[76] Murphy, *supra* note 69, at 1206; Cardiel et al., *supra* note 75; Martin, *supra* note 75.

[77] *Draft Articles*, *supra* note 48, at 31.

[78] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8). Through various treaties and customary international law, there is a State responsibility to protect the environment. *See* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Arb. Trib. 1941) ("[N]o State has the right to use or permit the use of its territory in

While this obligation exists, however, the doctrine of State responsibility allows for only certain measures in response, none of which includes a military intervention.[79]

States have used low-level uses of force to prevent environment threats in the past.[80] An environmental example occurred when the Liberian oil tanker *Torrey Canyon* went aground in British territorial waters in 1967, spilling vast amounts of oil.[81] After other measures failed, the United Kingdom (U.K.) bombed the ship to burn the oil.[82] This example took place in British territorial waters; there is no instance of using a theory of State responsibility to violate another State's sovereignty.[83]

Instead, responsible States must make full reparation for any injuries their wrongful acts cause.[84] While the theory of State responsibility does give strength to a justification for intervention, as States owe a responsibility to prevent environmental threats, it has not extended the ability to intervene in another State's affairs under current international law.

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such a manner as to cause injury by fumes in or to the territory of another."); United Nations Convention on the Law of the Sea arts. 192–196, Dec. 10, 1982, 1833 U.N.T.S. 397 (requiring States to protect and preserve the marine environment).

[79] Necessity permits a State to take an otherwise wrongful act if it "is the only way for the State to safeguard an essential interest against a grave and imminent peril." *Draft Articles*, *supra* note 48, at 80. But this cannot be used to violate jus cogens, which includes the prohibition on the use of force. *See id.* at 84–85. While considerations akin to necessity under State responsibility may have a role in humanitarian intervention, the commentary to Article 25 explicitly states that Article does not cover it. *Id.* at 84. Additionally, countermeasures are allowed under Article 49, but Article 50 specifically states they "shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations." *Id.*

[80] *Id.* at 82.

[81] *Id.*

[82] *Id.*

[83] However, a theory of necessity has been invoked to protect the environment in international areas. *See id.* at 81–82. In 1893, Russia invoked the theory to protect fur seals on the high seas and Canada did the same in 1994 to protect fishing stocks, leading to the boarding and arrest of a Spanish fishing ship. *Id.*

[84] *See id.* at 96.

D. Responding to an Environmental Threat Under Humanitarian Intervention

Following World War II and the establishment of the U.N., international law regarding intervention and the use of force centered on preventing a conflict between States.[85] Following the collapse of the Soviet Union, however, most threats to international peace and security have come from "intra-national crises of a wide variety," which are generally considered within the domestic control of the State in which they are occurring.[86]

Recognizing this, an independent commission found that NATO's intervention in Kosovo in 1999 was "illegal, yet legitimate" following bombing of the region based on humanitarian necessity.[87] The commission found "humanitarian intervention is not consistent with the U.N. Charter if conceived as a legal text, but that it may, depending on the context, nevertheless, reflect the spirit of the Charter."[88] This gap between legality and legitimacy concerned the commission, which stressed the need for a humanitarian intervention doctrine.[89] However, there is still no accepted standard under international law.

Only a few States have used humanitarian intervention as the basis to justify military intervention and the use of force.[90] The U.K., along with Belgium, argued that humanitarian intervention permitted NATO airstrikes in Kosovo, and the most explicit justification came two decades later from the U.K. to justify airstrikes in Syria.[91]

In April 2018, the U.K. stated it attacked Syria "to alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime's chemical weapons capability and deterring their further use."[92] The U.K. claimed that, under international law, it could take measures

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[85] INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 185 (2000).
[86] *Id.*
[87] *Id.* at 186.
[88] *Id.*
[89] *Id.* at 186–87.
[90] *See* Cardiel et al., *supra* note 75, at 140–44.
[91] *See id.*
[92] *Syria Action – UK Government Legal Position*, PRIME MINISTER'S OFF. (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

to "alleviate overwhelming humanitarian suffering" in exceptional circumstances.[93] The legal basis for the use of force was humanitarian intervention, which the U.K. government stated required three conditions:

> (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
>
> (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
>
> (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).[94]

