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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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TIME TO REPEAL THE ASSASSINATION BAN OF EXECUTIVE ORDER 12,333: A SMALL STEP IN CLARIFYING CURRENT LAW

MAJOR TYLER J. HARDER[1]

The ruling to kill Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it . . . .

Osama bin Laden, 23 February 1998

I. Introduction

On 11 September 2001, four commercial airliners were hijacked by members of al Qaeda, the terrorist network founded and led by Osama bin Laden, the disavowed son of a Saudi construction magnate.[2] The terrorist

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2. *See* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1; NBC News, *Osama bin Laden: FAQ*, *at* http://www.msnbc.com/news/627355.asp (last visited May 14, 2002).

hijackers intentionally crashed two of the airliners into the World Trade Center in New York and one into the Pentagon in Washington, causing the deaths of thousands of civilians.[3] Almost immediately, Osama bin Laden became the number one suspect, and in the weeks that followed, the trail of evidence would affix responsibility to bin Laden and his organization.[4] Certainly, hunting down Osama bin Laden and killing him would be an assassination. Or would it?

The word "assassination" invites memories of the tragic murders of past U.S. presidents and other great Americans, images of world leaders and heads of state being gunned down without legal justification, and covert operations where snipers take out foreign leaders that are deemed a nuisance to the United States. Those familiar with U.S. military laws quickly agree: assassination is illegal, absolutely prohibited. When asked the authority for that conclusion, many are quick to reference Executive Order 12,333 (EO 12,333), which specifically prohibits "assassination."[5] Closer examination of this subject, however, reveals obvious confusion leading to frequent debate. First, EO 12,333 does not make assassination illegal; assassination is and was already illegal according to both federal and international law.[6] Second, the distinction between "legal" or "permissible" killing and "assassination" is not all that clear, thus adding to the confusion. In the context of how the U.S. prohibition on assassination applies to the military, EO 12,333 creates a dangerous pitfall. It has the potential to artificially circumscribe U.S. flexibility or, at a minimum, create misplaced public enmity towards the military.

This article calls for a repeal of the assassination language found in paragraph 2.11 of EO 12,333.[7] Repealing the language would not make assassination legal. It would, however, eliminate some of the confusion over assassination and push the focus of the debate back to the proper applicable law, that is, federal and international law. First, this article discusses the definitions of assassination as applied during both war and

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3. *Grunwald*, *supra* note 2, at A1 (The fourth airliner crashed in rural Pennsylvania.).

4. Associated Press, *Oct. 4: Text of British Document, Summary of Evidence Against Osama bin Laden* (Oct. 4, 2001), http://www.msnbc.com/news/638189.asp.

5. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

6. *See infra* notes 29-61 and accompanying text.

7. The specific provision prohibiting assassination is found in paragraph 2.11 of EO 12,333. Exec. Order 12,333 comprises much more than just the assassination ban; however, for purposes of this paper, it is the assassination ban in para. 2.11, and not the entire executive order, that is the subject of discussion. *See infra* note 77 and accompanying text.

peacetime, and it provides a brief history of the law prohibiting assassination. Second, it looks at the environment and context in which the President promulgated the original executive order prohibiting assassination,[8] and it provides an analysis of the confusion surrounding the prohibition of assassination found in EO 12,333. Finally, it offers justification for the repeal of EO 12,333, paragraph 2.11, concluding that upon repeal Congress and the executive branch could respond to foreign crises more effectively, consistent with international conventional and customary law.

II. Defining Assassination

Assassination can be defined very broadly or very narrowly. Depending on the breadth of definition, assassination could define *any* intentional killing, or it could define only murders of state leaders in the narrowest of circumstances. Some scholars discuss assassination without defining it;[9] however, it is essential to define the term. Without an accurate definition, it becomes impossible to recognize the frequent misunderstandings of EO 12,333, for defining what is *not* assassination is as important as defining what is assassination.[10] This becomes increasingly important in situations where executive agents are required to interpret the assassination ban of EO 12,333. Unfortunately, EO 12,333 fails to provide a definition of assassination.[11] The early commentators defined assassination as "treacherous murder."[12] The modern approach tends to define it from one of two perspectives: a wartime perspective, or a general peacetime perspective.

A. Wartime Definition

The British *Manual of Military Law*, unlike the Uniform Code of Military Justice,[13] defines assassination, which is "the killing or wounding of

8. The original executive order containing an assassination ban was issued in 1976 by President Ford and is the basis for the current EO 12,333. *See* Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1977), *reprinted in* 50 U.S.C. § 401 (1976).

9. *See, e.g.*, FRANKLIN L. FORD, POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM 1-2, 301-02 (1985).

10. The struggle in defining the term is not new. So it is understood, regardless of what definition is given to assassination, not everyone will agree.

11. *See infra* note 95 and accompanying text.

12. *See* Lieutenant Colonel Joseph B. Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101, 102 & n.3 (1965) (listing several early commentators, including Grotius and Vattel).

13. 10 U.S.C. §§ 801-946 (2000).

a selected individual behind the line of battle by enemy agents or partisans . . . ."[14] This definition would seem to follow the definition of assassination found in the law of war, which, as discussed later, finds its roots in the Hague prohibition against "treacherous killing."[15] Focusing on the issue of treachery, a 1965 journal article defined assassination as "the *selected* killing of an enemy by a person *not in uniform.*"[16] The author explained that the killer's failure to wear a uniform was the very essence of treachery.[17] Although this view is consistent with the traditional view of a treacherous attack, it is not reflective of the post-World War II view.[18]

Professor Michael Schmitt, considered one of the leading scholars on the law of assassination, concluded that wartime assassination consists of two elements, "the targeting of an individual, and the use of treacherous means."[19] He argued that treachery is the key component of wartime assassination, and he defined treachery as a "breach of confidence."[20] During wartime then, a killing could not be an assassination unless it was accomplished by treacherous means (which would be a violation of the law of war), and was a killing of a specifically targeted individual. In other words, if the law of war is not violated, an assassination has not occurred.[21]

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14. Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law,* 17 YALE J. INT'L L. 609, 632 n.109 (1992) (quoting WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW art. 115 (1958) (U.K.), *reprinted in* 10 DIG. INT'L L. 390 (1968)).

15. *See infra* notes 32-43 and accompanying text.

16. Kelly, *supra* note 12, at 102.

17. *Id.* at 103.

18. *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 6. Before World War II, the law of war obligated soldiers to wear uniforms so they could be distinguished from the civilian (noncombatant) population. It would be considered a "treacherous killing or wounding" for a soldier to disguise himself in civilian clothes for the purpose of carrying out a surprise attack on an enemy force. Due to the large number of partisan forces and resistance groups relied upon in World War II, the law of war changed and now acknowledges the lawfulness of partisans to engage in combat, although the extent to which civilian clothing may be used by conventional forces is not clear. *Id.*

19. Schmitt, *supra* note 14, at 632.

20. *Id.* at 633. "The essence of treachery is a breach of confidence. For instance, an attack on an individual who justifiably believes he has nothing to fear from the assailant is treachery." *Id.* (internal citation omitted). *See also infra* note 32.

21. That is certainly not to say, however, that all killings that violate the law of war are assassinations.

B. Peacetime Definition

Those who have attempted to define assassination from a general perspective have not agreed upon a universal definition either. One writer defined it as "the intentional killing of a specified victim . . . perpetrated for reasons related to his . . . public prominence and undertaken with a political purpose in view."[22] Another defined assassination as a "premeditated and intentional killing of a public figure accomplished violently and treacherously for political means."[23] Judge Abraham Sofaer, former Legal Adviser at the U.S. Department of State, offered a simpler definition: "any unlawful killing of particular individuals for political purposes."[24] W. Hays Parks concluded: "In general, assassination involves murder of a targeted individual for political purposes."[25]

Although there are many definitions of assassination,[26] most definitions contain three common ingredients: an intentional killing, a specifically targeted individual, and a political purpose. As many scholars point out, however, assassination is an *illegal* killing, so an assassination must also be a murder.[27] Therefore, in understanding and applying the current policy, an assassination consists of three elements: (1) a murder, (2) of a specifically targeted figure, (3) for a political purpose. Absent any of these elements, a killing is not an assassination.

Several conclusions can be drawn from an analysis of this definition. A lawful homicide is never an assassination. An unlawful homicide may be a murder, but if the killing lacks a political purpose, it would not be an assassination. Finally, a political killing may be a murder, but if it lacks the specific targeting of a select figure, it would not be an assassination. For example, as Parks pointed out, the murder of a private citizen by ter-

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22. Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 598 (1995).

23. Boyd M. Johnson III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 402 n.7 (1992).

24. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 117 (1989).

25. Parks, *supra* note 18, at 4. W. Hays Parks is the Chief of the Army's Law of War Branch of the Office of The Judge Advocate General.

26. *Id.*, app. A, at 8 (providing additional general definitions of assassination).

27. *See* Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 146 (1991); Sofaer, *supra* note 24, at 117; Parks, *supra* note 18, at 4.

rorists aboard the Italian cruise ship *Achille Lauro* in 1985 was for political purposes, but it was not considered an assassination.[28]

This article defines assassination during peacetime as "a political murder of a specifically targeted figure," and during wartime as "the targeting of an individual by treacherous means." By adopting these definitions, one can properly identify what is and what is not an assassination. One can also distinguish assassinations from broader acts that do not necessarily amount to assassinations, such as political killings, murders, and military targeting of leaders. In addition, by reviewing the history of assassination law, one can understand the legal framework in which current policy exists.

III. A Brief History of International Law Prohibiting Assassination

A. During Armed Conflict

History demonstrates that assassinations are not new,[29] nor are the debates that accompany them. Throughout the centuries, many scholars have written on the subject of assassination, debating whether it is a legitimate means of warfare.[30] Beginning in the thirteenth century, men such as Saint Thomas Aquinas, Sir Thomas More, Alberico Gentili, Hugo Grotius, Balthazar Ayala, and Emer de Vattel have wrestled with the morality of assassination and its applicability, but almost exclusively in the context

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28. Parks, *supra* note 18, at 4.

29. One of the first recorded assassinations occurred around 1250 B.C. when Israel found itself under the rule of King Eglon and the foreign nation of Moab. A Jewish judge named Ehud strapped a sharp, eighteen-inch dagger to his thigh and, hiding it under his cloak, brought gifts to the obese king. After delivering the gifts, Ehud told the king he needed to deliver a message to him secretly. Once alone with the king, he plunged the dagger completely through the king's massive belly, entering his stomach and exiting out his back. *See Judges* 3:16-22 (NIV).

30. *See generally* ST. THOMAS AQUINAS, ON POLITICS AND ETHICS (Paul E. Sigmund trans. and ed. 1988); THOMAS MORE, UTOPIA (J. Churton Collins ed., Oxford U. Press 1904) (1516); ALBERICO GENTILI, DE IURE BELLI LIBRI TRES (John C. Rolfe trans., 1933) (1612); HUGO GROTIUS, THE LAW OF WAR AND PEACE (1625), *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16 (L. Friedman ed., 1972); BALTHAZAR AYALA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE (John P. Bate trans., Carnegie Institution 1912) (1582); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles Fenwick trans., Carnegie Institution 1916) (1758).

of armed conflict.[31] The majority of these scholars considered acceptable the targeting of specific individuals during wartime, provided it was not done "treacherously."[32] This view is now accepted as customary international law,[33] and it serves as the basis for today's prohibition of assassination during armed conflict.[34]

To understand properly the current law of assassination, Professor Schmitt listed three critical points that should be noted from these early writers: (1) historical norms established by these writings have not placed absolute prohibitions on the use of assassination; they only establish narrow exceptions to the more general idea that the selection of specific enemy targets is a permissible wartime practice;[35] (2) treacherous killing is not acceptable during armed conflict, but "treacherous" should not be construed too broadly, and thereby confused with stealth or trickery; it is treacherous only if the victim has an affirmative reason to trust the assailant;[36] and (3) international law regarding assassination and international law in general are interrelated, and therefore, an evaluation of the law prohibiting assassination must also include consideration of other broader

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31. Schmitt, *supra* note 14, at 614. For a more in-depth review of the historic debate on assassination, see generally FORD, *supra* note 9; Zengel, *supra* note 27.

32. Schmitt, *supra* note 14, at 614-16. "Under Gentili's model, treachery is the violation of the trust a victim rightfully expects from an assassin." *Id.* at 615. Treachery is therefore a "breach of confidence." The act of sneaking into the enemy camp to kill a leader would not be such a breach of confidence, but if the killing were committed by a member of the victim's household, it would be unlawful (that is, a treacherous killing). *Id.*

33. *See infra* note 42.

34. *See* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE 12 (7 Dec. 1956) [hereinafter DA PAM 27-1]; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 31 (18 July 1956) [hereinafter FM 27-10].

35. Schmitt, *supra* note 14, at 617.

36. *Id.* Schmitt uses the distinction between ruses and perfidy in expressing this point. A ruse is designed to mislead the enemy, but can be lawful, whereas perfidy involves the attempt to "convince the enemy that the actor is entitled to protected status under the law of war, with the intent of betraying this confidence." *Id.*

Whereas ruses are lawful under the law of war "so long as they do not involve treachery or perfidy," treacherous and perfidious acts are always forbidden. FM 27-10, *supra* note 34, para. 50. *See also* U.S. DEP'T OF ARMY, PAM. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 37 (1 Sept. 1979) [hereinafter DA PAM 27-1-1]. The United States signed the Protocols on 12 December 1977, but never ratified them. However, Article 37 is recognized by the United States as an expression of customary international law. *See* Michael Matheson, U.S. Dept. of State Deputy Legal Advisor, *Comments at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, *reprinted in* 2 AM. U. J. INT'L L. & POL'Y 428 (1988).

principles of international law, for example, the principle of necessity.[37] These points from the early writers are important to keep in mind when applying assassination law during armed conflict today.

The early customary international law is the basis for current assassination law. The United States first attempted to codify customary international law regarding assassination on 24 April 1863, with the promulgation of General Order No. 100, commonly known as the Lieber Code.[38] Article CXLVIII provided:

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.[39]

At the beginning of the twentieth century, the proscription of treacherous killing during wartime was embodied in the Annex to Hague Convention IV.[40] Article 23(b) of the Annex prohibits killing or wounding treacherously any individual of the hostile nation or army.[41] These regulations are considered to reflect customary international law.[42] Although Article 23(b) does not mention the word assassination, in 1956 the U.S.

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37. Schmitt, *supra* note 14, at 618. In general, the law of war prohibits any violence beyond that necessary for military purposes. The principle of "military necessity," one factor that must be considered in military targeting decisions, is defined as "that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." *See* FM 27-10, *supra* note 34, para. 3. Other principles of the law of war are discussed *infra* note 216.

38. General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, art. 148, *reprinted in* 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 158 (L. Friedman ed., 1972).

39. *Id.*, *reprinted in* 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 184.

40. Hague Convention No. IV, Annex to the Convention. Regulations Respecting the Laws and Customs of War on Land [hereinafter Annex to Hague IV], *reprinted in* DA PAM 27-1, *supra* note 34, at 8.

41. *Id.* art. 23(b), *reprinted in* DA PAM 27-1, *supra* note 34, at 12.

Army interpreted the article as "prohibiting assassination" in paragraph 31 of *Field Manual 27-10, The Law of Land Warfare*.[43] Thus, assassination during war, as previously defined, is interpreted by the United States as a violation of international law.

These customary and conventional international law provisions form the basis of the prohibition of assassination during armed conflict between states. Although U.S. policy applies the law of war to all military operations,[44] the law of war will not apply as a matter of *law* in peacetime situations.[45] There is, however, both customary and conventional international law that makes assassination illegal at all times, including peacetime.

B. During Peacetime

Two primary sources of international law are customary law and international agreements.[46] Although these two sources of law are considered to have equal authority,[47] when the sources conflict, treaty law will supersede customary law.[48] One exception to this rule is when the customary law is considered a peremptory norm, in which case it will supersede

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42. "[B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . . ." International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 248-49 (1947). International agreements often codify existing customary international law. 1 RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 33, § 102 (1986) [hereinafter RESTATEMENT].

43. Paragraph 31 reads, "This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive'." FM 27-10, *supra* note 34, para. 31.

44. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77]; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (27 Aug. 1999). Due to lack of resources during many military operations, however, the United States may not be able to comply completely with the law of war at all times. W. Hays Parks stated in a memorandum to The Judge Advocate General of the Army on 1 October 1990 that it has been the United States practice to comply to the extent practicable and feasible. INT'L AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 5-2 (2000) [hereinafter JA-422].

45. *See* 1 THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY 28, 32 (Jean S. Pictet ed., 1952) [hereinafter PICTET COMMENTARY] (construing the Geneva Conventions).

46. RESTATEMENT, *supra* note 42, § 102.

47. *Id.* § 102 cmt. j.

48. *Id.*

treaty law.[49] A peremptory norm, or *jus cogens*, is a rule of international law considered so fundamental that it binds all states, and it will supersede any treaty law that it might conflict with.[50] Customary international law prohibiting genocide, slavery, murder, and torture are examples of *jus cogens*.[51] Since assassination by definition is a murder,[52] it is only logical to include assassination as a subset of murder. This *jus cogens* of international law would therefore prohibit assassination.

Another source of international law prohibiting assassination is treaty law. With the forming of the United Nations in 1945, the member states agreed to the international law contained in the Charter of the United Nations. Article 2(4) of the Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[53] The "Purposes of the United Nations" include the "suppression of acts of aggression or other breaches of the peace . . . ."[54] This prohibition on the use of force has become international law binding on all states.[55] The *murder* of a state leader, wherever it occurred, would have to qualify as the use of force, or an act of aggression or a breach of the peace.[56] As Professor Schmitt concluded, "any state-sponsored assassination, however defined, would probably violate the prohibition on the use of force contained in Article 2(4) of the U.N. Charter."[57]

Additional treaty law addressing assassination, adopted by the General Assembly of the United Nations on 14 December 1973, is the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (commonly called the New York Convention).[58] Ratified by the United States on 26 October 1976, the treaty came into force on 20 February 1977.[59] Article 2 requires

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49. *Id.*

50. *Id.* § 102 cmt. k.

51. *Id.* § 702 cmt. n.

52. *See supra* notes 22-27 and accompanying text.

53. U.N. CHARTER art. 2, para. 4.

54. *Id.* art. 1, para. 1.

55. RESTATEMENT, *supra* note 42, § 102 cmt. h. The Restatement goes even further, stating "[i]t is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*." *Id.* § 102 cmt. k.

56. As previously discussed, murder by its very nature is a violation of international law. There are situations where self-defense would permit a lawful homicide, but a lawful homicide would not be a murder. *See also infra* note 112 and accompanying text.

57. Schmitt, *supra* note 14, at 621.

state parties to the treaty to make murder (among other acts) of internationally protected persons criminal under internal law.[60]

In summary, short of armed conflict, assassination is prohibited by *jus cogens*, customary law, and international agreements. As one writer states, these sources "constitute persuasive evidence of a peacetime ban of assassination . . . ."[61] During armed conflict, the law of war is an additional body of law prohibiting assassination. This corpus of law prohibits assassination with or without EO 12,333, thereby begging the question, why was an executive order banning assassination ever promulgated?

IV. Concern Preceding E.O. 12,333

To understand why EO 12,333 exists today, it is important to first examine the state of U.S. foreign affairs immediately before the first promulgation of the executive ban on assassination. With the passage of the National Security Act of 1947, the Central Intelligence Agency (CIA) became the lead agency in the intelligence community.[62] The CIA primarily served the executive branch, and congressional access to intelligence information was very limited.[63] Congress was largely willing to defer to executive authority on foreign issues and covert operations.[64]

It was not until the 1970s, in the midst of Watergate, that Congress was no longer willing to allow the Executive a free hand in this area.[65] In

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58. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* 14 December 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (20 Feb. 1977).

59. *Id.*

60. *Id.* art. 2. The internal law enacted by the United States in compliance with this treaty is found at 18 U.S.C. §1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected persons). By definition of an "internationally protected person" under the New York Convention, protection of Heads of State against assassination extends only when "such person is in a foreign state." *Id.* art. 1. So, although the treaty makes assassination a violation of international law, it does not extend to protecting leaders in their home state. Regardless of this perceived shortfall, other international treaty law would still make murder (to include assassination) a violation of international law. *See supra* notes 53-57 and accompanying text.

61. Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 662 (1987).

62. L. BRITT SNIDER, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE pt. 1 (Center for the Study of Intelligence, Intelligence Monograph CSI-97-10001, Feb. 1997), *available at* http://www.odci.gov/csi/monograph/lawmaker/toc.htm.

63. *Id.*

April 1974, the Director of Central Intelligence (DCI), William Colby, testified before a subcommittee of the House Armed Services Committee concerning reports of alleged CIA involvement in a military coup in Chile.[66] His testimony leaked to the *New York Times* and set off a public outcry that ultimately resulted in both executive (Rockefeller Commission) and congressional (Church and Pike Committees) investigations.[67]

In January 1975, the Senate established an investigating committee, headed by Senator Frank Church, "to investigate the full range of governmental intelligence activities," to include certain alleged assassination attempts.[68] The investigations focused on alleged CIA involvement in assassination plots in five foreign countries, mostly during the 1960s.[69] Although it found that no foreign leaders were killed as a result of assassination plots initiated by U.S. officials, the Committee did find that the U.S. Government was involved with the initiation of two failed plots, and it had encouraged other successful ones.[70] The Committee also indicated that the Executive apparently lacked proper control over the CIA.[71] Finally, the Committee denounced assassination as an acceptable tool of American foreign policy, stating that "a flat ban against assassination should be written into law."[72]

Congress's concern regarding the Executive's lax control over the CIA and the use of political killing as a tool of foreign policy would ultimately contribute to the legislative movement to assert a greater role in for-

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64. *Id.* at 6; *see also* Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795 (1989). *Covert operations* are "operations which are planned and executed so as to conceal the identity of or permit plausible denial by the sponsor." Parks, *supra* note 18, at 4 (citing JOINT CHIEFS OF STAFF, JCS PUB. 1, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1 June 1987)).

65. SNIDER, *supra* note 62, at 1.

66. *Id.* at 6.

67. *Id.*

68. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465, at 1 (1975) [hereinafter COMMITTEE REPORT].

69. The five countries were Cuba, the Congo (Zaire), the Dominican Republic, Chile, and South Vietnam. The individuals targeted or killed were Fidel Castro, Patrice Lumumba, Rafael Trujillo, General Rene Schneider, and Ngo Dinh Diem, respectively. *Id.* at 4.

70. *Id.* at 256.

71. The Committee reported, "Based on the record of our investigation, the Committee finds that the system of Executive command and control was so inherently ambiguous that it is difficult to be certain at what level assassination activity was known or authorized." *Id.* at 261.

eign affairs.[73] The situation in the mid-1970s, however, called for some form of immediate action. That action would come in the form of an executive order.

V. Original Motivation for an Executive Order Prohibiting Assassination

The original motivations for enacting the executive assassination ban serve as the bases for assessing the original scope of restriction intended by the ban. Therefore, the scope of the ban's restriction can be determined only after examining the context in which the ban was created.

A. The Birth of EO 12,333

In June 1975, during the Church Committee investigation, President Ford publicly banned the use of political assassination by his administration.[74] He followed his announcement with the issuance of Executive Order 11,905 on 18 February 1976, which read: "Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination."[75] In 1978, President Carter modified the ban when he issued Executive Order 12,036.[76] The ban, as modified by Carter, was incorporated without change in Executive Order 12,333 by President Reagan in 1981, and it reads: "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[77]

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72. *Id.* at 281. The Committee went on to further state:

> We condemn assassination and reject it as an instrument of American policy. Surprisingly, however, there is presently no statute making it a crime to assassinate a foreign official outside the United States. Hence, . . . the Committee recommends the prompt enactment of a statute making it a Federal crime to commit or attempt an assassination, or to conspire to do so.

Id. For a description of the proposed statute, see *infra* note 78.

73. *See infra* note 184 (providing examples of this movement).

74. COMMITTEE REPORT, *supra* note 68, at 281.

75. Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1977), *reprinted in* 50 U.S.C. § 401 (1976).

76. Exec. Order No. 12,036, §2-305, 3 C.F.R. 112, 129 (1978), *reprinted in* 50 U.S.C. § 401 (1978).

77. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

An analysis of the motivations behind the enactment of the original executive order, and why subsequent administrations have kept it, would be difficult without first looking at why Congress has never enacted legislation prohibiting assassination.

B. Failed Legislative Attempts

During the same period when the executive branch enacted and modified the current executive order, Congress made three attempts to enact a statutory prohibition of assassination. The first attempt came in 1976 on the heels of the Church Committee's recommendation to add 18 U.S.C. § 1118, making assassination, attempted assassination, or conspiracy to assassinate a crime.[78] The second attempt came in 1978, and it intended to clarify the existing executive order prohibiting assassination.[79] Finally, in 1980, legislation that copied the identical language of Executive Order 12,036 was introduced in both the House and Senate, but was ultimately abandoned.[80] Why Congress failed to enact a ban is uncertain; however, there is ample support to suggest that after several failed attempts, Congress and the Executive simply agreed to a political compromise.

Congress started out on the offensive in 1975, pushing for a legislative ban notwithstanding the Executive's ban, but found their momentum severely weakened when classified information leaked from the Pike

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78. *See* COMMITTEE REPORT, *supra* note 68, at 289. The proposed statute would have made it unlawful for any U.S. officer, employee, or citizen, while outside the United States, to conspire to kill, attempt to kill, or kill "any foreign official, because of such official's political views, actions or statements . . . ." *Id.* at 289. The proposed statute defined "foreign official" as:

> a Chief of State or the political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent . . . of a foreign government . . . or . . . of a foreign political group, party, military force, movement or other association *with which the United States is not at war* pursuant to a declaration of war *or against which the United States Armed Forces have not been introduced into hostilities or situations* pursuant to the provisions of the War Powers Resolution . . . .

Id. at 289-90 (emphasis added).

79. Brandenburg, *supra* note 61, at 685 n.195 (citing S. 2525, § 134(5), 95th Cong., 2d Sess., 124 CONG. REC. 3074 (1978)).

80. *Id.* at 686 n.195 (citing H.R. 6588, 96th Cong., 2d Sess. § 131 (1980); S. 2284, 96th Cong., 2d Sess. § 131 (1980)).

Committee.[81] The leaked information, obtained by CBS reporter Daniel Schorr, allegedly caused the murder of CIA agent Richard Welch in Greece by unknown individuals.[82] One Senator was quoted as saying, "Pike, Welch, and Schorr, those were the three names that caused us to pull back . . . ."[83] As the Senate and House struggled with internal battles, Congress found itself looking for a compromise.[84] Congressional efforts to pass legislation were also weakened by growing public indifference.[85] As Representative Pike stated, "It all lasted too long, and the media, the Congress, and the people lost interest."[86]

These congressional attempts to propose legislation seem to reflect this search for compromise since each proposal became less restrictive. In fact, the last attempt was nothing more than an effort to place the language of the executive ban into a statute.[87] And, according to one report, this last effort failed, in part, because President Carter had nothing more than "luke-warm support" for the proposal.[88]

C. Executive Motivation: Avoid Legislation

While Congress may have compromised its initial intent, it is equally likely that had President Ford not enacted the executive ban, Congress, lacking an incentive to compromise, would have eventually passed legislation. One author suggests that Ford's initial ban in 1975 preempted the perceived immediate need for a statutory ban on assassination, thus contributing to the initial failure to legislate a ban in 1976.[89] In light of all that was going on at the time,[90] it seems the President wanted to respond quickly to the perceived notion that the CIA was an out-of-control

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81. Leslie Gelb, *Spy Inquiries, Begun Amid Public Outrage, End in Indifference*, N.Y. TIMES, May 12, 1976, § 1, at 20.

82. *Id.* Richard S. Welch was the head of the CIA office in Greece and was murdered shortly after a magazine identified him. Daniel Schorr was a reporter for CBS who obtained and arranged for publication of the Pike Committee report while it was still classified. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Johnson, *supra* note 23, at 411.

88. *Id.*

89. *Id.*

90. Public confidence in the Executive office was already low in the aftermath of Watergate and the Congressional Committee investigations.

agency.[91] After the ban was issued, administrative officials quickly took the position that enough had been done to fix the problems, thereby thwarting congressional efforts to pass legislation.[92] As one writer stated, "the [executive] order responded to intense political pressure to 'do something' while maintaining flexibility in interpreting exactly what had been done."[93] Thus, the ban was an alternative to a "legislative fix." The same writer pointed out that the legislative ban would likely "have been far more specific, and, given the political climate at the time, far more restrictive."[94]

In support of the theory that the Executive sought to maintain flexibility, one need only look at EO 12,333 in its entirety. Paragraph 3.4 of EO 12,333 is devoted to defining various terms used throughout the order, but "assassination" is not one of them.[95] That an ambiguously broad term like "assassination" would go undefined tends to support a conclusion that a definition of assassination was intentionally omitted. Moreover, President Carter's removal of the modifier "political" from the ban in 1978 might also indicate the Executive's continuing desire to avoid a legislative ban. As Judge Sofaer pointed out, the change from banning "political assassination" to banning "assassination" came at the same time that Congress was attempting to enact a much broader and more restrictive ban on killing.[96] Thus, a change, albeit minor and inconsequential for practical purposes, may have served to appease Congress and, once again, weaken congressional resolve to pass a legislative ban.

D. Executive Motivation: Clarify U.S. Policy

The evidence strongly supports the conclusion that the executive order was as much a political enactment as anything else. It was issued amid public outcry over alleged CIA involvement in assassinations, and motivated by political pressure and a desire to avoid a legislative (and more restrictive) ban. However, there was undoubtedly some practical

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91. *See supra* note 71; *infra* notes 99-101 and accompanying text.

92. Gelb, *supra* note 81.

93. Zengel, *supra* note 27, at 145.

94. *Id.*

95. Exec. Order No. 12,333, para. 3.4, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000). The original Executive Order 11,905 did not define assassination either.

96. "During the years after President Ford adopted Executive Order 11,905, several bills were introduced in Congress to convert the ban to a legislative one . . . . [This] might explain the issuance in 1978 of a new executive order prohibiting any 'assassination,' not only 'political' assassination." Sofaer, *supra* note 24, at 119 n.62.

need for the ban as well. The CIA had engaged in activities that were not only illegal, but in violation of U.S. policy, even before the creation of the executive order prohibiting assassination. In 1972, CIA Director Richard Helms issued an internal memo to all Deputy Directors banning assassination.[97] Again, in 1973, CIA Director William Colby issued a memo to his Deputy Directors prohibiting assassination.[98] Based on these findings, the Church Committee determined that there was a failure in the CIA command and control system.[99]

The CIA's failure resulted from action officers failing to keep their superiors informed, and from superiors failing to make clear that assassination was impermissible.[100] The apparent confusion over the CIA's assassination policy stemmed from this breakdown in communication between the leadership and the action officers. Since the "leadership" would have to include the President himself, it would be important to issue some authoritative statement clarifying the U.S. position on assassination. This was Professor Schmitt's conclusion when he stated, "one likely motivation for the executive orders was to remedy the confusion over the U.S. assassination policy."[101]

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97. COMMITTEE REPORT, *supra* note 68, at 282. The memo, stated:

> It has recently again been alleged in the press that CIA engages in assassination. As you are well aware, this is not the case, and Agency policy has long been clear on this issue. To underline it, however, I direct that no such activity or operation be undertaken, assisted or suggested by any of our personnel . . . .

Id. (citing Memorandum from CIA Director Helms to Deputy Directors (Mar. 6, 1972)).

98. *Id.* The memo, stated, "CIA will not engage in assassination nor induce, assist or suggest to others that assassination be employed." *Id.* (citing Memorandum from CIA Director Colby to Deputy Directors (Aug. 29, 1973)).

99. *Id.* at 261. *See also supra* note 71 (quoting the language used by the Committee).

100. Schmitt, *supra* note 14, at 657.

101. *Id.* Schmitt remarked that

> the communication process within the agency was in disarray. Those in charge of the operations did not know what boundaries they were required to work within, and their superiors made no effort to guide them. Thus, while none of the operations reviewed was alone renegade, in a sense, the entire agency was.

Id.

The weight of the preceding analysis would support the conclusion that the enactment of the executive assassination ban was motivated by an effort to pacify Congress and the public (thus avoiding a legislative ban), and to clarify any existing confusion over the U.S. policy on assassination. Because assassination was already unlawful under international law[102] and contrary to CIA policy,[103] the assassination ban serves only to clarify and reemphasize existing law. If the assassination ban in Executive Order 11,905 was never intended to *change* existing law, it would logically follow that the scope of its restriction was never intended to be any greater than existing law.

VI. Contemporary Misunderstanding of the Prohibition

The executive prohibition on assassination has endured for over a quarter century, appearing to merge with the law of war on occasion,[104] and brandished by many as authority for arguing what the United States can or cannot do. Every time the military appears to target a specific individual during military operations, there are those who condemn the action and cite EO 12,333 as support.[105] On the other side are those who defend the action and attempt to explain the rationale and purpose behind the EO 12,333.[106] A number of factors contribute to the misunderstanding of EO 12,333 and the extent of its application. The definition of assassination and the interpretation of a state's right to use self-defense seem to be the two greatest contributors to this misunderstanding.

A. Failure to Understand the Definition of Assassination

Unfortunately, a proper legal definition[107] of assassination is rarely applied when the subject is discussed. Many tend to define the word by use of specific examples rather than by applying a definition of the word

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102. *See supra* notes 46-61 and accompanying text.

103. *See supra* notes 97-98.

104. In reality, EO 12,333 does not affect the application of the law of war during armed conflict. *See infra* note 217 and accompanying text.

105. *See, e.g., infra* notes 125, 130, 151 and accompanying text.

106. *See, e.g., infra* notes 146, 150 and accompanying text.

107. A legal definition during wartime would include the two elements of treacherous killing and specific targeting, and a legal definition during peacetime would include the three elements of murder, political purpose, and specific targeting. *See supra* notes 13-28 and accompanying text.

to a specific situation. Because of America's history of presidential assassinations, the definition more commonly used seems to be the intentional killing of any public official.[108] For the reasons previously described, applying such a general definition will result in inaccurate conclusions. Some argue that assassination cannot be comprehensively defined, but that "most would probably recognize an assassination when they see one."[109] It is precisely this erroneous view that causes much of the misunderstanding over EO 12,333.

To violate the assassination ban found in EO 12,333, there must be a politically motivated murder of a specific individual during peacetime, or there must be a treacherous killing of a specific individual during armed conflict. In other words, outside of armed conflict, if there is a lawful basis for the killing, it is not murder, and it cannot be assassination. And likewise, during armed conflict, if there exists a lawful target and the target is not treacherously killed, the law of war is not violated, and it cannot be assassination.[110] Under the law of war, one lawful basis for killing that has been long recognized is self-defense.

B. A State's Right to Self-Defense

Article 2(4) of the U.N. Charter prohibits the threat or use of force.[111] Just like domestic law, however, international law recognizes the right to self-defense. Article 51 of the U.N. Charter states in part, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[112] Therefore, if the United States is acting in self-defense, a legal basis to use force exists.[113] If the United States is subject to an armed attack, or it subjects another state to armed attack, the situation becomes armed conflict, and the United States will apply the law of war.[114]

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108. *See* Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. PUB. L. & POL'Y 291, 292 (1992).

109. Johnson, *supra* note 23, at 402.

110. *See supra* notes 40-43 and accompanying text. For an excellent discussion of the different analyses of wartime assassination and peacetime assassination, see Schmitt, *supra* note 14.

111. *See supra* notes 53-54 and accompanying text.

112. U.N. CHARTER art. 51.

113. *Id.*

Unfortunately, scholars fail to agree on exactly what comprises self-defense and armed attack.

One side of the debate maintains that there must actually be an attack before the right to self-defense can be invoked.[115] The other side argues that striking first is critical in military operations and, therefore, *anticipatory* self-defense allows the use of force before an armed attack actually occurs.[116] This debate has added more confusion, contributing further to an improper interpretation of assassination and EO 12,333.

One writer argued that the President can improperly circumvent the assassination ban of EO 12,333 by merely disguising an assassination attempt "under the cloak of Article 51 self-defense."[117] The writer incorrectly viewed the 1986 Libya raid[118] as nothing more than an assassination attempt of a foreign leader.[119] As Parks stated, however, the United States recognizes three types of self-defense: the first is response to actual force

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114. As previously mentioned, the U.S. policy is to apply the law of war in all military operations. *See* DoD DIR. 5100.77, *supra* note 44. Legally, the law of war does not apply in a peacetime situation, and during armed conflict what law of war applies depends upon whether the conflict is international (referred to as Article 2 armed conflict from the Geneva Convention General Articles) or internal (referred to as Article 3 armed conflict from the General Articles). *See* PICTET COMMENTARY, *supra* note 45, at 28, 37. The distinction between international armed conflict and internal armed conflict is beyond the scope of this paper. For purposes of discussion, both international and internal armed conflict will be considered together.

115. *See* Schmitt, *supra* note 14, at 646.

116. *Id.*

117. Johnson, *supra* note 23, at 423.

118. *See infra* notes 121-24 and accompanying text (discussing the 1986 Libya raid).

119. Johnson, *supra* note 23, at 423. Johnson argues that EO 12,333 is too easily circumvented and that a legislative ban prohibiting assassination is necessary. He calls for "comprehensive congressional legislation" precluding assassination "at all times, including wartime." *Id.* at 433. A legislative ban prohibiting assassination, however, would not change the available options (unless it incorrectly defined assassination as "any intentional killing of a leader"). His view, that EO 12,333 has either been violated or circumvented and that legislation would prevent U.S. actions such as the Libya raid, is erroneous. Johnson misunderstands assassination and current international law, and the legislation he envisions would actually change U.S. law, making it more restrictive than current international law.

or hostile acts; the second is preemptive self-defense against imminent force; and the third is self-defense against a continuing threat.[120]

Applying the previously discussed definitions of assassination and the U.S. policy on self-defense to specific situations may explain why the prohibition in EO 12,333 is misunderstood. The media, congressmen, administration officials, and even scholars misapply the definition of assassination and the right to self-defense, and consequently, they misunderstand the prohibition found in EO 12,333. Two foreign affairs incidents illustrate this point, the 1986 Libya raid and the 1991 Gulf War.

C. 1986 Libya Raid

On 14 April 1986, the United States had strong evidence that Colonel Muammar Qadhafi ordered the terrorist bombing of a nightclub in Germany eleven days earlier.[121] Intelligence reports further indicated Libyan involvement in other planned attacks on the United States around the world, including in Europe and Asia.[122] One report indicated that Libya was targeting up to thirty U.S. diplomatic facilities worldwide.[123] Based on this information, President Reagan ordered U.S. F-111 and A-6 aircraft to strike five selected targets in Libya, including Qadhafi's home and headquarters.[124] Immediately, there was concern that targeting Qadhafi's home was a violation of EO 12,333.[125] The administration denied Qadhafi had been specifically targeted, however, and justified the attack as anticipatory self-defense.[126] This initial denial suggests that the executive branch either misunderstood the scope of EO 12,333, or was simply uncomfortable with what the public perception might be concerning an alleged assassination. According to one investigative reporter, the primary goal of the

120. Parks, *supra* note 18, at 7.

121. Bob Woodward & Patrick E. Tyler, *U.S. Targeted Qaddafi Compound After Tracing Terror Message*, WASH. POST, Apr.16, 1986, at A24.

122. *Id.* The intelligence reports showed "an orchestrated, worldwide, centrally directed campaign of terror directed through the Libyan diplomatic channels and missions specifically targeting Americans." *Id.*

123. Schmitt, *supra* note 14, at 668 (citing *Joint News Conference by George Schultz, Secretary of State, and Casper Weinberger, Secretary of Defense* (Apr. 14, 1986), *in* DEP'T ST. BULL., June 1986, at 3).

124. *Id.* at 666 (citing *U.S. Jets Bomb Libyan Targets*, FACTS ON FILE WORLD NEWS DIG., Apr. 18, 1986 (LEXIS, NEXIS Library, U.S. Affairs File)).

125. Woodward, *supra* note 121.

126. *Id.*

attack, however, was Qadhafi's "assassination," and the pilots who flew the mission were so briefed.[127]

In the wake of high public approval of the raid, several legislators pushed for changing EO 12,333 to *broaden* the President's authority.[128] Senator Pressler stated, "I know it is repugnant to our thinking and repugnant in a democracy to even talk of such things, but we may be living in an era in which, to protect the lives of American citizens, we might need to consider changing that Executive Order."[129] The Senator misunderstood the scope of EO 12,333 and the legal basis for the military strike on Libya. He is not alone. Senator William Cohen, while arguing against removing the assassination ban in 1989, stated, "Executive Order 12,333 would appear to ban placing a poison pen in one of Col. Moammar Gadhafi's jump suits, but permit the release of a gravity bomb from several thousand feet onto his desert compound."[130]

Legal scholars have also interpreted the Libya raid as a violation of EO 12,333.[131] Several years later, however, Judge Sofaer wrote: "[Colonel Qadhafi] was and is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on U.S. citizens, diplomats (sic) troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target."[132] Professor Schmitt interpreted Judge Sofaer's "being attacked" language as implying that Sofaer considered Qadhafi a legitimate target.[133]

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127. Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, § 6 (magazine), at 17.

128. Schmitt, *supra* note 14, at 667.

129. 132 CONG. REC. S4574 (1986), *quoted in* Schmitt, *supra* note 14, at 667 n.264. In fact, both the House and Senate introduced bills in 1986 that would have given the President authority to use whatever measures he "deems necessary" to fight terrorism. This was considered by at least some Congressmen as authorization to assassinate leaders personally involved in terrorism. *See* Linda Greenhouse, *Bill Would Give Reagan A Free Hand on Terror,* N.Y. TIMES, Apr. 18, 1986, at A9; Helen Dewar, *GOP Lawmakers Propose Strengthening Reagan's Antiterror Hand*, WASH. POST, Apr. 18, 1986, at A24.

130. William S. Cohen, *Noriega: Not Worth American Killing*, WASH. POST, Oct. 17, 1989, at A27. Senator Cohen's "poison pen" example would have been illegal, *not* because it would have violated EO 12,333, but because it would have violated the law of war. *See* Annex to Hague IV, *supra* note 40, art. 23(a) (prohibiting use of poison or poisoned weapons).

131. *See, e.g.*, Brandenburg, *supra* note 61, at 690, 692-93; Johnson, *supra* note 23, at 423.

132. Sofaer, *supra* note 24, at 120.

133. Schmitt, *supra* note 14, at 668.

Under the law of war, indeed he was. He was a terrorist supporter, and a continuing threat to U.S. citizens.[134]

Under the U.S. interpretation of Article 51 of the U.N. Charter, the United States has the right to use self-defense against a continuing threat.[135] Once the decision to respond with force against Libya was made, the law of war targeting analysis[136] applied, and since Qadhafi was a combatant by virtue of his position, he could be lawfully targeted.[137] Although many felt EO 12,333 prevented the targeting of Qadhafi, a proper interpretation of EO 12,333 within the greater body of existing law indicates such a targeting is lawful as long as it is not done treacherously. Thus, the legislative change called for by some congressmen was unnecessary.

D. 1991 Gulf War

Possibly the most illustrative example of misunderstanding the prohibition on assassination is the Gulf War. On 2 August 1990, Iraqi troops invaded Kuwait.[138] The United States immediately condemned the invasion as blatant military aggression.[139] In December, the U.N. Security Council passed U.N. Resolution 678, which authorized the use of force against Iraq and set a deadline of 15 January 1991 for Iraq to withdraw from Kuwait.[140] On 14 January 1991, Congress passed legislation autho-

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134. *See supra* note 122-23 and accompanying text.

135. *See supra* note 120 and accompanying text.

136. *See infra* note 216 and accompanying text (defining the principles of the law of war used in a targeting analysis).

137. Members of the armed forces of a party to the conflict are combatants. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (12 Aug. 1949), *reprinted in* DA PAM 27-1, *supra* note 34, at 68; and Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 13 (12 August 1949), *reprinted in* DA PAM 27-1, *supra* note 34, at 28 (applying the law of war protection to combatants). *See also* DA PAM. 27-1-1, *supra* note 36, art. 43, at 30. Military objectives that may be attacked include combatants and "places devoted to the support of military operations or the accommodation of troops." FM 27-10, *supra* note 34, para. 40; DA PAM. 27-1-1, *supra* note 36, art. 48, at 34.

138. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1.

139. *Id.*

140. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990), *cited in* Johnson, *supra* note 23, at 430. This use of force was authorized under Article 42 of the U.N. Charter, which allows the Security Council to "take such action by air, sea, or land forces [of Members of the United Nations] as may be necessary to maintain or restore international peace and security." U.N. CHARTER, art. 42.

rizing President Bush to use military force,[141] and on 16 January 1991, the United States commenced armed conflict with Iraq.[142]

Soon after the Iraqi invasion, the debate over whether Saddam Hussein could be legally "assassinated" hit the newspapers.[143] In one article, Professor Turner[144] accurately distinguished between "killing" and "murder."[145] He argued that a state must meet two requirements to use force in self-defense: the force must be necessary (peaceful attempts to resolve the issue have been exhausted), and force must be proportional (use only the level of coercion necessary to achieve the permitted objectives).[146] He then applied the theory of "justifiable tyrannicide" and correctly suggested that killing Hussein would be morally and legally permitted.[147] Not everyone understood his perspective.

On 4 February 1991, on a *Nightline* television episode, Ted Koppel interviewed Judge Sofaer and Professor Abraham Chayes.[148] He asked both if it would be legal to target Hussein.[149] Judge Sofaer replied that it may not be politically wise, but it would be legal (the executive order notwithstanding).[150] Professor Chayes disagreed, however, stating, "If Sad-

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141. Authorization for Use of Military Force Against Iraq, Pub. L. 102-01, 105 Stat. 3 (1991), *cited in* Johnson, *supra* note 23, at 431.

142. Johnson, *supra* note 23, at 431. It should be noted that military force would also be authorized in collective self-defense under Article 51 of the U.N. Charter; however, in an attempt to distinguish this situation from the 1986 Libya raid, it will be analyzed from an Article 42 of the U.N. Charter, use of force perspective. *See supra* note 140 and accompanying text.

143. *See, e.g.*, Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1; Daniel Schorr, *Hypocrisy About Assassination*, WASH. POST, Feb. 3, 1991, at C07; Eric L. Chase, *Should We Kill Saddam*, NEWSWEEK, Feb. 18, 1991, at 16; Tom Kenworthy, *From Capitol Hill, A Potshot At Saddam*, WASH. POST, Feb. 27, 1991, at A23.

144. Professor Robert Turner is associate director of the Center for National Security Law at the University of Virginia School of Law.

145. Turner, *supra* note 143.

146. *Id.* at D2.

147. *Id. See also* Johnson, *supra* note 23, at 401 (explaining justifiable tyrannicide by using Abraham Lincoln's conclusion that killing a leader is "morally justified when a people has suffered under a tyrant for an extended period of time and has exhausted all legal and peaceful means of ouster"). *See generally* FORD, *supra* note 9 (providing an in-depth discussion of tyrannicide).

148. Professor Chayes of Harvard Law School served as the Legal Advisor at the U.S. Department of State during the Kennedy Administration. Schmitt, *supra* note 14, at 674.

149. Schmitt, *supra* note 14, at 674 (citing *Nightline: Why Not Assassinate Saddam Hussein?* (ABC television broadcast, Feb. 4, 1991)).

150. *Id.* (same).

dam was out leading his troops and he got killed in the midst of an engagement, well that's one thing. But if he is deliberately and selectively targeted, I think that's another . . . ."[151] As Professor Schmitt pointed out,

> [Professor Chayes'] comments simply misstate the law. . . . [L]awful targeting in wartime has never required that the individual actually be engaged in combat. Rather, it depends on combatant status. The general directing operations miles from battle is as valid a target as the commander leading his troops into combat. The same applies to Saddam Hussein. Once he became a combatant, the law of war clearly permitted targeting him.[152]

Members of Congress were also concerned about the assassination ban. On 17 January 1991, Representative McEwen introduced a resolution supporting the suspension of EO 12,333 for Iraqi leaders only, to make it legal to assassinate Hussein.[153] The resolution failed to move, so the Congressman introduced the resolution again on 26 February 1991, saying "I don't want some American pilot pulling two G's over Baghdad to be hauled up before some congressional inquisition a few years from now because he got Saddam Hussein."[154] House Speaker Foley responded by pointing out: "[T]hat is an executive order. It is not a statute. The president can [change it] with a stroke of a pen . . . ."[155] Unfortunately, neither Congressman correctly understood the assassination ban.

Applying the law of war, Hussein was a lawful combatant and was, therefore, a lawful target.[156] As Lieutenant Colonel Kelly correctly wrote years ago, "A man in uniform, whether that of a general or a private, is a proper target."[157] The only issue would be *how* Hussein was killed. Only if it were accomplished through means of treachery would it be unlawful.

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151. *Id.* (same).

152. *Id*.

153. Kenworthy, *supra* note 143.

154. *Id*. The Representative argued that EO 12,333 "prevents us from targeting the sources of attack upon the American forces," and "those military planners, those secretaries of defense, those commanders-in-chief, that pilot who is flying into Baghdad, should not have to be faced with the possibility of having violated an executive order. This should be removed." 137 CONG. REC. H536 (daily ed. Jan. 17, 1991) (statement of Rep. McEwen).

155. Kenworthy, *supra* note 143.

156. *See supra* note 137.

157. Kelly, *supra* note 12, at 103.

Using aircraft to strike a military target deliberately and selectively, to include Hussein, would not be an assassination.

The greatest contributor to America's misunderstanding of the assassination ban, however, is arguably the media. Reporters and journalists present the assassination ban in a light that suggests EO 12,333 alone prevents the United States from engaging in assassination, and that, but for the order, assassination would be permitted.

E. Misunderstanding in the Media

Reporter Daniel Schorr suggested in 1991 that the United States do away with EO 12,333 "to spare us from presidential doubletalk about designs on the lives of foreign foes."[158] He referred to a November 1989, Department of Justice (DOJ) clarification on the assassination ban as "a new 'interpretation' of the assassination ban."[159] In reality, the clarification simply restated the prohibition as it was intended years earlier; that is, the U.S. government can assist with coup plotters in foreign countries as long as the death of a political leader is not their primary objective.[160] Even the headlines to the newspaper article incorrectly stated the substance of the DOJ opinion.[161] The article maintained that a request for clarification on the ban came after the botched Giroldi Coup[162] in Panama in 1989, and the opinion was based on ten attorneys searching "through 160 boxes of documents from the Ford, Carter and Reagan administrations to determine whether the executive order was meant to exclude U.S. involvement in coups where violence and accidental death were possible."[163] The DOJ

158. Schorr, *supra* note 143.

159. *Id.*

160. David B. Ottaway & Don Oberdorfer, *Administration Alters Assassination Ban*, WASH. POST, Nov. 4, 1989, at A1. The Department of Justice opinion was, in fact, consistent with the Church Committee remarks fourteen years earlier that stated the possibility of assassination of a foreign leader is but one issue to consider in determining whether U.S. involvement would be proper. *See* COMMITTEE REPORT, *supra* note 68, at 258.

161. The headlines read, "Administration Alters Assassination Ban" on one page and "CIA Director Says Administration Has Revised Assassination Ban" on another. Ottaway & Oberdorfer, *supra* note 160, at A1, A4.

162. *See infra* notes 185-87 and accompanying text.

163. Ottaway & Oberdorfer, *supra* note 160, at A4.

opinion did not "loosen" the rules; rather, it was a "clarification of the 1976 Executive Order."[164]

The Army had attempted to provide its own clarification of the assassination ban before the Giroldi Coup failure.[165] As the Chief of the Army's Law of War Branch, Office of The Judge Advocate General, W. Hays Parks had prepared the memorandum mentioned earlier in this article regarding EO 12,333.[166] About this memo Professor Schmitt commented that "[b]efore publication, the press learned of the memo and characterized it as an attempt to narrow Executive Order 12,333 to the point of rendering it meaningless. Some members of the press even claimed that the memo permitted assassination."[167] Clearly, it does not; the memorandum places the assassination ban in proper context within the larger application of national and international law.[168] Indeed, the memorandum provides examples, as far back as 1804, where the law was applied consistent with modern application.[169]

The furor of media misunderstanding occurred again during the weeks following the terrorist attacks on the World Trade Center and the Pentagon. Three days after the attacks, CNN reporter Wolf Blitzer asked former Secretary of State Lawrence Eagleburger if it was time to repeal the assassination ban.[170] Two days later, CNN's Aaron Brown directed a similar question to Senator Bob Graham of the Senate Intelligence Committee, questioning whether the executive order "put handcuffs on the President."[171] Senator Graham responded that if he had to choose between assassinating bin Laden and the rubble of the World Trade Center and Pentagon, he would "have to opt for the assassination."[172]

Newspapers were also astir with reports of the significance of the assassination ban. The *Washington Post* printed an article entitled *Assassination Ban May Be Lifted for CIA.*[173] The article reported Secretary of

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164. *Id.*

165. Schmitt, *supra* note 14, at 671.

166. *See* Parks, *supra* note 18.

167. *Id.* (citing *Department of Defense Press Briefing*, FED. NEWS SERVICE, Apr. 11, 1989 (briefing by Dan Howard), *available at* LEXIS, Nexis Library, U.S. Affairs File).

168. *See* Parks, *supra* note 18.

169. *Id.* at 7.

170. *CNN Live* (CNN television broadcast, Sept. 14, 2001).

171. *CNN Live, America's New War* (CNN television broadcast, Sept. 16, 2001).

172. *Id.*

173. Walter Pincus & Dan Eggen, *New Powers Sought for Surveillance, Assassination Ban May Be Lifted for CIA*, WASH. POST, Sept. 17, 2001, at A1.

State Powell as saying that the administration was reviewing the executive order.[174] Unfortunately, it was assumed that Secretary Powell viewed the executive order as an obstacle to going after bin Laden. The reporters wrote, "administration officials said yesterday that they are considering lifting a 25-year-old ban on U.S. involvement in foreign assassinations," and that "administration officials and some lawmakers said the ban is unrealistic in an age of terrorism."[175] Initial indications, however, are that the Bush Administration properly understands that the assassination ban does not prohibit targeting bin Laden. As reported in *USA Today*, White House spokesman Ari Fleischer stated that the assassination ban "would not shield bin Laden," and that following review of the executive order, it was determined that the order would "not limit the United States' ability to act in its self-defense."[176]

The confusion and misunderstanding of EO 12,333 exists among scholars, journalists, and politicians alike. As Professor Schmitt stated with regard to ABC's *Nightline* episode in 1991, "[t]hat such an eminent legal scholar as Professor Chayes so misunderstands the law on assassination is strong evidence that the issue requires much clarification."[177] Indeed it does. One proposal might be to provide the necessary clarification and to educate those who misunderstand the assassination ban. A better proposal, however, is to simply get rid of the ban; if the ban does not exist, the confusion over the ban will cease to exist. While confusion may continue concerning assassination law generally, the debate will at least be shifted to the proper sources of law.

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174. *Id.* at A6.

175. *Id.*

176. Laurence McQuillan, *White House: Bin Laden Fair Game Despite Order*, USA TODAY, Sept. 18, 2001, at 4. Vice President Cheney echoed the Bush Administration's understanding that the assassination ban does not prohibit going after bin Laden. Cheney stated that he did not believe any U.S. or international law would prevent American agents from killing bin Laden. Dan Balz, *President Says Bin Laden Is Wanted 'Dead or Alive'*, WASH. POST, Sept. 18, 2001, at A16 (citing *Meet the Press* (NBC television broadcast, Sept. 16, 2001) (statement of Dick Cheney)).

177. Schmitt, *supra* note 14, at 675.

VII. Repeal of EO 12,333 Assassination Ban Is in the Best Interest of the United States

A. The Ban Is Redundant and Has Outlived Its Original Purpose

The enactment of EO 11,905 (and ultimately EO 12,333) added nothing substantive to the law prohibiting assassination. As previously discussed, it merely served as a policy statement for current issues. The essence of the prohibition already exists in law. Even at the time EO 11,905 was issued, the law of war and other customary international law prohibited assassination.[178] The CIA, the agency over which the entire controversy centered, had already established internal policy prohibiting assassination.[179] The actions taken by the CIA agents in the 1960s were already illegal and against policy. Had EO 12,333 existed at that time, those actions would not have been *more* illegal.

Today, international customary and treaty law, including the law of war, prohibits assassination during peacetime and wartime. The U.S. federal courts acknowledge the international law prohibiting assassination as well.[180] Moreover, many federal statutes prohibit assassination and murder,[181] and U.S. policy on assassination is clear, with or without EO 12,333.[182]

Scholars and experts agree, the original purpose in passing the assassination ban was to assure a cynical public and a concerned Congress that U.S. agencies would not repeat the unilateral actions undertaken by the CIA in the 1960s.[183] Since the Church Committee investigation in 1975, Congress has gone to great lengths to assert a greater role in foreign affairs and intelligence activities.[184] The changes over the past twenty-four years

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178. "Assassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it." Parks, *supra* note 18, at 4.

179. *See supra* notes 97-98 and accompanying text.

180. *See, e.g.*, Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) (citing both the New York Convention and the Organization of American States Convention on Terrorism treaties in finding an international consensus condemning murder); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (finding that assassination is action "clearly contrary to the precepts of humanity as recognized in both national and international law").

181. *See, e.g.*, 18 U.S.C.S. § 351 (LEXIS 2002) (assassination of congressional, executive, and judicial branch members); *id.* § 1114 (protection of officers and employees of the U.S.); *id.* § 1116 (killing foreign officials, guests, or internationally protected persons); *id.* § 1751 (Presidential and Presidential staff assassination); *id.* § 2349aa (assassination as a terrorist act).

182. *See supra* note 72 and accompanying text.

have radically changed the political climate. Since the promulgation of the original executive order prohibiting assassination, Congress is now more involved with foreign affairs and, if it chooses, intelligence activities. Indeed, many in Congress recognize the fundamental changes in both the international and national political climates, evident by their past desires to legislate exceptions to the ban, however unnecessary those exceptions might have been. Today, unlike earlier years, the legislature understands and appreciates the need for flexibility. Today, unlike earlier years, the legislature would be unlikely to push for a legislative ban if the executive ban was repealed.

National and international law properly reflect a ban on assassination. A valid purpose for restating the ban in EO 12,333 no longer exists. But

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183. "[T]he initial ban on assassination was adopted in response to allegations concerning planned killings of heads of state and other important government officials." Sofaer, *supra* note 24, at 119. "The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy." Parks, *supra* note 18, at 8. "Executive Order 12333 [was] designed to assure Congress and the public that unpopular and ill-conceived policies undertaken in the 1960's and early 1970's will not be repeated." Zengel, *supra* note 27, at 154.

184. A series of congressional actions over the past twenty-four years demonstrates this effort. In May 1976, following the Church Committee's final report, the Senate created the Select Committee on Intelligence as a permanent intelligence oversight committee. The House followed suit in July 1977 by creating the Permanent Select Committee on Intelligence. *See* SNIDER, *supra* note 62, pt. 1, at 8. In 1980, Congress enacted the Congressional Oversight Act, which required agency reporting of all intelligence activities to these Committees. Congressional Oversight Act, 50 U.S.C. § 413 (1980). In 1991, the Act was replaced with the current statutory requirements for intelligence activity accountability. 50 U.S.C. § 413 (1991). In 1992, Congress passed the Intelligence Organization Act of 1992, which provided a definition for "intelligence community" that included, among other agencies, the Defense Intelligence Agency, the intelligence elements of the military service departments, and "other offices within the Department of Defense." Intelligence Organization Act of 1992, 50 U.S.C. § 401a (1992). Also, the 1992 legislative changes required the Director of Central Intelligence to provide intelligence to Congress and the Committees, the first time such a requirement had been expressly stated in law. SNIDER, *supra* note 62, pt. 1, at 12. Today intelligence information is available to all Members of Congress, although classified intelligence reports are generally provided only to the committees with responsibility in national security. *Id.* pt. 3, at 1. Additionally, the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House have access to all intelligence held by the intelligence committees. *Id.*

aside from its uselessness, there is more importantly a real danger in keeping EO 12,333: the artificial limits it creates.

B. Misunderstanding EO 12,333 Creates Artificial Limits

Removing the assassination ban in EO 12,333 would not change U.S. law or policy; however, it might prevent the creation of artificial limits on U.S. ability to respond to situations of national interest. The 1989 coup attempt in Panama provides one example of such artificial limits.[185] The Bush Administration wanted to see Panama's military dictator, Manuel Noriega, ousted from power.[186] But once the coup, led by Panamanian officer Major Moises Giroldi Vega, began to falter, the U.S. Government, rather than assisting the coup to succeed, did nothing.[187] This inaction was based on an earlier interpretation from the Senate Intelligence Committee in 1988 that the CIA had an obligation to prevent an assassination planned by foreigners working with the United States.[188] This interpretation was based on concern that a killing under such circumstances would violate EO 12,333. As a result, the coup failed, and Noriega remained in power.

This clearly was not the original intent of EO 12,333. As stated in the 1989 DOJ opinion, the executive order did not prevent U.S. assistance to coup plotters in foreign countries, provided the coup's primary objective was not the death of a political leader.[189] Because of the erroneous interpretation, however, Noriega continued his drug trafficking, election rig-

185. Schmitt, *supra* note 14, at 669.

186. *Id.*

187. *Id.*

188. *Id.* The Senate Intelligence Committee reviewed an earlier coup plan submitted by the Reagan Administration and disapproved the plan. Some Senators felt the plan was insufficient while others viewed it as a "thinly disguised assassination plot." Stephen Engelberg, *Panamanian's Tale: '87 Plan for a Coup,* N.Y. TIMES, Oct. 29, 1989, § 1, at 18. One of the coup planners, a former Panamanian Army colonel, was informed by American "contacts" that EO 12,333 would actually *require* them (the Americans) to notify Noriega if they became aware of an assassination plot against him. *Id.*

189. *See supra* notes 159-64 and accompanying text. Apparently, the coup plan that was disapproved by the Senate Intelligence Committee did not make Noriega's death the primary objective; it was disapproved due to an overly broad interpretation of EO 12,333. A former Panamanian Army Colonel stated: "There was no assassination plot. What we wanted to do was enter Panama with a force and stage a coup. We would have seized him, arrested him, maybe burned him. We didn't know what would happen." Engelberg, *supra* note 188. The colonel was told that "the Senate Intelligence Committee saw his plans for a coup as dangerously close to violating the executive order that bars American involvement in assassinations." *Id.*

ging, and assault and intimidation tactics,[190] and he remained in power until Operation Just Cause in December 1989.[191] American troops were ordered into Panama on 20 December 1989, and at a cost of at least twenty-three American lives, accomplished what the Panamanians failed to do earlier—end Noriega's tyranny.[192]

The Panama experience is a perfect example of the potential cost of keeping EO 12,333. It has contributed to bad policy decisions, and unfortunately, to the loss of American lives. Professor Schmitt asserted that "setting forth a prohibition without clearly delineating what it means is arguably more damaging than having no order at all."[193] Repealing the prohibition would facilitate legitimate considerations of foreign assistance and legal use of force by removing the potential for misunderstanding and confusion.[194]

C. Contemporary Threats Require Maximum Flexibility

This is a time when national security threats to the United States demand more flexible U.S. responses, not more restrictive domestic law and policy.[195] Tyrants, terrorists, and terrorist supporters threaten every American.[196] The horrific events of 11 September 2001 make that painfully clear. The U.S. responses must include the entire range of options

190. Donna Miles, *Operation Just Cause*, SOLDIERS, Feb. 1990, at 20.

191. *Id.*

192. *Id.*

193. Schmitt, *supra* note 14, at 679.

194. The author does not believe the solution lies in defining the word "assassination" within the Executive Order. One scholar has argued for a revision of EO 12,333 that would add a subparagraph to paragraph 3.4 (definitions) defining assassination. *See* Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 317, app. (1998). The proposed paragraph reads: "Assassination means the treacherous targeting of an individual for a political purpose. The otherwise legal targeting of lawful combatants in armed conflict, including all members of an enemy nation's or organization's operational chain of command, is not assassination and is not forbidden by this Order." *Id.* Such a proposal would be an improvement over the status quo. While the proposed change correctly states existing law, however, this recommended solution simply replaces one controversial term (assassination) with two more (treacherous and political). Eliminating the paragraph on assassination altogether and referring directly to the appropriate sources of international law seems to be a more pragmatic approach.

permitted a state by international law.[197] Reviewing two examples, one of a tyrant and one of a terrorist and terrorist supporter, emphasizes this point.

Iraq's Saddam Hussein exemplifies a tyrant.[198] When the U.N. authorized the use of military force in response to Hussein's decision to invade and destroy Kuwait,[199] killing Hussein became a legal option.[200] As one commentator reasoned, "When diplomacy fails . . . the choice will be between killing tens of thousands of conscripted soldiers in the aggressive state's army, or taking only one life—that of the tyrant responsible for the choice to wage aggressive war."[201] One should not confuse tyrannicide,[202] which may be a legal option in some cases, with assassination, which is never a legal option.[203] Critics argue that killing a foreign leader will only strengthen the enemy morale and resolve.[204] In some situations, that may be the case. That is a policy decision, however, to be made by U.S. lead-

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195. Some argue for more restrictive interpretations of assassination through legislation. *See supra* note 119. Yet, as Professor Turner cautioned in 1990:

> [Before Congress codifies] a vague prohibition against "assassination" into permanent American Law . . . they ought to carefully consider whether the absolute protection of Saddam Hussein, Adolf Hitler, or other international criminals in the years ahead is really worth the lives of the thousands of their constituents who might be placed at risk in a more conventional response to aggression, if Congress were to leave that as the only "legal" alternative.

Turner, *supra* note 143, at D2.

196. This threat was recognized even before 11 September 2001. *See* THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1999) [hereinafter THE WHITE HOUSE]. *See generally* SECURING THE HOMELAND STRENGTHENING THE NATION (2001).

197. The Clinton Administration recognized this need, as reflected in its National Security Strategy, wherein it stated, "We will do what we must to defend [our] interests, including, when necessary and appropriate, using our military might unilaterally and decisively." THE WHITE HOUSE, *supra* note 196, at 1.

198. As Iraq's political and military leader, he was singularly responsible for the invasion of Kuwait. During the war, a defecting Iraqi officer stated, "If you kill Saddam, all this would stop." Anderson, *supra* note 108, at 306-07.

199. *See supra* notes 138-41 and accompanying text.

200. *See infra* notes 218-22 and accompanying text.

201. Wingfield, *supra* note 194, at 294.

202. *See supra* note 147.

203. For example, tyrannicide would be a legal option in the case where a tyrant presents himself as a lawful target. Killing a lawful target cannot be an assassination unless done treacherously. *See supra* notes 40-43, 110 and accompanying text.

204. *See, e.g.*, Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 499 (1999).

ership under the specific circumstances of each situation, not a legal conclusion that automatically eliminates the option.

Similarly, the United States must not limit its ability to respond to terrorists and terrorist supporters; applying a narrow view of policies creates that potential. The current international search for Osama bin Laden and the War on Terrorism demand maximum flexibility. As Judge Sofaer concluded, "We must never permit terrorists to assume they are safe."[205] Even before the terrorist attacks on the World Trade Center and the Pentagon, the United States had recognized an increasing need to "protect the lives and personal safety of Americans, both at home and abroad."[206]

United States policy reserves the right to use military force in self-defense.[207] On 14 September 2001, the Senate and the House recognized this right and overwhelmingly passed a joint resolution authorizing the use of military force against those responsible for the September 11 attacks.[208] Hunting down and killing bin Laden or other members of the al Qaeda network would be in self-defense of future attacks, and not assassination. As Sofaer warned, however, the assassination ban is prone to overbroad application because "Americans have a distaste for . . . the intentional killing of specific individuals."[209] Americans, now forced to choose between their distaste of killing terrorists and their own personal safety, need to understand the difference between self-defense and assassi-

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205. Sofaer, *supra* note 24, at 113.

206. THE WHITE HOUSE, *supra* note 196, at 1.

207. The United States exercised the option to use force in its 20 August 1998 missile strike of Osama bin Laden's terrorist base in Afghanistan. *See infra* note 223 and accompanying text. The U.S. policy was reflected in the Clinton Administration's National Security Strategy:

> As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist or actively support them.

THE WHITE HOUSE, *supra* note 196, at 14.

The Bush Administration continued this theme. "The first and best way to secure America's homeland is to attack the enemy where he hides and plans, and we are doing just that." President George W. Bush, Radio Address (June 8, 2002).

208. H.J. Res. 64, 107th Cong. (2001).

209. Sofaer, *supra* note 24, at 117.

nation. Repealing misunderstood and unnecessary executive orders like the assassination ban would be a helpful beginning toward that end.

One critic argued that assassination creates the risk of retaliation, and that Americans would be adopting the tactics of barbarians and terrorists.[210] That may be true if the United States were in fact resorting to "assassination," but targeting a terrorist who has demonstrated the desire, the ability, and the intent to kill innocent civilians is not assassination. It can be no more barbaric to act in self-defense than it is barbaric to engage in war. The current administration understands its legal options as reflected by the airstrikes in Afghanistan following the 11 September attacks and the broader War on Terrorism.[211] But the next administration may not. And the next use of military force against terrorist supporters may not have the same public support as the current use of force against the Taliban and al Qaeda.[212] It is imperative that the United States retain *all* legal options available, regardless of the popularity of exercising those options. Repealing the assassination ban would force the focus to shift from an executive order to national and international law, where it belongs.

IX. Military Application

Until the assassination ban of EO 12,333 is repealed, the military practitioner will continue to face questions regarding the executive order and its application to military operations. As previously discussed, there are two applicable definitions of assassination, a wartime definition and a peacetime definition.[213] There are also two independent applications of international law that address a state's permissible conduct. The first, *jus ad bellum*, addresses a state's right to resort to force, while the second, *jus in bello*, addresses a state's conduct during war (that is, the law of war).[214]

The military practitioner should focus on this second area, the law of war. Likewise, the military practitioner will work with the wartime defi-

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210. *See* Johnson, *supra* note 23, at 434.

211. *See* Dan Balz, *U.S., Britain Launch Airstrikes At Taliban Sites in Afghanistan*, WASH. POST, Oct. 8, 2001, at A1.

212. The Taliban militia ruling most of Afghanistan was targeted because it supported bin Laden's terrorist organization. The Taliban refused to turn bin Laden over to the United States after the September 11 terrorist attacks. Secretary of Defense Donald H. Rumsfeld stated, "[The] objective is to defeat those who use terrorism and those who house or support [terrorists]." *Id.* at A6.

213. *See supra* notes 14-28 and accompanying text.

nition of assassination. Any operation involving the military will require, as a matter of policy, application of the law of war.[215] The law of war prohibits treacherous killing, and it requires application of the principles of military necessity, proportionality, humanity, and distinction in determining whether someone is a proper military objective.[216] Since any planned killing by the military will have to first consider this law of war analysis, a violation of the assassination ban cannot occur so long as the killing complies with the law of war. In other words, it is never an assassination if an individual is a lawful target and not treacherously killed. Therefore, when a military legal advisor is faced with the question of whether it is legal to kill a specific individual, the analysis should be made entirely from a law of war perspective.

In a pragmatic sense, EO 12,333 does not apply to the military.[217] Consider two examples, one during armed conflict, and one during peacetime, which illustrate this point. During the Gulf War, Saddam Hussein was the military leader of the Iraqi forces, and his position made him a combatant.[218] "[E]nemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack."[219] There-

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214. *See* DOCUMENTS ON THE LAWS OF WAR 1 (Adam Roberts & Richard Guelff eds., 3rd ed. 2000) (discussing *jus ad bellum* and *jus in bello*). While there may be overlap between *jus ad bellum* and *jus in bello*, the military practitioner's focus is *jus in bello*, the law that governs the actual conduct of war. *Jus in bello* applies in all situations of armed conflict whether or not there is a formally declared war. *Id.* at 2.

215. *See* DOD DIR. 5100.77, *supra* note 44 and accompanying text.

216. *See supra* note 37 (discussing the principle of military necessity). The principle of humanity (or unnecessary suffering) generally forbids causing unnecessary destruction of property or using weapons intended to cause unnecessary suffering; the principle of proportionality requires that the anticipated loss of life and property damage resulting from a military attack not be excessive when compared to the concrete and direct military advantage expected to be gained; the principle of distinction (or discrimination) is the requirement that combatants be distinguished from non-combatants, and military objectives be distinguished from protected property or places, so that military operations are directed only against combatants and military objectives. *See* JA-422, *supra* note 44, at 5-4, 5-5. *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 1-26 (1996) (providing a more in-depth discussion of the law of war principles).

217. Numerous writers make the argument that EO 12,333 effectively has no applicability during war. *See, e.g.*, Schmitt, *supra* note 14; Wingfield, *supra* note 194. Interestingly, the language of the statute proposed by the Church Committee in 1975 specifically excluded circumstances where the U.S. was involved in armed conflict. *See supra* note 78. Schmitt construes this exclusion by the Committee both as "an acknowledgment that the targeting of certain officials would not constitute assassination under the law of armed conflict, and as a desire to avoid unreasonably limiting valid military operations." Schmitt, *supra* note 14, at 660.

218. *See supra* note 137.

fore, during the war, killing Hussein, whether with a Tomahawk cruise missile or a single sniper's bullet, would only have been an assassination if it were accomplished by means of treachery.[220] As previously noted, treachery is a breach of confidence or a perfidious act, that is, an attack on an individual who justifiably believes he has nothing to fear from the attacker.[221] Attacks on combatants not engaged in the battle at the time of the attack are not considered treacherous.[222] As this example demonstrates, the entire legal analysis that would permit targeting Hussein is accomplished by application of the law of war; EO 12,333 never enters the analysis.

The 1998 cruise missile strike against Osama bin Laden's terrorist base camp in Afghanistan provides a peacetime example.[223] The decision to use military force in self-defense was made at the Executive's level.[224] Once the decision to use force had been made and the military became involved, the *jus ad bellum* was no longer an issue for the military legal advisor. It had become a situation where the law of war applied, and thus a law of war targeting analysis was used. The base camp was the operations and training center for a terrorist group.[225] Provided the base camp

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219. Parks, *supra* note 18, at 5.

220. As far as the means used to effectuate the killing, the law of war only requires that it be a lawful weapon. Parks stated that "the prohibition on assassination [does not] limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, a single shot by a sniper, a commando attack, or other, similar means." *Id.*

221. *See supra* notes 20, 32, 36 and accompanying text.

222. *Field Manual 27-10* provides that, although Article 23(b) of Hague IV has been construed as prohibiting assassination, it does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." FM 27-10, *supra* note 34, para. 31.

223. The Clinton Administration explained the strike as follows:

> On August 20, 1998, acting on convincing information from a variety of reliable sources that the network of radical groups affiliated with Osama bin Laden had planned, financed and carried out the bombings of our embassies in Nairobi and Dar es Salaam, and planned future attacks against Americans, the U.S. Armed Forces carried out strikes on one of the most active terrorist bases in the world. Located in Afghanistan, . . . the strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities, and demonstrated that no country can be a safe haven for terrorists.

THE WHITE HOUSE, *supra* note 196, at 14-15.

224. *Id.*

qualified as a lawful military target, and treachery was not employed, any death caused by the strike could not be an assassination.[226] This is true even if the United States had knowledge that bin Laden was present at the time of the strike.[227]

The reality of these situations to the military legal advisor is simple. Executive Order 12,333 prohibits assassination, but so does the law of war. If a military operation complies with the law of war, there is no need to be concerned with EO 12,333 and the plethora of contentious issues that accompany it.[228]

X. Conclusion

Repealing the assassination ban found in EO 12,333 would clarify an often-misunderstood issue. Repealing the ban would not make assassination legal; rather, it would eliminate the current confusion and misunderstanding EO 12,333 creates, and ensure that the United States has maximum flexibility in responding to contemporary foreign affairs issues.

Executive Order 12,333 prohibits assassination, yet fails to provide a definition of that term. At least on one occasion, it has prevented the United States from following legal policy that could have saved American lives. Why should U.S. executive agencies continue to struggle with establishing the boundaries of this controversial prohibition? A father tells his child not to touch, but without parameters—a clarification of the father's

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225. *Id.*

226. Professor Turner analogizes killing bin Laden to killing a criminal. "Every civilized society recognizes the moral imperative of instructing police sharpshooters to kill a gunman who is murdering hostages. This is law enforcement, not assassination." Robert F. Turner, *In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden*, USA TODAY, Oct. 26, 1998, at 17A.

227. Through a law of war analysis, bin Laden would be considered a lawful military target. Terrorists, like combatants, are lawful targets when they are the objects of self-defense. *See* THE WHITE HOUSE, *supra* note 196, at 14. As Turner stated, "[k]illing someone like bin Laden would be a legitimate act of self-defense under international law." Turner, *supra* note 226, at 17A.

228. Reisman and Baker intuitively observed that "[b]ecause of the difficulties of definition, legal analysis of the lawfulness of [assassination] is best resolved with a contextual reading of each case which relies on both political context and reference to the traditional doctrines governing the use of force: proportionality, necessity and discrimination concerning the target." W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 23 (1992), *quoted in* Schmitt, *supra* note 14, at 625.

intent, and an understanding of the context in which the "don't touch" rule applies—that child will be either pathetically restricted or frequently in violation. The child learns the father's intent through trial and error, discovering the parameters of the rule over time. In the case of the assassination ban, executive agents simply cannot afford to discover the parameters through a process of trial and error.[229]

Meanwhile, as administrative officials wrestle with the definition of assassination, those in the military need to focus on the basics: apply the law of war in all military operations, using the principles of necessity, proportionality, humanity, and distinction.[230] To ensure commanders receive sound legal advice, military legal advisors should ignore the confusion created by EO 12,333. Legal advisors must also understand law and policy, applying both to meet the needs of their clients most effectively.

Some may fear that repealing the executive order's assassination ban will send the wrong message to the public, a message that is construed to authorize assassination by those who fail to understand assassination law. The need for clarification and explanation of assassination law, however, still exists. Time can be wasted debating what is and what is not assassination every time a conflict arises, or the assassination ban of EO 12,333 can be repealed so the essential elements of assassination law can be clarified once and for all.

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229. As Schmitt pointed out, "[t]he failure of the executive order to outline exactly what it prohibits has set planners and operators adrift." Schmitt, *supra* note 14, at 679.

230. *See supra* note 216.

A DISH BEST NOT SERVED AT ALL: HOW FOREIGN MILITARY WAR CRIMES SUSPECTS LACK PROTECTION UNDER UNITED STATES AND INTERNATIONAL LAW

DAVID L. HERMAN[1]

I. Introduction

One precarious position in wartime is to be a captured soldier accused of war crimes by the victorious state. Having fallen into enemy hands, accused military war criminals face the prospect of trials for acts sometimes done in the haste and confusion of combat. Depending on the severity of their acts and the laws of the prosecuting state, the penalty may be death. Under these circumstances, it would be proper to afford those soldiers as much procedural protection as possible so that their fate does not become a preordained conclusion arising from what one U.S. Supreme Court Justice called "judicial lynchings" and "revengeful blood purges."[2]

The existing system of war-crimes prosecutions, with its emphasis on national-level trials, exposes these defendants to procedurally unfair trials. Although captured military personnel accused of war crimes would be protected by the Third Geneva Convention[3] like any other prisoners of war (POW), the Convention's articles prefer the use of military, not civil, courts to try war crimes. Moreover, foreign military defendants, at least in the United States, do not enjoy the same array of constitutional protections as civilian defendants. The U.S. Supreme Court has held that the protections of the Bill of Rights, particularly the right to due process, do not apply to nonresident aliens. This includes non-Americans who commit war crimes overseas.[4] Even the proposed International Criminal Court

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2. Homma v. Patterson, 327 U.S. 759, 760 (1946) (Murphy, J., dissenting). Justice Murphy's position on this case is discussed in detail *infra* Part II(F).

3. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

4. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

(ICC) would not protect the defendants, as its complementarity provisions would rely on national courts to handle most prosecutions.

Part II of this article describes the domestic war-crimes prosecution of one foreign soldier: the trial of Japanese General Masaharu Homma for his role in one of the more infamous war crimes of World War II, the deaths of thousands of American and Filipino prisoners of war (POWs) during the Bataan Death March. Homma's trial featured questionable procedural and evidentiary rules, which his victorious adversaries hastily had created and administered. The Supreme Court's approval of the U.S. Army's methods used to convict and condemn Homma led to his execution after trial.

Part III examines the sources of authority for prosecuting soldiers like Homma for war crimes such as the mistreatment of POWs. This part describes how the U.S. Constitution, supporting U.S. statutes, the Third Geneva Convention, and other international conventions on the rules of war provide a framework for defining and prosecuting war crimes.

Part IV examines the existing and proposed systems of U.S. and international law to show how the authority to prosecute would still be misused, and how Homma would have fared no better today. These systems include the Uniform Code of Military Justice (UCMJ), the procedural provisions of the Third Geneva Convention and Protocol I to the Geneva Conventions, and the ICC.

Part V reviews an example of the most effective war-crimes prosecution to date, the International Criminal Tribunal for the former Yugoslavia (ICTY), whose establishing statute provides primacy of jurisdiction over national courts. In conclusion, the article advocates that primacy must be included in all future international criminal tribunals to instill necessary procedural protections for foreign military war-crimes suspects. Such reform is required absent additional ratifications of Protocol I or amendments to the ICC statute.

II. Homma and the Bataan Death March

A. The Bataan Death March

Shortly after the attack on Pearl Harbor in December 1941, a Japanese army of 43,000 men, commanded by Lieutenant General Masaharu Homma, landed on Luzon, the largest of the islands comprising the Philip-

pines, then a U.S. commonwealth. This army moved south toward Manila, the Filipino capital.[5] The U.S. commander, General Douglas MacArthur, declared Manila an "open city"—one that was not to be defended or bombed—and soon abandoned it to the invaders. Meanwhile, most of the U.S. and Filipino soldiers retreated in January 1942 to the Bataan Peninsula.[6]

MacArthur incorrectly estimated that the Japanese force was larger than his own army, and he failed to realize that the amount of supplies previously stored on Bataan was insufficient to feed the Allied defenders.[7] As a result, MacArthur's troops starved and failed to launch any counteroffensives to beat back the Japanese.[8] President Franklin D. Roosevelt reassigned MacArthur to Australia in March, demoralizing the soldiers left behind to fight without their veteran commander.[9] On 9 April 1942, 76,000 Allied troops surrendered to the Japanese army after three months of heavy attacks, starvation rations, and epidemics of malaria, dysentery, and various diseases.[10]

Homma now needed to clear the peninsula of his captives so that his troops could use the area as a staging point to attack the Allied fortress on the nearby island of Corregidor.[11] Having anticipated the surrender of Bataan, Homma had previously ordered five staff officers to prepare a plan for evacuating the prisoners.[12] On 23 March 1942, two weeks before the surrender, the officers submitted their plan, which relied on an estimate of 40,000 prisoners. This was half the number of eventual Allied POWs.[13]

The evacuation plan called for the movement of the Allied troops, scattered across the peninsula, to the town of Balanga, where they would assemble and receive food.[14] Then the U.S. and Filipino prisoners would move thirty-one miles to San Fernando, where they would board trains and ride to another town twenty-five miles away. The prisoners were to finish

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5. STANLEY L. FALK, BATAAN: THE MARCH OF DEATH 27 (1962); LAWRENCE TAYLOR, A TRIAL OF GENERALS: HOMMA, YAMASHITA, MACARTHUR 52 (1981).

6. FALK, *supra* note 5, at 27-28; TAYLOR, *supra* note 5, at 64-65.

7. TAYLOR, *supra* note 5, at 65-66.

8. *Id*. at 66.

9. *Id*. at 76-79.

10. FALK, *supra* note 5, at 18-25.

11. *Id*. at 46.

12. *Id*. at 47.

13. *Id*. at 48, 58.

14. *Id*. at 48, 51.

with a nine-mile walk to Camp O'Donnell, a former military base that would serve as a converted POW camp.[15] The plan included several stops for food and medical treatment.[16] Most prisoners would go to San Fernando on foot because the Japanese had few vehicles, most of which the Allies had previously destroyed.[17] The Japanese evacuation plan generally conformed to the terms of the 1929 Geneva Convention for treatment of POWs.[18] Homma's order to carry out the evacuation plan specified that the Japanese troops were to treat all POWs "in a friendly way."[19]

The plan was doomed to failure for several reasons. It anticipated 40,000 relatively healthy and well-fed captives. The surrendering army, however, was twice as large, reduced to starvation rations, and so wracked with disease that, according to Colonel Harold W. Glattly, a U.S. Army doctor, they were "patients rather than prisoners."[20] The plan anticipated that Bataan would not fall until the end of April, and the food, medical services, and transportation would not have been ready until then.[21] Two senior officers shared responsibility for assembling and moving the prisoners, but they did not collaborate on the execution of the plan.[22] To make matters worse, the Japanese forces, which had been reinforced and now numbered 81,000 men, were chronically short of food and medical supplies for their own needs, let alone for those of their prisoners.[23]

Treatment of the Allied prisoners was inconsistent. Although some prisoners traveled in trucks or cars and suffered little, most were forced to march on foot and received little food, water, or medical aid.[24] Some groups received more food or time to rest; others received less.[25] Some guards treated their captives reasonably well, while others tortured the POWs or murdered them outright as punishment for surrender because the

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15. *Id.* at 53-54.
16. *Id.* at 52-53.
17. *Id.* at 53-54, 218.
18. *Id.* at 54; TAYLOR, *supra* note 5, at 93; *see* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932 [hereinafter 1929 POW Convention].
19. TAYLOR, *supra* note 5, at 93.
20. FALK, *supra* note 5, at 57-61, 213.
21. *Id.* at 61-62.
22. *Id.* at 56-57.
23. *Id.* at 62-66.
24. *Id.* at 221.
25. *Id.*

Japanese military code considered surrender dishonorable.[26] The only constant presence on the march was death: by the end of the evacuation in early May 1942, an estimated 5000 to 10,000 POWs had died.[27] Another 18,000 prisoners died in the first six weeks of imprisonment at Camp O'Donnell.[28]

In his analysis of the Bataan tragedy and the legal aftermath, *A Trial of Generals*, historian Lawrence Taylor ascribed the guards' atrocities to three factors, each of which counteracted Homma's specific directive to treat the POWs humanely.[29] First was the morale of the low-ranking Japanese soldiers. Having suffered almost as much as their enemies during the fighting, having seen many of their comrades die in battle, and having been trained to regard surrender as dishonorable, the Japanese soldiers sought revenge upon their now-helpless foes.[30] The second factor was a shortage of Japanese officers. There were not enough officers to supervise properly all aspects of the prisoner movement.[31] Because a company of infantrymen might be spread out to guard a mile-long file of captives, its commander could not supervise carefully; therefore, the captors attacked their captives with impunity.[32] The third factor was moral contamination of the Japanese junior officers. Several Japanese staff officers sent from Tokyo to assist Homma incited many of Homma's subordinate officers to treat the fighting as a racial war against the United States.[33] The junior Japanese officers' newly instilled racial hatred further ensured poor treatment of the Allied prisoners because Homma entrusted his junior officers with the actual supervision of the prisoners.[34]

Homma claimed that he was so preoccupied with the plans for the Corregidor assault that he had forgotten about the prisoners' treatment, believing that his officers were properly handling the matter. He allegedly did not learn of the death toll until after the war.[35] Even Major General Yoshikate Kawane, whom Homma assigned to direct the main portion of the prisoners' march from Balanga to Camp O'Donnell, neither knew of

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26. *Id.* at 221, 226-32.
27. *Id.* at 194, 198.
28. *Id.* at 199.
29. TAYLOR, *supra* note 5, at 96.
30. *Id.*
31. *Id.* at 96-97.
32. *Id.* at 97.
33. *Id.*
34. *See id*. at 98.
35. *Id.*

the atrocities nor their partial origin in the visiting staff officers' campaign of hatred.[36]

Shortly after the end of the march to Camp O'Donnell, Homma's troops attacked Corregidor. Corregidor's defenders and General Jonathan Wainwright, MacArthur's replacement as Allied commander, surrendered on 8 May 1942. The remaining Allied armies in the Philippines capitulated soon thereafter.[37] Homma was relieved of command the following month and returned to Japan, where he spent the rest of the war on reserve duty and later as Minister of Information.[38]

News of what came to be called the "Bataan Death March" reached the American public in January 1944, when the U.S. War Department released accounts from several survivors who had escaped from prison and reached Allied territory with the aid of Filipino guerrillas.[39] Secretary of State Cordell Hull, congressional leaders, and newspaper editors throughout the United States expressed outrage and shock at the atrocity, and vowed revenge for the dead prisoners.[40]

B. Proceedings Against Homma

Shortly after Japan's official surrender on 2 September 1945, U.S. Army officers took Homma to a POW camp near Tokyo, where he was questioned about his role on Bataan.[41] As part of a plan to curry favor with the Allied occupiers of Japan and General MacArthur, now the Supreme Commander of the Allied Powers, the Japanese government stripped Homma of his rank and decorations.[42] In December 1945, the U.S. Army transferred Homma to the Philippines and placed him in another prison camp near Manila, where questioning continued.[43]

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36. *Id.* at 92-93, 98.
37. *Id.* at 99.
38. *Id.* at 100, 140.
39. FALK, *supra* note 5, at 205-08.
40. *Id.* at 208-10.
41. TAYLOR, *supra* note 5, at 140, 168.
42. *Id.* at 169.
43. *Id.* at 170.

A U.S. military commission arraigned Homma on 19 December 1945 for forty-seven specifications of the charge of violating the laws of war.[44] Most of the specifications concerned mistreatment of POWs on the Death March and in the prison camps afterward, while other specifications alleged the bombing of Manila in violation of the open-city declaration.[45] The commission also charged Homma with refusing to give quarter to—that is, to accept the surrender of—the Allied forces on Corregidor in May 1942.[46] Homma pleaded not guilty after the commission denied a request by Homma's chief counsel, Major John Skeen, for more details about the specifications.[47] The defense also requested a one month continuance for investigation, on the ground that three-fourths of the possible defense witnesses were in China, Japan, or Korea.[48] The prosecution stated that it would be ready for trial in two weeks, but would not oppose "any reasonable request for delay" because the defense needed time for preparation.[49] Nevertheless, the commission's presiding judge, Major General Leo Donovan, announced that the proceedings would resume on 3 January 1946, two weeks after the arraignment.[50]

To defend against these allegations, Homma would have the services of an all-military defense team, which had been chosen by the U.S. Army shortly before the arraignment and fewer than four weeks before the start of trial. Only one of the five Army officers assigned to defend him was from the Army Judge Advocate General's (JAG) office, although all of the defense officers were attorneys.[51] In contrast to the haphazard forming of the defense team, MacArthur had chosen an experienced staff of prosecu-

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44. John F. Hanson, The Trial of Lieutenant General Masaharu Homma 103 (1977) (unpublished Ph.D. dissertation, Mississippi State University) (on file with the University of California, San Diego); TAYLOR, *supra* note 5, at 171-72. The terms "military commission" and "military tribunal" are often used interchangeably, but this article uses the slightly more specific term, "military commission." *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, para. 2(b) (2000) [hereinafter MCM].

45. PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 63 (1979); TAYLOR, *supra* note 5, at 171-72, 175.

46. HANSON, *supra* note 44, at 48.

47. TAYLOR, *supra* note 5, at 172.

48. HANSON, *supra* note 44, at 104.

49. *Id.*

50. *Id.* at 101, 104.

51. TAYLOR, *supra* note 5, at 170-71 (listing Captain George Ott as Homma's lone JAG counsel).

tors, who had already spent several months gathering evidence against Homma.[52]

To make Homma's plight more desperate, his former military adversary, MacArthur, had authority as Supreme Commander of the Allied Powers (SCAP) to order his trial by a military commission.[53] MacArthur also had the authority to draft the criminal procedures and evidentiary rules for the war-crimes trials in the Philippines.[54] Issued on 5 December 1945, the SCAP procedural and evidentiary rules provoked great controversy.[55]

The SCAP procedural and evidentiary rules allowed courts to admit evidence that had objectively probative value.[56] The rules were to be used to ensure a speedy trial;[57] arguably, the rules were not meant to ensure full protection for defendants like Homma because there was no mention of prejudicial potential as a basis for excluding proffered evidence.[58] The military commission could admit documents without proof of signature or issuance if they appeared to have been signed or issued by any government agency or official.[59] The commission could also admit documents that appeared to have been signed or issued by the Red Cross, doctors, investigators, and intelligence officers.[60] Other admissible documents included affidavits, depositions, diaries, letters, and secondary evidence, provided the probative-value threshold was met.[61] The U.S. military commissions operating under the SCAP regulations thus permitted the use of virtually all evidence, including sworn or unsworn statements and hearsay.[62] Lawrence Taylor summarized the SCAP regulations by stating, "In essence, MacArthur's rules and procedures were simple—anything goes."[63]

In addition to choosing the rules and procedures, MacArthur had selected all five members of the military commission.[64] Three of the five

52. *Id.* at 170.
53. *Id.* at 129-31.
54. HANSON, *supra* note 44, at 100-01.
55. *Id.* at 101.
56. *Id.* at 110; PICCIGALLO, *supra* note 45, at 38.
57. PICCIGALLO, *supra* note 45, at 38.
58. HANSON, *supra* note 44, at 110; TAYLOR, *supra* note 5, at 137.
59. HANSON, *supra* note 44, at 109.
60. *Id.*
61. *Id.* at 110.
62. PICCIGALLO, *supra* note 45, at 38.
63. TAYLOR, *supra* note 5, at 137.
64. HANSON, *supra* note 44, at 100-01; TAYLOR, *supra* note 5, at 171.

generals who formed the commission had fought the Japanese during the war, and could have been challenged for conflict of interest.[65] The presiding judge, General Leo Donovan, was not a JAG officer.[66] General Donovan had recently presided over the military commission that had tried, convicted and condemned General Tomoyuki Yamashita, Homma's successor as Japanese commander in the Philippines.[67] All of the judges were career officers, probably loath to antagonize a general as powerful as MacArthur, and MacArthur commanded the prosecutors and defense attorneys through his other title, Commander of United States Army Forces, Pacific (AFPAC).[68] MacArthur also reviewed all appeals from convictions decided by those officers.[69]

Finally, MacArthur had the authority to "approve, mitigate, remit in whole or in part, commute, suspend, reduce or otherwise alter the sentence imposed, or remand the case for rehearing before a new commission."[70] The effect of this sentence-review power allowed MacArthur to ignore almost completely the commission's decision, if he did not like its verdict.[71] In short, MacArthur had near-total control over the entire course of the trial. Since MacArthur had also fought against Homma and lost, the issue of prejudice and conflict of interest was predominant for the defense.