The U.K. argued these elements were satisfied due to the Syrian regime's use of chemical weapons dating back to 2013, the death of nearly 1,000 people with hundreds more injured as a result, and evidence that Syria would continue to use chemical weapons leading to "further suffering."[95] It also noted half of the Syrian population had been displaced, "with over 13 million people in need of humanitarian assistance."[96] The U.K. stated that Russia repeatedly blocked actions at the U.N. Security Council and, as a result, diplomatic actions, sanctions, and U.S. unilateral airstrikes were insufficient to deter "extreme humanitarian distress on a large scale."[97] The U.K. concluded, in this exceptional scenario, the "overwhelming humanitarian necessity" justified military intervention.[98] The intervention was limited to specific targets aimed exclusively at "averting a humanitarian catastrophe" in Syria and was the minimum intervention necessary.[99]

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*

Aside from State practice, the International Commission on Intervention and State Sovereignty (ICISS) provided additional guidance in its 2001 report on the "responsibility to protect."[100] The report noted that even States with the strongest opposition to intervention still acknowledged there must be some exception for cases that "'shock the conscience of mankind,' or which present such a clear and present danger to international security, that they require coercive military intervention."[101] The International Commission on Intervention and State Sovereignty acknowledged there are no universally accepted factors, but summarized the consensus as requiring six thresholds: "*right authority*, *just cause*, *right intention*, *last resort*, *proportional means* and *reasonable prospects*."[102]

Additionally, ICISS stated, "military action for limited human protection purposes cannot be justified if in the process it triggers a larger conflict."[103] In these cases, States will be unable to save certain people because the cost of intervening would be too high. The Commission acknowledged this would likely preclude action against any permanent member of the U.N. Security Council or other world powers.[104] However, the failure to intervene in one case should not preclude an intervention in all cases.[105] Additionally, some environmental threats may become existential threats to populations where the damage caused by the conflict is less than the damage that would result from the threat spreading across the region or globe.[106]

The report also provides greater detail than the U.K.'s published criteria. To establish a "just cause," ICISS outlined scenarios, one of which included "large scale loss of life" regardless of State action, inaction, or intent.[107] The Commission also provided several examples that would typically be considered "conscience-shocking."[108] It specifically included

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[100] ICISS REPORT, *supra* note 38.
[101] *Id.* para. 4.13. However, ICISS also stated if there was any consensus about who should be authorizing humanitarian interventions, it is the U.N. Security Council should be the organ to make the determination as to whether a breach of State sovereignty is required. *Id.* para. 6.14.
[102] *Id.* para. 4.16.
[103] *Id.* para. 4.41.
[104] *Id.* para. 4.42.
[105] *Id.*
[106] *See* Martin, *supra* note 75.
[107] ICISS REPORT, *supra* note 38, para. 4.19.
[108] *Id.* para. 4.20.

"overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened."[109] Further, ICISS stated humanitarian intervention can be legitimate as an anticipatory measure.[110] Otherwise, the international community would be "in the morally untenable position of being required to wait" for the situation to begin before they could act.[111] This provide the best framework for dealing with environmental threats if there is no U.N. or diplomatic response, as it allows for intervention to prevent a threat in advance and permits addressing threats for humanitarian reasons without regard for the intervening State's interests.

However, critics argue it will lead to abuse and even more conflict.[112] As the Kosovo commission noted, the main problems with humanitarian catastrophes is their prevention is frequently a political rather than a legal issue.[113] The cynical view is humanitarian intervention will not occur unless it is in the political interest of the intervening State or coalition.[114] Should the United States choose to intervene to prevent an environmental disaster, there will be suspicion, as in Kosovo, that "'humanitarian intervention' is a new name for Western domination."[115] However, even if a State will only intervene when it benefits its own national security, there will be important humanitarian benefits if environmental threats are mitigated or prevented.[116]

IV. Standardizing Military Intervention to Respond to an Environmental Threat

The United State should analyze any potential justification to address environmental threats in the context of its focus on inter-State competition,

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[109] *Id.*
[110] *Id.* para. 4.21.
[111] *Id.*
[112] Preventing significant environmental threats outweighs the risk of abuse and additional conflict. Martin, *supra* note 75 (arguing when a threat is "existential," such as climate change, "the risk posed by the potentially increased incidence of armed conflict is dwarfed by the existential risk").
[113] INDEP. INT'L COMM'N ON KOSOVO, *supra* note 83, at 187.
[114] *See id.* at 188–89.
[115] *Id.*
[116] *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 11 (2018) (stating that while the United States "is not the world's policeman," foreign disorder threatens its interests); Martin, *supra* note 75 (stating that environmental threats may become "existential" threats).