On 3 January 1946, the commission reconvened, and the defendant introduced a motion to dismiss.[72] The motion alleged violations of Homma's due-process rights through the creation and application of the SCAP Rules of Procedure and Evidence, particularly the use of hearsay and lack of authentication of documents.[73] The motion also attacked the self-interest of General MacArthur in convening the commission because MacArthur had: commanded the army defeated by Homma in 1942, from which the Death March originated; commanded all of the officers participating in the trial; and possessed the authority to decide whether to carry out any death sentence imposed on Homma.[74] Lastly, the defense attacked

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65. HANSON, *supra* note 44, at 101, 201.

66. *Id.* at 101-02.

67. *Id.* at 98, 101; TAYLOR, *supra* note 5, at 171.

68. HANSON, *supra* note 44, at 101 (describing MacArthur's multiple titles); TAYLOR, *supra* note 5, at 137.

69. TAYLOR, *supra* note 5, at 138.

70. *Id.* at 171.

71. *Id.*

72. HANSON, *supra* note 44, at 105.

73. *Id.* at 109-10.

74. *Id.* at 111.

the list of specifications as too vague and indefinite. The list failed to charge an offense against the laws of war with the circumstances of particular crimes, the motion concluded, and it failed to state instances of Homma's disregard or failure to discharge his duties as the commanding general.[75]

The commission denied the defense motion without stating the reasons for its ruling.[76] On the same day, the commission also overruled another defense motion for a bill of particulars and dismissal of several vague specifications.[77] The commission then denied another defense request for a ten-day continuance to conduct investigation.[78]

C. Trial

The prosecution's case against Homma was simple: Japanese troops had committed widespread atrocities in the Philippines while Homma commanded them; Homma should have been aware of those crimes.[79] Upon a defense request sustained by General Donovan, the prosecution explained which specification would be covered through each witness's testimony.[80] Between 3 January and 21 January, the prosecution called 136 witnesses to testify to the violation of the open-city status of Manila, the executions of civilians, and the mistreatment of POWs during the Death March and in the prison camps.[81] The commission accepted over 300 prosecution exhibits, most of which were affidavits admitted over a continuous defense objection to admission of hearsay.[82] Although the commission did eliminate many documents as repetitious or immaterial,[83] it generally rejected documents as hearsay only when witnesses could testify about the matters contained in those documents,[84] and it allowed hearsay testimony on several occasions.[85] Also, the commission allowed the transcript of an earlier war-crimes trial into evidence against Homma,

75. *Id.* at 111-12.
76. *Id.* at 114.
77. *Id.* at 114-18.
78. *Id.* at 118-20.
79. *Id.* at 123.
80. *Id.*
81. *See id*. at 124-38.
82. *Id.* at 130, 134.
83. *Id.* at 131.
84. *Id.* at 132.
85. *Id.* at 133.

under a rule allowing prior trials' verdicts if the prior and subsequent trials' accused served in the same unit.[86]

The prosecution's case was noteworthy for the absence of Homma's physical presence during the atrocities and sufferings of the Bataan Death March. During the days of testimony on the horrific events at Bataan, Camp O'Donnell, and elsewhere, Homma's name was infrequently mentioned. Some witnesses claimed to know of visits by Homma, but did not actually see him.[87] The eyewitness testimony did not indicate that unusual events occurred when Homma was present.[88] Not one witness mentioned Homma in connection with any particular atrocity.[89] The commission struck several statements about Homma from the record,[90] but those would not be needed to prove the prosecution's case. The prosecution seemed content to parade tales of "the horrifying nature of the isolated instances of brutality."[91] It was the prosecution's position that Homma did nothing to stop his soldiers; therefore, he was responsible for the soldiers' crimes.[92]

On 21 January 1946, the defense presented several motions requesting findings of not guilty, for want of sufficient evidence, on thirteen of the specifications.[93] The thirteen specifications included charges of mistreating POWs and civilians, the open-city charges, and the charge of denying quarter to the Corregidor defenders.[94] After argument by the prosecution, the commission ruled that the specifications regarding the open-city status of Manila and the refusal to grant quarter at Corregidor, along with one specification regarding mistreatment of sick Allied soldiers, would remain.[95] The commission granted the motion to dismiss on the other specifications attacked by the defense.[96] Next, the commission heard

86. *Id.* at 211-12.
87. *Id.* at 135.
88. *See id.* at 135-36.
89. TAYLOR, *supra* note 5, at 177.
90. HANSON, *supra* note 44, at 136.
91. TAYLOR, *supra* note 5, at 177.
92. *Id.*
93. HANSON, *supra* note 44, at 138-42.
94. *Id.*
95. *Id.* at 142-43.
96. *Id.* at 143-44.

another defense request for a ten-day continuance, but granted only seven days.[97]

The defense's case was presented from 28 January to 7 February 1946. The defense sought to establish that Homma had neither ordered nor allowed atrocities to occur—indeed, that Homma never knew of the atrocities at all.[98] Homma had not been able to discipline his army, the defense suggested, because the visiting staff officers interfered by criticizing Homma to his subordinates.[99] Homma argued that the difficulties of the Bataan/Corregidor campaign forced him to rely on others so that he could handle the myriad difficulties of defeating the Allies, treating and supplying his troops, and caring for Filipino civilians.[100]

The first few defense witnesses, who had served on Homma's staff, testified to a lack of knowledge about conditions in the POW and civilian-internment camps.[101] Homma himself then testified that the Japanese Army's command structure did not allow him to appoint his own staff officers, and that he lacked authority to supervise the military police personnel who had committed executions of civilians.[102] Homma also testified that he had tried to maintain discipline through courts-martial, and denied that he had ordered the bombing of Manila in violation of the open-city declaration.[103] When questioned about the treatment of POWs, Homma said that his subordinates' reports made him confident that conditions were improving.[104] He said that he had not learned about the mistreatment of the POWs until he received notice of the charges against him.[105] Homma said that he considered the treatment of POWs to be an important matter, he explained that illness and his sudden recall to Tokyo had prevented him from inspecting the POW camps, and he denied that he had command of the Japanese Navy bombers used against Manila or of the military secret police who tortured civilians and POWs.[106] Several other witnesses testified that the poor condition of the POWs at Camp O'Don-

97. *Id.* at 144.
98. *Id.* at 147-48, 164.
99. *Id.* at 147.
100. *Id*. at 148.
101. *Id*. at 150.
102. *Id*. at 151.
103. *Id.*
104. *Id*. at 152.
105. *Id.* at 152-53.
106. *Id*. at 154-55.

nell and during the Death March was due to disease, not to Japanese brutality.[107]

The commission treated the defense evidence much as it had the prosecution evidence. The defense, as had the prosecution, elicited witnesses' opinions, and the commission occasionally allowed hearsay evidence that favored the defense.[108] The commission admitted all but one of the twenty-five exhibits that the defense offered.[109] Also, the commission allowed character testimony and affidavits attesting to Homma's humanity and kindness toward Filipinos and to his pro-British leanings.[110]

With the close of the defense presentation, both sides made closing arguments on 9 February 1946.[111] The commission then adjourned the proceedings until 11 February 1946, when it announced its verdict: guilty of the first charge of violating the laws of war by failing to discharge his duties as a commanding officer and thus allowing his troops to commit atrocities, but not guilty of the second charge of refusing to grant quarter to the Corregidor defenders.[112] The commission then sentenced Homma "to be shot to death with musketry."[113]

Before the commission's decision, Homma's attorneys prepared to attack the proceedings through appellate review. On 16 January 1946, the defense team filed a motion with the Supreme Court of the Philippines, but that court denied the motion one week later without argument or opinion.[114] Homma's attorneys then prepared to file a motion for leave to file a petition for writs of habeas corpus and prohibition with the U.S. Supreme Court, and also prepared a petition for writ of certiorari.[115] Before they

107. *Id.* at 157-58.
108. *Id*. at 161.
109. *Id*. at 163.
110. *Id.* at 164; TAYLOR, *supra* note 5, at 189-92 (describing character testimony by Homma's wife, Fujiko).
111. HANSON, *supra* note 44, at 165-84.
112. *Id.* at 57, 185.
113. *Id*. at 185.
114. *Id*. at 186.
115. *Id*.

could file, however, the Court issued its landmark decision of *In re Yamashita*.[116]

D. *Yamashita*

Yamashita's trial had begun shortly before Homma's trial. It also featured the use of vague specifications of war crimes committed by subordinates, heavy use of affidavits and hearsay evidence, many hours of testimony to murders and other atrocities, the absence of direct culpability on the part of the commander, and the use of negligence as the standard for the liability of commanders.[117] Following his conviction and announcement of a death sentence, Yamashita filed two petitions for writ of habeas corpus.[118]

The Court rejected Yamashita's petitions by a six-to-two vote, with Justice Jackson not participating.[119] After first finding that the military commission that tried Yamashita was properly constituted,[120] the Court then ruled that international law, as exemplified by the Annex to the Fourth Hague Convention of 1907 and the Geneva Red Cross Convention of 1929,[121] required Yamashita to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[122] The charge alleged that Yamashita had a duty to control his troops, and that he had breached that duty by failing to exercise control. According to the Court, that was enough to state a violation of the law of war; therefore, the commission could properly find Yamashita

116. 327 U.S. 1 (1946).

117. HANSON, *supra* note 44, at 98 (describing the *Yamashita* commission's acceptance of affidavits and hearsay); PICCIGALLO, *supra* note 45, at 51-52 (use of graphic testimony and negligence standard); TAYLOR, *supra* note 5, at 158-59 (absence of Yamashita's personal involvement, use of affidavits, hearsay and "parading victims of authorities"). *See generally* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

118. *Yamashita*, 327 U.S. at 4-5.

119. *Id*. at 26.

120. *Id.* at 9-13.

121. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 2 Bevans 965, *superseded by* Convention for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

122. *Yamashita*, 327 U.S. at 16.

guilty of that violation.[123] The Court's holding thus rested on the doctrine of command responsibility: that commanders have a duty to control their troops, that commanders should know what their troops are doing, and that commanders are liable for their troops' crimes regardless of whether the commanders knew of or ordered those crimes.

Having analyzed the issue of liability, the Court then examined other issues. It ruled that the charges against Yamashita did not have to "be stated with the precision of a common law indictment," and that the charges alleged both a violation of the law of war and the commission's authority to try and decide whether a violation had occurred.[124] Moreover, the Court wrote, the commission had admitted affidavits and hearsay testimony properly, even though that might have conflicted with standard U.S. military trial procedures, because those procedures did not protect foreign soldiers tried by military commissions for war crimes.[125]

The Court then turned to the applicability of the 1929 POW Convention. Article 63 of the Convention specified that a sentence "may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[126] Article 60, meanwhile, required the United States to notify the protecting power of Japanese POWs—in this case, Switzerland—of the trial.[127] Neither provision protected Yamashita, the Court held, because both applied only to acts committed during captivity, not to acts committed before capture.[128] Therefore, Yamashita had no protection under the 1929 POW Convention, even though the Court had admitted that he now was a POW and would be entitled to the same protections as any other POW.[129]

Justices Frank Murphy and Wiley Rutledge strongly dissented.[130] Murphy contended that the commission deprived Yamashita of due process entitled him as a defendant in a criminal proceeding under American jurisdiction, by rushing him to trial "under an improper charge," giving inadequate time for a defense, depriving him of evidentiary protections,

123. *Id*. at 17 n.4.
124. *Id*. at 17-18.
125. *Id.* at 18-20.
126. 1929 POW Convention, *supra* note 18, art. 63, 47 Stat. at 2021, 2052.
127. *Id*. art. 60, 47 Stat. at 2051.
128. *Yamashita*, 327 U.S. at 20-24.
129. *Id.* at 21.
130. *See id.* at 26 (Murphy, J., dissenting), 41 (Rutledge, J., dissenting).

and summarily condemning him.[131] Murphy alleged that "there was no serious attempt to charge or to prove that [Yamashita] committed a recognized violation of the laws of war" or that Yamashita had participated, condoned, or even known about the atrocities committed by his troops.[132] Murphy wrote that the chaos arising from the U.S. landings in the Philippines made effective command and discipline virtually impossible, and that this negated the charge that Yamashita had violated the rules of war by failing to control his troops.[133] International law was silent, Murphy mentioned, as to the liability of the commander of a defeated and disorganized army.[134] Murphy concluded that Yamashita's "rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification."[135]

Justice Rutledge focused his dissent on the commission's formation, its procedural and evidentiary rules, and the actual course of the trial, which constituted "deviations from the fundamental law" of the Constitution and supporting statutes and treaties, particularly the Due Process Clause of the Fifth Amendment.[136] Rutledge said that the commission had accorded to Yamashita only one "basic protection of our system"—representation "by able counsel" whose "difficult assignment has been done with extraordinary fidelity" in spite of the obstacles flung in their path by the commission and the operating rules.[137] Rutledge further objected to the commission's rulings that admitted virtually all evidence presented,[138] to the commission's rejection of the defense's evidentiary objections,[139] to the absence of proof of Yamashita's personal participation or ordering of atrocities,[140] and to the commission's vague findings.[141] Rutledge then deplored the commission's reliance on affidavits and its refusal to grant continuances to the defense.[142] Rutledge also argued that the proceedings violated the existing procedures of both the Articles of War—the U.S.

131. *Id.* at 27-28 (Murphy, J., dissenting).
132. *Id*. at 28.
133. *See id*. at 31-40.
134. *See id*. at 35-40.
135. *Id.* at 40.
136. *Id.* at 45, 78-81 (Rutledge, J., dissenting).
137. *Id*.
138. *Id*. at 48-50.
139. *Id*. at 49.
140. *Id*. at 50.
141. *Id.* at 50-54.
142. *Id*. at 54-60.

Army's legal code, created by Congress—and the 1929 POW Convention.[143]

E. Effect of *Yamashita* on Homma

The aspect of *Yamashita* most harmful to Homma's defense was the holding of the Supreme Court regarding command responsibility. The commission had condemned Yamashita for failing to prevent or halt his soldiers from mercilessly abusing and killing Filipino civilians and Allied POWs, even though he had never ordered such action to occur. The Court had affirmed Yamashita's conviction on this theory. Homma's position was more sympathetic; he had approved a plan that, on paper, conformed to the 1929 POW Convention.[144] Moreover, Homma had ordered his men to treat the captives humanely.[145] Nevertheless, Homma was the commanding general, and the command-responsibility doctrine of *Yamashita* allowed guilt by omission for commanders.[146] As Taylor described Homma's trial, "The point was simple—the atrocities had taken place, and Homma was the commanding officer."[147] Therefore, Homma was guilty of his soldiers' crimes.

F. Homma's Petition Before the U.S. Supreme Court

In the wake of *Yamashita*, Homma's motion for leave to file a petition for writ of habeas corpus and his petition for certiorari were both doomed before they even reached the Court. The Court received the motion and petition on 7 February 1946, and denied both in a *per curiam* decision on 11 February 1946, "on authority of" *Yamashita*.[148] Once again, Justices Murphy and Rutledge dissented.

Justice Murphy began with a stinging rebuke to the Court's reasoning and to the Army authorities:

> This nation's very honor . . . is at stake. Either we conduct a trial such as this in the noble spirit and atmosphere of our Constitu-

143. *See id*. at 61-78.
144. *See* 1929 POW Convention, *supra* note 18.
145. TAYLOR, *supra* note 5, at 93.
146. *Id.* at 98-99, 174, 187.
147. *Id*. at 187.
148. Homma v. Patterson, 327 U.S. 759 (1946) (per curiam).

> tion or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence.[149]

Justice Murphy then criticized the "undue haste" of the trial, and noted that the SCAP procedures amounted to approval of unconstitutional actions because they allowed coerced confessions and the use of evidence and findings of prior mass trials as proof of guilt.[150] In conclusion, Justice Murphy foretold a grim future for such precedent:

> Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here may be turned against others. A procession of judicial lynchings without due process of law may now follow.[151]

Justice Rutledge dissented on the same grounds as he had in *Yamashita*.[152] Exploring the relevant evidentiary procedures and trial chronology used against Homma, Justice Rutledge attacked the Court for its unprecedented decision to permit

> trial for a capital offense under a binding procedure which allows forced confessions to be received in evidence; makes proof in prior trials of groups for mass offenses "*prima facie* evidence that the accused likewise is guilty of that offense"; and requires that the findings and judgment in such a mass trial "be given full faith and credit" in any subsequent trial of an individual person charged as a member of the group.[153]

Homma had received fifteen days between his arraignment and the beginning of trial to prepare a defense, while Yamashita had received three weeks, and Homma's motions for continuances were denied.[154] Such questionable evidence and rapid haste only served "in my judgment [to] vitiate the entire proceeding," Justice Rutledge wrote. "I think the motion

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149. *Id.* at 759 (Murphy, J., dissenting).
150. *Id*. at 760.
151. *Id*.
152. *Id*. at 761 (Rutledge, J., dissenting).
153. *Id*. at 761-62 (internal citations omitted).
154. *Id*. at 762.

and petition respectively should be granted and determined on the merits."[155]

G. Homma's Execution

Following the Court's decision, Homma appealed for clemency.[156] MacArthur refused,[157] and issued a press release on 21 March 1946, which read in part: "If this defendant does not deserve his judicial fate, none in jurisdictional history ever did."[158] On 3 April 1946, Homma was executed by a firing squad.[159]

III. The Source of the Power to Punish

A. Constitutional Provisions

The power of Congress to prosecute foreign military war criminals derives from two sections of the Constitution. The first is the power to define and punish "[o]ffences against the Law of Nations."[160] This section enables Congress to ratify treaties and international conventions defining war crimes, to create statutes defining war crimes, and to create national-level tribunals and support international-level tribunals to prosecute those crimes.[161] The second is the power to "make Rules for the Government and Regulation of the land and naval Forces."[162] Such rules include carrying out the dictates of the Third Geneva Convention and other international agreements on the conduct of war to which the United States is a party, as well as establishing systems of military justice, such as the present UCMJ, that may be used to prosecute foreign military personnel accused of war crimes.[163]

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155. *Id*. at 762-63.
156. TAYLOR, *supra* note 5, at 217-18.
157. *Id.* at 219.
158. HANSON, *supra* note 44, at 198.
159. *Id*.
160. U.S. CONST. art. I, § 8, cl. 10.
161. *See Ex parte* Quirin, 317 U.S. 1, 26, 29-30 (1942).
162. U.S. CONST. art. I, § 8, cl. 14.
163. 10 U.S.C. §§ 801-946 (2001); *see also Quirin*, 317 U.S. at 26-27.

B. International Law and Universal Jurisdiction

Another source of national-level punishment power is found in international law. Generally, jurisdiction over foreign war criminals can be obtained through "universal jurisdiction," which allows individual nations "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . war crimes."[164] United States courts can prosecute international offenses when codified in U.S. law through approval of treaties and, for non-self-executing treaties, passage of implementing legislation.[165] Also, Congress may define international crimes under its Article I power "to define and punish" by reference to international law. An example of this was the enactment of a law allowing U.S. military commissions to adjudicate prosecutions for violations of the laws of war as defined by international agreements, treatises, and other nations' laws.[166]

The four Geneva Conventions of 1949 require the use of national prosecutions for serious war crimes, or "grave breaches," committed against persons protected under those conventions.[167] For example, Article 129 of the Third Geneva Convention states that each signatory nation "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts," but must give accused persons a minimum standard of procedural protection at trial.[168] Thus, the jurisdiction for prosecution of war criminals, at

164. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF OHE UNITED STATES § 404 (1986) [hereinafter RESTATEMENT].

165. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (no federal common-law crimes); RESTATEMENT, *supra* note 164, § 422.

166. *Quirin*, 317 U.S. at 29-31, 35-36. *See generally* U.S. CONST. art. I, § 8, cl. 10.

167. Convention for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for Amelioration of the Condition of Wounded Sick and Shipwrecked of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 3, 6 U.S.T. at 3418, 3420; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3516, 3518, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

168. Third Geneva Convention, *supra* note 3, art. 129, 6 U.S.T. at 3418.

least with regard to the serious mistreatment of war victims, relies on international law.

In addition, international law generally requires national prosecution of war crimes. Therefore, national-level tribunals would be the benchmark for prosecutions of foreign military personnel accused of violating the Geneva Conventions. Although Article 129 of the Third Convention and the analogous articles of the First, Second, and Fourth Conventions are not self-executing, nothing in the other articles requires action, other than the Conventions' ratification by the United States, for those articles to take effect.[169] Congress put these articles into effect in 1996 through its passage of the War Crimes Act,[170] which defined "grave breaches" of any of the four Geneva Conventions of 1949 as war crimes, punishable by a prison term or a death sentence.[171]

IV. The Failings of Current and Proposed Systems of War-Crimes Prosecutions

A. The Bill of Rights: No Help from the Founding Fathers

1. Inapplicability of Bill of Rights to Nonresident Aliens

The casual observer of U.S. criminal prosecutions might ask: Why not give the accused foreign defendants the same rights as anyone else charged with a crime? One might think that the Constitution would protect all defendants tried by U.S. courts. Yet this is not the case. Since World War II, the Supreme Court has issued a variety of rulings that withhold the procedural and evidentiary protections of the Bill of Rights from nonresident alien defendants, both in wartime and in peacetime. Because of these restrictions, U.S. courts would not provide full protections for foreign military personnel who commit grave breaches of the Geneva Conventions. This article previously discussed *Yamashita*, one of the four major cases involving nonresident alien defendants.[172] This section focuses on the

169. United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (reviewing whether Third Geneva Convention was self-executing, which would allow a lawsuit by deposed Panamanian general for breaches resulting from confinement in U.S. prison for felony convictions).

170. War Crimes Act of 1996, Pub. L. No. 104-192, § 2(a), 110 Stat. 2104 (1996) (prior to 1997 amendment).

171. 18 U.S.C. § 2241(a), (c)(1) (2001).

172. *See supra* Part II. D.

other three cases: *Ex parte Quirin*,[173] *Johnson v. Eisentrager*,[174] and *United States v. Verdugo-Urquidez*.[175]

a. Quirin

Quirin,[176] the first case, began in June 1942 when eight German spies were arrested shortly after landing from submarines in New York and Florida with a mission to attack U.S. war industries.[177] The Federal Bureau of Investigation transferred the Germans to the military authorities for trial before a military commission.[178] Between arrest and trial, President Franklin D. Roosevelt had issued an executive order and proclamation denying access to civilian courts and requiring military commissions for the trial of captured spies. The order was based on Article 38 of the Articles of War, which allowed the President to prescribe the procedures for military commissions.[179] The order made spies subject to the rules of war, including the Articles of War.[180] Moreover, it provided, "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."[181]

President Roosevelt issued the order even though the regular state and federal courts in the eastern United States remained open throughout this period.[182] While the military trial progressed, the German prisoners applied to the federal district court for the District of Columbia for leave to file a petition for writ of habeas corpus. When the district court denied

173. 317 U.S. 1 (1942).

174. 339 U.S. 763 (1950).

175. 494 U.S. 259 (1990).

176. 317 U.S. 1 (1942).

177. *Id*. at 21.

178. *Id*. at 23; *see also* Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 854 n.10 (1999) ("In American practice a military commission was a military tribunal for the trial of persons who are not members of the armed forces of the United States . . . . A commission did not provide all the evidentiary and procedural rights accorded in a court-martial by the Articles of War.").

179. *Quirin*, 317 U.S. at 22-23, 27; CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER-IN-CHIEF 112-15 (2d ed. 1976) (describing President Roosevelt's role in *Quirin*).

180. *Quirin*, 317 U.S. at 22-23.

181. 7 Fed. Reg. 5,103 (July 2, 1942); *see also* Wallach, *supra* note 178, at 854 (noting how military commission's rules of procedure and evidence in *Quirin* served as an exemplar for Allied postwar tribunals, including Nuremberg).

182. *Quirin*, 317 U.S. at 23, 24.

the motions, the Germans petitioned the Supreme Court for leave to file petitions for habeas corpus.[183] The Court issued a *per curiam* decision denying their request.[184] It released a full opinion three months later, after the conviction of all eight Germans and the execution of six of them.[185]

Writing for the unanimous Court, Chief Justice Harlan Fiske Stone began the opinion by reviewing the constitutional powers of Congress and the President to wage war, to regulate the armed forces, and to define and punish international crimes and war crimes.[186] Congress enacted the Articles of War to provide "rules for the government of the Army," he wrote, including the formation of special military commissions whose procedures would be prescribed by the President.[187] The President could exercise such powers of establishing military commissions and their corresponding procedures under his constitutional authority as Commander-in-Chief.[188]

The Articles of War allowed for the trial of persons who were subject to military law under the law of war.[189] The law of war defined offenses that military commissions could prosecute, such as espionage, sabotage, and other acts committed by "unlawful combatants."[190] Such unlawful combatants had no status as POWs, who were to be detained but not tried.[191] Because the captured Germans had entered the United States to spy and commit sabotage, the Court wrote, they fell squarely within the law of war concerning the definition and punishment of unlawful combatants.[192]

Chief Justice Stone then addressed the petitioners' contention that they were entitled to an indictment by a grand jury under the Fifth Amendment and to a trial by a civil jury under Article III, section 2, of the Constitution and the Sixth Amendment.[193] He began by noting that the Court had held earlier that the Fifth[194] and Sixth Amendments did not extend to

183. *Id.* at 48.
184. *Id.*
185. *Id.*; ROSSITER, *supra* note 179, at 114.
186. *Quirin*, 317 U.S. at 25, 26.
187. *Id*. at 26-28.
188. *Id*. at 28.
189. *Id.* at 27.
190. *Id*. at 28-29, 31.
191. *Id*. at 31.
192. *Id*. at 36, 37.
193. *Id*. at 38, 39.

cases "arising in the land or naval forces," that is, those cases involving members of the armed forces.[195] He then rejected the petitioners' assertion that an exception would afford such protections to enemy belligerents tried by military commission.[196] Article III did not apply, moreover, because military commissions "are not courts in the sense of the Judiciary Article."[197] Therefore, although the Germans were not members of the U.S. armed forces, the Fifth and Sixth Amendments would not be extended to them.[198] To rule otherwise would mean that enemy aliens would have the right to civil jury trials for violations of the law of war otherwise tried by military commissions, while military personnel would remain deprived of that right.[199] Thus, the Court held, the military commission could try the Germans for violating the law of war through their plans to spy and sabotage.[200]

b. Johnson v. Eisentrager

Later war-crimes trials further restricted the rights of foreign war-crimes suspects. In *Johnson v. Eisentrager*,[201] the Court analyzed a petition for writ of habeas corpus filed by a group of German defendants whom a U.S. military commission in China had convicted of "violating the laws of war" by committing espionage after the surrender of Germany, but before the surrender of Japan.[202] The defendants claimed, *inter alia*, that their trial violated the Fifth Amendment.[203]

Justice Jackson, writing for a majority of six justices, stated, "We are cited to no instance where a court, in this or any other country where [habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its ter-

194. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .").

195. *Quirin*, 317 U.S. at 40 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138-39 (1866)).

196. *Id.* at 40-41.

197. *Id.* at 39.

198. *Id*. at 44.

199. *Id*.

200. *Id.* at 46.

201. 339 U.S. 763 (1950).

202. *Id.* at 765-66.

203. *Id*. at 767.

ritorial jurisdiction."[204] Aliens received a "generous and ascending scale of rights" as they increased their contacts with the United States.[205] Still, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[206] Upon the commencement of war, Jackson maintained, the alien of a nation-state at war with the United States became subject to disabilities "imposed temporarily as an incident of war and not as an incident of alienage."[207]

The Court cited its adoption of the common-law rule barring resident enemy-state aliens from maintaining actions in the resident nation-state's courts during wartime, and explained that resident aliens had only a privilege of litigation, and not a right of litigation, through their presence in the United States.[208] Because the defendants at bar were not within U.S. territory at any relevant time, and because they had been arrested, tried, and convicted in a foreign land for acts committed on foreign soil, they did not enjoy a privilege to litigate.[209] The Court further wrote that to require protections for nonresident enemy aliens before U.S. courts, particularly in wartime, would "hamper the war effort" by diverting resources to supervise and care for aliens before and during hearings on petitions for habeas corpus.[210] Since the writ of habeas corpus was generally unknown outside of the English-speaking common-law nations, Jackson added, U.S. citizens seeking relief from enemy nations' military-judicial action could not expect to invoke such a writ.[211]

Next, Justice Jackson analyzed the possible application of *Quirin* and *Yamashita*. He distinguished *Quirin* on the grounds that the petitioners there were already present in the United States when arrested by civil authorities, were held in custody in the United States, and were tried in the United States under the supervision of the Attorney General.[212] Jackson distinguished *Yamashita* on the grounds that the offenses occurred in the

204. *Id*. at 768.
205. *Id*. at 770-71.
206. *Id*. at 771.
207. *Id*. at 772.
208. *Id*. at 777-78.
209. *Id*. at 778.
210. *Id*. at 778-79.
211. *Id*. at 779.
212. *Id*. at 779-80.

Philippines when it was a U.S. territory, and that the resulting confinement and trial occurred within U.S. jurisdiction.[213]

The Court in *Eisentrager* then rejected the defendants' claim that they deserved the protection of the Fifth Amendment, given that its text referred to "any person." The Court remarked that the defendants' claim to Fifth Amendment protection "amounts to a right not to be tried at all for an offense against our armed forces."[214] If the Fifth Amendment protected the defendants from military trial, the Court wrote, "the Sixth Amendment as clearly prohibits their trial by civil courts" because the Sixth Amendment required trial by a jury of the state and district where the crime occurred.[215] Since the alleged offenses occurred on foreign soil and not within U.S. jurisdiction, presumably no state or district existed from which a jury could be drawn. The Sixth Amendment's blanket reference to the "accused" would also have to include the defendants if the Fifth Amendment's reference to "any person" applied to the defendants, Jackson reasoned.[216] Therefore, wrote Jackson, no constitutional method of trying the defendants for violating the rules of law would be available if a military commission could not try the defendants in the foreign territory where the offense occurred.[217]

The Court then wrote that if the *Eisentrager* defendants could escape trial by a military court, they would enjoy more protection than U.S. military personnel received because "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans."[218] The Court considered such a scenario disturbing, commenting that "it would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."[219]

Finally, the Court rejected the defendants' claim that the military commission lacked jurisdiction. The military had a "well-established" power, it wrote, "to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents,

213. *Id*. at 780.
214. *Id*. at 782.
215. *Id*.
216. *Id*.
217. *Id*. at 783.
218. *Id*.
219. *Id*.

prisoners of war, or others charged with violating the laws of war."[220] The Court wrote that its earlier decisions in *Quirin* and *Yamashita* established that it was legal for military commissions to try "enemy offenses against the laws of war."[221] Because the defendants were accused of breaching the terms of the German surrender by continuing their espionage on behalf of Japan, the Court stated, they had violated international norms regarding scrupulous adherence to a truce or surrender; therefore, the defendants had violated of the laws of war.[222] The Court reversed the Court of Appeals and affirmed the district court's dismissal of the defendants' petition.[223]

c. Verdugo-Urquidez

Nonresident aliens, including war-crimes suspects, lost more procedural protections with the Court's decision in *United States v. Verdugo-Urquidez*.[224] United States law enforcement agents, acting with permission from the director of the Mexican federal police and joined by Mexican police officers, searched two houses in Mexico owned by the defendant, a Mexican citizen and resident suspected of smuggling illegal drugs into the United States.[225] The search, which was done without a warrant, revealed various documents allegedly implicating the defendant.[226] The defendant sought to suppress the evidence seized, claiming that the absence of a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures.[227] The Court reversed the grant below of the defendant's motion to suppress.[228]

Chief Justice William H. Rehnquist's plurality opinion in *Verdugo-Urquidez* stated that the historical purpose of the Fourth Amendment was to restrict searches and seizures conducted by the United States in domestic matters.[229] The opinion further remarked that there "is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in

220. *Id*. at 786 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 312, 313-14 (1946)).
221. *Id*.
222. *Id*. at 787-88.
223. *Id*. at 791.
224. 494 U.S. 259 (1990).
225. *Id*. at 262-63.
226. *Id*.
227. *Id*. at 263.
228. *Id*. at 263, 275.
229. *Id*. at 266.

foreign territory or in international waters."[230] The Court then cited *Eisentrager* to support its statement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[231]

Next, the Court rejected the defendant's claim that the plurality opinion in *Reid v. Covert*,[232] which had invalidated the trial of civilians by military courts on foreign territory, constrained U.S. agents to comply with the Fourth Amendment in all dealings overseas.[233] The Court distinguished *Reid* and several cases granting various constitutional rights to aliens on the ground that those cases only concerned citizens and resident aliens.[234] As the defendant was neither a citizen nor a resident alien within the borders of the United States, and as he had no "previous significant voluntary connection with the United States," *Reid* and the alien-rights cases did not apply to him.[235]

In concluding that the Fourth Amendment did not apply to the search, the plurality opinion stated that accepting the defendant's claim, as pointed out in *Eisentrager*, "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[236] Applying the Fourth Amendment to overseas activity, it reasoned, "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."[237] United States military and law enforcement personnel would be plunged "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures

230. *Id*. at 267.

231. *Id*. at 269.

232. 354 U.S. 1 (1957).

233. *Verdugo-Urquidez*, 494 U.S. at 269-70.

234. *Id*. at 270-71 (listing Plyler v. Doe, 457 U.S. 202, 211-12 (1982) (applying Fourteenth Amendment's Equal Protection Clause to illegal aliens); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (classifying resident alien as a "person" under Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (decreeing that resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (applying Just Compensation Clause of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (entitling resident aliens to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (applying Fourteenth Amendment to resident aliens)).

235. *Id*. at 271.

236. *Id*. at 273.

237. *Id.*

conducted abroad," it wrote.[238] Rather than risk such a result, the Court ruled against the defendant.[239]

d. Summary of Decisions

The holdings of *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* make it virtually impossible to attain procedurally fair, U.S. war-crimes prosecutions of foreign soldiers. The rights necessary to ensure fairness to such foreign personnel have been snatched away and reserved only for those persons with a voluntary attachment to the United States—citizens and resident aliens. Thus, the modern-day successors to Homma would also fare poorly. They too would be deprived of trials before civilian courts and of adequate time to organize a defense, and they would be attacked with improperly seized evidence of questionable value and grave prejudicial potential.

2. Military Commissions

After World War II, Congress overhauled military law by replacing the old Articles of War with the Uniform Code of Military Justice (UCMJ).[240] Retired Colonel Frederick Bernays Wiener, a military law commentator and former Army prosecutor who had participated in the trials of Yamashita and Homma, stated in 1986 that the "lawyerized" procedures of the UCMJ, including appellate review, would prevent the claims of procedural irregularity from happening again.[241] Still, the restrictions on the application of the Bill of Rights to foreign military war-crimes suspects would allow *Homma*- and *Yamashita*-type breaches of justice to occur today, even if the system of military law under the UCMJ is superior to that of the Articles of War.

Perhaps the Supreme Court's strongest criticism of the previous military justice system appeared in its 1946 opinion in *Duncan v. Kahan-*

238. *Id*. at 274.

239. *Id*. at 275; *see id*. at 278 (Kennedy, J., concurring) ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

240. 10 U.S.C. §§ 801-946 (2001).

241. Frederick Bernays Wiener, Comment, *The Years of MacArthur, Volume III: MacArthur Unjustifiably Accused of Meting Out "Victor's Justice" in War Crimes Cases*, 113 MIL. L. REV. 203, 215 (1986).

amoku.[242] That case arose out of the Hawaii territorial governor's declaration of martial law and suspension of the writ of habeas corpus immediately after the attack on Pearl Harbor.[243] The civilian courts were closed, and the Army's commanding general established special military criminal courts that prosecuted civilian defendants for the remainder of World War II.[244] Because military commissions were not part of the judicial system, the resulting convictions and sentences were not subject to direct appellate review.[245] Moreover, military orders prohibited the filing of petitions for writ of habeas corpus, under pain of fine, imprisonment, or death.[246] Still, two civilians sought review of their convictions. The Supreme Court granted review and reversed the convictions.[247]

Justice Hugo Black's majority opinion in *Kahanamoku* stated:

> Courts and their procedural safeguards are indispensable to our system of government. . . . We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. Legislatures and courts are not merely cherished institutions; they are indispensable to our Government."[248]

Justice Black continued, "Military [commissions] have no such standing," and remarked, "The established principle of every free people is, that the law alone shall govern; and to it the military must always yield."[249] He concluded that the territorial law allowing the use of martial law did not authorize the substitution of military commissions for civilian courts.[250] Justice Murphy concurred, writing that the Founding Fathers of the United States had designed the Bill of Rights to prevent military oppression of the

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242. 327 U.S. 304 (1946).

243. *Id.* at 307-08.

244. *Id.*

245. *Id*. at 309.

246. *Id*. (Military orders "prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment or death.").

247. *Id*. at 324.

248. *Id.* at 322.

249. *Id.* at 322-23 (quoting Dow v. Johnson, 100 U.S. 158, 169 (1880)).

250. *Id.* at 324.

individual by guaranteeing "the observance of jury trials and other basic procedural rights foreign to military proceedings."[251]

a. The UCMJ

Since *Kahanamoku*, the military justice system has been remodeled to resemble civilian criminal procedure more closely, while preserving the traditional historical principles, distinctiveness, and autonomy of military criminal law.[252] The result was the UCMJ, which governs a military legal system that, according to Francis A. Gilligan, senior legal advisor to the U.S. Court of Appeals for the Armed Forces, "greatly mirrors the civilian federal one."[253] Under the UCMJ, the major procedural elements "parallel civilian law with substantial due process requirements" to create a system that Gilligan believes is "generally superior" to the civilian criminal law system.[254] Also, the Military Rules of Evidence are for the most part quite similar to the Federal Rules of Evidence.[255] Indeed, in the areas of general provisions, judicial notice, relevancy and prejudice, witnesses, expert testimony, hearsay, authentication, and secondary evidence, they are almost identical.[256]

Other similarities between civilian and military courts lie in the structure of the trial. The structure of a court-martial is similar to a civilian trial. One "military judge" and at least five members comprise the usual court-martial, although a bench trial may be granted under certain conditions.[257] The members serve as the jury, and the military judge must be an attorney.[258] The judge rules on questions of law, but does not vote with the members on questions of fact.[259] The members vote by secret written bal-

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251. *Id*. at 325.

252. FRANCIS A. GILLIGAN ET AL., COURT-MARTIAL PROCEDURE 1-2, 14-16 (2d ed. 1999).

253. *Id*. at 8.

254. *Id*. at 2, 34.

255. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL xi (4th ed. 1997).

256. *Id*. (comparing Articles I, II, IV, and VI through XI of the Federal Rules of Evidence with identically numbered sections of the Military Rules of Evidence).

257. 10 U.S.C. § 816(1) (2000).

258. *Id*. § 825 (describing who may serve as court-martial members); *id*. § 826(b) (qualifications of military judge).

259. *Id*. § 826(a), (e) (military judge as presiding officer without vote); *id*. § 851(b) (power and duty of military judge to rule on questions of law).

lot,[260] and a guilty verdict requires a vote of at least two-thirds of the members for noncapital offenses, with unanimity required for a capital offense.[261] The members also vote on sentencing, with unanimity required for death, three-quarters of the members for prison terms of at least ten years, and two-thirds for all other punishments.[262] Post-conviction appellate review includes review by a three-judge panel of the Court of Criminal Appeals, whose members may be civilians. Appeals from the Court of Criminal Appeals may go to the Court of Appeals for the Armed Forces (CAAF),[263] staffed entirely by civilian judges, and the Supreme Court may review the decisions of this highest military court by writ of certiorari.[264]

Ostensibly, foreign military war-crime suspects would receive the protections of the UCMJ if treated as prisoners of war under the Third Geneva Convention. In fact, the UCMJ specifically lists POWs as one group subject to its provisions.[265]

The UCMJ still leaves open the possibility of war-crimes trials by military commissions, however, which could return captured foreign soldiers to the problems of *Quirin* and its progeny. Article 21 of the UCMJ grants jurisdiction to military commissions "with respect to offenders or offenses that by statute or by the law of war may be tried" by such commissions.[266] Article 36 provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals . . . may be proscribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal

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260. *Id*. § 851(a).

261. *Id*. § 852(a).

262. *Id*. § 852(b).

263. *Id*. § 866 (review powers, procedure, and composition of Court of Criminal Appeals); *id*. § 867 (review by CAAF, including discretionary powers and referral by Judge Advocate General).

264. *Id*. § 867a(a).

265. *Id*. § 802(a)(9). *See generally* Majors Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

266. 10 U.S.C. § 821.

> cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ].[267]

Moreover, the foreign soldier may not even receive the full procedural protections of the UCMJ.

> *Subject to . . . any regulations prescribed by the President or by other competent authority,* military commissions . . . shall be guided by the principles of law and rules of procedures and evidence prescribed for courts-martial.[268]

Thus, the possibility of modern military commissions with special procedures for war-crimes trials persists in the UCMJ, a half-century after commissions with procedures created pursuant to the Articles of War convicted Yamashita, Homma, and the German spies in *Quirin* and *Eisentrager.* Because the UCMJ retains broad authority for establishing military commissions that follow such abbreviated procedural and evidentiary rules, a procedurally unfair trial, like Homma's, could still occur for foreign military war-crimes suspects.

Since the opinions in *Quirin*, *Yamashita*, and *Eisentrager* effectively remove military commissions from Fifth and Sixth Amendment scrutiny, the UCMJ's allowance of military commissions and specialized rules for trials before these commissions could tempt commanders to use these provisions to try foreign soldiers for war crimes. Although the Supreme Court's opinions precede the enactment of the UCMJ, the cases have not been overruled. Many of the opinions' principles, particularly the inapplicability of the Fifth Amendment to nonresident aliens, have been reaffirmed since.[269]

b. Judicial Deference

To worsen the foreign military war-crimes suspect's situation, the civilian judiciary has historically refused to make a searching inquiry into the practices of military justice and regulations. Under the judicially cre-

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267. *Id*. § 836(a) (emphasis added).

268. MCM, *supra* note 44, pt. I, para. 2(b)(2).

269. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (reaffirming *Eisentrager*); Wright v. Markley, 351 F.2d 592, 593 (7th Cir. 1965) (citing *Quirin* to support holding that military tribunals, and specifically courts-martial, "are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments").

ated "military deference doctrine," civilian courts considering constitutional challenges to military laws "perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context."[270] Courts have used this doctrine to justify judicial deference to the military in areas ranging from restrictions on the free speech and religious freedoms of military personnel[271] to a refusal to apply the Sixth Amendment right to counsel in low-level military courts-martial.[272]

The military deference doctrine ensures that the general presumption regarding challenges to military trials leans in favor of Congress's exercise of its rulemaking powers for the armed forces. The Supreme Court wrote in a 1975 opinion that the congressional scheme reflected by the UCMJ contains an implicit view "that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights."[273]

To promote the congressional judgment, the standard of due process for military proceedings differs from the civilian standard. Although the Due Process Clause of the Fifth Amendment provides some protection to military defendants, courts use the military deference doctrine to limit due-process analysis to a balancing test: "whether the factors militating in favor of counsel at summary courts-martial," or in favor of another constitutional right, "are so extraordinarily weighty as to overcome the balance struck by Congress" in favor of the military.[274] Usually, deference "'is at its apogee,'" the Supreme Court has written, "when reviewing congressional decisionmaking in this area."[275]

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270. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (describing how application of doctrine in constitutional challenges to military regulations "often leads to results contrary to cases decided in the civilian context").

271. Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding Air Force's ban on wearing of yarmulke by Orthodox Jewish officer while in uniform); Parker v. Levy, 417 U.S. 733 (1974) (affirming conviction of Army captain for openly making remarks critical of Vietnam War).

272. Middendorf v. Henry, 425 U.S. 25 (1976) (finding no right to counsel before summary courts-martial).

273. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).

274. *Middendorf*, 425 U.S. at 44; *see also* Weiss v. United States, 510 U.S. 163 (1994) (applying *Middendorf* test to issue of fixed terms for military judges).

275. *See Weiss*, 510 U.S. at 176 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

Furthermore, the inability of nonresident aliens to receive protection under the Bill of Rights, a protection enjoyed by U.S. civilians, would render the procedures and safeguards largely irrelevant. As Justice Jackson noted in his majority opinion in *Eisentrager*, the absence of Fifth Amendment protection for U.S. soldiers would make extension of that protection to enemy nonresident aliens "a paradox indeed" because those aliens would then have more rights than U.S. citizens who had temporarily forfeited those rights through current military service.[276] Thus, the inapplicability of at least part of the Fifth and Sixth Amendments to military commissions,[277] and the absence of Fourth, Fifth and Sixth Amendment protections to nonresident aliens for acts committed and property maintained overseas,[278] would allow the U.S. armed forces to place foreign military war-crimes suspects on trial with only minimal procedural protections. The Supreme Court's rulings in *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* constitute a seal of approval to do just that.

To illustrate further the importance of the Court's rulings to military trials in the modern era of military criminal law, one must examine the source of authority for the practices and procedures of the UCMJ and the subsequent evidentiary rules. The procedural protections of the UCMJ do not derive directly from the Bill of Rights, but from Congress's constitutional power to "make rules for the Government and Regulation of the land and naval Forces."[279] Also, there are questions about whether the Bill of Rights applies at all to the armed forces, or whether it applies in part, or how much.[280] The Court of Military Appeals has held that the Fourth, Fifth, and Sixth Amendments apply at least in part in courts-martial.[281] Yet the Supreme Court has not overruled *Quirin*, *Yamashita*, *Eisentrager* or *Verdugo-Urquidez*, so the application of the Bill of Rights by the Court of Military Appeals to military commissions trying foreign military war-

276. 339 U.S. 763, 783 (1950).

277. *See* Bryan William Horn, Note, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 371 n.38 (1992) (citing *Quirin* for the proposition that "neither the Fifth nor the Sixth Amendments applies in trials before a Military Commission").

278. *In re* Yamashita, 327 U.S. 1 (1946); *Eisentrager*, 339 U.S. 763; United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

279. U.S. CONST. art. I, § 8, cl. 14; GILLIGAN, *supra* note 252, at 24-25.

280. GILLIGAN, *supra* note 252, at 25.

281. *See* United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960) ("[T]he protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces."); GILLIGAN, *supra* note 252, at 26 (mentioning post-*Jacoby* application of Fourth, Fifth, and Sixth Amendments in "literally thousands of cases").

crimes suspects must be constrained by the holdings of these Supreme Court precedents.

c. Commanders' Control of Proceedings

Finally, the role of the commanding officer provides another way to misuse the military commission to produce a "judicial lynching," to use Justice Murphy's words in *Homma*. Under the UCMJ, the power to convene a general court-martial or military commission "is a function of command."[282] The power is personal, it cannot be delegated, and it can be exercised by the President, the Secretary of Defense, the Service Secretaries, and commanding officers of posts as small as an Army brigade, a Marine regiment, an Air Force wing, or a naval station.[283] The convening authority personally appoints the members of the court-martial, although convening officers cannot appoint the prosecutors or defense counsel or the military judge[284] detailed to each general court-martial.[285] Thus, the commanding officer's ability to control the military justice system remains what Gilligan recently called the "primary flaw" in the modern system of the UCMJ.[286] In theory, this would allow a modern-day MacArthur to manipulate the composition and practice of a military commission formed to try a modern-day Homma, once again producing an unfair trial controlled by the improper exercise of command influence.

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282. GILLIGAN, *supra* note 252, at 512-13.

283. *Id*.; *see also* 10 U.S.C. § 822(a) (2000).

284. Because military judges are regular officers subject to regular ratings and fitness reviews by higher-ranking officers, there is at least a potential for abuse by senior officers or the Service Secretaries in selection and continued posting of military judges. GILLIGAN, *supra* note 252, at 548-50 (describing attempt by U.S. Secretary of the Navy to fire military judge by issuing order to Judge Advocate General of the Navy, who refused to carry out the order). *But see* Weiss v. United States, 510 U.S. 163, 179 (1994) ("We believe the applicable provisions of the UCMJ [such as Article 26], and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.").

285. 10 U.S.C. § 825(d)(2) (appointment of court-martial); *id.* § 826 (appointment of military judge); *id.* § 827 (appointment of prosecutors and defense counsel).

286. GILLIGAN, *supra* note 252, at 36.

B. The Third Geneva Convention

1. History of the Development of the Convention

In the wake of World War II, the International Committee of the Red Cross (ICRC) decided to address inadequacies in the 1929 POW Convention.[287] Following the drafting of new conventions and their tentative adoption at an international Red Cross conference in Stockholm in 1948, delegates from fifty-nine nations convened in Geneva in the spring and summer of 1949 to revise the drafts.[288] Beginning on 12 August 1949, the delegates signed the four Geneva Conventions.[289] In addition to new or revised conventions for the protection of civilians and injured military personnel,[290] the 1949 Conventions included a revised Geneva Convention for the treatment of POWs. On 30 August 1955, the United States ratified the new Geneva Convention Relative to the Treatment of Prisoners of War, which went into effect for the United States on 2 February 1956 and remains in force today.[291]

2. Relevant Provisions of the Convention

The Third Convention retained almost all of the provisions of the 1929 POW Convention, and added a new article to address the status of captured soldiers who are suspected of war crimes. This was done as a response to *Yamashita* and other Allied court decisions, which held that soldiers who had committed war crimes before capture were not protected by the 1929 POW Convention, but that soldiers who had committed crimes after capture enjoyed full protection.[292] The distinction between acts committed before capture and after capture offended the ICRC as an arbitrary distinction, and the ICRC proposed at the 1948 Stockholm conference that war-crimes suspects receive full protection as POWs from the time of cap-

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287. INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 6 (J. Pictet et al. eds., 1960) [hereinafter COMMENTARY].

288. *Id*. at 6.

289. *Id*. at 9.

290. First Geneva Convention, *supra* note 167, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention, *supra* note 167, 6 U.S.T. 3217, 75 U.N.T.S. 85; Fourth Geneva Convention, *supra* note 167, 6 U.S.T. 3516, 75 U.N.T.S. 287.

291. Third Geneva Convention, *supra* note 3.

292. ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 168 (1976); COMMENTARY, *supra* note 287, at 413 (citing *Yamashita* and French, Dutch, and Italian war-crimes trials).

ture until the time of conviction.[293] The 1949 diplomatic conference expanded the proposal to protect war criminals as POWs after conviction.[294]

The result was Article 85, which states: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[295] Those POWs "enjoy all the safeguards which the Convention provides," namely, the rights of defense under Article 105.[296] They also retain post-conviction rights, such as the rights to submit complaints, receive relief parcels, and be visited by ICRC representatives.[297]

In addition to Article 85, the Third Geneva Convention contains other articles specifying which laws govern POWs' conduct, what form of tribunal will try POWs for misconduct, and what minimum guarantees of fair trial will be given to POWs. Article 82 states that POWs are subject to their captors' laws, as applied to the captor-nation's own soldiers.[298] Article 129 imposes a duty on signatory nations holding persons suspected of grave breaches of the Third Convention, as defined in Article 130, to try those POWs for war crimes.[299] Article 84 states that only military courts can try POWs, unless the detaining nation's laws permit military personnel to be tried by civilian courts.[300] Article 84 also requires the detaining nation to extend certain minimum procedural rights to POWs on trial.[301]

The certain minimum procedural rights that POWs retain under the Third Convention are listed in Article 105, which grants a prisoner the rights to counsel of the prisoner's own choosing, to the calling of witnesses, and to an interpreter.[302] The prisoner's counsel has a minimum of two weeks to prepare a defense, may interview the prisoner in private, and may confer with defense witnesses.[303] The prisoner also has a right to receive particulars of the charges, as well as "the documents which are

293. ROSAS, *supra* note 292, at 168.
294. *Id*.
295. Third Geneva Convention, *supra* note 3, art. 85, 6 U.S.T. at 3384.
296. COMMENTARY, *supra* note 287, at 423.
297. *Id*.
298. Third Geneva Convention, *supra* note 3, art. 82, 6 U.S.T. at 3382.
299. *Id*. arts. 129-130, 6 U.S.T. at 3418.
300. *Id*. art. 84, 6 U.S.T. at 3382, 3384.
301. *Id*.
302. *Id*. art. 105, para. 1, 6 U.S.T. at 3396.
303. *Id*. art. 105, para. 3, 6 U.S.T. at 3396.

generally communicated to the accused by the laws in force in the armed forces of the Detaining Power," in a language that the prisoner understands, within "good time before the opening of the trial."[304]

3. Weaknesses of the Convention

Article 4 of the Third Convention specifies, in part, "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict . . . ."[305] Since all captured foreign military personnel are POWs under Article 4, and since all POWs retain the protection of the Third Convention even when suspected of war crimes, foreign military war-crimes suspects would merit the full protection of the Third Convention.

In his analysis of *Yamashita* and *Homma*, Colonel Wiener cited the Third Convention's Article 85 as proof that "no cases like *Yamashita* or *Homma* can ever arise again" because Article 85 would require use of the "lawyerized" provisions of the UCMJ when trying future military war-crimes suspects.[306] Nevertheless, Article 85 does not protect foreign military personnel from procedurally unfair prosecutions. First, it refers to prosecution under "the laws of the Detaining Power." This would mean that foreign military personnel in U.S. custody would be tried in accordance with the Constitution, which has been interpreted by the Supreme Court in *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* to deny the protections of the Bill of Rights to nonresident aliens, such as foreign war criminals.[307] Second, Articles 82, 84, and 129 of the Third Convention would return foreign soldiers to the mercies of municipal military prosecution, that is, to the army that defeated and captured them. Third, Article 105 of the Third Convention does not list or describe general or universal standards of procedure, evidence, or due process.

Article 82 of the Third Convention subjects POWs to the laws of their captors' armed forces.[308] This derives from the 1907 Hague Regulations and Article 45 of the 1929 POW Convention, which had allowed the application of the captor's military laws to POWs because prisoners of war are

304. *Id.* art. 105, para. 4, 6 U.S.T. at 3396.
305. *Id*. art. 4, 6 U.S.T. at 3320.
306. Wiener, *supra* note 241, at 214.
307. *See supra* Part IV(A)(1).
308. Third Geneva Convention, *supra* note 3, art. 82, 6 U.S.T. at 3382.

confined for military purposes and retain their status as military personnel.[309] In the case of foreign soldiers tried by the United States for war crimes, Article 82 would combine with the inapplicability of the Fifth and Sixth Amendments to military commissions, and the inapplicability of the Fourth, Fifth, and Sixth Amendments to nonresident aliens, to place these soldiers in a precarious position.[310] This would return foreign military personnel to the status quo of *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez*: they would have fewer rights than U.S. civilians, resident aliens, or even U.S. military personnel.

Article 84 of the Third Convention further restricts military war-crimes suspects' rights because it requires military trials for POWs, unless the captor-state's laws allow civil trial for the crimes committed by the POWs.[311] The ICRC's Commentary to Article 84 explained that, although POWs might derive an advantage from trial by "generally less severe" civilian courts, military courts could consider "infringements of the military laws and regulations to which prisoners of war are subject."[312] Therefore, it "was preferable to recognize the competence" of military courts.[313] The Commentary also stated that the civil-court exception of Article 84 derived from some states that confined certain offenses to civil tribunals alone, "whether or not committed by members of the armed forces to whom prisoners of war are assimilated."[314] Article 84's second paragraph, which provides that the procedural safeguards of Article 105 represent the minimum conditions to be fulfilled by any court that tried POWs, further enhances the flexibility of court choice.[315] Yet the preference for military courts in Article 84 would harm foreign military personnel by placing them before military courts-martial or commissions that lack the protective structures found in civilian courts. Thus, the Third Geneva Convention fails to aid the modern military war-crimes suspect, just as its 1929 predecessor failed to protect Homma and his contemporaries.

Article 105 of the Third Convention specifies a POW's minimum guarantees of defense. Nevertheless, Article 105 and the Third Convention in general are silent as to universal standards of procedure, admissibil-

309. COMMENTARY, *supra* note 287, at 406-07, 726 (comparing articles of 1929 POW Convention and Third Geneva Conventions).

310. *See supra* Part IV(A).

311. Third Geneva Convention, *supra* note 3, art. 84, 6 U.S.T. at 3382, 3384.

312. COMMENTARY, *supra* note 287, at 412.

313. *Id.*

314. *Id*.

315. *Id*.

ity of evidence, or due process in general, although the ICRC Commentary remarked that Article 105's list of rights was "in no way exhaustive and the Detaining Power may grant others."[316] Under these circumstances, captor nations would be within the letter of the Third Convention if they were to allow only those rights listed in Article 105, even if fundamental notions of fair play, justice, and an effective defense were not observed.

Article 129 requires signatory nations to bring persons suspected of "grave breaches" as defined in Article 130, including those accused of murdering or torturing POWs, into their own courts.[317] The only glimmer of hope for the accused military war criminal is that Article 129 apparently does not exclude extradition to an international tribunal. The ICRC Commentary maintained, "On that point, the Diplomatic Conference specially wished to reserve the future position and not impede the progress of international law."[318]

C. Protocol I to the Geneva Conventions

1. Development of the Protocol

Another international agreement that may protect the foreign military war-crimes suspect is Protocol I to the Geneva Conventions.[319] In 1977, a diplomatic conference at Geneva drafted two new protocols to the four Conventions of 1949. Protocol I concerned the application of the 1949 Conventions to international wars, while Protocol II dealt with internal armed conflicts.

2. Relevant Provisions of Protocol I

Article 75 of Protocol I is the most important provision for war-crimes trials, as it defines the "fundamental guarantees" for all "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Proto-

316. *Id.* at 491.

317. Third Geneva Convention, *supra* note 3, art. 129, 6 U.S.T. at 3418.

318. COMMENTARY, *supra* note 287, at 624.

319. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

col."[320] Part 4 of Article 75 lists various "generally recognized principles of regular judicial procedure."[321] These principles include a ban on *ex post facto* laws, presumption of innocence rebuttable only by proof beyond a reasonable doubt, protection against compelled self-incrimination, protection against double jeopardy, and a right to confront opposing witnesses and to summon defense witnesses.[322] Part 4 also states that the general procedures "shall afford the accused before and during his trial all necessary rights and means of defence."[323] Part 6 of Article 75 provides, "Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict."[324] Part 2 of Article 75 further describes the accused military war criminal's status as a POW:

> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse Party, of his right to be a prisoner of war.[325]

To further ensure that war-crimes suspects, including military personnel, receive full protection under the Third Convention, Part 7(b) of Article 75 specifies that those persons "who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article."[326]

3. Weaknesses of Protocol I

Protocol I provides more comprehensive guarantees of defense than the Third Geneva Convention provides. The international community has accepted those guarantees, at least in principle: as of 2002, 159 nations had ratified or acceded to Protocol I, including China, Germany, North Korea, Russia, and the United Kingdom.[327] Although Protocol I is considered customary international law, several states that have recently fought, or are

320. *Id*. art. 75, 1125 U.N.T.S. at 37.
321. *Id*. art. 75, pt. 4, 1125 U.N.T.S. at 37-38.
322. *Id*.
323. *Id*.
324. *Id*. art. 75, pt. 6, 1125 U.N.T.S. at 38.
325. *Id*. art. 75, pt. 2, 1125 U.N.T.S. at 23.
326. *Id*. art. 75, pt. 7(b), 1125 U.N.T.S. at 38.

likely to fight, international wars have not ratified Protocol I. These warring yet nonratifying countries include France, India, Iran, Iraq, Israel, Pakistan, and the United States.[328] Because these states have not ratified Protocol I and may not consider themselves constrained by it, Article 75 of the Protocol may not be followed when the nonratifying states fight international wars and try foreign military personnel for war crimes. The status of Protocol I as customary international law, however, could cause other states to apply moral and diplomatic pressure to compel the nonratifying states to follow Protocol I in fact if not in law.

D. The International Criminal Court: Is It the Answer?

Given the failings of existing national-level prosecutions of war criminals in general and military war criminals in particular, international prosecutions would appear to offer the best method for ensuring a lasting precedent of war-crime prosecution. An international tribunal, such as Nuremberg or its modern successor, the ICTY, carries a cachet of authority as one court speaking for all humanity. This cannot be said of the military commission in *Homma*, plagued as it was by the appearance of narrow-minded retribution. At first glance, the proposed ICC appears to provide a useful tool for prosecuting war-crimes suspects, and the permanent international tribunal would diminish the appearance of victor's justice. Yet the structure of the ICC, as spelled out in the 1998 Rome Statute (ICC Statute), does not fully meet the specialized needs of military personnel accused of war crimes.[329] To demonstrate this, *Homma* will be analyzed in the context of the modern world under the ICC Statute.

1. Relevant Features of the ICC

The ICC Statute provides several features of importance to defendants in military war-crimes trials. First, its jurisdiction would specifically include war crimes, defined by means of an exhaustive list of offenses.[330] These crimes include grave breaches of the Geneva Conventions and

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327. Int'l Comm. of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at* http://www.icrc.org/eng/party_gc (last visited May13, 2002).

328. *Id*.

329. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998) [hereinafter ICC Statute], *reprinted at* 37 I.L.M. 999.

330. *Id*. art. 8, para. 2, 37 I.L.M. at 1006-08.

twenty-six different crimes categorized within "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."[331] The ICC Statute restricts jurisdiction to those "war crimes . . . committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[332]

The main jurisdictional component of the ICC Statute is its complementarity. Article 1 of the ICC Statute specifies that the court "shall be complementary to national criminal jurisdictions."[333] This means that national courts will continue to perform the bulk of prosecutions for war crimes, crimes against humanity, and genocide.

The ICC Statute creates three methods of obtaining jurisdiction over suspects: referral by the U.N. Security Council, referral by individual nations, and initiation by the ICC prosecutor.[334] Once jurisdiction is obtained, the next issue would be whether the case could be admitted to the ICC for prosecution. Article 17 of the ICC Statute bars the ICC from admitting a case that is being or has been investigated or prosecuted by a country with jurisdiction, unless that country is "unwilling or unable genuinely" to investigate or prosecute, or its decision not to prosecute results from that unwillingness or inability.[335] Articles 18 and 19 specify the procedure of notice and challenge to ICC admission and jurisdiction. The ICC prosecutor has to notify all state parties and nonparty states that would normally exercise jurisdiction when a case is referred to the ICC by a state party or by a prosecutor-instigated investigation.[336] Suspects and states can challenge admission and jurisdiction through an appeals process.[337] The Security Council can also halt a prosecution for twelve months by a resolution under Chapter VII of the U.N. Charter.[338]

The ICC Statute provides thorough trial procedures and rules of evidence. Article 67 of the ICC Statute lists the rights of defendants, including the right to an impartial and fair public hearing and to other "minimum

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331. *Id*.

332. *Id*.

333. *Id*. art. 1, 37 I.L.M. at 999, 1003. *See generally* Lieutenant Colonel Michael A. Newton, *Comparative Complimentarity: Domestic Jurisdiction Consistent with the Rome Statue of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

334. *Id*. art. 13, 37 I.L.M. at 1010-11.

335. *Id*. art. 17, para. 1(a)-(b), 37 I.L.M. at 1012.

336. *Id*. art. 18, 37 I.L.M. at 999, 1012-13.

337. *Id*. art. 19, 37 I.L.M. at 1013-14.

338. *Id*. art. 16, 37 I.L.M. at 1012.

guarantees."[339] Defendants have the right to prompt and detailed information of the charges.[340] They also have the right to adequate time and facilities for preparing a defense, and to choose attorneys or receive appointed counsel, or to represent themselves.[341] The attorney-client privilege also exists to protect communications with counsel.[342] Furthermore, defendants may confront opposing witnesses and subpoena defense witnesses and shall have protection from compelled self-incrimination.[343] Defendants can make a defense statement, and can receive free interpretation and translation of documents.[344] The defense also has the presumption of innocence, rebuttable only by proof beyond a reasonable doubt.[345]

2. Critique of the ICC Statute

The procedural and evidentiary protections of the ICC Statute mirror the protections of Protocol I to the Geneva Conventions and further reiterate that international law requires a high level of protection for defendants. Such protections would work to a modern-day Homma's advantage, and alleviate the dissenting concerns of Justices Murphy and Rutledge.

Nevertheless, only those defendants whom the ICC tries in the first place can receive these protections. This would present a problem for the foreign military war-crimes suspect. Article 8(2) of the ICC Statute contains a threshold requirement that individual war crimes be committed as part of a plan or policy, or as part of a large-scale commission of such crimes.[346] This provision excludes most individual war crimes, regardless of the number of victims or the rank and power of the person involved.

Applying Article 8 to the situation in *Homma* illustrates the ICC's limitations. It would allow jurisdiction if the Bataan Death March had been part of a plan of combat, or as part of a Japanese policy to violate or ignore the Geneva Conventions. Because there was no evidence that the Death March was part of the Japanese war plan for the Philippines, the

339. *Id*. art. 67, 37 I.L.M. at 1040.
340. *Id*.
341. *Id*.
342. *Id*.
343. *Id*.
344. *Id*.
345. *Id*.
346. *Id*. art. 8, para. 2, 37 I.L.M. at 1006.

ICC's first axis of war-crimes jurisdiction would not apply.[347] The other axis—large-scale commission of war crimes—might have applied to Homma, however. The Japanese universally mistreated POWs, as shown by the deaths of approximately twenty-seven percent of all American and British Commonwealth POWs confined by Japan, compared to a death rate of four percent of American and British POWs held by Germany.[348] The Allied and neutral nations protested such atrocities repeatedly, yet the deaths continued.[349] If these facts indicated the presence of a policy of intentional neglect of POWs, then ICC jurisdiction would apply to Homma.[350] Without such evidence of a conspiracy or plan that involved violations of the Third Geneva Convention, however, Homma would not qualify for ICC prosecution, but would be subject to national prosecution by the United States or the Philippines.

The second and most significant problem in a modern-day prosecution of Homma is complementarity. The ICC's prosecutions will be complementary to national courts. Various provisions of the ICC Statute suggest, in the words of British barrister and human rights law analyst Geoffrey Robertson, "that 'subordinate' would be a more accurate description of the legal relationship."[351] These provisions include the acquisition of jurisdiction, admissibility of investigation, and the mechanisms for challenging admissibility and jurisdiction.

Of the ICC's three methods of obtaining jurisdiction,[352] Robertson has described initiation by the ICC prosecutor a "clumsy procedure" that would be used infrequently.[353] Prosecutions under this method will have to rely on information volunteered by various states, organizations, U.N. organs, and "other reliable sources," and will have to win approval from the ICC Pre-Trial Chamber, after that chamber has examined evidence, heard objections to jurisdiction, and ruled that a prima facie case exists.[354]

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347. *See infra* Part II & nn. 12-35 (failure of Japanese prisoner-evacuation plan).

348. PICCIGALLO, *supra* note 45, at 27.

349. *Id.* at 209.

350. *See id.* ("While perhaps not the result of an organized governmental plan . . . these crimes were not 'stray incidents' either . . . .").

351. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 349 (2000).

352. ICC Statute, *supra* note 329, art. 13, 37 I.L.M. at 1010-11.

353. ROBERTSON, *supra* note 351, at 347.

354. ICC Statute, *supra* note 329, art. 15, 37 I.L.M. at 1011; ROBERTSON, *supra* note 351, at 347.

The vast majority of prosecutions, in Robertson's view, will therefore occur through Security Council referral or individual-state referral.[355]

Jurisdiction through Security Council referral would not pose a problem for foreign military war-crimes suspects because it would deliver them to the ICC on the Security Council's request and not to the courts of the state seeking to prosecute the suspects. Robertson has praised this method as rendering ad hoc tribunals obsolete.[356] This would be the fairest method for Homma because it would send him to the ICC seat at The Hague and not to wherever a U.S. military commission might convene.

Jurisdiction through individual state referral, to be used when the Security Council does not act, will defer the ICC's prosecution and give primacy of prosecution to the national courts.[357] The ICC cannot acquire jurisdiction unless the crimes occur inside a state that was a party to the ICC Statute or has accepted ICC jurisdiction, or was allegedly committed by a citizen of a state-party or accepting state.[358] This method poses the most problems for ICC prosecution. First, states engaged in the "vicious repression" that creates war crimes, crimes against humanity, and genocide likely would not ratify the ICC Statute.[359] Second, a nonparty state with jurisdiction over a suspect could reject the ICC's exercise of jurisdiction by refusing to lodge the required declaration of acceptance with the ICC registrar.

In *Homma*, the two relevant nations would have been Japan, the defendant's homeland, and the United States, where the crimes occurred, given that the Philippines were a U.S. territory in 1942. As of the date of this writing, Japan and the United States have not ratified the ICC Statute.[360] In fact, Japan has not signed the statute at all, although the United States has signed.[361] The failure of Japan and the United States to ratify the ICC Statute would strip the ICC of jurisdiction. Moreover, the deaths of U.S. soldiers on U.S. territory might give the United States an excuse

355. ROBERTSON, *supra* note 351, at 347.

356. *Id.* at 345.

357. ICC Statute, *supra* note 329, art. 13(a), 37 I.L.M. at 1010; ROBERTSON, *supra* note 351, at 345.

358. ICC Statute, *supra* note 329, art. 12, para. 2, 37 I.L.M. at 1010 (preconditions to exercise of jurisdiction); *id*. art. 14, 37 I.L.M. at 1011 (referral by state party); ROBERTSON, *supra* note 351, at 345-46.

359. ROBERTSON, *supra* note 351, at 346.

360. United Nations, *Rome Statute of the International Criminal Court*, *at* http://www.un.org/law/icc (Ratification Status) (last visited May 13, 2002).

not to surrender Homma, thus ensuring that U.S. courts administered swift justice.

Article 17 of the ICC Statute reinforces the problem of complementarity through its treatment of admissibility of cases. The ICC cannot admit cases that are the subject of good-faith investigation or prosecution by a country with jurisdiction.[362] Robertson has criticized this provision as "much too broad," on the ground that it "kow-tows to state sovereignty" because the ICC would not be able to investigate, let alone prosecute, any case that a national prosecutor has investigated.[363] The ICC prosecutors would then have to convince the ICC of the national authorities' unwillingness or inability genuinely to investigate a crime, which could be difficult to prove because ICC judges would be leery of questioning national judicial systems.[364] Article 17, as Robertson observes, gives states an incentive to "deny the ICC jurisdiction over their nationals by pretending to put them on trial."[365] In *Homma* and similar cases, the United States could thwart an ICC prosecution by investigating and prosecuting on its own, as with the war criminals who were outside the scope of the Nuremberg and Tokyo tribunals.

To compound these problems, the ICC Statute contains a detailed structure for challenging admissibility and jurisdiction that further aggravates complementarity and weakens the power of the ICC.[366] Once a case has been referred to the ICC, the ICC prosecutor will have to notify all state

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361. *Id. Editor's Note: Although the Rome Statute will enter into force on 2 July 2002, the United States retracted its signature after the author submitted this article in September 2001.*

> In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Id.

362. ICC Statute, *supra* note 329, art. 17, para. 1(a)-(b), 37 I.L.M. at 1012.
363. ROBERTSON, *supra* note 351, at 350.
364. *Id*.
365. *Id*.
366. ICC Statute, *supra* note 329, arts. 18-19, 37 I.L.M. at 999, 1012-13.

parties and nonparty states that would normally exercise jurisdiction.[367] Robertson has attacked this provision, stating that the notice required in Article 18 would "serve to tip off criminals."[368] Also, Article 18 would allow hostile states to thwart prosecution by conducting their own investigation, which would lead to inadmissibility under Article 17. Article 19, moreover, would allow suspects and states—even nonparty states with jurisdiction over the suspects—to challenge admissibility and jurisdiction.[369] This, in Robertson's view, reinforces the complementarity problem by giving states "hostile to a prosecution" the opportunity to "derail a prosecution, or to delay it for years through appellate maneuvers."[370] Again, the United States' desire to prosecute General Homma would prevent the ICC from admissibility and jurisdiction because U.S. and Filipino prosecutors could challenge the ICC by offering evidence of a good-faith investigation and prosecution.

The Security Council could impose a further obstacle. It has the power not only to refer a case to the ICC, thus avoiding the issue of complementarity, but also to retard prosecution virtually indefinitely. Under Article 16 of the ICC Statute, the Security Council has power to issue a resolution that halts an investigation or prosecution for twelve months.[371] The Security Council may renew this no-investigation order, and Article 16 does not specify how often the renewals can continue.[372] Under these circumstances, the United States, as a Security Council member, could try to halt an ICC prosecutor's investigation of Homma, or of any suspect under U.S. jurisdiction, by convincing the other Security Council members to adopt a resolution that would halt the investigation. The only possible remedy for this situation would be for the ICC to reject such a request because it would not relate sufficiently to restoration of peace or security, the basis on which Chapter VII of the Charter authorizes the Security Council to take extraordinary measures.[373]

The creators of the ICC Statute did create a statute rich in procedural protections for foreign military war criminals. Yet the Statute did not go

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367. *Id.* art. 18, 37 I.L.M. at 999, 1012-13.

368. ROBERTSON, *supra* note 351, at 351.

369. ICC Statute, *supra* note 329, art. 19, 37 I.L.M. at 1013-14.

370. ROBERTSON, *supra* note 351, at 351.

371. ICC Statute, *supra* note 329, art. 16, 37 I.L.M. at 1012.

372. *Id.*; *see also* ROBERTSON, *supra* note 351, at 348 ("The effect of Article 16 is to give the Security Council ultimate control" by referring cases on its own and stopping other cases that it does not like.).

373. *Id.*

far enough to protect the rights of soldiers like Homma. The jurisdictional and admissibility problems of the ICC would mean that Homma would still be returned to his Allied captors for trial. In short, the ICC would not protect Homma at all.

V. Primacy of International Tribunals and Other Possible Solutions

A. Primacy and Procedures: From ICTY to ICC?

Since the existing schemes of national-level prosecutions do not provide adequate protections for foreign military war criminals, other means should be explored. The first would be to create international tribunals with primacy over national courts, rather than to rely on the complementarity of the ICC. The use of primacy-based jurisdiction would protect defendants like Homma from potentially unfair, national-level trials. The ICTY[374] serves as a model for future international criminal tribunals, primarily because of its statutory power of primacy over national courts.

1. ICTY Primacy Jurisdiction and Procedures

Some distinguishing features of the ICTY, when compared to the ICC, are the jurisdictional provisions set out in Article 9 of the ICTY Statute. The ICTY and national courts "shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."[375] Moreover, the ICTY "shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."[376] The primacy of the ICTY receives

374. *See generally* Statute of the International Tribunal, Annex to Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., Supp. Apr.-June 1993, at 117, U.N. Doc. S/25704 (1993), *reprinted at* 32 I.L.M. 1159, 1192-1201 (1993) [hereinafter ICTY Statute], *as amended* by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998); S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/RES/1329 (2000). *See also* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/RES/827 (1993), *reprinted at* 32 I.L.M. 1203 (1993) (enacting Security Council resolution for ICTY Statute).

375. ICTY Statute, *supra* note 374, art. 9(1), 32 I.L.M. at 1194.

376. *Id*. art. 9(2), 32 I.L.M. at 1194.

further support from Article 29 of the Statute, which states that individual states shall cooperate with the ICTY in the investigation and prosecution of war-crimes suspects and mandates that nations "shall comply without undue delay with any request for assistance," including surrender or transfer of suspects to the ICTY.[377]

Another important feature of the ICTY is its Rules of Procedure and Evidence.[378] For example, defendants have the right to counsel, the right to an interpreter, and the right to remain silent.[379] Defendants also have the right to reciprocal disclosure of evidence, including exculpatory evidence.[380] The tribunal may admit evidence if it has probative value, as with the SCAP rules used in *Homma*, but with critical caveats. It may not admit evidence if the probative value is substantially outweighed by "the need to ensure a fair trial."[381] Furthermore, the tribunal may exclude evidence "obtained by methods which cast substantial doubt on its reliability" or if admission would violate "the integrity of the proceedings."[382] The tribunal may also admit written statements in lieu of oral testimony if a balancing of factors for and against admission so justifies, and if a sworn and verified declaration attesting to the truth and correctness of the statement is attached.[383]

2. Analysis of Primacy

The ICTY's Statute, with its jurisdictional decree of primacy, permits the ICTY to block the ex-Yugoslav nations and provinces, particularly Bosnia and Croatia, from subjecting captured enemy troops to trials such as the military commission in *Homma* or its counterpart in *Yamashita*.

377. *Id*. art. 29, 32 I.L.M. at 1189.

378. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.18 (2000) [hereinafter ICTY Rules], *available at* http://www.un.org/icty/basic/rpe/ IT32_rev18con.htm; *see also* United Nations, *ICTY Amendments to the Rules of Procedure and Evidence*, *at* http://www.un.org/icty/basic/rpe/IT183e.htm (last modified Dec. 13, 2000).

379. ICTY Rules, *supra* note 378, R. 42.

380. *Id*. R. 67, 68.

381. *Id*. R. 89(C), (D).

382. *Id*. R. 95.

383. *Id*. R. 92 *bis*.

This favorable result is attained because individual nations have to cooperate with the ICTY and surrender war-crimes suspects if requested.

In 1998, the U.N. Security Council emphasized the ICTY's statutory primacy through Resolution 1207.[384] In response to the Yugoslav government's failure to comply with the ICTY's requests for arrest and extradition of several suspects, Resolution 1207 reiterated the Security Council's decision "that all States shall cooperate fully" with the ICTY.[385] The Security Council affirmed "that a State may not invoke provisions of its domestic law as justification for its failure to perform binding obligations under international law."[386]

The concept of primacy received judicial reinforcement through the 1995 ICTY Appeals Chamber's decision on jurisdiction in *Prosecutor v. Tadic*.[387] In reviewing a Bosnian Serb defendant's interlocutory appeal and the Trial Chamber's denial of his pretrial motion on jurisdiction, the Appeals Chamber considered his claim that the ICTY lacked primacy over competent national courts.[388] Before the commencement of the ICTY proceedings, the defendant had been under investigation by a German court.[389] The German government then surrendered the defendant to the ICTY on request.[390] The defendant claimed that the assumption of jurisdiction by the ICTY would violate the sovereignty of individual states.[391] The ICTY prosecution, the defendant said, violated the doctrine of *jus de non evocando*, which requires that an accused be tried only by existing courts and not by special or extraordinary courts.[392]

The Appeals Chamber rejected both contentions. First, it rejected the defendant's sovereignty argument on the basis that individual states could voluntarily waive jurisdiction through cooperation with an international tribunal such as the ICTY, thereby openly accepting that tribunal's juris-

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384. S.C. Res. 1207, U.N. SCOR, 53d Sess., 3944th mtg., U.N. Doc. S/RES/1207 (1998), *available at* http://www.un.org/Docs/scres/1998/sres1207.htm.

385. *Id*.

386. *Id*.

387. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber (1995), *reprinted at* 35 I.L.M. 32 (1996).

388. *Id*., 35 I.L.M. at 48.

389. *Id*., 35 I.L.M. at 49.

390. *Id*.

391. *Id*., 35 I.L.M. at 50.

392. *Id*., 35 I.L.M. at 52.

diction.[393] More importantly, it reasoned, norms concerning war crimes and crimes against humanity had a universal character because those crimes "shock the conscience of mankind" and constitute "acts which damage vital international interests."[394] The nature of war crimes and crimes against humanity required that "borders should not be raised as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity," the tribunal wrote.[395] Without endowing international tribunals like the ICTY with primacy over national courts, "there would be a perennial danger of international crimes being characterised as 'ordinary crimes,' or proceedings being 'designed to shield the accused,' or cases not being diligently prosecuted," the tribunal concluded.[396]

The Appeals Chamber then disposed of Tadic's *jus de non evocando* argument by stating that there was no universal acceptance of an exclusive right of trial before one's own national courts and under national laws.[397] "[O]ne cannot find it expressed," the tribunal wrote, "either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions."[398] The Appeals Chamber stated that the purpose of *jus de non evocando* was "to avoid the creation of special or extraordinary courts designed to try political offences in time of social unrest without guarantees of a fair trial."[399] Transferring jurisdiction "to an international tribunal created by the Security Council acting on behalf of the community of nations" would not infringe any of Tadic's rights, it maintained; "quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal."[400] Any inconvenience resulting from Tadic's removal from his national forum was outweighed by "a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming from all continents of the world."[401] Concluding that the ICTY's exercise of primacy would not vio-

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393. *Id.*, 35 I.L.M. at 50-51 (1995) (citing Bosnian legislative decree and letter from Bosnian President to U.N. Secretary-General).

394. *Id.*, 35 I.L.M. at 51 (quoting Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 291-293 (Isr. Sup. Ct. 1962)).

395. *Id.*, 35 I.L.M. at 52.

396. *Id*. (quoting ICC Statute, *supra* note 329, art. 10(2)).

397. *Id*.

398. *Id.*

399. *Id*.

400. *Id*., 35 I.L.M. at 53.

401. *Id*.

late Tadic's rights, the Appeals Chamber dismissed his interlocutory appeal.[402]

3. The Model for Future Courts

The ICTY's statutory provision of primacy should be inserted in all permanent and ad hoc international courts with power to try foreign military war-crimes suspects. The impartiality of an international tribunal of judges exercising primacy over national courts eliminates the risk of "victor's justice." The winning side in a war would not be able to claim first right of prosecution of captured enemy soldiers, and it would not be able to try those captured soldiers before a panel of judges selected from the personnel of the victor's army. The rules of procedure and evidence would provide fairness to foreign soldiers, as they could challenge the use of improperly obtained evidence, prejudicial evidence, and evidence without sufficient indicia of reliability. The ICTY stands in direct contrast to *Homma* and its use of a trial by the victor's own army with admission of unverifiable evidence of low probative value and high risk of prejudice. In fact, the ICTY Rules provide a useful link between Protocol I to the Geneva Conventions and the ICC Statute, as the rules reiterate the guarantee of a proper defense and the necessary procedures to provide that defense.

To solve the ICC's problems with complementarity, the ICC Statute should be amended to replace complementarity with a system of primacy. Article 121 of the ICC Statute provides for proposal of amendments by any nation that is a party to the ICC Statute, provided at least seven years have elapsed from the Statute's entry into force.[403] The process of amending the ICC Statute requires two different supermajority votes for approval—first, from the "Assembly of States Parties," a representative oversight body of delegates from the "state party" nations, and second, from the individual states-parties.[404] Even though the ICC's method of amendment may appear untimely, it provides an opportunity for individual states and nongovernmental organizations to note the shortcomings of complementarity

402. *Id*.

403. ICC Statute, *supra* note 329, art. 121, para. 1, 37 I.L.M. at 1067.

404. *Id.* art. 121, 37 I.L.M. at 1067; *see id.* art. 112, 37 I.L.M. at 1064-65 (composition, duties and procedures of the Assembly of States Parties).

and suggest alteration or replacement with a primacy-jurisdiction amendment for military war-crimes trials.

B. Protocol I: Should More Nations Ratify It?

The option of including a power of primacy in international tribunals' statutes, whether ad hoc or permanent tribunals, is but one option that could be used to produce fair war-crimes prosecutions of foreign military personnel. Another option is to reform the existing structure of war-crimes trials through Protocol I of the Geneva Conventions. Protocol I further defines the status of military personnel as prisoners of war and how that protected status is not lost even when war crimes are committed.[405] Protocol I also specifies the minimum fundamental rights of due process under the Conventions. Unfortunately, many of the nations more recently embroiled in wars have yet to ratify Protocol I. To ensure that Protocol I has vitality as an explicit statement of international law, nonratifying nations—particularly the United States, France, Israel, and Iraq—should ratify Protocol I, or else other nations, including the allies of the nonratifying nations, should pressure them into de facto compliance.

VI. Conclusion

Since the 1940s, the United States has reorganized its laws in an attempt to ensure that foreign military war-crimes suspects receive trials that are fairer procedurally than those of Homma and many of his contemporaries. The international community, through the creation of the Geneva Conventions, the additional protocols to the Conventions, and the ICC Statute, has also sought to reform the system of trying those suspects. Yet the potential for mischief remains because the reforms of U.S. law, the Third Geneva Convention, and international criminal prosecutions have not gone far enough. Thus, it remains quite possible that vengeful prosecutions and overwhelming bias will plague prosecutions of soldiers like Homma, whether in Iraq, the former Yugoslavia, or wherever soldiers of different nations fight in future wars.

Further reforms need to be instituted. In the absence of universal ratification of Protocol I to the Geneva Conventions, all international tribunals must have their statutes amended to guarantee ICTY-style primacy

405. *See supra* Part IV(C).

jurisdiction, procedures, and rules of evidence that guarantee fair trials of foreign military war-crimes suspects. Otherwise, unfair trials will continue, leaving only a bitter taste of retribution with no value for improving the morality of international criminal law. The noted international law analyst, Sir Hersh Lauterpacht, identified this prospect near the end of World War II and warned that the desire for revenge must yield before the need for true justice.

> It is incumbent upon the victorious belligerent intent upon the maintenance and the restoration of international law, to make it abundantly clear by his actions that his claim to inflict punishment on war criminal[s] is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigours of a newly created rule.[406]

If revenge is a dish best served cold, then the existing system for trying foreign military war-crimes suspects is a dish best not served at all. Without further reforms, this system will continue to foster the practice of victor's justice.

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406. Hersh Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 80 (1944).

DOD CONTRACTOR COLLABORATIONS:

PROPOSED PROCEDURES FOR INTEGRATING ANTITRUST LAW, PROCUREMENT LAW, AND PURCHASING DECISIONS

MAJOR FRANCIS DYMOND[1]

I. Introduction

> *Despite improvement due to acquisition reform, the* [DOD] *acquisition process continues to be overly risk averse, which inhibits innovation and access to creative, high technology solutions . . . The oversight community, at the operating level, continues to function with an inadequate understanding [of] the realities and changing dynamics of the market or industry.*[2]

One of the most pervasive changes in the U.S. defense industry and procurement markets has been the rapid growth in Department of Defense (DOD) contractor collaborations in both "systems" (or major end-items)[3] and other nonsystems procurements.[4] While the trend in the general U.S. economy has been to scrutinize such business practices under antitrust laws,[5] the DOD has only just begun a dialogue on the impact of such contractor behavior on its procurements.[6] Likewise, DOD only recently began to include measurements of market and industry competitiveness, the cornerstone of antitrust policy, as significant high-level planning factors in the

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monopsonist DOD "systems" procurement process.[7] Although DOD, the

2. OFFICE OF THE SECRETARY OF DEFENSE, DEFENSE SCIENCE BOARD TASK FORCE ON PRESERVING A HEALTHY AND COMPETITIVE U.S. DEFENSE INDUSTRY TO ENSURE OUR FUTURE NATIONAL SECURITY, FINAL BRIEFING 25 (Nov. 2000) [hereinafter DSB REPORT ON PRESERVING DEFENSE INDUSTRY], *available at* http://www.ndia.org. Within the context of antitrust analysis of mergers and acquisitions, one scholar has concluded that "the Department [of Defense] has not devised a common framework for its subordinate institutions to follow when analyzing the competitive impact of specific consolidation events." William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, ANTITRUST BULL., Summer 1999, at 446. The DOD confronted some policy questions regarding both structural and personnel deficiencies in its decentralized approach to industrial structure and market behavior in OFFICE OF THE SECRETARY OF DEFENSE, DEFENSE SCIENCE BOARD TASK FORCE ON VERTICAL INTEGRATION AND SUPPLIER DECISIONS 33-39 (May 1997) [hereinafter DSB REPORT ON VERTICAL INTEGRATION].

3. "Major defense suppliers" serve as prime contractors to provide DOD with "major systems" and other designated items or services. U.S. DEP'T OF DEFENSE, DIR. 5000.62, IMPACT OF MERGERS AND ACQUISITIONS OF MAJOR DOD SUPPLIERS ON DOD PROGRAMS para. 3.2 (21 Oct. 1996) [hereinafter DOD DIR. 5000.62].

> The term "major system" means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property. A system shall be considered a major system if (A) the conditions of section 2302d of this title are satisfied, or (B) the system is designated a "major system" by the head of the agency responsible for the system."

10 U.S.C. § 2302(5) (2000). Section 2302d further provides:

> For purposes of section 2302(5) of this title, a system for which the Department of Defense is responsible shall be considered a major system if - (1) the total expenditures for research, development, test, and evaluation for the system are estimated to be more than $115,000,000 (based on fiscal year 1990 constant dollars); or (2) the eventual total expenditure for procurement for the system is estimated to be more than $540,000,000 (based on fiscal year 1990 constant dollars).

Id. § 2302d(a). *See also* U.S. DEP'T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATION INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (5 Apr. 2002) [hereinafter DOD DIR. 5000.2-R]; U.S. DEP'T OF DEFENSE, INSTR. 5000-2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM encl. 2 (5 Apr. 2002) (calculating the dollar values for such expenditures at $140,000,000 for research and development and $660,000,000 for the total system expenditure threshold).

4. Jon Shepard, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 ANTITRUST L.J. 641 (1998). "Announcements of joint ventures, strategic alliances, and other cooperative arrangements among competitors have occurred with increasing regularity in virtually all industry sectors over the past several years." *Id*. at 641.

Department of Justice (DOJ), and the Federal Trade Commission (FTC) in the last decade settled on antitrust enforcement coordination procedures for DOD contractor mergers and acquisitions,[8] the debate over the competitive effects of contractor collaborations and consequent enforcement procedures needs a concerted push. Even DOJ and FTC recently acknowledged that contractor collaborations "require antitrust scrutiny different from that required for mergers."[9]

In a defense industry that is consolidating and changing to a new paradigm after the Cold War downsizing,[10] one of the most significant DOD contractor behavioral adjustments is the use of collaborative contracting. Collaborations among competing DOD contractors, whether called "teaming arrangements," "joint ventures," "strategic alliances," "subcontracts," "associations," licensing arrangements," "partnering," or "leader-follower agreements," provide a variety of benefits to market participants in winning and keeping DOD contracts. Industry observers predicted such benefits (or arguably, business necessities) even as the post-Cold War "peace dividend" appeared.[11]

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5. *Id*.

6. *See DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999); Note, *Industry Group Questions Proposed DFARS Rule on Exclusive Teaming Arrangements*, GOV'T CONTRACTOR, Feb. 2, 2000, para. 43 [hereinafter *Industry Questions*].

7. *See, e.g.*, Memorandum, Deputy Under Secretary of Defense (Acquisition & Technology), DUSD (A&T), subject: Future Competition for Defense Products (7 July 2000) [hereinafter Future Competition Memorandum], *available at* http://www.acq.osd.mil/ia. A monopsony exists when a buyer controls the market. BLACK'S LAW DICTIONARY 1023 (7th ed. 1999).

8. OFFICE OF THE SECRETARY OF DEFENSE, DEFENSE SCIENCE BOARD TASK FORCE ON ANTITRUST ASPECTS OF DEFENSE INDUSTRY CONSOLIDATION (Apr. 1994) [hereinafter DSB REPORT ON INDUSTRY CONSOLIDATION]. The DOD conducted forty-six formal merger or acquisition reviews in 1999. U.S. DEP'T OF DEFENSE, ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS (Feb. 2000) [hereinafter INDUSTRIAL CAPABILITIES REPORT], *available at* http://www.acq.osd.mil.

9. FEDERAL TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.3 (Apr. 2000) [hereinafter COLLABORATION GUIDELINES], *available at* http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm.

10. *See* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 1.

11. William E. Kovacic, *The Application of the Antitrust Laws to Government Contracting Activities: Illegal Agreements with Competitors*, 57 ANTITRUST L.J. 517 (1988); John W. Chierichella, *Antitrust Considerations Affecting Teaming Arrangements*, 57 ANTITRUST L.J. 555 (1988); Charles L. Eger, *Contractor Team Arrangements Under the Antitrust Laws*, PUBLIC CONTRACT L.J., No. 2, June 1988, at 595; William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 ANTITRUST L.J. 1059 (1989).

Of course, the defense industry downsizing and related consolidation were not the exclusive causes of this behavioral trend. As DOJ and FTC have stated: "In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs."[12] Even DOD's nonsystems markets, including base services and other commercial items, are experiencing these "forces."[13]

With more strident competition, particularly in the defense systems industrial base, antitrust experts and observers over the past decade cautioned against the anticompetitive risks of collaboration. These commentators assert that companies seeking market monopolies or groups seeking to restrain trade to an advantageous end can abuse overly restrictive collaborative arrangements.[14] Because of such cautionary antitrust scholarship, the business community at large has also shown risk aversion toward collaborations.[15] Therefore, "[a] perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of pro-competitive collaborations."[16]

The two forces of defense procurement reform and sensitivity toward unclear antitrust standards for collaborations fueled a firestorm of controversy recently when DOD proposed a new set of rules prohibiting what it perceived was a particularly anticompetitive contractor collaboration—exclusive teaming arrangements.[17] These arrangements exist when one contractor with a unique asset agrees to participate in a DOD procurement

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12. COLLABORATION GUIDELINES, *supra* note 9, at 1. In fact, in the 1995 hearings conducted by FTC on global and innovation-based competition, FTC and DOJ learned that "global and innovation-based competition [continues] driving firms toward ever more complex collaborative agreements." Shepard, *supra* note 4, at 641 n.2 (quoting Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22,045, 22946 (Apr. 28, 1997)). These agencies discovered that the business community was confused about both FTC and judicial standards for evaluating such increasingly valuable business activities. *Id.*

13. *See, e.g.*, Colsa Corp. v. Martin Marietta Servs., Inc., 133 F.3d 853 (11th Cir. 1998) (finding Martin Marietta's termination of a software services support subcontractor on a Navy facilities operation and maintenance contract not to be illegal anticompetitive conduct.); *see also* Shepard, *supra* note 4, at 641.

14. *See, e.g.*, Chiericella, *supra* note 11; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11; Eger, *supra* note 11.

15. *See* Shepard, *supra* note 4, at 641.