mainly with China and Russia.[117] According to its National Security Strategy (NSS), the United States "will continue to lead the world in humanitarian assistance" and will provide its capabilities to those in need due to both man-made and natural disasters.[118] While this generally means providing funding, supplies, and support to humanitarian programs rather than military intervention, the United States has recognized the importance of military humanitarian operations to international security.[119]

The United States often views international relations in binary terms: States are either "at peace" or "at war."[120] This is also the general framework for the law of war. However, the United States is in "continuous competition" with its adversaries, and its military must be prepared to compete across the full spectrum of conflict.[121] China and Russia operate on "the edges of international law" and blur the line between civil and military goals.[122] They are content to accrue small gains, slowly moving the standard of what is acceptable under international law.[123]

This adds additional risk to a potential intervention on the basis of an environmental threat. States could accuse the United States of violating sovereignty for its own gain as well, particularly as only a few States have accepted humanitarian intervention as international law.[124] But the United States should strive to meet its competition where it has legal justification to do so, and humanitarian intervention is a legally justifiable position in

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[117] WHITE HOUSE, *supra* note 20, at 42.
[118] *Id.*
[119] *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. at 11 (stating that the United States has a national security interest in promoting regional stability and mitigating humanitarian disasters).
[120] *Id.* at 28.
[121] *Id.*
[122] *Id.* at 27; U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 2 (2018).
[123] WHITE HOUSE, *supra* note 20, at 28.
[124] *See* Cardiel et al., *supra* note 75, at 140–44.

this context.[125] The United States should keep "the widest range of legal options" available in order to "compete, deter, and win."[126]

The primary response methods should be diplomacy and multilateral organizations, which would galvanize support to address the problem. A unilateral response in which the United States intervenes to curb an environmental threat could alienate States, allowing a competitor to seize the narrative and offer its own counter-assistance and influence. However, if all diplomatic measures fail, and the U.N. is unable to respond, the United States should consider all feasible options, including intervention based on humanitarian assistance due to the serious impact of environmental threats.[127]

This threshold should contain safeguards to avoid provoking a larger conflict or accusations of an illegal violation of sovereignty. Absent safeguards, other States could accuse the United States of acting as an imperial power and using force to achieve its own objectives. In many cases, the information environment will be a crucial factor. If the United States demonstrates how its military intervention will prevent a global catastrophe and save lives, it is more likely the international community will accept a potential justification. The United States' adversaries would also likely try to take the perceived vacated moral high ground and provide a contrast to the United States. However, in some cases, the risk may be worth it. The

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[125] Russia and China have indicated that they do not consider environmental threats ones that require intervention. In the context of the AIDS epidemic, Russia stated that disease "is not a source of conflicts, but conflicts create conditions that contribute to the spread of the epidemic and also complicate efforts to curb it." Evans, *supra* note 33, at 23. Additionally, neither China nor Russia called Ebola a "threat to the peace" during debate in the Security Council, though both voted for the resolution. *Id.* at 26; *see* S.C. 7268 Meeting, U.N. Doc. S/PV./7268 (Sept. 18, 2014).

[126] *See* U.S. DEP'T OF AIR FORCE, JUDGE ADVOC. GEN.'S CORPS, JAG CORPS FLIGHT PLAN 2020: BRIDGING THE STRATEGIC TO THE TACTICAL AND BACK (2020).

[127] The United States has never relied on humanitarian intervention. Michael P. Scharf, *Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention*, 19 CHI. J. INT'L L. 586, 608 (2019). It has, however, justified military action in part based on humanitarian concerns. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 14–15 (2018) (citing missions in Iraq, Haiti, Somalia, and Bosnia). These concerns have even played "primary" basis in some cases, including a response to an environmental threat in Somalia as U.S. troops deployed to areas "most affected by famine and disease." *Id.* at 15.

loss of life or destruction may be so widespread or devastating that targeted military force is the only way to prevent wider harm.

As ICISS recognized, this threshold will likely never be met against a United States' near-peer competitor, like China or Russia.[128] Military intervention against one of these countries would likely begin a series of retaliatory and escalatory acts that could potentially lead to a greater loss of life and destruction than what the United States is trying to prevent.[129]

While there is a paucity of scholarship on military intervention in response to environmental threats, three articles that have addressed the topic have argued that self-defense is the more appropriate framework to justify intervention.[130] The international law practitioners who drafted *Modern Self-Defense: The Use of Force Against Non-Military Threats* argued an "armed attack" should be evaluated by the magnitude of its effects to allow a self-defense response to non-military threats.[131] The authors do concede humanitarian response is a better "fit" than self-defense, as it offers a better explanation rather than "attempting to characterize a non-military event, such as refugee flows or an environmental catastrophe, as an armed attack."[132] However, the authors state because it exists in the U.N. Charter, self-defense provides a stronger justification for a use of force in response to an environmental threat.[133]