16. COLLABORATION GUIDELINES, *supra* note 9, at 1. *See* Shepard, *supra* note 4, at 641 (noting the business community's anxiety over unclear and inconsistent antitrust standards for collaborations).

with one or more other contractors, provided that the collaborators agree not to work with nonparticipants. Such collaborations subjugate collaborators to the unique asset owner and, therefore, violate antitrust law, according to the DOD position. The ensuing industry comments reveal a deep chasm in the defense community's understanding and respective interests in the enforcement structure of antitrust law to contractor collaborations and its role in the procurement process.[18]

This article reviews the three overlapping general aspects of government action that govern the level of collaboration among DOD contracts, and the procedural enforcement regimes used within each. First, DOJ and FTC apply antitrust laws to the private conduct of contractor collaborations.[19] These agencies take into account the unique DOD regulatory and monopsony powers to inform their assessments, but so far have relied little on DOD for coordinating their enforcement efforts. The DOD defers on matters of antitrust laws to these agencies. Second, the various federal procurement statutes provide a host of requirements for achieving competition during DOD procurements and punish contractors financially for violating antitrust laws.[20] In addition, a host of exceptions may contradict or limit the application of antitrust competition standards.[21] Finally, as a buyer (market participant or market-maker), DOD's purchasing decisions play a significant role in shaping the behavior of its contractors.[22]

With the aid of realistic hypothetical collaborations, this article critiques the effectiveness of the three procedural enforcement regimes as they apply to anticompetitive collaborations. Specifically, this article

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17. *See DFARS Case 99-D028*, 64 Fed. Reg. 63,002 (Nov. 18, 1999); Douglas E. Perry & Richard C. Park, *Exclusive Teaming Arrangements: Impact of Antitrust Guidelines*, *in* WEST GROUP BRIEFING PAPERS 2D, No. 00-6, May 2000, at 1; *Industry Questions*, *supra* note 6.

18. *See, e.g.*, *Industry Questions*, *supra* note 6.

19. *See, e.g.*, The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (2000); The Federal Trade Commission Act, 15 U.S.C. § 45. While substantial, this article does not include discussion of the role of individual states in enforcing competition laws; however, individual state's antitrust laws are not preempted by the federal laws. California v. ARC America Corp., 490 U.S. 93, 100-06 (1989).

20. *See* The Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 1175 (codified as amended 10 U.S.C. § 2304 (2000)) (CICA); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION pt. 6, subpt. 9.4 (Sept. 2001) [hereinafter FAR] (implementing the CICA in part); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 209.4 (Aug. 17, 1998) [hereinafter DFARS] (same).

21. *See, e.g.*, Fed. Trade Comm'n v. Alliant Techsystems Inc., 808 F. Supp. 9, 22 (D.D.C. 1992).

22. *See* Future Competition Memorandum, *supra* note 7; Kovacic, *supra* note 2.

addresses the following missing or ineffective interrelationships: (1) the role and effect of DOD buying behavior and its agents' representations in the application of antitrust law to contractor collaborations; (2) the procedures used by DOD under its procurement system to monitor, assess, report to, and assist DOJ and FTC with potentially illegal collaborations among DOD contractors; and (3) the lack of effective procedures within DOD to assess and incorporate the results of an antitrust review of potential collaborations into particular procurements or buying decisions and practices.

This article proposes a new set of procedures that fill in the enforcement procedural gaps outlined above, and synchronize agency actions on contractor collaborations. This article evaluates the proposed procedures by: (1) their ability to assist contractors in predicting government reactions to collaborations; (2) the efficiencies and flexibility gained through more rapid and responsive coordination of enforcement activities, including decreased transactional costs to both DOD and its contractors; (3) their relative ease of implementation and application, including training of DOD personnel; and (4) their overall effect in fostering competitive behavior and achieving other DOD industrial capability goals.

This article outlines three distinct proposals. First, through a critique of the current system, this article discusses the unmitigated disadvantages of maintaining the existing enforcement system. Second, this article outlines a set of procedures based upon a centralized DOD analytical review model. Finally, this article recommends the incorporation of antitrust concepts and review procedures into the existing decentralized and specialized purchasing and budgeting systems, or "centers of excellence." The proposed procedures focus on coordination of procurement procedures and law enforcement procedures, including investigations, with regard to the distinction between "per se" violations of antitrust law and those subject to reasonableness tests, the efficiencies gained in collaborations, the types of anticompetitive harm to be considered within specific industry conditions, and the balancing of anticompetitive harm and benefits in collaborations.

II. Background

A. The Defense Industrial and Procurement Environment

Scholarly application of antitrust laws to DOD contractor business activity historically focused only on the "defense industry." Defining the

"defense industry" in the twenty-first century, however, is becoming more difficult. The financial world generally views this industry as a distinct and powerful group of companies serving global aerospace and national defense "systems" (that is, vehicle, weapons, information technology, and similar) needs. Within the United States, the industry comprises manufacturing and service segments and sub-segments based on the nature of the output, variously categorized as: commercial and military;[23] defense, commercial aircraft, and space;[24] commercial "off-the-shelf" and specialized;[25] by product function;[26] and other services.[27] For antitrust purposes, DOJ and FTC define "market" as a particular product (or service) market[28] within a geographical market.[29]

Since the early 1990's, the defense budget reductions have reduced the number of defense industry companies by about half. Now one or two

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23. Peter B. Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Activities in Markets for Specialized Government Products*, 57 ANTITRUST L.J. 543, 543-44 (1988).

24. Hoover's Online, *Aerospace/Defense-Products*, *at* http://www.hoovers.com/industry/description/ 0,2205,2310,00.html (last visited Apr. 30, 2002).

25. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 517 (applying antitrust market definitions to defense procurements).

26. Kovacic, *supra* note 2, at 423.

27. *See, e.g.*, U.S. CENSUS BUREAU, THE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS) – UNITED STATES (1997) (listing various defense products among other economic outputs, including traditional vehicles and equipment in various manufacturing subcategories and various other service outputs throughout, such as national security services under "Other Services"), *available at* http://www.census.gov/epcd/www/naics.html . Researchers may find it helpful to search the various aerospace and defense industry participants by Standard Industry Classification Codes. *See* Hoovers, Inc., *Aerospace & Defense-Products, SIC Codes*, *at* http://www.hoovers.com/industry/siccodes/ 0,2519,2310,00.html (last visited Apr. 30, 2002). The DOD also reports on and analyzes its contractors by "military products." *See* INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 8. The DOD codes individual procurements under the Federal Supply Classification Codes according to the nature of the item procured and the three main categories of RDT&E, supplies and equipment, and services and construction. *See* U.S. DEP'T OF DEFENSE, WASHINGTON HEADQUARTERS SERVICES, PRIME CONTRACT AWARDS BY SERVICE CATEGORY AND FEDERAL SUPPLY CLASSIFICATION (n.d.) [hereinafter PRIME CONTRACT AWARDS] (listing DOD expenditures by federal supply classification code and description), *available at* http://web1.whs.osd.mil/peidhome/ prodserv/p07/fy2000/p07.htm. The DOD also categorizes and manages individual procurements according to the procurement process used, either as "major systems" through "acquisition programs" and "major defense acquisition programs," depending on estimated expenditures or non-major systems. *See supra* note 3. "Major systems" acquisitions are subdivided into component milestones where various decisions are made, including whether to proceed with the procurement. U.S. DEP'T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM encl. 2 (23 Oct. 2000).

large firms dominate each "systems" industry sub-segment,[30] despite marginal financial performance.[31] The DOD has worked closely with DOJ, FTC, and other agencies to oversee this reduction by shaping the industry's mergers and acquisitions in hopes of obtaining significant procurement cost savings.[32] The DOD largely realized the savings from this activity,[33] but with consolidation nearly complete, the focus is changing. Thus, the defense industry is entering a new paradigm.[34]

> The Defense industrial and technology base has undergone a fundamental change over the past decade. DOD traditionally relied on a largely defense-unique industrial base comprised of dozens of suppliers and technology leaders. In the future, the Department must increasingly access the commercially driven marketplace, in which the Department competes with other business segments for technology, investment, and human capital.[35]

Several additional economic and political factors have played a role in this shift, including a more informed and competitive investment community, the "revolution" in information technology, the globalization of the capital and industrial markets, streamlining reforms in government

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28. The relevant product market is determined by "identifying all reasonable demand substitutes and all firms that make (or could make, without significant cost or delay) the product in question." Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087. *See* U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.1 (revised Apr. 8, 1997) [hereinafter HORIZONTAL MERGER GUIDELINES], *available at* http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm.

29. The relevant geographic market is "established by determining the area to which the purchasing agency can look to attract offerors for individual contracts." Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.2. Accordingly, a firm in the defense industry can participate in a variety (even a web) of product and geographic markets, although the market for a system is typically a single national one. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1984).

30. *See* Hoovers, Inc., *Aerospace & Defense-Products, Companies in This Industry, at* http://www.hoovers.com/industry/description/0,2205,2310,00.html (last visited Apr. 30, 2002) (providing a list of industry participants); Kovacic, *supra* note 2, at 422-23 (listing current segment leaders).

31. *See* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 6.

32. *See* INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 12-13; DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1.

33. INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 8.

34. *See* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 6.

35. *Id.*

management, and other technological improvements caused by more competitive research and global development.[36] The necessary post-downsizing rationalization of the defense industry moves under these influences.[37] They have radically changed business models (witness the terms "old" and "new" economies) and competitive business practices.[38] For example, one popular idea has been competitor use of the Internet to form buying collaborations.[39] Even five major defense industry participants have collaborated recently to develop an Internet site, called "Exostar," where they can purchase parts from over 8,000 worldwide suppliers.[40] The defense firms expect to dramatically reduce the number of subcontractors and supplier transaction costs.[41]

Defense industry observers and participants are encouraging DOD to tap into the broader marketplace for competitors to integrate commercial technologies into exclusively defense systems.[42] Further, they suggest a

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36. *Id.*; *see also* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1061-62; Wendy A. Polk, *Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations*, PUB. CONT. L.J., Spring 1999, at 415-16.

37. Economists refer to the process of company adjustments in capacity, structure, finance, etc., in response to the downsizing as "rationalization." *See, e.g.*, DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 2. The post-downsizing industry structure has heaped the problems of excess infrastructure and workforce capacity, outdated business processes, tighter revenue sources, and others upon an industry that is competing with what has been referred to as the "new economy." INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 2; DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 17. A large part of the pressure to adopt more competitive commercial practices stems from the political and financial pressures to rationalize. There appears to be a debate among analysts as to whether the external economic pressures first generated the interest in adopting more commercial practices or whether the Cold War down-sizing forced the defense industry to adopt commercial solutions to these forces in their own efforts. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1060 (providing an example of the latter theory).

38. "They have reduced excess infrastructure and workforce levels to better match reduced demand, streamlined processes, increased productivity, and revamped supplier relationships." INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 7.

39. *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (rejecting challenge to a purchasing cooperative of competing retailers). The use of buying or selling collaborations will be addressed from an antitrust perspective below.

40. *See* Exostar, *Introducing Exostar*, *at* http://exostar.com/company.asp (last visited Apr. 30, 2002).

41. *See id. See generally* Michael S. McFalls, *Symposium: Antitrust Scrutiny of Joint Ventures: The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 ANTITRUST L.J. 651, 671 (1998) (arguing that collective buying arrangements do not reduce levels of "insider competition" among joint venture participants).

host of other strategies for leveraging the competitive business practices of the broader economy to both entice participation by nontraditional firms and improve cost and performance goals by becoming more "commercial."[43] One strategy, adopted in part by DOD, and "designed to promote competition and increase access to commercial inventories,"[44] seeks to scrutinize the increasing potential for powerful, anticompetitive collaborations by competitors.[45]

Accordingly, the lines of distinction between the competitive business practices of traditional "defense industry" and other commercial suppliers continue to blur. In 1988, one antitrust and defense industry observer noted, "the economic forces one finds in these two discrete government marketplaces are quite different, and the types of antitrust issues that arise differ as well."[46] But with DOD now moving toward integration of nontraditional defense competitors, it must be aware of the effects of anticompetitive business practices on both industrial management goals for the existing defense industry and the disincentives for new firms to enter this market.[47] Further, similar economic forces motivating collaborations among "defense industry" firms exist within the purely commercial segments of the DOD procurement market.

To that end, DOD must examine collaborative conduct among its commercial products and services contractors under similar scrutiny. Even these nonsystems procurements are affected by economic and political changes, and the volume of such procurement activity equally supports

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42. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 28-29; Kovacic, *supra* note 2, at 455-62; INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 15.

43. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 28; Kovacic, *supra* note 2, at 443-67; INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 12-20. The DOD has acknowledged that its efforts to attract nontraditional defense firms face several obstacles, but in general, acquisition reform and management of industry structure can provide benefits. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 8-9.

44. INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 20.

45. *See* Kovacic, *supra* note 2, at 465-66; *Industry Questions*, *supra* note 6 (discussing the proposed rules on exclusive teaming arrangements).

46. Work, *supra* note 23, at 544. Work outlined three unique characteristics of "specialized government products." First, the government has monopsonist powers and shapes both the existence of future markets and the requirements for participation. Second, the barriers to entry into such markets are so high that contractors on particular product segments are not easily replaceable. Third, the government considers noneconomic factors in procurement decisions, such as industrial capacity and socio-economic policies. *Id*. at 544-45.

47. Kovacic, *supra* note 2, at 464-66. To a degree, the DOD has recognized these obstacles. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 27-28.

such an approach. In particular, DOD continues to put a substantial portion of its commercial activities up for bid, having identified about 250,000 positions subject to competitive outsourcing.[48] Acquisition reform efforts over the past decade successfully persuaded the government to purchase such "commercial items"[49] and services in a manner more consistent with the broader commercial marketplace, while avoiding the abuses heaped upon the procurement system in the 1980s. In fiscal year 2000, DOD spent under contract $55 billion on services and construction, $65 billion in supplies and equipment, and $20 billion in research, development, testing, and evaluation.[50] The procurements for "commercial items," however, also experience the unique regulatory and monopsonistic influences exerted by DOD, as demonstrated by the sheer magnitude of the "acquisition reform" movement of the 1990s.[51]

The antitrust standards applicable to DOD contractors are flexible enough for all markets. The DOD should adopt a consistent set of procedures across its own procurement submarkets to enhance its systems and nonsystems competition goals.

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48. *See* U.S. Dep't of Defense, *FAIRNET, at* http://web.lmi.org/fairnet (last visited May 28, 2002).

49. FAR, *supra* note 20, at 2.101 (a "commercial item" is "any item other than real property, that is of a type customarily used for nongovernmental purposes"). *See* Kovacic, *supra* note 2, at 455-56. These efforts continue. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2000, 106 Pub. L. No. 65, 113 Stat. 512 (1999); Acquisition of Commercial Items, 66 Fed. Reg. 53,483 (Oct. 22, 2001) (amending FAR 2.101).

50. *See* PRIME CONTRACT AWARDS, *supra* note 27 (providing a specific breakdown of expenditures by federal supply classification code and description by fiscal year). *See also* U.S. GENERAL ACCOUNTING OFFICE, REPORT, CONTRACT MANAGEMENT: TAKING A STRATEGIC APPROACH TO IMPROVING SERVICE ACQUISITIONS, GAO-02-499T (Mar. 2002).

51. *See, e.g.*, Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994); Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996). For example, the procurement of "commercial activities" is subject to extensive federal regulation beyond the FAR. *See, e.g.*, FEDERAL OFFICE OF MGMT. AND BUDGET, CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983) [hereinafter OMB CIR. A-76] (now implementing the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998)).

B. Corporate Structure, DOD Contractor Competitive Factors, and Collaborative Behavior

1. Corporate Structure and DOD Contractor Competitive Factors

The leading theoretical business management model explains the significance of collaborative behavior. While this article does not attempt to provide a complete review of current microeconomic and management theory on the incentives for the collaboration trend, a brief overview of the leading theoretical business management model will illustrate the way in which the myriad competitive factors motivate such corporate activity.

The shift in emphasis from diversified conglomerate firms began seriously in the 1970s, largely under the influence of the development of corporate strategic management theories. An influential scholar, Michael Porter, described companies as "value chains," wherein a company transforms inputs into outputs that customers value.[52] Such a transformation requires expert management of the primary activities of research and development, production, marketing, sales, and distribution, combined with such supporting activities as the company infrastructure, human resources, and materials management.[53]

Under Porter's model, these activities provide the best customer value if their products or services are either lowest in cost, highest in differentiation, or capture a niche ("focused") market.[54] If a firm, depending on its target market, can maximize its operating efficiencies, quality of output, customer responsiveness, and level of innovation, it will obtain some competitive advantage over other industry participants.[55] Arguably, when a firm's strategy to provide its products or services within a particular industrial environment results in the lowest cost or highest level of differentiation or captures a niche, it produces earnings at a level above its peers.[56] For a variety of reasons, including the condition of a particular industry, many firms either avoid these competitive pressures or ignore the rationale

52. *See* MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE (1985).

53. CHARLES W.L. HILL & GARETH R. JONES, STRATEGIC MANAGEMENT: AN INTEGRATED APPROACH 120-23 (4th ed. 1998) (citing PORTER, *supra* note 52). Sophisticated techniques have since been developed to assess how well a firm's value chain provides a "competitive advantage," including enhancements to the "value chain" itself. *See* W. Jack Duncan, Peter M. Ginter & Linda E. Swayne, *Competitive Advantage and Internal Organizational Assessment*, ACAD. MGMT. EXECUTIVE, No. 3, 1998, at 1.

behind this theory, continuing to operate for long periods without substantial improvements in cost or differentiation.

Based on the nature of a firm's industry, its markets, and its unique "competitive advantages," it will form a strategy to structure and orient its primary and supporting activities to achieve its goals. This theoretical model now includes major adjustments reflecting the economic pressures mentioned above, notably the "technological revolution" and "increasing globalization."[57] Companies gain a competitive advantage by executing different organizational structure or transactional strategies,[58] or both, as the circumstances dictate.[59]

Where a copper-pipe manufacturing firm, for example, purchases a copper mining operation, it theoretically does so to save on "upstream"

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54. MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS (1980). If a product stands out in some qualitative way from its competitors, some segment of customers may be willing to pay a "premium" for the difference. The firm that satisfies a qualitative demand unique to a customer segment's desires should expect to earn that segment's business. The product or service need not be differentiated on functionality (or uses) alone. In fact, antitrust law acknowledges that products or services may form entirely legally distinct markets (or "submarkets") in a variety of ways. *See* Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1073-81 (D.D.C. 1997) (applying Supreme Court criteria of "submarkets" to find distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies). The DOJ and FTC established specific methods of accounting for product differentiation in the federal merger guidelines. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 28, §§ 1.12, 1.22. Differentiation by sellers of commodities based solely on price is subject to the Robinson-Patman Act (Section 2 of the Clayton Act), 15 U.S.C. § 13 (2000), but is not addressed in this article.

55. HILL & JONES, *supra* note 53, at 120. A firm that develops unique resources into "skills and capabilities [possesses] core competencies." Michael A. Hitt, Barbara W. Keats & Samuel M. DeMarie, *Navigating in the New Competitive Landscape: Building Strategic Flexibility and Competitive Advantage in the 21st Century*, ACAD. MGMT. EXECUTIVE, No. 4, 1998, at 22, 28.

56. Various theories and practices of corporate finance and accounting also support this model and are, to a large extent, reflected in the concerns of the defense industry's structure. *See* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 9, 13, 44; *see also* INDUSTRIAL CAPABILITIES REPORT, *supra* note 8, at 2.

57. Hitt, Keats & DeMarie, *supra* note 55, at 22, 23.

58. These strategies include: vertical integration of suppliers (called "backward," or "upstream integration") or distributors ("forward," or "downstream integration") via merger or acquisition; formation of strategic alliances (collaborations) with upstream or downstream firms as an alternative to permanently integrating; outsourcing activities instead of integrating; and even diversifying into other markets (where primary or supporting activities can be shared efficiently among a firm's different markets). HILL & JONES, *supra* note 53, at 280-307.

costs of purchasing copper for production by reducing transactional costs and risks, including price fluctuations. But firms now must possess "strategic flexibility" in addition to a unique competitive advantage.[60] Components of such flexibility include developing outsourcing strategies, use of new manufacturing and information technologies, and application of cooperative strategies, among others.[61] So, a copper manufacturer wishing to avoid the consequences of severe fluctuation in copper prices may choose a strategic purchasing alliance with other copper buyers instead of mining copper itself.

2. Collaborative Behavior

Depending on the circumstances of the transaction, collaborations on primary and supporting activities with either market competitors or vertically related firms can provide benefits to the collaborating firms. Such collaborations offer a host of "efficiency enhancing integrations of economic resources,"[62] including: "lower costs through economies of scale; increase[d] capacity, research and development (R&D), or market access;[63] entry into a new market; minimiz[ing] risk; avoid[ing] duplication; efficiently commercializ[ing] new products or technology; achiev[ing] synergies by combining complimentary capabilities; and obtain[ing] better returns on investment and innovation."[64] The nature and

59. "Parties may form joint ventures to set standards, research and develop new products, purchase inputs, produce inputs, integrate production, or distribute, market, or sell production. Many ventures will perform more than one (and perhaps several) of these functions." McFalls, *supra* note 41, at 652.

60. Hitt, Keats, & DeMarie, *supra* note 55, at 26. Firms that possess "dynamic core competencies" establish the strategic flexibility to shift their resources, skills and capabilities to support unique market opportunities. *Id.* at 28. More precise asset valuation and corporate financial models have subjected DOD industry to the pressures of re-shaping their core competencies. This "portfolio shaping" was presented in 1997 as one of the critical problem areas facing the industry. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 11. This pressure has only grown. DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 9, 13.

61. Hitt, Keats & DeMarie, *supra* note 55, 26. *See also* Norman Ray, *Rio Grande: Transatlantic Reality – A U.S. Defense Contractor's View*, DEF. DAILY INT'L, Sept. 22, 2000 (improving efficiencies, mastering politics, and collaborations necessary to meet financial markets' expectations). *But see* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, app. E-2 (asserting that a 1991 survey found that DOD prime contractors tend not to change "make" or "buy" decisions once capability is established).

62. Comment and Hearings on Joint Venture Project, 62 Fed. Reg. 22045, 22,946 (Apr. 28, 1997), *quoted in* Shepard, *supra* note 4, at 642.

scope of any efficiencies[65] depend upon the contractual terms and structure of the collaboration, regardless of its name.[66]

A more detailed understanding of such incentives rests in microeconomic theories that are highly technical and undergoing constant scrutiny. The calculation of firms' costs, including fixed costs, variable costs, marginal costs, transfer prices,[67] and total average costs, depend on the multiple variations in accounting rules, business estimates, and the reasons for choosing among these calculation methods.[68] The prices charged for

63. Joint buying and selling collaborations commonly assist small, local firms in achieving quantity discounts that lower overall prices making them more competitive with larger regional or national firms. *See, e.g.*, Business Review Letter from Joel I. Klein, U.S. Department of Justice Antitrust Division, to Garret G. Rasmussen (Mar. 8, 2000) (joint steel buying collaboration to service small nonoverlapping steel drum manufacturers), *available at* http://www.usDOJ.gov.atr/public/busreview; Business Review Letter from Joel I. Klein, U.S. Department of Justice Antitrust Division, to Michael P.A. Cohen (Jan. 13, 1999) (joint purchasing association between local funeral homes), *available at* http://www.usDOJ.gov/atr/public/busreview.

64. Shepard, *supra* note 4, at 642. *See also* COLLABORATION GUIDELINES, *supra* note 9, § 2.1; MERGER GUIDELINES, *supra* note 28, § 4 (distinguishing measurability and likelihood of efficiencies in primary and secondary business activities generated by mergers and acquisitions). For a variety of reasons beyond the scope of this article, the defense industry has been subject over the past decade to significant pressure from the stock market to "consolidate, trim excess capacity, and increase efficiencies." DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 11. Defense industry participants see several reasons for Wall Street's pessimism, including: lack of growth potential in a growth-oriented equity market and concerns about DOD and Congress as a customer (such as lack of predictability, uncertainty about payment cash flow, low returns, and serious doubts about company management). DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 44. The structure of defense industry firms continues to be re-shaped, supporting the notion of "strategic flexibility." *The Collaboration Guidelines* discuss in detail the benefits and risks of collaborations in four common business activities. COLLABORATION GUIDELINES, *supra* note 9, § 3.31(a).

65. Companies may gain efficiencies through risk reduction by sharing such risks with co-collaborators. Naturally, joining with rivals carries many off-setting costs and risks that must be weighed from a variety of perspectives, including contractual risks, financial risk (such as operating, interest rate, foreign exchange, and other risks), economic risks (for example opportunity costs), asset exposure (such as losing protection of intellectual property and trade secrets), risk of foreign sovereign action (for trans-national collaborations) and, of course, antitrust scrutiny, among many others. *See* Gregory J. Werden, *Antitrust Scrutiny of Joint Ventures: Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 702 (1998).

66. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1060; Shepard, *supra* note 4, at 642; Perry & Park, *supra* note 17, at 1; Polk, *supra* note 36, at 415-16, 422-23. *See also* COLLABORATION GUIDELINES, *supra* note 9, § 2.1.

goods and services, the level of investment made in various primary activities, the level of quality and post-sale services, and the degree of market penetration, among other things, depend upon a firm's interpretation of its industry's structure and operating rules. For example, firms operating in fully competitive markets theoretically affect the price of goods only when they can permanently lower their marginal costs through "competitive advantage." [69] Doing so will attract customers away from competitors, thereby forcing the competitors to achieve lower marginal costs to bring the market back into competitive equilibrium. However, not all markets are fully competitive; some are controlled by oligopolies,[70] others by monopolies.[71] Each market structure has competing theoretical economic incentives for behavior.[72] Much of antitrust law is based on such theories, and the schools of interpretation of antitrust laws range as broadly as do

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67. Transfer pricing involves the accounting of costs among a firm's organizational components or between a collaboration and its members (that is, the amount a joint venture charges its members per unit). For example, the Cost Accounting Standards treat joint ventures as "segments" for purposes of defining subcontracts as well as allocation of general and administrative expenses and R&D/bid and proposal costs. *See* 48 C.F.R. subpts. 9903.201, 9904.410, 9904.420 (2001).

68. *See, e.g.*, Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO. MASON L. REV., 479, 484-85 (1998) (outlining different judicial use of marginal and average variable costs in antitrust predatory pricing cases and U.S. Department of Commerce use of total average cost in trade law antidumping cases).

69. *See* McFalls, *supra* note 41, at 652 (defining "classical market power," "exclusionary market power," and "allocative efficiency" theories in antitrust law):

> The classical model of perfect competition assumes that competitive markets consist of numerous suppliers that compete to set the price of their output at marginal cost. Because each firm is too small to affect the market price by itself, a firm attempting to increase prices above the competitive level (i.e., above its marginal cost) will lose customers and either be forced to return prices to the competitive level or go out of business. Similarly, a reduction in the firm's output will not affect the market price because its output is too small to significantly reduce the market output. In other theoretical models, firms may set prices above marginal cost, yet still not earn supracompetitive prices due to high fixed costs. In the classical model of monopoly, by contrast, the monopolist affects market prices through unilateral changes in output.

Id. at 653-54.

70. An oligopoly exists when only a few firms dominate a market. *See, e.g.*, Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) (discussing "consciously parallel behavior" of firms in a concentrated industry). Federal merger and acquisition policy focuses extensively on the predisposition or ability of oligopolies under certain market conditions to act like monopolies through noncollusive conduct described as "coordinated interaction." *See* HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 2.

the varying schools of microeconomics.[73] As the opening quote of this article suggested, one of the defense industry's complaints is that DOD procurement officials at the operating level fail to understand how such dynamics apply to "their" industry.[74]

Within the defense "systems" industry, one scholar argues that there are several motivations to collaborate during the down-sizing period: (1) cooperating with competitors to retain a piece of the shrinking defense budget;[75] (2) combined R&D capacity sought by DOD; (3) sharing the financial risks associated with DOD shifting of developmental costs to contractors; (4) broader availability of competitive business practices fostered by acquisition reform; and, (5) alleviating political pressures on individual programs by avoiding winner-take-all contract awards.[76] Other company-specific benefits for defense industry participants focus on cost and risk-sharing for "systems" development, sharing unique and costly tooling, test equipment and facilities, pooling employees,[77] and occasional "free riding" on the progress of co-collaborators.[78] Firms also may seek to resolve structural and environmental concerns over cost accounting sys-

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71. *See e.g.*, U.S. DEP'T OF ENERGY, HORIZONTAL MARKET POWER IN RESTRUCTURED ELECTRICITY MARKETS (Mar. 2000) (describing monopolistic tendencies in scores of electricity markets across the United States and the United Kingdom), *available at* http://www.usdoe.gov. Various DOD agencies (directly or indirectly through the General Services Agency) purchase electricity, sell it, or produce it internally in many of these markets. *See* FAR, *supra* note 20, pt. 41; U.S. DEP'T OF ARMY, REG. 420-41, ACQUISITION AND SALES OF UTILITY SERVICES (15 Sept. 1990).

72. Werden, *supra* note 65, at 702, 716.

73. For a succinct introductory overview of economic theories as they relate to antitrust law, see ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL ch. 3 (1994). For a more specific application to collaborations, see Edmund W. Kitch, *The Antitrust Economics of Joint Ventures*, 54 ANTITRUST L.J. 957 (1986). *See generally* Economists, Inc., *Antitrust Policy, at* http://www.antitrust.org (last visited Apr. 30, 2002) ("an on-line resource linking economic research, policy and cases").

74. *See supra* note 2 and accompanying text. Again, this article cannot serve to provide such a review, but concludes that DOD procurement officials, auditors and legal advisors must have a better understanding of this behavior to effectively interpret and balance antitrust law, procurement law, and buying policies.

75. *See, e.g.*, Vago Muradian & John Robinson, *Raytheon Expresses Concerns to Navy Regarding New DD-21 Team*, DEF. DAILY, Dec. 11, 1997.

76. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1061-62.

77. Polk, *supra* note 36, at 415-16, 422 (citing Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 938 (1993)). *See also* FAR, *supra* note 20, at 9.602; Perry & Park, *supra* note 17, at 3.

78. Polk, *supra* note 36, at 423.

tems and DOD oversight of profit margins. They may manage projected responsibility determinations of co-collaborators, political support for a procurement, pre-qualification and first article testing requirements,[79] and agency problems (information asymmetry and conflicts of incentives between owners and managers). Finally, as the consolidation trend continues, firms may avoid mergers because of heightened antitrust scrutiny or because consolidation would result in unnecessary permanent structural changes to the firm (that is, retaining "strategic flexibility").[80]

Even the DOD has adopted "teaming" and "partnering" as key management practices at the lowest level, both within departmental components and in external agency relationships.[81] The DOD also actively encourages international collaborations for various industrial capability and political reasons (tempered by national security concerns).[82] Whatever the particular reason, procurement officials, auditors, regulators, and legal advisors must be attuned to the specific transactional and organizational incentives involved in any individual procurement, any series of procurements, or structural change that affects industry conditions. Such officials are likely to receive arguments from contractors based on these factors to support their collaborations (and the final price or quality of their output).

The trend toward collaborative behavior challenges the DOD to establish a robust analytical system that fully captures the intent and bases for collaborations related to each transaction and, as later discussed, that fully weighs the benefits and risks to competition in each procurement market.[83] Procurement officials at DOD may encounter myriad agreements among contractors forming complicated webs of collaboration on a

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79. *See* FAR, *supra* note 20, at 9.206 (for effects on competition of qualification requirements), 9.304 (for risks to contractors required to submit to first article testing).

80. Polk, *supra* note 36, at 416-17.

81. For an example of internal teaming, the Defense Contract Management Agency "teams" with procurement offices to provide market research and source evaluations. *See* U.S. DEP'T OF DEFENSE, DEFENSE LOGISTICS AGENCY, EARLY CAS TEAMING FOR ACQUISITION SUCCESS (Sept. 1996), *available at* http://www.acq.osd.mil (U.S. DEP'T OF DEFENSE ACQUISITION DESKBOOK, § 1.2.2.4.1). For an example of external teaming, see DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, app. F-5 (program offices are "teaming with contractors").

82. Vago Muradian, *Pentagon Mulls Overseas Sale of Lockheed's Sanders Unit; Deal May Test Limits*, DEF. DAILY, June 19, 2000; *Analysts: GD Bid for Newport News May Not Die in Antitrust Review*, AEROSPACE DAILY, Feb. 22, 1999, at 266.

83. Perry & Park, *supra* note 17, at 10. *See also* COLLABORATOR GUIDELINES, *supra* note 9, pmbl.

variety of primary or supporting activities.[84] Some agreements may be in the form of collaborations formally endorsed by procurement regulations, such as "teaming arrangements" and "leader-follower" agreements that are specifically contemplated under the Federal Acquisition Regulation (FAR).

The FAR contemplates "teaming arrangements" of two limited types: formal horizontal or vertical collaborations through partnerships or joint ventures (joint ventures), and vertical collaborations in which one company acts as the prime contractor and one or more of its competitors serves as subcontractor (teaming arrangements).[85] In the former, firms join economic resources and integrate them under a newly created legal entity.[86] Under *The Collaboration Guidelines*, such a joint venture may qualify as a merger if certain conditions are met, thereby requiring merger analysis.[87] In the latter, written or oral agreements serve to contractually bind economic resources to a particular activity (for example, a single government contract or types of contracts).[88] Scholars and practitioners note that these

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84. Kovacic, *supra* note 2, at 440. *See, e.g.*, Vago Muradian, *BAE Awaits Justice, CIFIUS Rulings on Planned Purchase of Lockheed Unit*, DEF. DAILY INT'L, Nov. 10, 2000 (BAE Systems' purchase of a Lockheed Martin electronics business, AES, complicated by BAE teaming arrangement with Northrop Grumman on infrared countermeasure system competing directly with AES effort.). Government oversight of mergers and acquisitions is becoming increasingly complex, due in part to contractual restraints on buyers of assets divested as part of the government review. Robert Pitofsky, The Nature and Limits of Restructuring, Remarks Before the Cutting Edge Antitrust Conference, New York (Feb. 17, 2000), *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm.

85. FAR, *supra* note 20, at 9.601.

86. Polk, *supra* note 36, at 422; Eger, *supra* note 11, at 599-600.

87. COLLABORATION GUIDELINES, *supra* note 9, § 1.3. Merger analysis will be conducted when:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms.

Id. In addition, collaborators may be required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000), to provide notice to DOJ and FTC before forming a joint venture, whether it qualifies as a merger or meets joint venture notice threshold. Except as briefly noted in Section III.A, *infra*, this article assumes that all qualifying joint ventures file the appropriate notice.

88. Perry & Park, *supra* note 17, at 2-3; *see also* Polk, *supra* note 36, at 437; Kovacic, *supra* note 11, at 1060.

definitions are often inconsistent with broader scholarly and judicial use as well as inconsistent with other provisions of the FAR itself.[89] "Leader-follower" agreements may also be encountered in rare circumstances.[90] The FAR does not prohibit other types of collaborations, even if they fail to meet these definitions; rather, various provisions of the FAR allude to other permissible types.[91]

Collaborations encountered by procurement officials more likely will include the broad range of "one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom."[92] These "agreements," regardless of the form, involve "one or more business activities, such as research and development, production, marketing, distribution, sales, or purchasing . . . as well as information sharing and various trade association activities."[93] All of these collaborations are subject to antitrust scrutiny by DOJ and FTC, whether during a "systems" procurement or not, and regardless of what components from participating firms' value chains are involved.[94] To become subject to antitrust scrutiny, they require no formal acknowledgement by DOD as FAR-sanctioned agreements, nor do they require acknowledgement by DOJ and FTC.[95]

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89. Polk, *supra* note 36, at 422 (citing Kovacic, *The Application of the Antitrust Laws to Government Contracting Activities: Illegal Agreements with Competitors*, *supra* note 11, at 437). A generally accepted definition of "joint venture" has yet to be established even among the business community at large. Shepard, *supra* note 4, at 642. In particular, "teaming arrangements" often refers to both horizontal and vertical collaborations not otherwise qualifying as "joint ventures."

90. Polk, *supra* note 36, at 445; Eger, *supra* note 11, at 598-99; FAR, *supra* note 20, at 17.401. Under these arrangements, the DOD requires the prime to share resources, such as innovations, with its "follower" collaborator.

91. For a discussion of the FAR's varying coverage on this point, see Polk, *supra* note 36, at 437 n.212.

92. COLLABORATION GUIDELINES, *supra* note 9, § 1.1.

93. *Id. See also* Perry & Park, *supra* note 17, at 10.

94. COLLABORATION GUIDELINES, *supra* note 9, § 2.3. For policy arguments over the breadth of collaborations covered by antitrust law, see Werden, *supra* note 64, and Edward Correia, *Antitrust Scrutiny of Joint Ventures: Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737, 738 (1998).

95. To the extent that such ambiguities and inconsistencies in definitions exist between the FAR and *The Collaboration Guidelines* (and within the FAR), the Federal Acquisition Council should consider regulatory modifications. Procurement officials not trained in antitrust laws (in particular, in *The Collaboration Guidelines*) likely will overlook the legal and economic impact of carrying out procurements involving such nonsanctioned collaborations.

C. Hypothetical Collaborations

Examples of the various types of collaborations provide a method of critiquing DOD's procedures for integrating antitrust enforcement activities, procurement policies, and buying decisions.[96] Naturally, given the broad application of *The Collaboration Guidelines*, these hypothetical agreements cannot envision all possible forms and terms and conditions of collaborations. The purpose of this article, however, is not to elaborate or refine substantive antitrust law as it applies to DOD procurements, but rather, to propose robust procedures through which such a broad range of activities can be effectively reviewed and acted upon.

Collaborations are viewed under antitrust laws primarily by their level of integration of economic resources among the participants and the consequent effect they have on the level of competition in the relevant market.[97] These factors may compliment the benefits sought by DOD in the "new" industrial paradigm.[98] The collaboration that most closely approaches a merger is a joint venture,[99] where competitors in a market integrate an economic activity in that market such that the integration eliminates all competition among them, and the collaboration does not terminate in a limited period.[100] On the other end of the continuum, the least significant collaboration may be the purchase of a repair part from a competitor under a commercial contract. The following hypothetical collaborations provide examples of the range of activities encountered in DOD procurements to give the reader some context within which they can apply

96. At least one other author has used this technique to propose a methodology for antitrust review of FAR-sanctioned collaborations by private practitioners. Eger, *supra* note 11. *The Collaboration Guidelines* uses them extensively to illustrate various points. COLLABORATION GUIDELINES, *supra* note 9, *passim.*

97. *See* COLLABORATION GUIDELINES, *supra* note 9, § 1.3 (distinguishing mergers from collaborations); Kitch, *supra* note 73, at 958.

98. *See supra* note 73 and accompanying text. *See also* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 8-9.

99. Unless otherwise stated, the term "joint venture" used in this article includes only those collaborations established by members through the establishment of a separate legal corporate entity (such as a partnership or corporation). Although the term "joint venture" has been used to describe other broader arrangements, Polk, *supra* note 36, at 422, the more narrow definition maintains consistency in terminology. This article identifies the appropriate definition of "teaming arrangement" as the context dictates, but it is most often used in the procurement community to cover vertical arrangements among competitors.

100. COLLABORATION GUIDELINES, *supra* note 9, § 1.3.

the subsequent legal background and analysis. These examples will then be applied to this article's proposed enforcement procedures.

1. Hypothetical A:[101] *Joint Venture and Licensing Arrangements for Laundering Machines*

The U.S. Military Personnel Agency (a fictitious DOD activity) validated an operational need for personal hand-held laundering machines for service members to carry in their individual gear on deployments. The machine will clean by applying cleansing agents to dirty laundry while spinning it on a small, hanging spinner device. The agency anticipates an annual need of 400,000 units for the first five years, and 50,000 per year thereafter. A microcomputer chip will control the engine and the application of the cleansing agents. A small and powerful commercial fuel cell will power the machine. A technical board determined that the requirement is technologically feasible and proposes contracting for a firm to integrate computer chips, user interface panels, the fuel cell, cleansing agent dispensing controllers and dispensers, engines, and a miniature, hanging clothes spinner.

The program manager identified three national laundry machine manufacturers that can design, develop and produce the hanging clothes spinner and engines, as well as integrate the other components. Six global microcomputer chip manufacturers can produce the requisite number and volume of computer chips in economic quantities. Four national firms in each of the user interface, fuel cell, cleansing agent and dispenser markets can produce nondevelopmental versions of those items at sufficient quantities, but various intellectual property rights protect all products.

The three national laundry machine manufacturers propose to enter into an R&D joint venture to design and develop the hanging clothes spinner and engines. The joint venture would comprise a separate legal entity with a board of directors representing two officers of each manufacturing firm and managed by executives hired by the board. The joint venture would have exclusive access to the research laboratories of the largest manufacturer. Each manufacturer would possess equal rights to use any

101. Taken with significant modification from "Example 1" in Eger, *supra* note 11, at 599.

developed products commercially, and each would contribute $15 million to the effort (the Agency estimates $45 million in R&D).

2. Hypothetical B*: Prime-Subcontract Teaming Arrangement for Base Services*

Fort Anywhere recently received a directive to conduct a "commercial activities" cost comparison pursuant to *Office of Management and Budget Circular A-76*.[102] Fort Anywhere sits 270 miles from the nearest metropolitan area, and receives some of its base supplies via rail or truck from regional suppliers as no local firm could handle the base's requirements. The performance work statement calls for all commercial items or services, and four national base services firms and two regional firms are expected to submit offers.

There are five small plumbing firms in the local town, with a total workforce of twelve plumbers in the surrounding 100-mile area. The base plans to reduce its plumbing employee force from ten to none, and these employees will be entitled to a right of first refusal under any contract awarded. The contracting officer prepared an acquisition plan for the estimated $40 million procurement (over one-year and four option periods), and plans to use a best value negotiated acquisition. She and the installation commander view price equal to the combined sub-factors of past performance, quality, and management experience.

The contracting officer received written questions from the offerors at the pre-solicitation conference indicating that: one national firm may hire the ten plumbers as employees; one regional firm plans to enter into a subcontract with all five local firms, and it would enter into a teaming arrangement to share the ten employee positions and share pro-rata in the subcontracted work; and a national and regional firm may team for a variety of services, including plumbing, which would be performed by the regional firm under subcontract from the national firm.

These examples should provide the reader with the general factual context within which to understand antitrust law, procurement law, and purchase decisions. This article next provides an extensive overview of

102. OMB CIR. A-76, *supra* note 51.

the antitrust, procurement, and purchasing procedures as they relate to collaborations among DOD contractors.

III. Legal and Procedural Framework of Competition Policy: A Critique

A. Antitrust Standards and Enforcement Procedures

1. Legal Framework of Antitrust Standards for Collaborations

While collaborations among businesses can lead to a variety of benefits to individual firms, some collaborations may harm the competitive ability of others, including horizontal rivals and vertically-related firms.[103] As the Supreme Court noted, "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors.*'"[104] Thus, the antitrust laws focus on the economic mechanisms influencing particular markets, although there is debate over the extent to which other noneconomic factors apply.[105]

Congress put into place the primary competition laws, the Sherman Act,[106] the Clayton Act,[107] and the Federal Trade Commission (FTC) Act,[108] around the turn of the twentieth century. Several provisions from these statutes potentially govern collaborative conduct between competitors.[109] Section 1 of the Sherman Act proscribes "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade."[110] It principally focuses on the concerted action of two or more

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103. *The Collaboration Guidelines* include an assessment of competitive effect in both markets. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.31, 3.36.

104. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

105. *See, e.g.*, DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 31-32 (acknowledging inconsistency between Supreme Court precedent and practice); Mark Schwartz, *The Not-So-New Antitrust Environment for Consolidation in the Defense Industry: The Martin Marietta-Lockheed Merger*, 1996 COLUM. BUS. L. REV. 329, 331-33 (1996) (discussing unique national security and procurement regulatory effects on application of antitrust laws to defense industry mergers). *See also* United States v. Brown University, 5 F.3d 658 (3d Cir. 1993) (discussing joint financial aid determinations and socio-economic factors); In the Matter of The Boeing Company/McDonnell Douglas Corporation, Fed. Trade Comm'n File No. 971-0051, July 1, 1997 (discussing "national champion" defense in mergers).

106. 15 U.S.C. §§ 1-7 (2000).

107. *Id.* §§ 12-27; 29 U.S.C. §§ 52-53 (2000). The Robinson-Patman Act also proscribes price discrimination by sellers of commodities. 15 U.S.C. § 13.

108. 15 U.S.C. § 45.

firms, as in the formation of a collaboration that unreasonably restrains competition. Section 2 of the Sherman Act prohibits firms from monopolizing or attempting to monopolize the markets.[111] A distinct entity, such as a joint venture, may illegally acquire, maintain, or attempt to acquire or maintain a monopoly. Section 7 of the Clayton Act prohibits the acquisition (through direct purchase, merger, or otherwise) of stock or assets in another firm when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[112] Finally, the FTC Act proscribes unfair methods of competition or deceptive acts or practices

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109. The term "'competitors' encompasses both actual and potential competitors" in a particular market. COLLABORATION GUIDELINES, *supra* note 9, § 1.1. Horizontal restraints are those agreements that affect firms who participate in a market at the same level of business activity (for example, two distributors). As *The Collaboration Guidelines* state, "[f]irms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present." *Id.* § 1.1 n.6. Vertical restraints are important in the context of teaming arrangements as used by the FAR, but are assessed under *The Collaboration Guidelines* only when they exist between competitors or as a collaboration that may affect related vertical markets.

110. Section 1 of the Sherman Act provides:

> Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

111. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. § 2.

112. *Id.* § 18. This provision applies to joint ventures. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 168 (1964).

in or affecting commerce.[113] Conduct covered under the FTC Act includes conduct in violation of the Sherman and Clayton Acts.[114]

The Collaboration Guidelines synthesize judicial interpretations of these different provisions (and incorporate various underlying economic theories) to establish a single methodology for assessing legality of restraints imposed on collaborating competitors. The DOJ and FTC structured them to allow for "judgment and discretion in antitrust law enforcement."[115] As discussed above, both these agencies and other affected parties must "evaluate each case in light of its own facts and apply the analytical framework set forth in the Guidelines reasonably and flexibly."[116] Several commentators and practitioners anticipated the "analytical framework," and several proposed specific applications of it to defense procurements.[117] Accordingly, this article provides only an overview of the methodology adopted by DOJ and FTC, focusing on coordination and enforcement procedures related to DOD procurement decisions.

Early antitrust caselaw attempted to draw a bright line between conduct of collaborators.[118] "Agreements of a type that always or almost always tend to raise price or to reduce output are per se illegal."[119] All other agreements are analyzed under a "rule of reason" analysis, which

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113. 15 U.S.C. § 45.

114. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, n.31 and accompanying text (explaining pertinent case history).

115. COLLABORATION GUIDELINES, *supra* note 9, § 1.1. There is extensive debate and disagreement over the specific provisions of *The Collaboration Guidelines*. *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Issue Antitrust Guidelines for Collaborations Among Competitors (Apr. 7, 2000) (concurring statements of Commissioners Thompson and Leary), *available at* http://www.ftc.gov/opa/2000/04/collguidelines.htm. Further, *The Collaboration Guidelines* represent only DOJ's and FTC's compromises on federal government enforcement policies based upon their interpretations of the antitrust laws. They do not purport to settle all interpretive disputes in antitrust law among the federal courts, FTC Commissioners, the states, or other pertinent entities (such as the private bar). This article relies on *The Collaboration Guidelines* as reflective of the federal antitrust regime and enforcement system. The proposed procedures may be modified, if needed, to accommodate more subtle antitrust law interpretative issues. *See also* U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines).

116. COLLABORATION GUIDELINES, *supra* note 9, § 1.1.

117. *See supra* note 11 and accompanying text.

118. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1101; Eger, *supra* note 11, at 604.

119. COLLABORATION GUIDELINES, *supra* note 9, § 1.2.

weighs pro-competitive benefits with anti-competitive harm by considering many market and conduct factors.[120] Rule of reason inquiry traditionally is fact-specific and resource-intensive.[121] While arguably any conduct that violates antitrust law can be a criminal offense,[122] DOJ only prosecutes "hard-core cartel agreements."[123] As set out in Section III.B, below, government contract practitioners are familiar with the FAR and DOD procurement fraud system that provides extensive provisions for detecting and assisting DOJ in prosecuting such blatant conduct. Likewise, the courts will only invoke the per se rule "where judicial experience demonstrates that the particular conduct is a 'naked restraint of trade with no purpose except stifling of competition.'"[124]

a. Per Se Illegal Agreements

The per se rule applies to all horizontal and vertical restraints in all operating environments. These include restraints that fix prices, rig bids, or allocate customers, suppliers, territories, or lines of commerce.[125] Price-fixing and bid-rigging can take many forms and evidence themselves in many ways[126] These activities received great attention in the area of government contracts in the late 1980s and early 1990s.[127] Group boycotts

120. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1101. The rule of reason factors are attributed to Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

121. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050-51 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983).

122. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1072.

123. COLLABORATION GUIDELINES, *supra* note 9, § 1.2.

124. Perry & Park, *supra* note 17, at 7 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

125. *Id*.; U.S. DEP'T OF JUSTICE, ANTITRUST RESOURCE MANUAL § 8 (Oct. 1997) [hereinafter ANTITRUST RESOURCE MANUAL], *available at* http://www.usDOJ.gov/atr/public. For specific examples of cases, see the Supreme Court's discussion of the per se rule in *NYNEX Corp., v. Discon, Inc*., 525 U.S. 128, 133-34 (1998).

126. FAR, *supra* note 20, at 3.303(c), 3.305. *See* Polk, *supra* note 36 , at 428-29, 434-35 (discussing various forms and definitions of these proscribed activities within the context of government contracts). Drawing the line between the exchange of competitive information and violating these standards poses significant challenges. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978); COLLABORATION GUIDELINES, *supra* note 9, § 3.34(e).

127. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1059.

of competitors likewise are per se illegal,[128] as are a monopolist's refusal to allow competitors access to facilities "essential" for competition.[129] Vertical restraints including resale price maintenance,[130] tying arrangements,[131] and (possibly) exclusive-dealing restrictions[132] fall under the same test.[133] Collaborations whose entire purpose violates the per se rule

128. Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). This activity is enforced by DOJ and FTC outside *The Collaboration Guidelines*. COLLABORATION GUIDELINES, *supra* note 9, § 1.1 n.5. In vertical relationships, allegations of "boycotting" one supplier in preference to another fall under the rule of reason analysis. NYNEX Corp., v. Discon, Inc., 525 U.S. 128, 135 (1998).

129. Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). This basis is limited to control of essential facilities by monopolists where competitors cannot reasonably duplicate the facility and the monopolist denies use to competitors when otherwise feasible to do so. MCI Communications Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983). This activity likewise is not enforced under *The Collaboration Guidelines*, *supra* note 9, § 1.1 n.5. For an application of group boycotts and "essential facilities" doctrine to government contractors, see Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1100-04.

130. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). This conduct includes agreements to restrict distributors to certain resale prices. *But see* State Oil Co. v. Khan, 522 U.S. 3 (1997) (vertical *maximum* price fixing no longer to be presumed per se illegal).

131. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). This conduct involves abuse of monopoly power in one product by requiring buyers to purchase a second product together with the first.

132. Standard Oil Co. of California v. United States, 337 U.S. 293 (1949). Similar in nature to horizontal refusals of access or group boycotts, this conduct involves an agreement among firms at different stages of the "value chain" where one agrees to limit its input or output solely to the other. Courts review the impact of these cases in the market at the level of the exclusion. For example, if an oil company has distribution contracts with retail gas stations where those gas stations cannot sell competitors' gas, the courts examine the size of the foreclosure and its impact on the retail gas market. *See* U.S. DEP'T OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES § 3.2 (rescinded) [hereinafter VERTICAL RESTRAINT GUIDELINES (rescinded)] (providing a detailed discussion of the conditions necessary for exclusive dealings to be anticompetitive), *available at* http://www.antitrust.org/law/US/vertguide.html. *But see* FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.4 (Apr. 6, 1995) [hereinafter INTELLECTUAL PROPERTY GUIDELINES] (following a rule of reason approach in all vertical restraint licensing cases), *available at* http://www.usDOJ.gov/atr/public/guidelines/ jointindex.htm. Exclusive dealing arrangements can be challenged under Section 3 of the Sherman Act, 15 U.S.C. § 3 (2000). *See also* Correia, *supra* note 94, n.107 and accompanying text. *Cf.* Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316 (1966) (no examination of market foreclosure impact required when challenged under Section 5 of FTC Act); Northwest Wholesale, Inc., v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (refusal to access "essential facilities" per se illegal when involving horizontal competitors).

are deemed to be cartels. Such illegal arrangements can occur in the licensing of intellectual property,[134] in healthcare services,[135] in international operations,[136] and in all other business activity.[137] Of course, DOD procures goods and services in all of these environments. The first step in reviewing any collaboration, then, is to identify a per se illegal collaboration or any terms or conditions contained within a collaboration that would be per se illegal.[138]

The nature of contractual terms and conditions governing collaborations most significantly complicates the screening for per se violations. Each term or condition of a collaboration (that is, "a set of one or more agreements"[139]) generally determines the level of integration and must be reviewed independently to assess its "competitive effect."[140] Therefore, the entire collaboration may serve an illegal purpose. Likewise, a particular term or condition of the underlying agreement(s) may do so, either independently or within the context of the overall collaboration. For example, if three firms collaborate to establish a distribution joint venture (to warehouse and sell products to retailers), the overall purpose of the joint venture may not be per se illegal, but a related condition that allocates down-stream retailers among the participants' products may be.[141] Gre-

133. Under the Clinton Administration, DOJ rescinded guidelines for vertical restraints. *See* VERTICAL RESTRAINT GUIDELINES (rescinded), *supra* note 132. With the exception of tying arrangements and exclusive-dealings, the courts assess all non-price vertical restraints under the rule of reason. Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

134. INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 3.4.

135. U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (Aug. 1996) [hereinafter HEALTH CARE GUIDELINES], *available at* http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm.

136. FEDERAL TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 2 (Apr. 1995) [hereinafter INTERNATIONAL OPERATIONS GUIDELINES] (allowing only for "jurisdictional requirements, comity, and doctrines of foreign governmental involvement"), *available at* http://www.usDOJ.gov/atr/public/guidelines/jointindex.htm.

137. Congress afforded certain research and production collaborations limited protection from per se condemnation in certain cases. 15 U.S.C. §§ 4301-4302 (2000).

138. For specific types of conduct that may constitute per se violations, see ANTITRUST RESOURCE MANUAL, *supra* note 125, § 8, and U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION fig. 8-1 (19 Sept. 1994).

139. COLLABORATION GUIDELINES, *supra* note 9, § 2.3.

140. *Id.* §§ 2.3, 3.3.

gory Werden, Director of Research at DOJ Antitrust Division's Economic Analysis Group, describes this aspect of analysis as follows:

> The distinction between the two types of restraints has been usefully framed in terms of "ancillarity." An ancillary restraint is one that is reasonably necessary to the accomplishment of a venture's efficiency-enhancing purposes. The agreement forming the joint venture and all ancillary restraints should be analyzed together under the rubric of the legality of the joint venture itself. Nonancillary restraints should be analyzed separately. Nonancillary restraints are not necessarily unlawful, but any competitive benefits of a joint venture are irrelevant to the analysis of its nonancillary restraints, so those restraints may fall within the scope of the per se rule.[142]

Until relatively recently, firms were subject to prosecution and many courts would enjoin or punish collaborators for per se violations.[143] However, various judicial decisions raised questions about the dichotomy between automatic condemnation and detailed analysis, and conducted more focused inquiries into the purpose of collaborations or their collateral restraints as well as their competitive effects.[144] This trend caused considerable consternation in the antitrust legal community.[145] If a provision in an agreement appeared to have anticompetitive effects, but was ancillary to the collaboration, the courts and litigants would engage in a resource-

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141. Because DOD is a down-stream consumer of its contractors, this article emphasizes upstream vertical restraints. However, downstream vertical restraints are important to DOD for industrial capacity reasons (that is, the increasing tendency towards multiple interlocking webs of collaborations among its prime and subcontractors that can significantly influence the effects of industry structural changes and create oligopolistic behavior).

142. Werden, *supra* note 65, at 705.

143. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

144. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

145. For a review of this trend and proposed adjustments to antitrust enforcement policy, see Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1119, Werden, *supra* note 65, and Correia, *supra* note 94.

intensive rule of reason inquiry.[146] Accordingly, *The Collaboration Guidelines* acknowledge a shift to a multi-level review.[147]

b. "Limited Factual Inquiry" and Efficiency Showings

The DOJ and FTC compromised in announcing a "flexible" structured analysis.[148] "Sorting out the facts of actual cases under the rule of reason is apt to be difficult and subject to significant error. Antitrust enforcement with respect to joint ventures, therefore, is made more efficient through the use of a structured analysis employing presumptions and burden shifting."[149] For example, why engage in a detailed analysis of a software license that restricts computer manufacturers from reselling an application program when the license is commonly used by all software developers?[150] On the other hand, as *The Collaboration Guidelines* take into account, industry conditions may change after entering into the license such that it would then become anticompetitive considering those new

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146. Of particular concern, as discussed below, are the expertise and resources required to define the relevant markets and measure the market power of the collaboration (in addition to the likelihood that most defendants' conduct is upheld when the rule of reason is applied).

147. This approach was adopted more generally by DOJ and FTC in 1995 in the *Intellectual Property Guidelines*, *supra* note 132, § 3.4, and even earlier in their now rescinded *Vertical Restraints Guidelines*, *supra* note 132. *See* Eger, *supra* note 11, at 609; *see also* Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1 (1979) (applying a modified rule of reason approach).

148. Werden, *supra* note 65, at 735. "Despite years of debate, there is not a clear consensus on the application of the per se rule and the rule of reason. The Supreme Court has stated various formulations of both." Correia, *supra* note 94, at 739.

149. Werden, *supra* note 65, at 735. One Chief of the DOJ Antitrust Division said:

> We reject the notion that there should be two methods of analysis – per se or full-blown rule of reason market analysis. As a matter of both sound and efficient antitrust analysis, we think this dichotomy is too stark and, frankly, that it leads to far too much of a front-end emphasis on which approach to apply, a choice that can sometimes be outcome determinative.

Correia, *supra* note 94, at 745.

150. *See* INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 2.3.

conditions. Accordingly, all collaborations are subject to a new review at any future time when anticompetitive harm may occur.[151]

After identifying collaborations (or collateral terms) that are "blatant" per se violations, DOJ and FTC now will conduct a "limited factual inquiry"[152] to examine a rebuttal showing that "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its pro-competitive benefits."[153] Efficiency-enhancing integration includes collaborations to combine some portion of one or more business functions (such as production, distribution, marketing, purchasing, or R&D), "by contract or otherwise, significant capital, technology, or other complimentary assets."[154] If the concern relates to a collateral restraint, collaborators must also show that such a restraint is verifiable and potentially pro-competitive, reasonably necessary, *and* that no "practical, significantly less restrictive means" can be used.[155]

Notably, under *The Collaboration Guidelines*, the burden falls upon the collaborators to meet this low standard to justify the overall collaboration and to establish collateral restraints as ancillary to it. Several models for the "limited factual inquiry" and its relationship to assessments of collateral restraints were debated before issuance of *The Collaboration Guidelines*.[156] *The Collaboration Guidelines* do not clearly settle the issue from a judicial perspective, and provide DOJ and FTC flexibility in analyzing collateral restraints either independently or within the context of the overall collaboration.[157] It is clear, however, that if the collaborators provide sufficient evidence that the collaboration constitutes an efficiency-

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151. COLLABORATION GUIDELINES, *supra* note 9, §§ 2.4, 3.4, 4.3.

152. *Id*. § 3.2. This technique, in various forms, has been referred to as "quick look" and many other names. *See* Correia, *supra* note 94, n.56.

153. COLLABORATION GUIDELINES, *supra* note 9, § 3.2. *See* INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 3.4; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 4. Some claim that this procedure "depart[s] from familiar ways of evaluating the competitive impact of an agreement," Perry & Park, *supra* note 17, at 10, but a review of the other published guidelines, cases, and academic literature reflects otherwise.

154. COLLABORATION GUIDELINES, *supra* note 9, § 3.2.

155. *Id.* § 3.6.

156. *See, e.g.*, Werden, *supra* note 65; Correia, *supra* note 94; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1118 (citing others). *But see* Polk, *supra* note 36, at 420 (finding that FTC looks upon efficiency justifications with skepticism in defense industry mergers).

157. COLLABORATION GUIDELINES, *supra* note 9, § 2.3.

enhancing integration, then the focus of initial scrutiny on collateral restraints shifts to reasonableness.[158]

Three principal issues arise at this stage for DOD procurement officials and antitrust officials at DOJ or FTC. First, are there any unique DOD-related efficiency rationales or types of collateral restraints that could justify otherwise per se violations? Second, what role does DOD, and the negotiations process in particular, play in determining "reasonable necessity" and the plausibility of alternatives? Third, how are initial reports of suspected per se violations and relevant information to be effectively exchanged between the agencies? The latter question pertains equally to the rule of reason analysis and, therefore, will be addressed later.

While the consequences for DOD contractors (for example, criminal prosecution[159]) and a DOD purchasing agency (for example, program delays and litigation costs) can be substantial, little literature and no DOD guidance have been published regarding this initial screening of the collaboration as it applies to DOD contracts.[160] Determining whether an independent legal entity or a contractually created teaming arrangement serves as a "naked agreement on price or output among competitors"[161] can be a daunting task for a contracting officer or program manager reviewing a quote or contract proposal. It may seem unlikely that such conduct would occur, particularly given the FAR's distinct competition requirements,

158. The restraint must reasonably relate both to the efficiency of the integration and the necessity of the restraint to achieve pro-competitive benefits beyond those to be enjoyed solely by the collaborators. *See* Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). *The Collaboration Guidelines*, *supra* note 2, § 3.2, discuss "reasonable necessity" and "intertwined" collateral restraints, *id.* ex. 2. Scholars have been advising firms' legal counsel to not only document efficiencies in collaborative agreements, but also to integrate them into the structure of the legal documents themselves in order to qualify for rule of reason inquiry. *See* Kitch, *supra* note 73, at 964; Eger, *supra* note 11, at 628-30 (proposing a checklist).

159. Further, the costs of defending against criminal or civil antitrust prosecutions are not reimbursable from the government under a government contract, even if the collaboration was formed exclusively for the government contract and encouraged by the government. FAR, *supra* note 20, at 31.205-33(f).

160. *See generally* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11; Polk, *supra* note 36. Even these authors focus more on providing guidance to private practitioners and antitrust officials at DOJ and FTC than to DOD.

161. *See* Correia, *supra* note 94, at 741-45 (comparing different analytical techniques for conducting the review).

including submission of a Certificate of Independent Price Determination[162] with an offer (where applicable). Further, verifying the claim of efficiencies and reasonableness involves specialized skills and knowledge that DOD previously declined to establish in-house.[163] It also requires knowledge of each of the numerous markets in which procurements may take place. Disagreements over the significance of efficiencies in contractor administrative costs (or their verifiability) may also complicate the review.[164] Finally, procurement officials may not be inclined to examine the overall competitive effect of collaborations where the market is broad and procurement competition rules (for example, "full and open competition"[165]) appear to be satisfied in a particular case. Any collaboration review procedures under the current division of responsibility between DOD, DOJ and FTC seem to require either straight-forward and administrable tests on one hand or elaborate intra-agency review and investigative support mechanisms on the other.

There may be a host of plausible efficiencies gained through resource integrations. The "DOD may be in a position to evaluate and explain claims of efficiency because of its experience as a long-term purchaser and its resultant knowledge base."[166] *The Collaboration Guidelines* require that the restraint "benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation."[167] The integration may or may not require a financial contribution or actual performance of a function by one, any, or even all collaborators.

Within the context of DOD procurements, the most likely unique justification may be that a DOD procurement official either required or

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162. FAR, *supra* note 20, at 3.103-1, 52.203-2. *But see* discussion Section III.B, *infra*.

163. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 4-5.

164. *Id*. at 30.

165. The Competition in Contracting Act, 10 U.S.C. § 2304 (2000).

166. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 30 (commenting on merger-related efficiencies).

167. COLLABORATION GUIDELINES, *supra* note 9, § 3.2. *The Collaboration Guidelines* provide that theoretically implausible efficiencies or arguments that competition itself is unreasonable are insufficient as a matter of law. *Id.* From an economics perspective, efficiencies are ways "to overcome the so-called imperfections in the marketplace." Kitch, *supra* note 73, at 963. Economists consider "externalities" ("when an investment confers benefits that cannot be captured by the firm making the investment"), economies of scale, and "transactional efficiencies." *Id.* at 963-64.

endorsed the agreement.[168] Review, negotiation, and approval of teaming arrangements by contracting officers is authorized and, in some instances, required by DOD policy.[169] In *Northrop Corp. v. McDonnell Douglas Corp.*,[170] two competing fighter aircraft manufacturers teamed at the direction of DOD to design and produce the F-18 for the Navy and foreign customers. This was done because McDonnell Douglass could help adapt Northrop's land-based YF-17 prototype for carrier use. Their teaming agreement allocated sales to different customers between carrier-based and land-based aircraft.[171] The court found the agreement not to be a per se illegal market allocation, in part, because it provided benefits in a special market that otherwise would not have existed.[172] *The Collaboration Guidelines* treat favorably the special benefits derived from combining unique design and production competencies and from sharing between competitors who otherwise lack access to such innovations. Moreover, in DOD procurements, meeting "national security" needs may be considered as efficiencies.[173]

Firms may argue additional justifications when seeking to hedge quantity[174] or address time uncertainty in government procurements, as are found in contracts with options to extend, requirements (and indefinite delivery and indefinite quantity) contracts,[175] "systems" acquisition mile-

168. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1085 (citing Eger and Chierichella in support). *Cf.* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 9-14 (critiquing four merger cases and the unofficial testimony of DOD officials and its impact on the case).

169. Memorandum, Deputy Under Secretary of Defense (Acquisition & Technology), DUSD (A&T), subject: Exclusive Teaming Arrangements (Jan. 5, 1999) [hereinafter Exclusive Teaming Arrangements Memorandum], *available at* http://www.acq.osd.mil/ia.

170. 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983) (the court assessed the venture under Sections 1 & 2 of the Sherman Act).

171. *Id*. at 1037-38.

172. *Id*. at 1053. The court also added that parties fashioned the collateral market-allocating restraint to prevent the "fiasco" of conflicts between military service aircraft specifications in an earlier procurement. *Id. But cf.* United States v. Alliant Techsystems, Inc., 808 F. Supp. 9 (D.D.C. 1992) (the only two producers of Combined Effects Munitions teamed at higher than competitive prices without DOD endorsement). *See also* HEALTH CARE GUIDELINES, *supra* note 135, para. 3 (noting that some services or products may not exist without collaborations due to high barriers).

173. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 28-32.

174. *See* FAR, *supra* note 20, at 7.202 (requiring agencies to evaluate appropriate quantities for per-unit savings), 7.107; 13 C.F.R. § 125.2(d) (2002) (criteria for contract bundling).

175. *See generally* FAR, *supra* note 20, pt. 11 (requiring market research regarding quantities, delivery/performance, and specifications).

stones, or Federal Supply Schedule contracts.[176] In *Colsa Corp. v. Martin Marietta Servs., Inc.*,[177] for example, the Navy awarded Martin Marietta a facility operation and maintenance contract, with Colsa acting under a teaming agreement as a subcontractor for software support services. Martin Marietta and Colsa negotiated the subcontract after contract award, and they re-negotiated after the Navy exercised each annual option. Collaborating with competitors on a broader or more responsive distribution system (for example, using the Internet) could also permit reductions in contingency pricing from scaling or work rotations.

Contractors may argue efficiencies by attempting to hedge the risks inherent in the contract type offered by the government,[178] the size and scope of the contract effort,[179] specification requirements,[180] and other factors reflected in the level of competition sought by DOD at the prime and subcontract levels.[181] Arrangements to accommodate foreign firm participation in a procurement involving classified information can permit a U.S.

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176. *Id.* at 8.404. *See, e.g.*, Department of the Air Force, Contracting Policy Memorandum 98-C-07, subject: Use of Blanket Purchase Agreements (BPAs) with Federal Supply Schedules (FSS), attachment, para. 2.b(3) (1 May 1998) (discussing teaming among GSA Schedule contractors and Blanket Purchase Agreements). Further, the General Accounting Office investigated DOD's selective use of multiple-award schedule IDIQ contracts and found that contractors often lose significant amounts due to the favorable treatment of some contractors.

177. 133 F.3d 853 (11th Cir. 1998). After Martin Marrietta terminated Colsa's subcontract during the third option period, Colsa sued under Section 2 of the Sherman Act alleging that Martin Marietta engaged in anticompetitive monopoly behavior. The 11th Circuit rejected Colsa's allegation. *Id.*

178. Authorized contract types are discussed in FAR, *supra* note 20, pt. 16. Due to the variability in assignment of risk (and consequently, price), FAR 16.103(a) requires contracting officers to consider a pertinent laundry list of factors in deciding which type of contract to award. *See* Chierichella, *supra* note 11, at 559 (discussing disincentives for subcontractors when certain contract types and data rights packages are elected by the government). *But see* Polk, *supra* note 36, at 421 (asserting that short contract periods and lowest bidding techniques may decrease barriers).

179. Contract bundling and A-76 competition permit the agency to decide the appropriate number and size of goods and services under a particular contract. Recent efforts have been made to limit this discretion. *See* Federal Acquisition Circular 97-19, 65 Fed. Reg. 46,052 (July 26, 2000); 13 C.F.R. § 125.2(d) (2002); FAR, *supra* note 20, at 1.107.

180. CHE Consulting, Inc.; Digital Tech., Inc., B-284110, B-284110.2, B-284110.3, 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000 (finding no unfair competitive advantage or unduly restrictive specification where government required offerors to have original equipment manufacturers support at least sixty-five percent of equipment and where the winning offeror had such support under exclusive agreements).

firm to control access to the information with the overseas firm conducting key portions of the work.[182] Likewise, collaborating with foreign firms on overseas contracts can serve to accommodate foreign customs, labor, capital commitment, and other laws, as well as restrictions imposed by politics and geography, including transportation costs, resource availability, and trade laws or treaties.[183] Collaborations may permit or restrict information exchanges between competitors (when otherwise unlawful when not acting as a single legal unit)[184] or protect intellectual property brought to the contract or developed under the contract.[185] Additionally, collaborations to market products to the government (in particular, to gain exposure to local commanders and other procurement officials) can often inform or persuade contracting officers to shift choices based on functionality, price or quality, or provide other political leverage.[186] Finally, with civil-military integration, collaborations may accommodate the restrictive accounting rules required of contracts qualifying for accounting under the Cost Accounting Standards.[187]

c. The Nature of the Agreement and Anticompetitive Harm

If DOJ or FTC find an efficiency-enhancing integration of resources plausible and find collateral restraints to be reasonable (that is, ancillary), *The Collaboration Guidelines* next subject the relevant agreement to a slightly more detailed review. Review begins at this point for all collaborations or agreements that lack facially per se illegal provisions. This next

181. The CICA lists three general levels of competition and criteria for contracting officers to apply when restricting competition. Of particular import is the "industrial mobilization base" exception that permits DOD to award contracts to particular firms necessary to retain a sufficient source for national defense.

182. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1068-71.

183. *Id.* at 1097 (citing to earlier version of the *International Operations Guidelines*, *supra* note 136, which accounted for political considerations); FAR, *supra* note 20, pt. 25.

184. *See* Eger, *supra* note 11, at 602-03 (discussing the application of the "Certificate of Independent Price Determination").

185. *See* Chierichella, *supra* note 11, at 559 (discussing motivations for prime and subcontractors to contribute to innovations under government data rights rules).

186. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1097.

187. *See* 48 C.F.R. § 9901.305(a)(1) (2001) (requiring the Cost Accounting Standards Board to consider "the probable costs of implementations, including inflationary effects, if any, compared to the probable benefits"). These standards apply to most negotiated contracts exceeding $500,000. *Id.* § 9903.201-1.

inquiry focuses on the "nature of the relevant agreement [because] the nature of the agreement determines the types of anticompetitive harms that may be of concern."[188] Characteristics of certain types of agreements may cause anticompetitive harm. This level of inquiry examines "the ability or incentive to compete independently [or] . . . the likelihood of an exercise of market power by facilitating explicit or tacit collusion."[189]

The DOJ and FTC examine the extent to which independent decision-making is limited by the agreement.[190] They also examine whether the agreement requires collaborators "to combine control or financial interests [that] may reduce the ability or incentive to compete independently"[191] or to reduce control over "decisions about key competitive variables that otherwise would be controlled independently."[192] *The Collaboration Guidelines* discuss specific types of concerns common in production, marketing, buying, and R&D collaborations (as reflected in caselaw).[193] Finally, the agencies examine factors related to oligopolistic behavior.[194] In defense industry mergers, DOJ and FTC have been particularly concerned with the ability of merging firms to share proprietary information about their competitors that could be used to harm competitors.[195] On the other hand, ancillary restraints that would constitute per se illegal agreements if they were standing alone may be so common, necessary or sufficiently regulated that they cannot be expected to cause harm.

Some anticompetitive concerns may be obvious to DOJ or FTC, or may already have caused harm.[196] In those cases, DOJ or FTC will either

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188. COLLABORATION GUIDELINES, *supra* note 9, § 3.3.

189. *Id*. § 3.31. Antitrust law examines both the ability of a single firm to take anticompetitive action ("unilateral effects") or that of a group of firms ("coordinated interaction"). For an analysis of these theories as they apply to defense industry collaborations, see Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1092-94, and Casey R. Triggs & Melissa K. Heydenreich, *The Judicial Evaluation of Mergers Where the Department of Defense Is the Primary Customer*, 62 ANTITRUST L.J. 435, 445-48 (1994) (for merger cases).

190. COLLABORATION GUIDELINES, *supra* note 9, § 3.31. In doing so, the agencies consider the business purpose for the agreement, as determined from "objective facts" and inferences drawn therefrom. *Id.*

191. *Id*.

192. *Id*. § 3.31(a). For a discussion of the three types of competition among participants relative to control, see McFalls, *supra* note 41, at 660-61 (discussing elimination of competition among participants in the relevant market outside the joint venture, elimination of price or output competition among participants within the joint venture, and elimination of competition against the joint venture through other joint ventures). Another view of this component assesses the degree of restraint on independent decision-making of each participant regarding activities related to the venture. Werden, *supra* note 65, at 718.

challenge the agreement (if the collaboration falls outside one of the two limited "safety zones"[197]) or weigh the competitive benefits against the identified harm (discussed *infra* Section III.A.1.g). In other cases, "a determination of anticompetitive harm may be informed by consideration of market power."[198] The review then shifts to a detailed market analysis (although some monopolistic or weak market positions of collaborators

193. COLLABORATION GUIDELINES, *supra* note 9, § 3.31(a). Production collaborations involve "agreements on the level of [production] output or the use of key assets, or on the price at which the product will be marketed by the collaboration, or on other competitively significant variables, such as quality, service, or promotional strategies." *Id*. For example, participants' lack of control over per-unit (marginal) production costs transferred to them (that is, transfer pricing) may result in inflated prices among some collaborators. *Id*. at n.38. In marketing collaborations, agreements involving price, output or "other competitively sensitive variables" are of concern. *Id.* § 3.31(a). "For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables." *Id*. In buying collaborations, the ability of collaborators to gain and exercise monopsony power "or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement" is of concern. *Id*. Such collaborations may also "facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases." *Id*. In R&D collaborations, agreements that "create or increase market power or facilitate its exercise by limiting independent decision-making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts" are of concern. *Id.* Of particular concern in R&D collaborations is the likelihood that an exercise of market power would eliminate or slow the competitive pace of innovation, and anticompetitive harm is most likely where a participant already possesses market power or "when R&D competition is confined to firms with specialized assets, such as intellectual property, or when a regulatory approval process limits the ability of late-comers to catch up with competitors already engaged in the R&D." *Id*.

194. The sharing of competitively sensitive information (prices, output, costs, or strategic planning; current and future operating or business plans; other company-specific data) can lead to collusion on price, output, customers, territories, or "other competitively sensitive variables." *Id*. § 3.31(b).

195. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, apps. D-5, D-6.

196. COLLABORATION GUIDELINES, *supra* note 9, § 3.3. "Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates pro-competitive, pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market." *Id*. § 3.31(b).

197. *Id*. § 4. The "safety zones" are discussed at Section III.A.1.h, *infra*.

198. *Id*. § 3.31(b).

may be obvious, as where only two producers of a specialized weapons system exist).

d. Market Power and Facilitating Its Exercise

i. Market Concentration

Assessments of the market power of the collaborators (or collaboration) mirror the techniques used in merger and acquisition analysis under *The Horizontal Merger Guidelines*.[199] Determining the market power of collaborators requires a two-step process. First, DOJ or FTC defines the relevant affected markets.[200] Two component factors comprise a relevant market: the product market and the geographic market in which the product market exists. While the *Horizontal Merger Guidelines* provisions for geographical markets are adopted in whole, *The Collaboration Guidelines* provide specific examples and criteria for defining categories of product markets, including goods and services markets, technology markets, and research and development (innovation) markets.[201] The DOD participates in possibly thousands of different relevant markets in these areas and can even create "specialized markets" itself, primarily due to the high barriers to entry.[202] Scholarly application of antitrust law applicable to DOD focuses almost exclusively on these "specialized markets."[203] Decisions

199. HORIZONTAL MERGER GUIDELINES, *supra* note 28.

200. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.32, 3.34.

201. *Id*. § 3.32(a)-(c). In *Brown Shoe v. United States*, 370 U.S. 294 (1962), the Court stated that "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id*. at 325. It went further to state that, even where a product may be functionally interchangeable, there may exist an "economically significant submarket" for antitrust purposes, and the Court provided a "practical indicia" test for determining whether such a submarket exists. *Id*. These indicia include: "industry or public recognition of the submarket as a separate entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. *The Horizontal Merger Guidelines* test product and geographical boundaries by determining the buyers' reactions to a theoretical nontemporary price increase of at least five percent. The narrowest point where buyers fail to shift to another product, group of sellers of the product, or location generally will be the boundary of the relevant market. For a developing application of the product market criterion and Supreme Court criteria for determining "submarkets," see *Fed. Trade Comm'n v. Staples, Inc*., 970 F. Supp. 1066, 1073-81 (D.D.C. 1997) (finding distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies; the parties agreed that metropolitan areas were the geographical market).

by procurement officials to seek competition on DOD purchases, however, include factors very similar to the criteria that define specific markets.[204]

The second step in assessing market power requires identification of participating firms and measurement of their concentration and relative percentage of sales or capacity. "Market share and market concentration affect the likelihood that the relevant agreement will create or increase market power or facilitate its exercise."[205] Market power tends to encourage anticompetitive behavior because of the assumption of economic incentives in a competitive market.[206] If a firm controls a large percentage of the output in a competitive market, it needs to restrict its own output less to drive prices up.[207] *The Horizontal Merger Guidelines* use the Herfind-

202. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056-57 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). *See also In re* The Boeing Company/McDonnell Douglas Corporation, Fed. Trade Comm'n File No. 971-0051, July 1, 1997 (discussing lack of future defense procurement of fighter aircraft as lack of a "defense market"); DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 17 (distinguishing market of possible future new or proposed weapon system from future purchases within an existing weapon system market that may have been subject to competition in design or production stages).

203. Chierichella, *supra* note 11, at 557-58 (citing examples of reported cases within the Supreme Court's "submarket" criteria); Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1086-89 (discussing the differences between commercial and off-the-shelf markets, and arguing that enforcement agencies should avoid applying restrictive sourcing laws to find an overly narrow market). *See also* Triggs & Heydenreich, *supra* note 189 (reviewing judicial distinctions between product market definitions of scheduled and unscheduled future weapons systems purchases).

204. *See infra* Section IIIB; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1088 (summarizing various cases suggesting that DOD procurements of commercial items should not be distinguished merely because they are sold to the government, unless procurement or other regulations establish significant barriers to entry); Kovacic, *supra* note 2, at 475-86 (proposing analytical methodology for weapons industry structural management).

205. COLLABORATION GUIDELINES, *supra* note 9, § 3.33.

206. *Id*.

207. *Id*. As noted previously, this assumes a fully competitive environment where the ability of one firm to affect the supply and demand curves within a market is little. In such a market, when a firm restricts its output, it will have negligible effects on the market price, and the firm will sustain losses because its marginal costs increase relative to that stable price.

ahl-Hirschman Index (HHI) to calculate market concentration in the affected markets.[208]

ii. Adjustments to Market Concentration Measurements of Market Power

The Horizontal Merger Guidelines identify markets as unconcentrated, moderately concentrated, or concentrated depending on the HHI total. They set presumptions of market power for the participants based on their scores. After assessing the relative power of the collaboration,[209] the agencies make adjustments for the assumption of full competition.[210] The DOD acknowledged that it "may be able to play a valuable role in assisting the antitrust agencies in defining relevant product markets."[211] The regulatory authorities granted to DOD for procurements can also serve to diminish market power. The courts, FTC, and scholars have analyzed DOD's ability to conduct audits and profit analysis, subcontractor "breakouts," and many other techniques to determine if DOD possesses "buyer power."[212] The DOD should also work to help DOJ and FTC identify "likely future competitors" on new weapons systems so that the proper number of market participants is identified.[213] If the collaboration lacks

208. This index combines the total output (in prices, production, or capacity, depending on the industry conditions and available information) and assigns a percentage of that output to each firm relative to its own output. Each firms' percentage of output is squared, and then all are summed. HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.4. In the case of a collaboration (unlike mergers), DOJ or FTC calculates a range of possible market shares. At the "high end," all of the participating firms' shares are combined, then squared, reflecting the power of the collaboration as if it were a single firm. At the "low end," the collaboration's shares are calculated in isolation. The total reflects the market concentration, theoretically ranging from 10,000 (a true monopoly) to zero (an infinite number of firms). COLLABORATION GUIDELINES, *supra* note 9, § 3.33.

209. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.4.

210. *See id.* §§ 1.52, 2.1, 2.2; Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 94-95 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2nd Cir. 1981) (adjusting market shares based on historical sales and adding a potential competitor to historical competitors). The DOD's "specialized markets" are not fully competitive, but the ability of firms to restrict output or to raise prices is somewhat controlled by procurement regulations. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1090. *See also* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 16-17.

211. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 18.

212. *See infra* note 349 and accompanying text.

213. *Id*. As civil-military integration efforts proceed, DOD's understanding of the markets will be critical. *See* Triggs & Heydenreich, *supra* note 189.

sufficient market power to "reveal a likelihood of anticompetitive harm," the review ends.[214]

e. Mitigating Factors Related to Collaborators' Ability to Independently Compete

Where a collaboration possesses market power, *The Collaboration Guidelines* examine whether the likelihood of anticompetitive harm is mitigated by six additional factors related to the level of competition remaining among its participants.[215] These include:

> (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates;
> (b) the extent to which participants retain independent control of assets necessary to compete;
> (c) the nature and extent of participants' financial interests in the collaboration or in each other;
> (d) the control of the collaboration's competitively significant decision making;
> (e) the likelihood of anticompetitive information sharing; [and]
> (f) the duration of the collaboration.[216]

f. Mitigating Factors Related to Entry Barriers and Industry Conditions

If competition among participants does not mitigate market power, DOJ or FTC next will assess whether additional firm "entry would be timely, likely, and sufficient in its magnitude, character and scope to deter

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214. COLLABORATION GUIDELINES, *supra* note 9, § 3.33. This level presumably is at twenty percent of the market output, the same level used to identify an enforcement "safety zone," discussed in Section III.A.1.h, *infra*.

215. *Id*. § 3.34.

216. *Id*. § 3.34. The exclusivity factor does not distinguish between horizontal exclusivity or vertical exclusivity, the former being more significant under antitrust review. Compare this factor to DOD's policy of treating exclusive teaming agreements (which also fails to distinguish between their horizontal or vertical nature) as per se violations. *See* Exclusive Teaming Arrangements Memorandum, *supra* note 169.

or counteract the anticompetitive harm of concern."[217] Due to the secretive nature of collaborations and their complexity, the incentives for potential competitors (committed entrants[218]) to react with additional competition vary. Accordingly, *The Collaboration Guidelines* adjust this inquiry depending upon the nature of the collaboration and the industry conditions. The DOD's efforts at civil-military integration should be of particular import in this analysis. If traditional capital requirements, technological compatibility, accounting rules, data rights, other procurement regulatory barriers, milestone and budgeting uncertainty, and DOD's purchasing decisions can be altered or clarified to lower traditional entry barriers, the market power of traditional defense industry firms may be overstated under the HHI technique.[219] Likewise, the ability of DOD to perform the work as a noncommercial competitor, as in the case of the "commercial activities" contracting out process[220] and depots, may restrict anticompetitive behavior. The "power buyer" defense to anticompetitive collaborations, however, has been very narrowly applied by the courts and

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217. *Id*. § 3.35. The ability of firms to enter, those that are "waiting in the wings," may prevent existing firms from raising prices. Polk, *supra* note 36, at 421.

218. Committed entrants are firms that lack the ability (due to capacity or entry barriers) to respond within a relatively short time to nontransient increases in prices. HORIZONTAL MERGER GUIDELINES, *supra* note 28, § 1.32. Uncommitted entrants are firms that can provide a supply response within one year to competitors' nontransitory price increases without committing significant sunk costs. *Id*.

219. *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 23 (listing techniques used by DOD to fund or otherwise support competitors); Triggs & Heydenreich, *supra* note 189, at 442-44, 448-50; Kovacic, *supra* note 2 (arguing for better DOD management of its purchasing decisions to encourage competition). A variety of provisions in the FAR, *supra* note 20, permit contracting officers to make competitively significant adjustments, including the provision of government-furnished equipment, contract financing, and data rights. *See also* DEP'T OF DEFENSE SYSTEMS MANAGEMENT COLLEGE PROGRAM MANAGER'S DESKBOOK § 1.8 (June 1992) (Planning Competition for Major Systems) (outlining alternative methods of fostering competition during systems design and production stages); Memorandum, Principal Deputy Under Secretary of Defense (Acquisition & Technology), DUSD (A&T), subject: Subcontractor Competition (May 5, 1999) (requiring acquisition officials to ensure competition for systems components between the prime contractor's divisions and other subcontractors and to consider purchasing systems components to provide to the prime as Government Furnished Equipment), *available at* http://www.acq.osd.mil/ia; Polk, *supra* note 36, at 420-21 (discussing various ways in which barriers to DOD markets are reduced, including repetitive bidding, provision of data and technical packages for lower design, development and testing costs, progress payments, government-furnished equipment, and others).

220. OMB CIR. A-76, *supra* note 51. *See also* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 23-24 (discussing DOD's role in curbing anticompetitive conduct through its own production of goods). Various DOD laboratories and depots can compete for R&D and production work.

is of limited value as an affirmative defense, but the underlying facts may indicate mitigation of potential harm.[221]

g. Weighing Pro-Competitive Benefits and Anticompetitive Harm

Next DOJ or FTC identify and examine pro-competitive benefits of the collaboration in more detail than when first assessed for "plausibility" during the "limited factual inquiry."[222] Again, these benefits include lowering competitive prices and quality or delivery improvements arising from efficiencies to firm structure or transaction costs. The same criteria are used as earlier, but the agencies attempt to verify or even quantify the benefits to be weighed against potential harms. Finally, DOJ or FTC make an "approximate judgment" to determine whether the benefits offset the potential anticompetitive harm.[223] Depending upon the "likelihood and magnitude of anticompetitive harms," DOJ and FTC may require the collaborators to provide more substantial evidence that the pro-competitive benefits are commensurate.[224] Opinions from DOD may be decisive at this juncture. If DOJ and FTC are convinced, the collaboration will not be challenged; otherwise, it will be challenged if it falls outside a "safety zone."

h. "Safety Zones" and Immunity

There are two "safety zones" where a collaboration will not be challenged.[225] The first provides that if a collaboration and its participants possess less than twenty percent market share, then a non-per se illegal collaboration will stand unchallenged. The second informs research collaborators that their collaboration will not be challenged when it is one of at least three independently controlled efforts, as defined by various criteria.[226]

The Collaboration Guidelines omit reference to a number of judicially created "immunities." First, the Supreme Court reviews some boy-

221. *See infra* note 352 and accompanying text.
222. COLLABORATION GUIDELINES, *supra* note 9, § 3.36.
223. *Id*. § 3.37.
224. *Id*.
225. *Id*. § 4.

cotts or refusals to deal under its formulation of the complex *Noerr-Pennington Doctrine*, through which it recognizes that such activities may constitute expressive speech or "political action" rather than business activity governed under the Sherman Act.[227] Second, the Supreme Court also established that federal regulation (when implementing a congressional mandate)[228] and "state action" can immunize or mitigate a firm's anticompetitive behavior. The Supreme Court also recognizes immunity in various situations within the context of labor laws.[229] Application of these immunity doctrines involves complex application of governmental policies and fact scenarios. Thus, by necessity their application should involve DOD headquarters.[230]

Finally, the same general analytical framework for assessing contractor collaborations applies to international operations, healthcare services, intellectual property development, and agreements. Due to the specific nature of those environments, various additional factors are considered at

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226. The Small Business Innovation Research Program, 15 U.S.C. § 638 (2000), and The National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301-05 (2000), provide limited R&D immunity from per se challenges in certain situations. *See* Polk, *supra* note 36, at 426. *See also* INTELLECTUAL PROPERTY GUIDELINES, *supra* note 132, § 4.3 (including nonfacially illegal restraints within "safety zone" for intellectual property licenses).

227. *See* Fed. Trade Comm'n v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990) (public defenders' boycott of cases to seek higher fees not immune); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991) (upholding immunity of government officials from allegations of antitrust conspiracies under *Parker v. Brown*, 317 U.S. 341 (1943), and clarifying the "sham" exception to *Noerr* immunity).

228. Otter Tail Power Co. v. United States, 419 U.S. 366 (1973) (federal regulation); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056-57 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983); Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (state action). *See also* Kovacic, *supra* note 2, at 466 (arguing for DOD regulatory oversight of competition policies); Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1076-80 (discussing four methods contractors can consider in seeking immunity or assurances from DOJ or FTC that they will not take action).

229. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (discussing "statutory" and applying "non-statutory" labor law immunity).

230. In addition to suspecting an antitrust violation and satisfying "safety zone" and immunity criteria, the Supreme Court has established significant procedural and evidentiary burdens for plaintiffs to bring *ex-post* suits for civil recovery. *See, e.g.*, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (applying the "antitrust injury" standing requirement to competitor-victims of vertical, maximum price fixing scheme); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (articulating plaintiff's evidentiary requirement for direct or circumstantial evidence of motive to engage in economically plausible predatory pricing conspiracy).

the appropriate level of review, but they will not be discussed further in this article.

2. Antitrust Enforcement Regime

The variety of methods for resolving antitrust concerns plays an important role in the DOD procurement process. The DOJ prosecutes antitrust violations in federal district court as criminal (for per se violations)[231] or civil complaints (seeking injunctive or equitable relief), and it has a variety of civil investigative techniques to assist it in identifying alleged violations.[232] The FTC prosecutes civil complaints either in federal district court or through the FTC administrative hearing process.[233] Private parties or a state attorney general acting in *parens patriae* alleging injury from an antitrust violation may sue in federal district court,[234] or join or comment on DOJ or FTC complaints under certain circumstances.[235]

The DOJ or the FTC may provide business reviews to participants of proposed collaborations,[236] or state objections to collaborations qualifying as mergers.[237] Within DOD, collaborators may find themselves defending administrative suspension or debarment actions based on an antitrust violation.[238] They may also confront overlapping investigative interests, including DOJ, FTC, auditors, contracting officers, and procurement fraud officials (such as military investigative services, inspectors general, and legal advisors). Moreover, violations of the Sherman Act or the Clayton

231. The *Antitrust Resource Manual*, *supra* note 125, outlines procedures under which U.S. Attorneys may investigate and prosecute per se criminal violations, but all prosecutions are subject to review and approval procedures within the DOJ Antitrust Division or its field offices. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS MANUAL chs. 7-1, 7-2 (Oct. 1997), *available at* http://www.usDOJ.gov/usao/eousa/foia_reading_room/usam.

232. 15 U.S.C. §§ 4, 25 (2000) (federal district court jurisdiction); The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Section 7A of the Clayton Act), 15 U.S.C. § 18a; The Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (DOJ civil enforcement procedures).

233. 15 U.S.C. § 45.

234. *Id.* §§ 4, 15c, 26 (Sections 4 and 4C of the Clayton Act). *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (articulating the additional element required for injured parties to establish "antitrust injury" under Section 4 of the Clayton Act).

235. *See* The Tunney Act (Section 5 of the Clayton Act). 15 U.S.C. § 16.

236. 28 C.F.R. § 50.6 (2001) (outlining DOJ authority).

237. 15 U.S.C. § 18a.

238. FAR, *supra* note 20, at 9.406-1 (causes for suspension), 9.406-2 (causes for debarment).

Act evidence themselves in many ways and may be detected by a number of personnel related to the procurement. Thus, this article considers enforcement procedures according to the various sources from which violations may be detected.

a. Contractor Notice

Only the Hart-Scott-Rodino Antitrust Improvements Act of 1976[239] requires contractors to file notice with the government of its intent to form joint ventures qualifying as covered "mergers" or "acquisitions."[240] However, relatively few joint ventures qualify for this notice requirement.[241] Commonly, DOD may learn of a proposed qualifying joint venture informally from a contractor before filing notice.[242] Therefore, qualifying joint ventures may come to the attention of DOD directly or via DOJ or FTC after they receive formal notice.

In response to concerns over industry consolidation in the early 1990's, DOD established a Defense Science Board Task Force on Industry Consolidation to examine the deficiencies in its merger review procedures.[243] As a result, DOD promulgated *Department of Defense Directive 5000.62*.[244] The DOD General Counsel and the Under Secretary of Defense for Acquisition and Technology coordinate DOD's position (and, if necessary, evidence) with DOJ or FTC regarding qualifying "mergers or acquisitions involving a major defense supplier."[245] "Major defense suppliers" generally are those DOD contractors servicing "major systems" or

239. 15 U.S.C. § 18a.

240. *Id.*

241. Pursuant to 15 U.S.C. § 18a(a), filing of notice applies to any direct or indirect acquisition, by voting securities or assets of any other person, if the acquisition meets specific criteria. Generally, the acquisition (or joint venture involving acquisition of assets) involves one organization with assets or sales valued at over $100,000,000 and another with assets or sales valued at over $10,000,000 where the acquisition involves more than fifteen percent of such value.

242. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 41.

243. *Id.* at 6.