While self-defense and humanitarian intervention reinforce each other in this context, humanitarian intervention would be the more appropriate justification, as relying on self-defense would hamper potential responses. For example, the United States may not be able to respond under self-defense if an environmental threat only causes a regional crisis that does not cross its borders. Additionally, a justification under self-defense requires expanding the definition beyond what is accepted as the international norm.[134] Using humanitarian intervention also goes beyond current norms,

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[128] ICISS REPORT, *supra* note 38, para. 4.42.
[129] *Id.* If an environmental threat rises to a substantial probability of widespread damage, a large conflict may still be justified if it will be less damaging than the environmental threat. *See* discussion *supra* Section III.D.
[130] *See supra* note 75.
[131] Cardiel et al., *supra* note 75, at 138.
[132] *Id.* at 139.
[133] *Id.*
[134] Additionally, the ICJ found the United States' arguments to intervene in matters within domestic control of a State based on collective self-defense and protection of human rights to

but it can be tailored more appropriately to address the humanitarian concerns of environmental threats and to permit responses before the threats spread. If the United States can add rationale showing the necessity of its response to protect its own interests, it may avoid opposition and enjoy additional support in the international community, but the primary justification for military intervention should be humanitarian intervention.

The United States should utilize the U.K.'s basis for humanitarian intervention and adopt it, with some modifications, to allow for a response to environmental threats.[135] The U.K. test requires evidence of "extreme humanitarian distress" and while this is a good threshold for ongoing events, preemptive action may be required.[136] Merging ICISS's comments with the U.K. test would allow for the most flexibility under a legally justifiable position.

The criteria for military intervention in the case of an environmental threat should be:

> (1) There is evidence that extreme humanitarian distress on a large scale, requiring immediate and urgent relief, is occurring or will occur;
>
> (2) There is no practicable alternative to the military intervention if lives are to be saved;
>
> (3) The State concerned is unwilling or unable to handle the environmental threat or consent to assistance; and
>
> (4) The proposed military intervention and potential use of force is necessary and proportionate to the aim of

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be insufficient to justify military intervention. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 268 (June 27).

[135] While the United States has never recognized a right of humanitarian intervention, it did tell the Security Council that it "worked in lock step" with the U.K. and was "in complete agreement" regarding the Syria airstrikes for which the U.K. relied on humanitarian intervention. Scharf, *supra* note 127. While the United States' justification did not solely rely on humanitarian invention, one scholar argued statement before the Security Council could be an implicit adoption of the principle. *Id.*

[136] *Syria Action – UK Government Legal Position*, *supra* note 92; ICISS REPORT, *supra* note 38, at 33.

> humanitarian suffering, is strictly limited in time and scope to this aim, and will not exceed the suffering it prevents.

The proposed test would allow the United States to prevent or mitigate environmental threats regardless of whether it is directly affected. Even if the threat does not reach U.S. borders, the United States should intervene, as humanitarian crises and regional disorder threaten its national security. This test also allows for action without waiting for the environmental threat to spread or intensify. If there is evidence of a future threat, the United States may take action immediately to prevent it. Additionally, this test also focuses on a State's action or inaction in addition to the magnitude of the environmental threat, emphasizing a State's responsibility and ensuring intervention in another State's affairs is appropriate based on its failure respond to the threat.[137] Finally, it also ensures the response will be measured to address only the environmental issue. The United States should strive to maximize its ability to act, and this legally cognizable justification allows the United States to continue to compete in international law.

V. Conclusion

The United States has never based a use of force solely on humanitarian grounds; however, it has used force on multiple occasions to preserve regional stability.[138] Additionally, it has cited "U.S. interest in mitigating humanitarian disasters" as a justification for military deployments, though never as the sole justification for military intervention.[139] This would be an expansion of what the United States has considered international law but would allow it to have all options at its disposal. The first choices to handle an environmental threat should remain diplomacy and U.N. procedures. If those fail, however, the United States should use every option to respond as necessary to prevent a widespread disaster. This article's proposed test would allow the United States to retain flexibility under international law to respond to the novel threats facing the country.

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[137] *See* Martin, *supra* note 75. While a State may not initially cause an environmental threat, action will be justified against States that contribute to or worsen the spread of the threat through action or inaction.

[138] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 11 (2018).

[139] *Id.*