244. DOD DIR. 5000.62, *supra* note 3. This Directive does not alter the DOJ and FTC Hart-Scott-Rodino review process. Rather, it addresses DOD's role within that process. For a flowchart of the Hart-Scott-Rodino review process, see the *DSB Report on Vertical Integration*, *supra* note 2, app. D-2.

245. DOD DIR. 5000.62, *supra* note 3, para. 2. *See also* U.S. DEP'T OF THE ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 3.304 (Oct. 2001) [hereinafter AFARS] (requiring all communication related to mergers or acquisitions to travel through Army headquarters and DOD).

other specially designated procurements.[246] While this Directive does not specifically address joint ventures qualifying for Hart-Scott-Rodino notice, the value threshold of "major defense suppliers" exceeds the filing notice threshold.[247] More importantly though, these procedures do not cover those joint ventures not involving "major defense suppliers" which otherwise qualify for Hart-Scott-Rodino notice. This gap exists because the underlying focus of the directive targets traditional defense industry consolidation (that is, corporate restructuring) instead of collaborative behavior.[248]

The DOD review of horizontal or vertical[249] mergers or acquisitions covered by Hart-Scott-Rodino filings generally cover two interrelated facets of antitrust law. First, it applies merger analysis to joint ventures and examines the potential alternative collaborations to minimize competitive harm caused by permanent industry structural changes.[250] Second, it requires identification and assessment of interlocking webs of collaborations among all firms in a particular market affected by mergers or acquisitions.[251] It is not clear that DOD can track or desires to track these collaborations at the headquarters level, except for the most significant transactions involving significant political interest.[252] The trend in the past five years has been for field acquisition personnel to minimize involve-

246. *See supra* note 3 and accompanying text.

247. The value of the firm or interest in a firm to be acquired is likewise not addressed.

248. *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 7 ("The Task Force's review is oriented toward the particular circumstances at play in the current period of industry downsizing.").

249. In 1997, the DOD determined that *DOD Directive 5000.62*, *supra* note 3, adequately provided for review of vertical mergers and acquisitions. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 29-33.

250. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 29. The DOD, DOJ, and FTC appear to have been particularly active in negotiating mitigating revisions to proposed mergers or acquisitions. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 32.

251. *See supra* note 84 and accompanying text.

252. *See, e.g.*, Vago Muradian, *GD-NNS Raises 'Concerns' Within DOD; Decision Expected Soon*, DEF. DAILY, Feb. 26, 1999 (outlining political pressure, loss of competition, and efficiencies gained through one nuclear shipyard's purchase of the only other such shipyard); Vago Muradian & John Robinson, *Raytheon Expresses Concerns to Navy Regarding New DD-21 Team*, DEF. DAILY, Dec. 11, 1997 (outlining competitive concerns with teaming arrangement involving both destroyer builders). The DOD directed that certain exclusivity provisions be eliminated in the offers. *See* Kovacic, *supra* note 2, at 465.

ment or review of prime contractors' structural or collaborative activities ("hands-off" or "performance-based management").[253]

b. Internal DOD Reporting

Collaborations not involving major defense suppliers or those that do not require Hart-Scott-Rodino filing notice are subject to review at the DOD field operating level. Little to no guidance exists, however, on review procedures or for deciding which collaborations to review. Current regulatory guidance and other directives focus on reporting and investigating per se violations of antitrust law.[254] Contracting officers may encounter formal written collaborations when reviewing quote packages or proposals, but pursuant to FAR Subparts 3.3 and 9.6, need not endorse or reject such collaborations unless they evidence violations of antitrust law.[255] Evidence of antitrust violations may be resolved through three different channels within DOD: suspension and debarment officials, a centralized procurement fraud system, and defense auditors. Each channel hinders application of the analytical framework of *The Collaboration Guidelines*.

First, most federal contracting personnel are required to report evidence of violations through the suspension and debarment process and to DOJ.[256] Government personnel may encounter or receive such evidence through a variety of sources, including (within DOD) from auditors when they determine the presence of "anticompetitive exclusive teaming agreements."[257] The FAR provides a list of specific indicators of *per se* illegal behavior the detection of which warrants referral to DOJ of practices "sufficiently questionable to warrant notif[ication]."[258] These provisions do not permit considerations of efficiencies or require specific analyses for a determination of anticompetitive harm prior to referral. For DOD con-

253. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33-39.

254. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 519.

255. In the absence of individual interest or a strong local procurement fraud program, contracting officers lack institutional training in or emphasis on antitrust law, and may take little notice of collaborations in this light unless they otherwise fail to satisfy subcontracting competition or cost or pricing requirements.

256. FAR, *supra* note 20, at 3.301(b), 3.303(a) (citing 10 U.S.C. § 2305(b)(9)).

257. Exclusive Teaming Arrangements Memorandum, *supra* note 169; U.S. DEP'T OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY AUDIT MANUAL para. 4.705 (Jan. 2000) [hereinafter DCAA AUDIT MANUAL].

258. FAR, *supra* note 20, at 3.303(b), (c).

tracting personnel, Defense Federal Acquisition Regulation Supplement [DFARS] 203.301 directs contracting officers to "[r]eport suspected antitrust violations in accordance with [DFARS] 209.406-3 or 209.407-3, and DODD 7050.5."[259]

i. Suspension and Debarment Officials

DFARS 209.406-3 and *209.407-3* require submission of detailed reports of suspected antitrust violations to the agency suspending and debarring official (SDO), as designated in DFARS 209.403. The SDOs may initiate suspension of contractors for alleged violations of antitrust laws automatically when based on an indictment, or otherwise when based on "adequate evidence."[260] They may initiate debarment for the same conduct, however, only when based on a conviction or civil judgment.[261] The DFARS provides no guidance to SDO's regarding further referral to DOJ, but authorizes referral to "the appropriate Government entity,"[262] which most likely means DOJ when read consistent with the FAR's mandatory notification provision.[263] The FAR permits the SDO to initiate suspension and to conduct fact-finding through notice and opportunity to present matters.[264] To find "adequate evidence" of a violation, a concept tantamount to probable cause, the SDO must apply *The Collaboration Guidelines* framework.

With mandatory referral to DOJ Antitrust Division, that agency will likewise initiate the burden-shifting analysis prescribed by *The Collaboration Guidelines*. This process appears to create an investigative dilemma for both DOD and its contractors. Therefore, while SDOs and DOJ may

259. DFARS, *supra* note 20, at 203.301. *See* 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936, B-251936.2, 1993 U.S. Comp. Gen. LEXIS 529, May 13, 1993 (holding that contracting officers are required to report violations of Certificate of Independent Price Determination and related antitrust violations to DOJ).

260. FAR, *supra* note 20, at 9.407-2(a), (b). *See* Coleman Am. Moving Servs., Inc., v. Casper Weinberger, 716 F. Supp. 1405 (M.D. Ala. 1989) (upholding automatic suspension of moving contractors based on indictment even though they were eventually acquitted of all antitrust charges).

261. FAR, *supra* note 20, at 9.406-2(a).

262. DFARS, *supra* note 20, at 209.406-3(a)(iv), 209.407-3(a)(iii) (authorizing referral or investigation, "as appropriate").

263. FAR, *supra* note 20, at 3.301(b), 3.303(a). The SDOs may prefer to submit such matters to the DOJ Antitrust Division directly or to their local U.S. Attorney's Office. *See supra* note 231 and accompanying text. In this process, the FTC is virtually omitted.

264. FAR, *supra* note 20, at 9.407-3.

legitimately reach independent conclusions, at least for charging and suspension purposes, SDOs likely will take action only based on indictments or where DOJ files a civil action. This approach avoids duplicative dedication of resources and criminal due process implications. Because DOJ's policy is to prosecute criminally only "hard-core cartels," the ability of the suspension and debarment process to address anticompetitive conduct appears to be limited to per se violations that are significant enough to warrant action in the judgment of the Antitrust Division.[265] This SDO process also removes discretionary application of *The Collaboration Guidelines*' analytical framework from procurement personnel when any collaboration contains provisions that evidence agreement on pricing, bidding, output allocations, other per se illegal conduct, or even non-per se illegal agreements that may be anticompetitive by their nature.

ii. Procurement Fraud System Reporting

Related to the SDO referral report is procurement fraud coordination directed by *DOD Directive 7050.5*.[266] This directive centralizes processing of "significant cases" of procurement fraud within each DOD component and requires tracking of investigations and coordination of all criminal, civil, and administrative remedies, including suspension or debarment. The program contains three notable features pertinent to collaborations. First, it does not specifically address antitrust violations, although implementing regulations of DOD components may.[267] Second, it relies heavily upon defense criminal investigative services for investigations and coordination with other law enforcement officials.[268] Presumably, these officials are familiar with the congressional mandate to refer

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265. 28 C.F.R. § 0.40 (2001) requires DOJ Antitrust Division supervision of all antitrust investigations and cases. The FAR, however, appears to authorize conflicting investigations. *See* FAR, *supra* note 20, at 9.407-2, 9.407-3. The two distinct investigative processes also create the possibility of different findings of pro-competitive benefits or other benefits to DOD. Because SDOs serve mostly as conduits for referral, they might defer to DOJ for such determinations.

266. U.S. DEP'T OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989) [hereinafter DOD DIR. 7050.5].

267. *Id*. para. 4.3, enclosure 1. *Cf*. U.S. DEP'T OF ARMY, REG. 27-40, ARMY LITIGATION, para. 8-9b(3) (19 Sept. 1994) [hereinafter AR 27-40] (requiring Army Procurement Fraud Advisors to consider civil remedies for violations of the Sherman Act). This Army regulation does not address non-per se illegal antitrust violations. It does, however, otherwise authorize Army personnel to coordinate with DOJ for civil recovery or equitable relief. *Id*. para. 8-7c.

alleged violations to DOJ, although no guidance clarifies whether military investigative service notice or SDO notice takes precedence. The procurement fraud system likewise does not permit procurement personnel to consider efficiency justifications or other factors when initially referring cases to DOJ. Moreover, because "significant cases" include only those alleging losses of $100,000 or more,[269] procurement fraud teams unable to conduct economic analyses may omit any detailed review of even per se violations where amounts of loss cannot be established.

iii. Auditor Reports

Finally, the Defense Contract Audit Agency (DCAA) establishes its own procedures for detecting and reporting suspected antitrust violations. After an auditor verifies the existence of "sufficient evidence" of "anticompetitive procurement practices," for example, while evaluating a cost estimate or pricing proposal,[270] it must refer to different offices depending on activity type:[271] exclusive teaming arrangements and all other anticompetitive practices.

If the auditors discover an exclusive teaming arrangement, they must determine whether "one or a combination of the companies participating in an exclusive teaming arrangement is the sole provider of a product or service that is essential for contract performance."[272] If so, the auditor must notify promptly the pertinent contracting officer and the auditor must report any unsuccessful efforts by the contracting officer to eliminate the exclusivity provision to the DCAA General Counsel.[273]

This procedure reflects a directive from DOD Under Secretary of Defense for Acquisition, Technology, and Logistics[274] and a proposed

268. DOD DIR. 7050.5, *supra* note 266, para. 5.1.3. Centralized reports of "significant cases" are also submitted from the field to designated military service headquarters. *Id.* para. 5.1.1. For example, the Army requires submission of "procurement fraud reports" by field attorneys to the Procurement Fraud Division, Office of The Judge Advocate General (which coordinates with DOJ). AR 27-40, *supra* note 267, paras. 8-7, 8-8. However, the Army's SDOs serve outside this Office. DFARS, *supra* note 20, at 209.403.

269. DOD DIR. 7050.5, *supra* note 266, para. 3.2. The definition includes product substitution and "corruption," with the latter limited to bribery, gratuities, or conflicts of interest. *Id.*

270. DCAA AUDIT MANUAL, *supra* note 257, para. 9.002h.

271. *Id*. para. 4.705b.

272. *Id*. para. 4-705c.

273. *Id*.

revision to *DFARS 203.303*.[275] The proposed DFARS change would also require reports to SDOs of unsuccessful efforts to eliminate exclusivity provisions involving "essential" products or services.

This proposal generated three significant objections from the Council of Defense and Space Industry Associations (CODSIA), which represents a segment of DOD contractors.[276] First, the term "essential" is not defined for contracting officers. Second, exclusivity can generate benefits (such as protecting licensing rights) and should not be treated as per se illegal. Third, the CODSIA asserts that referral to SDOs is automatic and fails to require a determination (after an opportunity to comment) of actual anticompetitive impact. Such a referral would prevent the teaming firms from being awarded the work and would be an unfair economic loss if no anticompetitive harm would have occurred. The CODSIA's proposed analytical process conflicts with the ambiguous regulatory referral process outlined above.

These objections, however, reflect the flexible analytical framework adopted by *The Collaboration Guidelines* where competing firms are involved. Indeed, exclusivity provisions are scrutinized only in vertical restraints cases, but only narrowly under the "exclusive dealings" doctrine. In horizontal restraints between competitors, courts must find that *a monopolist* restricted access to an "essential facility" where it would have been feasible for an otherwise incapable competitor to duplicate the facility.[277] Further, DOD guidance on exclusive teaming arrangements does not distinguish between horizontal or vertical collaborations.[278] Even if such an exclusive arrangement were not per se illegal, DOJ or FTC must assess the "nature" of the agreement for anticompetitive harm, a task CODSIA believes should be conducted by a contracting officer. Finally, under the analytical framework, if a firm can present an efficiency justification even for per se violations, DOJ will examine the arrangement for actual or potential anticompetitive effects.

While CODSIA argues that a DOD contracting officer should make that determination, *DOD Directive 7050.5* and the proposed change to the

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274. Exclusive Teaming Arrangements Memorandum, *supra* note 169.

275. DFARS Case 99-D028, 64 Fed. Reg. 63,002 (Nov. 18, 1999).

276. *See generally Industry Questions*, *supra* note 6.

277. *See supra* note 129 and accompanying text. Recall that these restraints are excluded from coverage under *The Collaboration Guidelines*, *supra* note 9.

278. Recall that the FAR definition of a teaming agreement includes both joint ventures *and* subcontract relationships.

DFARS appear to defer to DOJ for that function. In that case, DOJ's Antitrust Division[279] would coordinate with contracting officers directly (or through litigation channels) for information and evidence regarding the analysis of every such exclusive teaming arrangement. As CODSIA points out, for the teaming arrangement to be rejected, such a process would require either an indictment or injunction filed by DOJ or a nonresponsibility determination by the cognizant contracting officer.[280] This procedure provides the only hint at how DOD would treat all other collaborations that require assessment of efficiency claims in otherwise per se illegal collaborations. It would appear that contracting officers attempting to make such assessments would interfere with the investigative function of DOJ (or FTC, when otherwise informed) in these matters. In fact, even analyzing procurement bid information to verify bid-rigging, price fixing and other per se illegal conduct can require technical DOJ assistance.[281]

All other suspected and verifiable anticompetitive practices discovered by DCAA auditors must be referred by DCAA Form 2000.0, DCAA Suspected Irregularity Referral Form, to the Department of Defense Hotline in Washington, D.C.[282] No other referral or coordination with contracting officers or other procurement fraud personnel is required (or indicated in the manual). Local contracting officers and other procurement fraud team members then must rely on notice of such cases after subsequent referral to DOJ.

c. Third-Party Reports

Other entities may also detect, report and challenge antitrust violations involving DOD contracts. Contractor employees or members of the public at large may report violations.[283] Interested competitors may also

279. This assumes full intra-DOJ coordination required by the *U.S. Attorneys Manual*, *supra* note 231, when SDOs report violations to local U.S. Attorneys.

280. This assumes that the cognizant SDO does not take action on an independent investigation, as discussed above. This also assumes that all other award factors are held equal.

281. ANTITRUST RESOURCE MANUAL, *supra* note 125, § 8.

282. DCAA AUDIT MANUAL, *supra* note 257, para. 4-705 (referring auditors to para. 4-702.4). Government sole-source awards, CICA violations, and contractor buy-ins are excluded. *See id.*

283. They also may be eligible to file qui tam lawsuits if the violation falls under the False Claims Amendments Act of 1986, 31 U.S.C. §§ 3729-3731 (2000).

sue under the Sherman and Clayton Acts when injured or challenge a contract award in federal court.[284] These sources and remedies may not be as fruitful or effective as DOD enforcement because of the likelihood of conflicting interests. Further, private efforts to enjoin the award of a contract based on a violation of antitrust law can place DOD at risk of procurement delays or inadvertent awards because it may not otherwise be aware of the litigation.

B. DOD Procurement Law Competition Standards

Consistent with the U.S. policy of upholding competition among private industry, Congress imposes on DOD the responsibility of seeking, "to the maximum extent practicable," competition in its procurements. FAR Part 6, Competition Requirements, implements the basic statutory charge of The Competition in Contracting Act of 1984 (CICA).[285] Contracting officers must seek full and open competition on DOD procurements by using competitive procedures unless certain sources are properly excluded or statutory exceptions for other than full and open competition are invoked.[286] Government procurement personnel document these deci-

284. The General Accounting Office lacks jurisdiction to resolve bid protests based on alleged violations of antitrust law. 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936, B-251936.2, 1993 U.S. Comp. Gen. LEXIS 529, May 13, 1993. However, competitors may refer such matters to DOJ themselves. *Id*. *See also* Halifax Technical Servs., Inc., B-246236.4, 1993 U.S. Comp. Gen. LEXIS 4, Jan. 5, 1993; CHE Consulting, Inc.; Digital Techs., Inc., B-284110, B-284110.2, B-284110.3, 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000, n.8. Prior to 1996, some contractors challenged procurements that involved allegations of antitrust violations in the Court of Federal Claims and in the federal district courts. At least one published assessment of this practice indicates that it was not an especially successful technique because challenges were reviewed for rationality of agency actions under the Administrative Procedures Act, 5 U.S.C. § 706 (via the "Scanwell Doctrine"). Del Stiltner & Robert J. Sherry, *Son of Scanwell: Antitrust Challenges to Government Contracts Awards and Related Actions*, 17 PUB. CONT. L.J., June 1988, at 514. In 1996, Congress enacted The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870 (1996) (amending 28 U.S.C. § 1491). This Act gave federal district courts and the Court of Federal Claims jurisdiction until 31 December 2000, to hear pre-award and post-award bid protests based on violations of statutes or regulations. Because the standards of review are similar to "Scanwell" cases (that is, application of the Administrative Procedures Act), such challenges may have been of equally limited value to competitors.

285. 10 U.S.C. § 2304 (2000). Other provisions contained within Title 10, Chapter 23, U.S. Code, and annual appropriations and authorization acts also address specific requirements relating to procurements.

286. FAR, *supra* note 20, at 6.101.

sions daily, and are well equipped with legal advisors to defend against protests at the General Accounting Office or in the federal courts. The DOD's decision to contract with a particular source or to impose its purchasing preferences in a particular manner, however, can appear to conflict with the underlying intent of antitrust law and the CICA. Accordingly, this section reviews those procurement procedures that directly relate to decisions affecting market and participant definitions and the ability of procurement personnel to influence or review collaborative behavior.

1. Antitrust-CICA Relationship

The DOD's use of the CICA exclusion and exception authorities *as a consumer* may conflict with the purposes of antitrust laws. It also does not establish antitrust immunity. These authorities allow DOD to permit collaborations between limited suppliers or rejection of existing suppliers in order to satisfy the purpose of the exclusion or exception. For example, DOD may award a contract under CICA to the smaller one of only two capable weapons producers on the basis of maintaining an industrial mobilization base.[287] But, DOD's basis for award does not permit the two firms to engage in per se illegal practices or exempt them from the prohibitions of the antitrust laws. The CICA does not mandate the circumvention of competition, nor does it entitle contractors to the right to deny DOD the benefits of competition.[288] Likewise, restrictions on foreign firm participation, such as those found in the Exon-Florio Amendment to the Defense Production Act of 1950[289] do not exempt otherwise qualifying firms from competition,[290] nor do security clearance restrictions.[291]

On the other hand, the FAR contains other specific provisions that assist DOD in obtaining procurement-specific competition among both

287. Award pursuant to 10 U.S.C. § 2304(c)(3), as implemented in FAR, *supra* note 20, at 6.302-3.

288. Fed. Trade Comm'n v. Alliant Techsystems Inc., 808 F. Supp. 9, 22 (D.D.C. 1992). *See also* ALM, Inc., B-221230.3, B-221249, B-221250, 65 Comp. Gen. 405, Mar. 11, 1986 (finding that encouragement of teaming arrangements is consistent with CICA and there is no absolute limit on the number of teaming members).

289. 50 U.S.C. App. § 2170 (Supp. V 2000). The Department of the Treasury implements the Act at 31 C.F.R. Part 800 and covers qualifying joint ventures. 31 C.F.R. § 800.301 (2001). The Committee on Foreign Investment in the United States (CFIUS) investigates each transaction.

290. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1069-72.

291. *Id*.

prime and subcontractors, including the Certificate of Independent Price Determination, and the component break-out and leader-follower provisions.[292] Also, a prime contractor, such as one in a teaming arrangement, cannot restrict competition among subcontractors when subcontractor competition is mandated by CICA and the FAR.[293]

Even the substance of contract packages may be litigated for its competitive effects on potential bidders.[294] The procedural and substantive decisions on a procurement establish part of the competitive framework for contractors.[295] For example, if a domestic firm deems it necessary to collaborate with a foreign firm to bid on a DOD weapons system contract, its collaboration necessarily will include provisions assigning control over classified information and control of assets to the domestic firm. Under antitrust analysis, such provisions would be reviewed (after a proper showing of justification from the collaborators) for ancillarity and anticompetitive effects.[296] The foreign firm participation restrictions[297] also inform the definition of the relevant market. These restrictions may appear to restrict the relevant geographic market to the United States, but the proposed collaboration expands that market worldwide.[298]

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292. *See id*.; Chierichella, *supra* note 11, at 560 (listing several provisions available to DOD to enhance competition).

293. *See* Chierichella, *supra* note 11, at 558 (discussing relationship of antitrust laws to CICA-mandated competition in subcontracting).

294. *E.g.*, 10 U.S.C. § 2305 (2000); CHE Consulting, Inc.; Digital Techs., Inc., B-284110, B-284110.2, B-284110.3, 2000 U.S. Comp. Gen. LEXIS 35, Feb. 18, 2000, (specifications requiring original equipment manufacturers' support agreements); Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD ¶ 351 (specifications containing geographical restrictions); DFARS, *supra* note 20, at 211.270-1 (restricting use of "brand name or equal" provisions); FAR, *supra* note 20, at 37.601, 37.501 (encouraging performance-based service contracting and using "best practices" in the contract management process).

295. *See, e.g.*, FAR, *supra* note 20, subpts. 15.1, 15.3 (cost, quality, and performance trade-offs, and evaluation criteria requirements), 32.105 (considerations for contract financing), 45.105 (Government Policy and competitive advantages).

296. COLLABORATION GUIDELINES, *supra* note 9, §§ 3.2, 3.3.

297. *See* DFARS, *supra* note 20, at 209.104-1(g).

298. *See* Kovacic, *supra* note 2, at 485-86 (discussing factors that may assist DOD in deciding to expand the geographical markets through foreign firm participation).

2. Considering Collaborative Behavior and Incentives in Procurement Planning

Put another way, contractors may not unreasonably restrain their competitors when bidding on DOD contracts, but DOD (through the CICA and its procurement choices) may provide either incentives or obstacles to collaborative behavior. The DOD procurement officials do not make decisions to limit competition to achieve a specific goal or to encourage collaborations to achieve broader competition in a vacuum. Rather, they make them through the FAR procurement process. The FAR recognizes the advantages of teaming arrangements[299] and encourages their use in "appropriate" circumstances (that is, when they do not violate antitrust laws and if they present advantages to the government).[300] Given the vast variety of collaborations and advantages to DOD, what are effective methods that procurement officials use to evaluate "appropriateness?" This section argues that the process of identifying DOD's needs, conducting market research, and evaluating offers should include assessments of incentives to collaborate and the competitive effects therefrom. Competition advocates must better articulate this process. Finally, this process must also be effective and efficient when the application of antitrust laws fails to reach the specific conduct.

a. Market Research

The process of gathering information about industry conditions within a particular market for antitrust law analysis varies in detail from that under the FAR procurement process. Market research under the FAR focuses on the procuring agency's needs and whether an industry can satisfy those needs in a competitive manner. As outlined above, antitrust law examines the competitive conditions of the market and the industry structure. There is little guidance in the FAR, however, to aid procurement officials in assessing the competitive conditions of the markets to predict or manage collaborative behavior. A critical review of the market research

299. FAR, *supra* note 20, at 9.601.

300. *See* ALM, Inc., B-221230.3, B-221249, B-221250, 65 Comp. Gen. 405, Mar. 11, 1986; *see also* Kovacic, *supra* note 2, at 442, 465-66 (discussing DOD's rejection of teaming arrangements when competitive industrial structure is implicated).

procedures shows that procurement officials should gather information traditionally pertinent to antitrust analysis during this process.

Before developing any new requirements documents and before soliciting offers, procurement officials collect and analyze information "appropriate to the circumstances" about the ability of the market to satisfy the agency's needs.[301] The results are used to determine whether commercial or nondevelopmental sources exist from which the goods or services will be sought[302] and, if not, to consider re-defining the agency's requirements to accommodate such sources.[303] The DOD recently announced that it will oversee the market analysis process to weigh the effects that DOD component budgeting and acquisition plans have on future competition (and industrial structure, in general).[304] The Office of the Deputy Under Secretary of Defense (Industrial Affairs) intends to provide nonproprietary market information on its Web site and publishes an "informational Market Analysis Handbook."[305] The FAR mandates that the results of market research should be used to determine: if existing sources can satisfy DOD's needs; if commercial items can meet DOD's needs; the extent to which commercial items can be integrated into components; if recovered materials and energy efficiencies can be achieved; if bundling is necessary; and the practice(s) of firms engaged in producing, distributing and supporting commercial items, such as warranties, financing, maintenance, packing, and marking.[306]

Any number or manner of techniques are available to procurement officials to gather market data, from contacting industry or government representatives directly and obtaining source lists to conducting interchange meetings and holding pre-solicitation conferences.[307] No specific techniques that consider the use of collaborations or the specific market

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301. FAR, *supra* note 20, at 2.101, 10.001(a)(2). Part 10 of the FAR implements 10 U.S.C. §§ 2305 and 2377. For Major Defense Acquisition Programs and Major Automated Information Systems, market research is conducted at the initial stages of program definition. DOD DIR. 5000.2-R, *supra* note 3, para. 2.3.1. For "commercial activities" conversion studies, market research is conducted during the "commercial activities" inventory phase. U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES para. 9 (Sept. 1985).

302. FAR, *supra* note 20, at 10.002(b).

303. *Id.* at 10.002(c).

304. Future Competition Memorandum, *supra* note 7. It is not clear that this effort extends beyond projected major systems (that is, to "commercial activities").

305. *Id*.

306. FAR, *supra* note 20, at 10.001(a)(3).

307. *Id*. at 10.002.

influences that would induce or discourage collaborative behavior have been endorsed.[308] Market research in acquisition planning traditionally focuses on the capabilities of firms to satisfy the functional, performance, or physical characteristics needed by DOD.[309] The particular contract or subcontract is coded for identification of function by service or product as discussed in Section II, above. Finally, the FAR encourages the release of limited amounts of agency information for firms to decide if they can meet a need and requires documentation of market research consistent with the size and nature of the procurement.[310]

Market research must be conducted continually during the acquisition planning stage of a procurement, whether the acquisition is on a contract or systems basis.[311] Among other things, the market research will result in an assessment of the level of competition among the prime and major component/subcontractor levels, the product or service descriptions, the contracting methods, and preferred sources.[312] Procurement personnel must account for how competition will be sought and sustained at the subcontract level, including assessment of barriers to competition and other industry factors.[313] For major defense acquisition programs and major automated information systems,[314] the acquisition plans must specifically include discussion of open systems architecture, incorporation of commercial/nondevelopmental items, dual-use technologies, industrial capabilities and preparedness, technical data rights, "critical product and technology competition,"[315] and foreign entity cooperation.[316] To address "critical product or technology competition," program managers must consider the

308. The FAR requires the agency to re-evaluate needs to determine if commercial items can be used, *id.* at 10.002(c), (d), and to use commercial items procedures if it can, *id.* pt. 12; otherwise, it must announce that those procedures will not be used. There are no procedures requiring research or examination of collaborative behavior.

309. *Id.* at 6.502(a); U.S. DEP'T OF DEFENSE, DEFENSE ACQUISITION DESKBOOK § 1.2.2.4.131 (Jan. 2001), *available at* http://www.acq.osd.mil.

310. FAR, *supra* note 20, at 10.002(e).

311. *Id.* at 7.105(b).

312. *Id*. at 7.105(c).

313. *Id*. at 7.105(c)(2)(i)-(iv). The DOD requires *written* acquisition plans for development acquisitions with a total estimated cost of at least $5,000,000, production and service acquisitions estimated to be at least $15,000,000 or more per fiscal year or $30,000,000 total, or otherwise when appropriate. DFARS, *supra* note 20, at 207.103(c)(1).

314. These systems acquisitions are a subcategory of major systems with higher projected dollar expenditures, or as otherwise designated by Congress or DOD. DOD DIR. 5000.2-R, *supra* note 3, definitions.

315. *Id.* para. 3.3.2; DFARS, *supra* note 20, at 207.103(b), 207.106.

316. DOD 5000.2-R, *supra* note 3, para. 3.3.6.2.

degree of vertical integration (including proposed exclusive teaming) of competing firms and whether sub-system competition or collaborations are most effective.[317]

Within the weapons systems segment of the defense industry, one scholar proposes a methodology for DOD to apply to market research and its industrial capability program.[318] Professor William Kovacic argues that DOD must identify the research and development competencies in firms specific to each current or future weapons system need, as subdivided into contracting functions of "systems integration," "design, production, and assembly of components," and "modifications and upgrades."[319] Next, he proposes that, through market research, DOD should identify and rank industry participants "according to the volume and quality of previous work related to specific competencies."[320] These participants should include current contractors, commercial firms, and foreign firms, all of which may enter the market through direct participation, mergers, or collaborations.[321] These steps will gather information that can aid antitrust tribunals in defining the relevant markets, their participants, and the competitive effects of transactions.[322]

Such a methodology would require development of substantial internal DOD economic and legal analytical capabilities,[323] in addition to information systems needed to track the process and coordinate with DOJ and FTC.[324] Whether DOD incorporates this specific methodology into a centrally managed budgeting and acquisition planning cell for its monopsonistic weapons systems markets, it simply is unworkable for all other procurements across DOD due to their sheer number and variety of markets. This holds true particularly where procurements fall within isolated product and geographical markets, such as fuel refinement, office supplies, facilities maintenance and repairs, information systems design and operation, or other specialized and non-specialized products at DOD locations

317. *Id*. para. 3.3.2.4.

318. Kovacic, *supra* note 2, at 475-80.

319. *Id*. at 476-78.

320. *Id*. at 479.

321. *Id*. at 480. The third step in his methodology seeks to identify "activities that sustain [the identified] capability." *Id*.

322. *Id*. at 481. They will also help to monitor the interlocking webs of collaborations and other agreements related to merger review consent decrees. *Id*. at 439-43.

323. Professor Kovacic likewise addresses these factors. *Id*. at 481-84.

324. The DOD addressed issues related to confidentiality and exchanges of information between the three agencies in the *DSB Report on Industry Consolidation*, *supra* note 8, at 40-43.

around the globe, as defined by the Supreme Court's "submarkets" criteria. Procurement officials also must assess the necessity for licensing arrangements when intellectual property rights are acquired and assess geographical and legal restrictions when procuring overseas or from overseas firms.

Procurement officials should evaluate the acquisition strategy in terms of adequate competition when one of several situations occurs. They, and competition advocates,[325] should examine the causes for potential economic or contract-related barriers when less than five firms have been identified in any given market, particularly one comprising homogenous products. Likewise, where a collaboration of firms that produce similar services or products (in any quantity) represent at least one in five potential offerors at the initial market research stage or where interested firms express the need for collaborations in order to participate, procurement officials must re-evaluate the strategy. Finally, procurement officials must be cautious where DOD's procurement need for any identifiable product or service substantially increases the demand within the market because of the impact it may have on coordinated supplier responses. For example, competing a military base's building maintenance and repair function under the "A-76 commercial activities" process may create a substantial new commercial demand within the geographical area of a base with limited suppliers.

b. Information Exchanges, Negotiations and Evaluation

The procurement official's choice of needs description, level of competition (under the CICA), and competitive contract framework at the pre-solicitation stage does not end DOD's ability to influence and review collaborations. Indeed, pre-solicitation information exchanges (for example, through the draft Request for Proposals process) and the source-selection and negotiations process often serve as the focal point for trade-offs

325. The FAR requires appointment of a competition advocate within each agency. FAR, *supra* note 20, at 6.501. There is no DOD-wide Competition Advocacy program. Individual military services provide for various levels of competition advocacy. For example, the Army provides for an Army-wide Competition Advocate, major command Special Competition Advocates, and installation-level Local Competition Advocates. AFARS, *supra* note 245, at 6.502; U.S. DEP'T OF ARMY, REG. 715-31, ARMY COMPETITION ADVOCACY PROGRAM paras. 1.13, 1.14 (9 June 1989). Competition advocates establish periodic competition goals and identify barriers impeding achievement of those goals. FAR, *supra* note 20, at 6.501. They do not receive training or participate in antitrust oversight activities to any significant degree.

between DOD's program needs, industrial capability needs, and competition policies. Contracting officers and other source selection personnel will find that offerors have structured their proposals based on their unique competencies and structure and their interpretations of the requirement. Combined with these factors, the choices made by the procuring agency to enhance or restrict competition through the CICA and through other competitive framework factors provide additional incentives or barriers that may be resolved through collaborations.

Accordingly, when proposals reflect the use of collaborations between actual or potential competitors in the particular product or service market, procurement officials traditionally consider the evaluation criteria they established in the pre-solicitation process. Procurement officials also may be under pressure to adopt short-term cost, quality, or delivery needs[326] rather than considering long-term competition, particularly where DOD is not the sole customer.[327] The challenge, then, is to provide the appropriate response when a collaboration facially contains a feature that restricts price, output, customers, or participants.

Contracting officers possess little regulatory guidance for determining whether such collaborations are "appropriate." The FAR requires offerors to disclose teaming arrangements in their offers, or if formed after award, before they become effective.[328] The government normally will recognize the "integrity and validity" of such arrangements and will not require or encourage their dissolution.[329] In the evaluation process, source selection personnel may address the cost, quality, or performance aspects of the collaboration as it relates to the procurement.[330] However, the FAR does not excuse teaming arrangements that violate antitrust laws.[331] If the proposal containing the collaboration provides the "best value" to the government, may the contracting officer award the contract where the collaboration contains a provision evidencing a per se illegal restraint? More

326. *See* Kovacic, *supra* note 2, at 469.

327. This conflict is most acute, however, where the relevant product market comprises only the current DOD procurement (for example, during "commercial activities" competitions) because the resulting contract may permanently shape future competition on similar procurements.

328. FAR, *supra* note 20, at 9.603.

329. *Id*.

330. The DOD procurement officials must also consider the inclusion of small and disadvantaged businesses as competitors, including through joint ventures, teaming arrangements and subcontracts. DFARS, *supra* note 20, at 215.304(c)(i).

331. FAR, *supra* note 20, at 9.604(a).

importantly, if the collaboration includes efficiency justifications obvious to the procurement officials, what procedure should be used to resolve its legality?

The recent DOD directive on exclusive teaming arrangements where one participant possesses a "product or service that is essential for contract performance" suggests how DOD will approach this. Contracting officers first must negotiate with the offeror to eliminate the exclusivity provisions related to the essential product or service. Where unsuccessful, the matter should be reported to DOJ (through SDOs and the procurement fraud system) because DOD deems such teaming arrangements to be evidence of per se illegality. As noted by CODSIA, implementation of this particular procedure requires contracting officers to apply antitrust laws to a particular teaming arrangement.

The FAR authorizes contracting officers to negotiate with offerors to eliminate teaming provisions that conflict with subcontract competition requirements or other competition-enhancing rights.[332] Under the DOD interpretation of this authorization, contracting officers should also negotiate to eliminate other per se illegal arrangements before they take effect. If they cannot be eliminated or if they have already been formed, they should be reported to the DOJ under the DOD procurement fraud reporting system. This system requires DOJ (or FTC) to apply *The Collaboration Guidelines*, not contracting officers or their legal advisors. The DOJ will inform the contracting officer of its concerns and the contracting officer may attempt additional negotiations, as in teaming arrangements under the Navy's DD-21 destroyer solicitation cited above,[333] or DOJ may intervene.[334] If DOJ succeeds in obtaining a conviction or civil judgment based on the collaboration, the contracting officer must consider that fact in determining the present responsibility of the offeror(s).[335] In other cases, DOJ may use the procuring agency's data and opinions to inform its analysis and find that the collaboration is legal. The DOD procurement officials, therefore, serve as information coordinator and negotiator on behalf

332. *Id.* at 9.604.

333. *See supra* note 252.

334. *See* DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 31 (DOD reviews horizontal and vertical mergers and acquisitions "from a customer perspective," while only assisting DOJ and FTC with antitrust enforcement decisions).

335. FAR, *supra* note 20, at 9.104-3(c)(i).

of DOJ, but lack decision-making authority on matters that relate to competitive industry conduct because it falls under the rubric of antitrust law.

Accordingly, the success of this process depends upon two factors. First, procurement officials must thoroughly screen collaborations in proposals for per se illegal terms, identify them, and raise them with offerors or potential offerors during the appropriate negotiation phase or report them promptly. Current players in this process are the contracting officers, auditors, source selection officials, and designated legal advisors. If both the offerors and the contracting officer find the restraint beneficial, they may frame their reports and cooperate with DOJ accordingly.

Second, procurement officials' market research and understanding of market practices will enable solicitation packages to be structured in ways that foster only acceptable collaborations and that quickly and persuasively inform DOJ or FTC about DOD's needs. Under such a cooperative system, reporting and coordinating through adversarial SDO and procurement fraud systems may be counterproductive. To treat antitrust assessments automatically as suspect encourages risk aversion and adversarial relationships. As currently structured, the process also contains numerous bureaucratic gaps and redundancies that cause delay, particularly where inter-agency disputes arise out of conflicting interests. Further, where collaborations affect multiple procurements (or even non-DOD markets), they may be permissible in one setting and not in another. This case-by-case factor again necessitates some tracking mechanism.

C. Buying Power: DOD as a Monopsonist

Within the framework for analyzing collaborations and within the procurement process, DOD procuring offices make choices that enhance its position as a customer. In many markets, DOD enjoys a monopsonist position or, together with other major buyers, an oligopsonist position. The analyses and discussion above critiqued DOD's process of reviewing collaborations under antitrust law and how it accounts for that review in its procurement process. In particular, aspects unique to DOD purchases under the FAR shed light on efficiency justifications, market definitions, anticompetitive effects, and barriers to entry under antitrust analysis. Procurement officials must also evaluate DOD's immediate procurement needs when structuring solicitations and evaluating proposals. The DOD's needs in a particular transaction may be unique vis-à-vis particular market conditions or it may seek to enhance capabilities or competition as a con-

sumer. This section presents a brief overview of the buying practices available to DOD to achieve those sometimes contradictory objectives.

The monopsony powers of DOD can be categorized into two parts. First, the mere purchasing power of DOD as a consumer in a relevant market[336] dramatically shapes the behavior of all market participants and committed entrants. This aspect of monopsony power has been recognized in DOD policies in terms of its future budgeting and acquisition strategies for major systems[337] and in its ability to compete against potential firms in various specialized and commercial markets.[338] The second part of monopsony power stems from the sovereign statutory and regulatory choices afforded DOD in its purchasing. In merger cases, DOD's sovereign "buying power" has served to inform the courts about potential mitigating factors to potential anticompetitive effects.[339] These factors correlate to the additional industry-related mitigation factors outlined previously in Section III.A.

1. Budgeting and Acquisition Choices

At least one scholar has proposed sophisticated budgeting and acquisition strategies for DOD to meet its need for future competitive weapons systems research and development.[340] Based on the premise that competition is the best driver for low costs and high quality, this process attempts to balance DOD's industrial capability needs with strategies to sustain competition by: allocating R&D resources more effectively, expanding use of foreign firms, fostering participation by commercial firms, providing better incentives for sole-source suppliers, intervening to prevent anticompetitive conduct, and preserving interservice and interprogram rivalries within DOD.[341]

All major defense systems purchases require assessments of industrial capability (including foreign cooperation) in the acquisition strat-

336. As noted above, the DOD possesses the exclusive power to create or terminate a market.

337. Future Competition Memorandum, *supra* note 7.

338. DOD DIR. 5000.2-R, *supra* note 3; OMB CIR. A-76, *supra* note 51, para. 5.

339. *See* Triggs & Heydenreich, *supra* note 189, at 447-48 (reviewing three factors assessed by the courts).

340. Kovacic, *supra* note 2, at 443-67.

341. *Id*.

egy.[342] Where commercial markets and capabilities exist and can be expected to remain for nonweapons procurements, DOD need not be so concerned with industrial capability assessments in its procurements. It should, however, be cautious of dramatically changing the market landscape if it possesses substantial purchasing power within a relevant market. For example, in Hypothetical *A*, the conversion of plumbing services for a base to a private partnership comprising two of the five small plumbing companies in a neighboring town may significantly alter the market power of the three remaining companies. (Consider also in this scenario the ability to seek adequate competition on future contract renewals.) On the other hand, if a nearby military installation can provide plumbing services under a more competitive intragovernmental support agreement, the local five-firm private market remains relatively unaffected.[343]

2. Statutory and Regulatory Powers

A variety of procurement process and substantive choices permit DOD to establish or eliminate barriers to competition, such as procurement procedures or contract terms. As discussed above, contracting officers and competition advocates are trained in and experienced at recognizing and dealing with these factors related to each procurement and each procuring agency. The FAR's discussion of teaming arrangements at FAR 9.604 reserves rights to the government to exercise some of these powers. Accordingly, this section seeks only to critique various techniques available to procurement officials as they consider the incentives and disincentives for collaborations.

First, DOD can regulate the structure of its contractors to a large degree to achieve its goals. The FAR permits DOD regulation through "withhold[ing] consent to unreasonably priced subcontracts; the replacement, with other suppliers, of government-owned tooling and test equipment; dual sourcing; direct purchases of subsystems under a 'component breakout program'; and leader-follower programs."[344] As noted by Professor Kovacic, DOD may structure its R&D purchases to maintain competitive levels of industrial capability. The authority under the CICA to restrict competition on individual procurements provides DOD the ability

342. DOD DIR. 5000.2-R, *supra* note 3, para. 3.3.

343. The possibility of additional consumer demand or of additional competition may influence the behavior of the current market participants.

344. Chierichella, *supra* note 11, at 560. For a specific analysis of leader-follower arrangements under antitrust law, see Polk, *supra* note 36, at 446.

to make these choices and the conditions under which they may be made. But that authority does not establish the analytical methods found in antitrust law for monitoring the competitive conditions and incentives within particular markets and industries.[345] Moreover, as discussed above, DOD has significant latitude in defining its needs, ranging from types of specifications, to performance and delivery schedules, to design choices.[346]

Second, procurement officials can adjust the competitive framework in a solicitation package with a number of techniques. As noted earlier, contracting officers may provide for contract financing, government-furnished equipment and property, technical and data rights re-procurement packages, tailored specifications, and maximum use of commercial items. From a procedural point of view, the identification of barriers to competition in particular markets is hampered by the post-facto nature of the Competition Advocacy program. This program generally requires setting of competition goals, measurement of goal achievement and analyses of failure. While these post-award analyses may aid decision-making in future repetitive procurements, better market research and communication with industry would enhance the choices made by the procurement official.

Finally, the FAR provides DOD with methods of challenging the benefits of anticompetitive contractor behavior and reducing obstacles to competition. These methods, therefore, may diminish incentives to collaborate. These methods include audit and profit analysis rights, cost accounting standards for reasonableness of transfer prices within the collaboration or competing firm segments, and requirements for contractors to certify the accuracy of their prices and costs, to limit profits under cost contracts, and to terminate contracts for convenience.[347] The DOD also possesses a wide range of "regulatory commands" and "tools for monitoring compliance," including expanded coverage of the False Claims Act and *ex post* review of prices.[348] Contracting officers can inject a degree of prospective management oversight of the collaboration through assessments of the present responsibility of collaboration participants,[349] and

345. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1090.

346. *See* DOD DIR. 5000.2-R, *supra* note 3, para. 4.4.10 (requiring consideration of system design in relation to contractors' vertical integration).

347. *See* Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1087-91.

348. Kovacic, *supra* note 2, at 461-63.

349. FAR, *supra* note 20, at 9.104-2, 9.104-4. This authority may be limited in overseas (international) procurements by treaties and host-nation laws. *Id.* at 1.102(a).

may establish pre-qualification requirements for the acquisition.[350] Even the specific contract type and performance periods can have an effect on the ability of firms to compete.[351]

All three groups of techniques have limited value in restraining anticompetitive conduct. Courts, the FTC, and scholars have rejected the notion that these tools give DOD "buyer power" status.[352] Rather, actual or potential competition serves as the best method for achieving cost savings and enhanced levels of quality or innovation.[353] In relation to antitrust law, these powers narrow the identifiable markets, market participants, entry barriers and mitigating factors to potential anticompetitive harm. In relation to specific procurement choices, procurement officials must balance the specific program needs with the method of achieving competition under the existing market conditions.

IV. Analysis: Closing the Gaps

A. Defining the Procedural Gaps

The interrelationship between antitrust law analysis, the procurement process, and DOD's exercise of monopsony powers has three primary shortfalls as it relates to contractor collaborations. First, the procurement process fails to consider market conditions for both short-term and long-term competition goals. Second, DOD procurement officials lack a useful methodology for applying DOD's monopsony powers to relevant market conditions on procurements to achieve both goals. Finally, DOD's collaboration review process is bureaucratically cumbersome and adversarial, making it counter-productive. This section examines the two hypothetical collaborations to support these contentions.

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350. *Id*. subpt. 9.2. *See also id.* at 9.206-3 (regarding effects on competition).

351. Polk, *supra* note 36, at 421.

352. Triggs & Heydenreich, *supra* note 189, at 447-48 (judicial analysis of DOD "buyer power" in merger cases); Polk, *supra* note 36, at 422; Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, *supra* note 11, at 1091 (these "seemingly formidable powers sometimes may supply a relatively feeble check") (citing P. AREEDA & H. HOVENKAMP, ANTITRUST LAW (Supp. 1989)).

353. Kovacic, *supra* note 2, at 424-25.

1. The Procurement Process and Incorporating Market Conditions

The procurement process, and its market research and acquisition planning components in particular, fail to fully account for market-specific forces that influence collaborative behavior. Defense contractors and the business community at large routinely assess their relevant markets and make transactional, structural and strategic choices based upon the best available information. The DOD's procurement process is designed to seek only short-term competitive goals with minimal *ex post* analyses of the barriers to that competition through each services' Competition Advocacy program. The DOD's plan to implement a centrally managed market research function[354] acknowledges this shortcoming implicitly.

Market specific forces can be assessed from a variety of economic perspectives.[355] From DOD's (customer) point of view, however, two components to this process must be confronted. First, what technique should be used for surveying markets and gathering information? Second, what analytical model(s) should be applied to the information to create the most accurate and useful picture of its industries' competitive factors and conditions?

This is not to say that the FAR procurement system lacks any meaningful market research function. Rather, the FAR's guidance overlooks industry antitrust "due diligence" details[356] important to DOD's role in influencing collaborative behavior and sustaining long-term competition. These objectives may be addressed only through assessments of key industry competitive factors within the particular market subject to DOD procurement. Part of this omission rests in the distinction that the FAR fails to make between market research and industry research.

Federal Acquisition Regulation 2.101 defines market research as "collecting and analyzing information about capabilities within the market to satisfy agency needs." As noted above, the FAR's market research criteria then serve only to gather information about whether the item to be acquired can be purchased from existing commercial and nondevelopmental sources.[357] The DOD's field guidance likewise fails to address antitrust

354. *See supra* note 301 and accompanying text.

355. *See* Kitch, *supra* note 73.

356. This refers to the economic condition of pertinent industries and markets and the viability of participating firms' structures, strategies, and competitive positions (for example, value chains).

357. FAR, *supra* note 20, at 10.002(b).

law's market characteristics. Such characteristics are based in both market (relevant product and geographical markets) and industrial (market participants and the nature of agreements) analyses. A basic definitional difference between industry analysis and market analysis can be stated in terms of the focus of the inquiry. Market analysis examines the demand factors of products and services where industrial analysis examines the operating conditions of firms that offer, or have the potential to offer, close substitutes for those products and services.

A popular method of industrial analysis for managers is Michael Porter's "Five Forces" model. In this model, Porter suggests assessing the relationship between and operating conditions of industry competitors, potential competitors (entrants), actual and potential product substitutes (the FAR's emphasis), the relative buying power of customers, and the relative selling power of suppliers to the competitors.[358] Within DOD, only the Defense Industrial Capabilities Assessments Program includes an industrial assessment model that indirectly reflects some of these factors.[359] When defining relevant markets, courts consider such factors as "unique production facilities" and "specialized vendors" that would be identified under this analysis.[360] Firms with different cost structures, profit margins, production facilities, distribution networks, pricing systems, target markets, and other variables are said to form "strategic groups."[361] These factors also inform the assessment of efficiency justifications and

358. PORTER, *supra* note 52.

359. The DOD considers these factors when identifying the potential loss of product markets directly related to national security. U.S. DEP'T OF DEFENSE, DIR. 5000.60, DEFENSE INDUSTRIAL CAPABILITIES ASSESSMENTS (25 Apr. 1996) [hereinafter DOD DIR. 5000.60]. Under this centrally managed program, written assessments are conducted and provided to DOD headquarters to justify decisions to make private or public investments to sustain a critical capability. *Id.* A similar method of analysis appears to be the central feature of Professor Kovacic's proposals regarding budget and acquisition strategies for DOD's weapons systems. *See* Kovacic, *supra* note 2. Some studies of major weapons product sectors "of concern" have been conducted by DOD, with support from DOD components and industry groups, but have focused on industry health and future DOD spending. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 37.

360. *See supra* note 201. Note that the factor of "distinctive prices" may also reflect industrial factors, such as distribution systems and other cost structural elements. *See* Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1073-81 (D.D.C. 1997) (finding distribution and pricing structure of office supply superstores to be distinct market of all retailers selling office supplies).

361. *See* K.R. Harrigan, *An Application of Clustering for Strategic Group Analysis*, 6 STRATEGIC MGMT. J. 1 (1985).

entry barriers or other industry conditions that may mitigate anticompetitive harm.

Traditional corporate market analysis focuses on satisfying the particular needs of customers, as differentiated in a variety of ways. These firms research and gather intelligence on customers' buying behaviors, anticipated needs (in terms of tastes, quality, price, safety, and other preferences), and segmentation variables (such as demographics, purchasing systems, and regulatory requirements). Many government contractors develop elaborate government marketing plans.[362] While competitors' marketing plans may not be particularly relevant to a particular DOD procurement official, a firm's marketing and bidding strategy will reflect its strategic plan and the competitive advantages it possesses vis-à-vis its "strategic group" and its overall industry. Finally, the competitive factors that drive a marketing plan assist courts in defining, *inter alia*, relevant markets.[363]

In Hypothetical *A*, detailing a design and production contract for hand-held laundry machines, the program manager and contracting officer would conduct research to determine that computer chips, user interface panels, and cleanser dispensing controllers are available commercially, but previously have not been integrated. The miniature hanging clothes spinner and related engines, however, do not exist in the commercial markets, nor can the requirement be re-stated to accommodate commercial or nondevelopmental items. All of the commercial components (subsystems) can be procured in economic quantities within a relatively short period of time, and each have at least a ninety-day commercial warranty. All three commercial devices require patent or copyright licenses to modify and resell.

While it is clear in this hypothetical that some form of collaboration may be required for the procurement, the market research provides no information about the specific relevant component markets and participants. Nor does the market research inform one about industry conditions among the various components' competitors or about that of the firms that have the potential to produce the hanging clothes spinner and related engines. The traditional market research process leaves to the procurement official's discretion whether to inquire about the number of competitors within each component category, the definition and concentration of

362. *See, e.g.*, Don Hill, *Who Says Uncle Sam's a Tough Sell?*, SALES & MARKETING MGMT., July 1988, at 56-60.

363. *See supra* note 201.

their relevant markets, the cost and pricing structure within those markets, licensing practices for participants, and the effect of a large DOD purchase on the participants.

Some of this information is available from nonproprietary sources, including the volume of sales to the government,[364] on-line or subscriber industry profiles, and the U.S. Census Bureau. Moreover, "concentration measures have traditionally been used as a proxy for the relevant variables."[365] Accordingly, the procurement officials could identify the quantity of items sold by the component competitors (or their capacity or sales values), then conduct the relevant market concentration analysis outlined above. The same could be conducted for the design and production aspects for the noncommercial items, as well as the integration function of combining all the components into the final product. Under *The Collaboration Guidelines* framework, this information provides key insight into the ability of any likely collaboration to exercise market power both on the DOD procurement or as a consequence of it.

Likewise, market research at this point in the procurement process leaves the procurement official with little information about the long-term effect of DOD-funded design of a small, hand-held laundry device on the laundry machine and supply industry. If the three small laundry machine manufacturers created a joint venture to design the device and integrate the components at prices and quality competitive with the two large companies, what cognizable anticompetitive advantages would all five firms have in the immediate acquisition and in future DOD and non-DOD sales? What solicitation provisions and monopsony powers could enhance or eliminate variables that could be expected to influence a likely collaboration?

The DOD market research criteria for major systems expand the list of factors to include assessments of open systems architecture, dual-use technologies, industrial capabilities and preparedness, technical data rights, "critical product and technology competition," and foreign entity cooperation. But here, too, (to the extent that the procurement official adopts an effective technique for gathering this information) these data in isolation provide no insights into the competitive effects of the hypothetical procurement *on the relevant markets*. Unlike the defense weapons industry, where DOD as a monopsonist has immediate access to most rel-

364. *See* FAR, *supra* note 20, at 4.602; PRIME CONTRACT AWARDS, *supra* note 27.
365. Kitch, *supra* note 73, at 4.

evant industry information, relevant information about industries affected by large procurements involving commercial products and services may be difficult to accumulate. Even in systems markets, DOD acknowledges that its acquisition managers are losing visibility of relevant component markets due to hands-off management approaches.[366] Further, DOD does not track coordination among acquisition managers purchasing from similar markets, and "DOD does not have good mechanisms to share its industry knowledge across DOD in important supplier areas to help compensate for the limited insight being gained in individual weapon system acquisition programs."[367]

For example, the micro engines and hanging spinners may qualify as "critical product and technology" under the DOD's recent exclusive teaming guidance. Further, DOD investment in R&D of such components may give a significant commercial advantage to the three laundry machine and supply firms (depending upon the terms of the R&D collaboration) because it could be used in those markets as a dual-purpose technology. The extent of this benefit and the potential effects of possible exclusion of the two larger firms are unclear, however, without more detailed information and industry analysis. The DOD would feel the consequence of these effects in follow-on procurements where the industry conditions may have been changed as a result of the procurement. The DOD has taken the position since 1994 that such matters are beyond its jurisdiction, and must be considered by DOJ or FTC.

Because neither DOJ nor FTC receive formal notice of or review every significant collaboration that may affect DOD, and because they lack the expertise and industrial management requirements of DOD, this position is misplaced.[368] As Professor Kovacic argues, "[b]uilding a strong internal analytical capacity is essential if DOD is to make intelligent tradeoffs between cost-reduction and competition-preserving goals."[369] This is

366. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33.

367. *Id*. at 37. The DOD instituted "several new mechanisms to elevate DOD's internal attention to industry matters," but these efforts were limited to the nature of technical assistance (although it established a new position to assess industrial capability and conditions). *Id*. Yet the DSB recommended that DOD "strengthen business- and industry-related skills of DOD's acquisition personnel." *Id*. at 40. This recommendation mirrors the findings in the recent *DSB Report on Preserving Defense Industry*, *supra* note 2, at 25.

368. Kovacic, *supra* note 2, at 469.

369. *Id*.

not to say, however, that DOJ and FTC lack vital information that may assist DOD on industry or market conditions.

2. Exercise of Monopsony Powers Only for Short-Term Goals

The DOD procurement officials lack a structured approach to utilizing DOD's monopsony powers in their acquisition planning to achieve both short-term and long-term competition goals across its procurement markets. This point is most vividly made through the recent changes made by DOD's Industrial Affairs management team in the weapons systems industrial segment. As discussed above, the team concluded that short-term procurements and their competitive framework in weapons research and development must be made within a strategy for achieving long-term weapons needs through a competitive and well-managed industrial base. More importantly, procurement officials lack a systematic methodology for reviewing the competitive forces in the relevant markets affected by each procurement.

Acquisition planning at both the contract or systems level includes a complex range of considerations "that will control the acquisition."[370] Written from the perspective of the customer, the acquisition plan seeks to identify the appropriate method of satisfying the agency's current needs "in a timely manner and at a reasonable cost."[371] This process currently does not serve as "a rigorous competitive effects methodology [that] can assist DOD in assessing the merits of each potential business arrangement and selecting an optimal strategy."[372]

In Hypothetical *B*, concerning a teaming arrangement for base services at Fort Anywhere, the contracting officer learns that there are firms

370. FAR, *supra* note 20, at 7.105.

371. *Id*. at 7.101.

372. Kovacic, *supra* note 2, at 482. For example, the 1997 DSB vertical integration study found that "the Department's success in saving money or enhancing development by managing products known as [Government Furnished Equipment], or serving as system integrator, has been inconsistent." DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, app. F-4. *See also* U.S. GENERAL ACCOUNTING OFFICE, REPORT, CONTRACT MANAGEMENT: RULES AND RESPONSIBILITIES OF THE FEDERAL SUPPLY SERVICE AND FEDERAL TECHNOLOGY SERVICE, GAO-02-560T (Apr. 2002); U.S. GENERAL ACCOUNTING OFFICE, REPORT, DEFENSE ACQUISITION: DOD FACES CHALLENGES IN IMPLEMENTING THE BEST PRACTICES, GAO-02-469T (Feb. 2002); U.S. GENERAL ACCOUNTING OFFICE, REPORT, BEST PRACTICES: TAKING A STRATEGIC APPROACH COULD IMPROVE DOD'S ACQUISITION OF SERVICES, GAO-02-030 (Jan. 2002).

in the local area with the capability of providing most of the services to be contracted and many of the supplies. Some of the installation supply requirements exceed the capacity of local distribution networks (as the installation provides for its own intake and warehousing of supplies). There are four major national and two regional firms that have the capacity and experience to integrate these local firms into an aggregate base services contract. Because the contract value is expected to exceed $40 million over five years, the contracting officer is preparing a written acquisition plan. The contracting officer and installation commander have decided to utilize a best value approach to the contract evaluation.

While the performance work statement has been prepared to include all commercial items and performance-based statements of work, the contracting officer must address: potential sources, competition at prime and subcontract levels, "considerations" of contract terms, management information systems required for contractor oversight, government-furnished property, logistics concerns, and other variables.[373] As noted above, the contracting officer must consult the respective provisions of the FAR (or agency supplements) to address each factor on this list. While this list contains some considerations pertinent to industry conditions among the affected relevant markets, it does not specifically require or assist the contracting officer in an assessment of each relevant market and the industry conditions affecting the competitive status among the participants. Rather, it presumes that the use of commercial or nondevelopmental items, with minor contract adjustments, will satisfy short-term competition needs.

The solicitation requirement for plumbing services illustrates this point. With five small plumbing firms in the area,[374] the local plumbing market will dramatically change with the additional demand of plumbing service equivalent to ten full-time plumbers as a consequence of the installation turning over its operations to contract support. A winning offer from one of the six base service firms necessarily must include this new portion of the local market. Further, the ten plumbers leaving the installation's employment will be privileged with the first right of refusal for employment at these positions. One national offeror may choose to establish its own plumbing services branch and hire these employees directly. Another may choose to subcontract with one or more of the local plumbing firms under a collaboration and let those firms hire the plumbers on some pro-

373. FAR, *supra* note 20, at 7.105(b).

374. For simplicity, this scenario ignores requirements to maximize small business participation and assessments of bundling required by FAR 7.105(b)(1) and 7.107.

rata basis. In yet another scenario, a national firm may team with a regional firm for the regional's performance of portions of the base services, including plumbing. These various arrangements each have a unique effect on the existing local market for plumbing. In the long term, they each affect both the civilian consumers and the installation when contract renewal occurs because they shape industry operating structure.

The installation contracting officer may or may not emphasize long-term competition at the plumbing service or any other subcontract level by identifying these or similar concerns. In this type of negotiated contract, the level of short-term competition or long-term competitive impact typically will not affect the evaluation due to the breadth and variety of other functional areas under consideration and the evaluation criteria to apply. The challenge for the contracting officer, therefore, is to make the appropriate response when one of the offers contains a teaming arrangement. The response, from both an antitrust and a customer perspective, depends upon the variables relevant to determining the "appropriateness" of a teaming arrangement as outlined above.

Suppose that the offer containing a teaming arrangement among the five small firms to act as subcontractors to a national prime provides lower projected costs and better management plans than the in-house plumbing proposal. Should the contracting officer consider antitrust concerns related to an apparent market allocation of services among the small businesses and require elimination of that provision? How will the work be apportioned among the plumbing firms? Should government-furnished supplies, services, or facilities or other terms be included in the solicitation to compensate for any advantages or induce the offeror to change its approach? The contracting officer must review the teaming arrangement and report it properly to the SDO if such a provision is not removed, even if its removal increases DOD's expected costs. Successful review of the arrangement depends upon an efficient procedure for coordinated review within the government.

3. A Counter-Productive, Adversarial Review Process

The inter-agency process for assessing questionable collaborations inhibits a productive, proactive review that could increase the use of only pro-competitive collaborations by DOD contractors. Firms and government officials acknowledge that firms avoid collaborations for three specific reasons. First, because of the potential liability for and cost of

defending against alleged antitrust violations, firms hedge against uncertain results by avoiding the risk.[375] Second, conflicting representations among DOD, DOJ, and FTC officials causes additional uncertainty for firms in predicting the government's reaction to proposed collaborations.[376] Third, the choices made by contracting officers in the procurement process and the ability to exercise monopsony powers prevent an accurate calculation by contractors of the possible efficiencies on a particular offer that will benefit both DOD and the contractor.[377]

Under both Hypotheticals *A* and *B*, the contracting officer is confronted with various offers containing a joint venture (in *A*) and teaming arrangements (in *B*). Each contains at least one provision that is suspect under the per se standard. In Hypothetical *A*, the production arrangement that limits prices to be charged participants when the product is developed and sold commercially constitutes a per se illegal collateral price fixing agreement. In Hypothetical *B*, the teaming arrangement among the five small plumbing firms constitutes a per se illegal market allocation of services in the local markets.[378] Further, both hypotheticals appear to contain provisions that are questionable in nature even though not per se illegal. In Hypothetical *A*, the provision allowing the prime contractor to determine the prices to be charged and its access to participants' sales information increases the likelihood that it could exercise its market power through collusion. In Hypothetical *B*, the teaming arrangement between the national and regional firm which requires exclusive use of the regional firms' plumbing contractor (in order to accommodate former government employees) appears to limit competition among plumbing subcontractors.

Under the current procedures, the contracting officer must attempt to eliminate the per se illegal restraints in each of the offers. This requirement conflicts with the basic charge of *The Collaboration Guidelines* to consider efficiency-enhancing integration of resources that reasonably

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375. COLLABORATION GUIDELINES, *supra* note 9, pmbl. *See also* U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines).

376. Kovacic, *supra* note 2, at 484-85.

377. *See* Chierichella, *supra* note 11, at 560.

378. The prime contractor and plumbing firms' agreement to allocate plumbing services horizontally (among plumbers) constitutes the per se illegal provision. Any vertically related decisions by the prime to contract with certain subcontractors falls under a rule of reason analysis, as firms are generally free to choose from among their own suppliers and distributors. *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998).

relate to the pro-competitive benefits of the collaboration. Nonetheless, the contracting officer must report the per se illegal violations once such justifications are offered and the proposals are not modified. Moreover, the contracting officer must report the other non-per se illegal restraints as evidence of "antitrust violations." One of CODSIA's complaints about the recent DOD guidance (and proposed DFARS change) on exclusive teaming arrangements concerns this very point. The CODSIA's opinion that the contracting officer must find actual or potential anticompetitive harm before referring the suspected violation to DOJ has merit from an antitrust law perspective, but is inconsistent with both the FAR and the current DOD analytical capability. The CODSIA's complaint, however, is more noteworthy when considering the uncertainty and bureaucracy inherent in the existence of the various other sources of referral, such as those through the DCAA or DOD Hotline (both from auditors) or through the procurement fraud system.

The contracting officer must either suspend evaluations or make a determination that the offerors whose proposals contain these provisions are not responsible. This would delay both procurements while the reports are evaluated by the various military and DOJ channels. The DOJ (or perhaps FTC) would conduct an analysis of the collaborations by gathering information from the offerors and from DOD. Because such a review falls outside the purview of the Mergers and Acquisitions review directive, it is not clear which DOD officials would represent the final DOD position to DOJ.[379] Moreover, if the contracting officer submits a report pursuant to the DFARS, the military service SDO may find "adequate evidence" of an antitrust violation even before DOJ review is complete.

As structured, the enforcement coordination procedures within DOD are inadequate as to likely violations and adverse to potentially beneficial collaborations. Procurement officials lack the expertise to make competitive effects assessments and, as a consequence, inaccurate reports (or a lack of reported) antitrust violations may delay and deter pro-competitive conduct (or fail to discourage anticompetitive conduct). This warrants change in the review and coordination procedures.

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379. This assumes sufficient facts and that a competitive effects analysis was done initially by DOD for that purpose.

B. Proposed Review and Coordination Procedures

The DOD recognizes that change is necessary in its weapons system acquisition management policies to account for the interrelationship between antitrust law, procurement procedures, and monopsony powers. There are four structural obstacles, however, to implementing any meaningful change across all DOD procurement markets.[380] First, DOD must adopt a competitive effects methodology for assessing individual transactions. Second, it must significantly add to its analytical capability to do so, most notably by increasing its economic and legal expertise. To avoid impinging upon the enforcement authority of DOJ and FTC, DOD has declined to do either since the 1994 Defense Science Board Report.[381] In addition, DOD must recognize that its interest in many relevant nonweapons markets is, while not that of a near-absolute monopsonist, sizable and may approach oligopsonist or monopsonist levels, depending on how those markets are defined under antitrust analysis.[382] Finally, the decentralized nature of DOD procurements prevents a centrally managed industrial and marketing analysis function that informs procurement officials and coordinates with DOJ and FTC in their behavior-monitoring functions.

1. Review and Coordination Procedures

Any proposed solutions must account for the procedural gaps and the obstacles preventing effective use of collaborative contractor activity. Accordingly, the solutions must permit the gathering of useful data to analyze markets and industries under both antitrust law and procurement law standards. They must provide a mechanism to incorporate the results of industry and market analysis into the procurement planning and negotiations process. They must provide a general framework for assessing the range of monopsony powers to achieve a balance between short-term and long-term competition while satisfying all other federal socio-economic

380. Professor Kovacic has framed the first two. Kovacic, *supra* note 2, at 475-84.

381. *See supra* note 8.

382. The impact of DOD procurement and employment decisions on local markets became apparent during the Base Realignment and Closure process, resulting in enactment of The Base Closure and Community Assistance Act of 1994, Pub. L. 103-160, div. B, tit. XXIX, subtit. A, § 2901, 107 Stat. 1907, and The Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. 103-160, div. B, tit. XXIX, subtit. A, § 2903(c), 107 Stat. 1915. *See generally* 10 U.S.C. § 2687 note (2000); U.S. Department of Defense, *Office of Economic Adjustment*, *at* http://emissary.acq.osd.mil/oea/home.nsf (last visited Apr. 30, 2002).

policies. And they must capitalize on DOD's, DOJ's, and FTC's respective capabilities to inform each other in an effective manner in accomplishing these tasks. There are at least three alternative solutions.

a. Option 1: The Status Quo

First, DOD could simply maintain the status quo to include, perhaps, implementing Professor Kovacic's or similar proposals for management of the weapons system industrial base.

b. Option 2: Comprehensive DOD Economic and Antitrust Program

Second, the DOD could expand its current effort to establish centralized industry and antitrust analytical capability to assess all of its procurement markets and the antitrust concerns incident to procurement activity within them. Under this approach, procurements of certain presumptive sizes (for example, $500,000) would require procurement officials to obtain a detailed industry analysis from DOD headquarters as part of their market research and acquisition planning. Procurement officials would develop an acquisition plan that addresses factors related to industry cost structures, profit margins, production facilities, distribution networks, pricing systems, target markets, and other variables as well as relevant market analyses.

Procurement officials would review each factor against all relevant monopsony powers for inclusion in the solicitation (for example, whether to require subcontract competition). The central office would review any proposed or executed collaborations among contractors to assist procurement officials in negotiating or exchanging information with offerors. The central office would approve efficiency justifications to suspected per se illegal agreements and determine whether actual or potential anticompetitive harm exists or is otherwise mitigated or outweighed by pro-competitive benefits, pursuant to *The Collaboration Guidelines*. If not mitigated,

this office would refer conclusions of antitrust violations to DOJ or FTC for legal action.[383]

c. Option 3: Decentralized "Centers of Excellence"[384] *and Proactive Cooperation*

Third, the DOD could improve upon its decentralized structure and call upon its vast technical and information resources to build "centers" of industrial and market expertise for procurement officials' use. Under this approach, the DOD *policy office* with the most direct involvement in a procurement market would conduct and maintain (with DOJ and FTC coordination) market and industry profiles and analyses.[385] All such analyses would be subject to market participant input.[386] For example, military service Surgeon's General would conduct market research and industry analyses for health care related markets. When military services procure health care services or supplies above a presumptive threshold, they would obtain such analyses for the relevant markets and prepare the acquisition plan.

As in Option 2, procurement officials would screen the various monopsony powers against competitive conditions in those relevant markets. To assist procurement officials in assessing the competitive effects of various types of collaborations during the information exchange and negotiation phases, DOD would not conduct conclusive antitrust analyses

383. The DOJ or FTC would determine whether a case fell within a "safety zone" or qualified for some other immunity. The DOD rejected approaches similar to Option 2 in 1994 when many in industry and within DOD recommended that DOD perform its own merger and acquisition antitrust review analysis. *See* DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1; *see also* Kovacic, *supra* note 2, at 484.

384. The author did not coin this phrase and cannot locate its origin. It has been used within DOD for several years. *See, e.g.*, U.S. Army Corps of Engineers, *Services for the Military/Centers of Expertise*, *at* www.usace.army.mil/military.html#Expertise (last visited Apr. 30, 2002). The author adopted the term from U.S. Army Reserve organizational management proposals.

385. Some DOD procurement offices, such as the Defense Contracts Management Agency, currently provide market research to other DOD activities on a reimbursable basis. But as assessed in Section IV.A.1, the current level of market and industry analysis necessary under antitrust (long-term competition) needs is inadequate. Where the military services possess duplicate policy offices, DOD may designate one of them as the "center" or establish procedures for shared responsibility among them.

386. This technique has been used by the Office of the Deputy Under Secretary (Industrial Affairs & Installations) recently for particular weapons systems segments. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 37.

internally. Rather, DOD would establish more responsive and nonadversarial collaboration review procedures with DOJ and FTC. Review requests would be routed through DOD headquarters to the appropriate DOJ and FTC review offices (to decide whether DOJ or FTC will review the collaboration).

The procurement official would submit for review, with comments, any proposed or actual collaborations with suspected per se illegal provisions or agreements otherwise anticompetitive in nature, as defined by *The Collaboration Guidelines*. The DOJ and FTC, with any DOD headquarters input, would provide comments or concerns to guide the procurement official in completing negotiations. This review process, for traditional defense industry firms in particular, would include an assessment of existing collaborations and outstanding merger or other consent decree provisions. If insufficient efficiency justifications are not revised by offeror(s) or otherwise anticompetitive terms are not eliminated, the procurement official would submit such evidence of suspected violations to DOJ pursuant to existing DFARS directives. This article recommends Option 3, and it proposes corresponding collaboration review and coordination procedures in the Appendix.

2. Evaluation Criteria

Any proposed structural or procedural change must be evaluated by an objective measure. Four discrete measures are appropriate for evaluating DOD Contractor Collaborations.

a. Transparency & Predictability

The DOD's procedures for conducting market and industry analysis and for its review of collaborations must be both transparent and predictable. Transparent procedures permit input from interested parties and hold decision-makers accountable for demonstrating consistently applied principles and articulating the rationale of their decisions. Because firms react to actual and signaling behavior of market participants, DOD's procedural and substantive procurement use of thorough industry and market analyses must be transparent.[387] Such reactions can be reflected by formal input to DOJ or FTC antitrust reviews or by actual buying behavior and practices. Further, these reactions must be relatively predictable to market participants. Predictable procedures are those where interested parties can rely

upon their clear and consistent application when making economic or legal assumptions. While the procurement process generally preserves flexibility in individual DOD business and legal decision-making, its procedures and standards should lend predictability to those most affected.[388]

b. Efficiency and Flexibility of the Procurement Process

Administrative processing, reviews, and procedures for procurements should be designed to be efficient[389] and flexible for the DOD purchasing agency.[390] Accordingly, incorporation of antitrust law competition standards into the procurement process and the exercise of DOD monopsony powers must occur at the most effective time. The initial stages in the procurement and budgeting cycle provide the best time for exercising monopsony powers to achieve the best competitive conditions for DOD. Prompt review and coordination would preserve competitive conditions and protect DOD when competitor conduct occurs outside the solicitation and award timeframe. Review of incentives to collaborate and resulting collaborations also must serve both a planning function and an enforcement function. Therefore, a collaboration review and enforcement procedural system should provide both advice and sovereign powers to procurement officials in planning and in execution phases of procurements with minor administrative costs.

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387. Kovacic, *supra* note 2, at 484-85; FAR, *supra* note 20, at 1.102-2(c).

388. *See* U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992) (dissenting statement of Commissioner Mary L. Azcuenaga on the issuance of horizontal merger guidelines) (criticizing the lack of "simplicity, feasibility, and predictability" in the guidelines and stating, "To have a predictive value, enforcement guidelines must accurately reflect how the agencies analyze mergers and how they respond to different sets of facts"). *See also* DSB REPORT ON PRESERVING DEFENSE INDUSTRY, *supra* note 2, at 44 (Wall Street's concerns with defense industry includes "too many surprises—they want predictability.").

389. FAR, *supra* note 20, at 1.102-2(b), (d). "The time consumed by investigation and analysis of complex mergers may complicate legitimate business planning, create a cloud of uncertainty over a particular transaction, and, in extreme cases, make it impossible for the parties to proceed even if a transaction offers considerable benefits." DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 41.

390. FAR, *supra* note 20, at 1.102-2(a).

c. Feasibility of Implementation

Any new process or modifications to existing processes must account for realistic implementation. This has two components. First, the procedures considered must align with the agency structure and existing systems. Second, the relevant employees must possess the knowledge, skills and abilities to undertake the process.

d. Accountability for Competition Goals

An evaluation of competition enforcement procedures should consider the relationship between the proposal and the goals to be achieved. Specifically, which proposal provides a more direct relationship between the goal of enhanced competition and the intended procedural tool? Which proposal best balances the multitude of factors relevant to individual market and industry conditions?

3. Assessing the Options

a. Option 1: The Status Quo

The shortcomings of the current system have been diagnosed above and illustrated through Hypotheticals *A* and *B*. There remain, however, three additional issues. First, the current system provides little to no transparency or predictability in the formal antitrust review process of DOD contractor collaborations. Except through the examples cited by Professor Kovacic in his arguments relative to the weapons industry,[391] there has been no reported study estimating the number of false positive or nonreported antitrust violations submitted to DOJ or FTC. With the increasingly greater skill and ability of DOJ and FTC to assess markets and competitive effects to the level of precision of small submarkets, the ability of DOD to leverage this system to more accurately foster national competition policies is equally enhanced.

Second, neither the Competition Advocacy program, nor the trend toward broader use of "commercial items" captures DOD's impact on competitive factors in relevant markets and industries. While preferences for use of "commercial items" eliminates some government contract-

391. *See* Kovacic, *supra* note 2.

unique barriers to entry by nontraditional defense firms, the FAR's commercial items provisions do not provide a framework for ensuring that such commercial items meet DOD's long-term competitive needs in a given market. As for the Competition Advocacy program, it likewise focuses on barriers to competition, but frames the focus on *ex post* assessments of subjective local and annual (that is, short-term) competition goals, for example, number of offers per solicitation. Such assessments fail to inform all procurement officials about conditions on a market or industry basis.

Finally, DOD's collaboration review and enforcement coordination procedures lack any meaningful planning value. As critiqued above, they are designed to eliminate considerations of efficiencies, as in recent directives to contracting officers to mandate elimination of exclusivity provisions or other per se illegal agreements. Such efficiencies could benefit DOD in both the procurement at hand or in the long-term competitive conditions of a particular industry. With the exception of very high-level and politically sensitive teaming arrangements, or those otherwise subject to mandatory review under a merger consent decree, DOD lacks procedures to obtain expert advice from DOJ or FTC on a given transaction.

b. Option 2: Comprehensive DOD Economic and Antitrust Program

The DOD recognizes its significant role in monitoring national security and ensuring that adequate national resources exist to satisfy its needs.[392] On the other hand, it recognizes both the expertise and statutory mission of DOJ and FTC to monitor business practices and national competition policies. In recent years, the three agencies have collaborated to provide a more synergistic approach to monitoring consolidation events that affect the competitiveness of the national security industrial base. The DOD remains under pressure, however, to assume more responsibility for the competition monitoring function for monopsonist defense markets.[393]

Given the trends noted in this article, such a function carries with it a broader mission than weapons systems. The DOD may possess near-monopsonist or oligopsonist powers in many nonweapon system commer-

392. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1.

393. Professor Kovacic's scholarship and CODSIA's recommendations evidence this trend.

cial or nondevelopmental markets, upon which it depends. Further, to the extent that DOD relies upon such markets for its industrial needs, it must exercise some form of purchasing or sovereign power to preserve long-term competitive capabilities in those markets. Option 2 seeks to provide a full-time and centrally managed antitrust and industrial base enforcement function at DOD headquarters level.

This approach has the advantage of permitting the most predictable and transparent standards and reviews for collaborative activities in markets affected by DOD procurements. As a central control point for validating the military services' requirements definitions (once military operational needs have been properly screened and approved) and for applying the antitrust analytical framework for collaborations, such a program can offer immediate and decisive review on procurements. With an in-house capability to perform market and industry analyses, to review acquisition plans designed to incorporate those analyses, and to review offered collaborations or other industry structural changes, such an office can direct DOD's actions and reactions within each market. The adoption of such a formal system would reduce the number of internal DOD participants and provide predictability to users and contractors.

To be fully transparent and predictable, however, the three agencies must reconcile their positions on information laws as they pertain to application of antitrust and industrial base analyses to procurement decisions. The DOD may be constrained specifically by interpretations of the Freedom of Information Act,[394] the Trade Secrets Act,[395] the source selection and evaluation provisions of CICA,[396] and the Hart-Scott-Rodino Antitrust Improvements Act.[397] Moreover, it may need to re-examine its information management procedures to properly integrate proprietary and nonproprietary information into usable analyses.[398]

A centralized system also affords a large degree of efficiency in the procurement process. Centralized industry analysis and review of collaborations within current procurement acquisition lead time and program milestone requirements would significantly reduce sequential and potentially contradictory reviews from within DOD and from either DOJ or FTC. Contracting officers may also receive more prompt and consistent

394. 5 U.S.C. § 552 (2000).
395. *Id.* §§ 552(b)(4), 1905.
396. *See* 10 U.S.C. § 2305 (2000); 41 U.S.C. § 253b (2000).
397. 15 U.S.C. § 18a (2000).
398. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 42.

economic and antitrust advice during the pre-award phase of a procurement.

What is gained through central analyses and technical review, however, may be diminished through inflexibility and loss of intra-DOD innovation.[399] The current decentralized DOD procurement structure permits business decisions at the lowest level necessary[400] and competition for work among various DOD activities. Centralized conduct of market and industry analyses, review of acquisition plans, and both economic and legal judgments on collaborations substantially taxes DOD headquarters, requiring manpower adjustments away from field offices. Thus, this approach necessitates expanding the function beyond a few additional personnel.[401] It also subjects these decisions to a single business approach that could impinge upon intra-DOD competition.

This approach is the least feasible to implement for two reasons. First, legal and political barriers prevent DOD's assumption of economic and antitrust functions traditionally controlled by DOJ and FTC.[402] Second, it would require a dramatic change from decentralized management practices that might have unanticipated management or technical spillover effects. The DOD currently recognizes the problems inherent in the decentralized system, chiefly the lack of technical expertise of the acquisition workforce in this area.[403] Withdrawing business judgments from field procurement officials, while theoretically efficiency-enhancing, argues for an *isolated and less qualified*, more administration-oriented workforce. Where ultimate responsibility for sound business decisions, economic judgments, and proper planning is removed to DOD headquarters, accountability cannot rest with the field procurement official.[404]

On the other hand, this point illustrates that a centralized approach provides the most direct benefits to both short-term and long-term compe-

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399. Professor Kovacic argues for continued interservice and interprogram rivalries. Kovacic, *supra* note 2, at 466-67.

400. By the Heads of Contracting Activities for certain acquisition plans.

401. Professor Kovacic recommends such a support structure. Kovacic, *supra* note 2, at 481-84. One technique he failed to address could rely upon interagency details of personnel for this purpose, a decision to be made on proper cost and budget analyses.

402. DSB REPORT ON INDUSTRY CONSOLIDATION, *supra* note 8, at 1; DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 30-31; Schwartz, *supra* note 105.

403. DSB REPORT ON VERTICAL INTEGRATION, *supra* note 2, at 33-36.

404. Kovacic, *supra* note 2, at 466-67 (arguing for decentralized acquisition workforce to promote innovation).

tition. The incentives for a field procurement office to achieve short-term program or contract goals can be placed in proper perspective when weighed objectively by a less interested headquarters function. The central function also possesses the ability to negotiate political landmines by balancing competing interests in short-term and long-term projects. But the overall decentralized DOD management philosophy encourages resolution of political and community relations issues at the lowest appropriate level, subject only to anti-lobbying restrictions and limitations on congressional or Executive delegations of authority.

c. Option 3: Decentralized "Centers of Excellence" and Proactive Cooperation

The final approach to competition analyses and collaboration review focuses on the current DOD structure as a decentralized procuring agency. Much like DOD's merger and acquisition review program, this "teaming" approach seeks to integrate the unique technical, business, and legal capabilities of DOD, DOJ, and FTC. Because DOD contractor collaborations and the competitive factors influencing them become visible most often at DOD operating levels, a review and enforcement system must reflect this fact by necessity.

A decentralized approach presents different efficiencies for market and industry analyses than for collaboration review and enforcement. It requires an elaborate web of "centers of excellence" to conduct or maintain market and industry analyses. From the viewpoint of a contractor engaged in multiple markets, it may be difficult to participate in and monitor DOD's assessment of its markets and industry conditions. Further, such a system is workable only if DOD carries through with its intention to establish standardized market and industry analysis criteria. Whether or not DOD adopts a "Five Forces" model[405] into DOD-wide industry analytical standards and incorporates all of the Supreme Court's sub-market definition "indicia" into market analysis, some standards would be required. In addition, the Office of the Deputy Under Secretary of Defense (Industrial Affairs & Installations) (DUSD (IA&I))[406] or military service designates would have to provide DOD-wide visibility of offices capable of conduct-

405. *See supra* note 358 and accompanying text.

406. For the mission statement and charter of this DOD Office, see their Web site at http://www.acq.osd.mil/ia.

ing these analyses as well as the latest reports, most effectively through electronic means.

Any structured system for reporting collaborations and involving DOJ and FTC in a proactive and effective enforcement mode would be an improvement over the current system. By requesting responsive technical and legal support from these agencies on proposed or executed collaborations related to a procurement before offers or contract funds expire, a contracting officer could add significant negotiating leverage to enhance competition. Further, clear reporting and enforcement standards throughout the DOD procurement process would enable contractors to accurately predict the three agencies' responses. Compared to a centralized approach, however, the sequential review process at DOD headquarters and DOJ or FTC would add an additional procedural hurdle, but one that is more controlled than the many alternative and adversarial variations that presently exist. Although the DUSD (IA&I) and DOD General Counsel provide a bottlenecked conduit to DOJ or FTC, they add value to the process with substantive counsel and by flagging industry-wide concerns.

Finally, contrary to the centralized approach, assignment of market and industry assessment functions throughout DOD will ultimately improve DOD's relations with industry, enhance acquisition workforce skills, and provide for better business and programmatic decisions. While assessing industries and tracking collaborations, DOD procurement personnel would also have the opportunity to conduct these analyses and interact with both DOD headquarters and DOJ or FTC.

While the predictive value of collaboration reviews under such a system may be slightly less than a centralized model, established standards and review procedures would make those decisions sufficiently transparent for contractors, end users, and other stakeholders (such as politicians). The flexibility to make acquisition planning and monopsony decisions at the operating level would also compensate for any loss in predictive value.

Implementing this approach would be challenging. Again, the industry and market analyses can be distinguished from the collaboration review and reporting components. To be effective, procurement officials must be trained in established industry and market analyses techniques. These training and monitoring costs could be substantial, but DOD already has committed itself to these investments. As previously noted, DOD recently announced plans to develop market analysis handbooks to be posted on the DUSD (IA&I) Web site. It also directed the addition of industry-compet-

itive factors at DOD educational institutions, including the Defense Acquisition University. Just as workforce training and re-training always constitute a management imperative, procurement personnel would require training in use of market and industry analyses conducted under the centralized approach.

Implementing collaboration review and reporting procedures would require much less effort. The pro-competitive benefits and deterrent effects of clear standards and procedures significantly outweigh the cost of a regulatory change to the DFARS to allow for more detailed pre-award DOD "business reviews" and more accurate reporting of suspected violations. Existing acquisition legal advisors and procurement fraud advisors (commonly one person serving both functions) assist procurement officials in executing this system. Under the current system, little legal assistance can be offered to these officials due to the adversarial mandatory reporting structure and lack of enforcement coordination. This may explain why government contracts attorneys receive little to no formal training on antitrust law at military service schools, save infrequent instruction at procurement fraud courses. This deficiency should be addressed, and horizontal and vertical restraints doctrine should be incorporated into basic contract law and procurement fraud courses.

This approach likewise directly fosters both short-term and long-term competition. By subjecting procurements subject to acquisition plans to formal consideration of both aspects of competition, Option 3 provides a counter-balance to short-term goal achievement by procurement officials under intense pressure. It could also provide a significant tool for informing end-users of the environmental impact of their decisions.

The most significant benefit of this approach, however, is that it precludes usurpation by DOD of DOJ and FTC's antitrust review roles, allowing these agencies to maintain autonomy in their areas of expertise and statutory function, in addition to monitoring information related to their decisions. Together, the three agencies could enhance national competition goals at a modest cost, a cost which must be lower than that caused by the government's current lack of long-term competition management. One challenge to such a system may be that neither DOJ nor FTC possesses clear authority to provide advisory opinions on collaborations. This challenge may focus on the unreliability of factual bases for antitrust reviews or on the lack of binding or precedential value of such reviews. Yet two factors refute such challenges. First, DOJ and FTC provide legal counsel and litigation service to federal agencies and are proscribed only from pro-

viding advisory opinions to private parties.[407] Second, these agencies routinely rely upon regulatorily prescribed types of information submitted by private parties when conducting business reviews under the Hart-Scott-Rodino notice filings or other requests for a statement of the agencies' enforcement intentions.[408] As set out in this article's Appendix, similar information can be obtained by and coordinated through DOD procurement officials.

d. Recommendation

Option 3 provides the most benefits in relation to the identified costs. Both Options 2 and 3 present solutions to the procedural gaps of the existing system (Option 1). Option 2, however, is not politically feasible, it encourages inflexibility, and it detracts from the business expertise and innovative potential now developing in the decentralized acquisition structure. While Option 3 suffers from administrative burdens that require detailed assessment by DOD leaders, it also provides the most realistic and workable solution.

Option 3 presents three types of administrative burdens. First, DOD must process regulatory changes outlining the proposed procedures. Second, DOD must designate the "centers of excellence;" in addition to training relevant personnel, it must establish a programmatic model and consistent analytical tools for the centers to use. Finally, DOD must train its procurement officials to use the new system, monitor the officials' performance, and estimate any delays the new system will add to procurement acquisition lead-time (PALT).

Before comparing Option 3's costs to its efficiencies, one should compare those costs relative to Option 2. Option 2 requires the same costs of regulatory changes. Likewise, it requires similar identification and dedication of additional resources to a central office as well as training of procurement personnel in the use of its output. Further, DOD similarly must provide training to procurement personnel in the appropriate reports and application of research to procurements in addition to monitoring their use of the procedures. Finally, to the extent that procurement officials report more collaborations for prospective review or for enforcement than currently occurs, there will be additional delays. The major differences

407. 16 C.F.R. pt. 803 (2002); 28 C.F.R. § 50.6 (2001).
408. 16 C.F.R. pt. 803.

between Options 2 and 3 are the concentration of analytical personnel and the costs of processing reviews and enforcement in terms of time delays and control. Option 2 seeks to minimize time delays while retaining control within policy-makers at DOD headquarters. Option 3 emphasizes a balance between PALT extensions and savings from resulting competition while accommodating the widest dispersion of competition policy oversight consistent with current laws.

Accordingly, the efficiencies inherent in the decentralized "centers of excellence" approach at first may be overshadowed by the perception that pass-through layers of internal DOD review and external DOJ or FTC determinations would substantially add to PALTs. This perception would be misplaced for two reasons. First, acquisitions subject to the proposal typically require months or years of PALT, including substantial contingencies for reviews, milestone decisions, protests, budget shortfalls and the like. Second, DOJ and FTC provide relatively prompt review turnaround times for existing reviews under Hart-Scott-Rodino notice filings, ranging from fifteen to thirty days.[409] Thus, review and coordination of proposed collaborations during contracting officers' exchanges of information or proposal evaluations would not add substantial time to the process.

The efficiencies in Option 3 lay not in centralized processing, but in readily available expertise in numerous market and industry environments. Unlike Option 2, it does not seek to establish a DOD antitrust policy function by carving it out of DOJ or FTC statutory authority, as the defense contractor community has sought. Option 2 favors consistency in DOD antitrust policy over consistency in national competition policy, and it may also foster internal conflicts between budget officials, procurement officials, and law enforcement officials because an SDO might disagree with a central collaboration review official. In contrast, Option 3's "centers of excellence" approach disseminates market research skills, specialized industry knowledge, and improved business judgment about competitive decision-making to the field. Individual business decisions remain within the discretion of the procurement officials with sound antitrust legal advice from the enforcement agencies. This arrangement provides more consis-

409. 15 U.S.C. § 18a (2000); 16 C.F.R. §§ 803.3, 803.10. This constraint includes DOD review of a merger or acquisition when it involves a major defense system contractor. It excludes, however, up to twenty additional days when DOJ or FTC file a "second request" for additional information. 15 U.S.C. § 18a(e).

tent and meaningful signals to DOD contractors whose protests remain unanswered.

V. Conclusion

The current competition policy enforcement regimes of antitrust law, procurement law, and DOD monopsony purchasing decisions reflect significant missing interrelationships. The new *Collaboration Guidelines* present challenges to DOD contracting practices and procurement decisions when antitrust review is applied to collaborations. The analytical framework used to evaluate collaborations takes these factors into account in assessing efficiency justifications and their relationship to a collaboration's pro-competitive benefits, the relevant markets and market concentration, the industry conditions, and the barriers to market entry. The FAR and the DFARS, however, fail to provide effective procedures for reporting, reviewing, and enforcing these factors. Further, given the results of an antitrust review of potential collaborations, DOD lacks effective procedures to assess and incorporate those results into particular procurements or to use the results to better inform its buying decisions and practices.

These missing interrelationships prevent procurement officials from incorporating market and industry analyses into procurement decisions. They also inhibit the effective exercise of DOD monopsony powers to promote long-term competition goals over short-term incentives. Finally, the current inter- and intra-agency review and enforcement system for DOD contractor collaborations serves only a counter-productive, adversarial purpose.

The option of retaining the current regime aside, DOD should explore two alternative solutions to close these procedural gaps. While a centrally managed, DOD industry and market analysis function and antitrust review activity would provide the most predictable, transparent, and efficient system, this approach is not feasible. Instead, DOD should follow a decentralized "centers of excellence" approach to market and industry analyses and a modified, proactive collaboration review process among DOD, DOJ, and FTC to effectively improve DOD's ability to balance its short- and long-term, competition-enhancing procurement strategies.

Appendix

Proposed Review and Coordination Procedures for DOD Contractor Collaborations

Proposed Amendment to DFARS 210.002:

1. Market Research and Industry Analysis. This requirement shall apply to all acquisitions subject to a written acquisition plan (DFARS 207.103). These procedures may be applied to all other acquisitions with a total value of $500,000 or more, when appropriate.

a. When conducting market research, Program Managers and Contracting Officers shall define the relevant market for each contracted end-item (product) or service by:

(1) Identifying all end-items (products), services, and reasonable substitutes for each that satisfy the agency's basic requirement and any component (see FAR 10.002(b));

(2) Identifying all firms that sell or have the potential to sell the end-items (products), services, and reasonable substitutes, and whether any firm previously has sold to the government; and

(3) Identifying all firms that sell or have the potential to sell any components of each end-item (product), service, and reasonable substitute, and whether any firm previously has sold to the government.

b. Industry Analyses. If there are less than five firms identified for each basic or component end-item (product), service, and reasonable substitute, the Program Manager or Contracting Officer shall request an industry analysis report from a designated "Industry Analysis Center of Excellence." "Industry Analysis Centers of Excellence" are DOD activities that have been charged by the DUSD (IA&I) to coordinate with the U.S. antitrust agencies and other appropriate sources to gather current market and industry data and conduct industry analyses at the request of DOD procurement officials. As prescribed by the DUSD (IA&I), industry analyses will include assessments of the operating conditions of industry competitors and potential entrants, the relative buying power of industry output, and the relative selling power of suppliers to the industry. "Operating conditions of the industry" will address physical (*e.g.*, geographic), legal, and economic barriers to entry, industry cost structures, availability of necessary facilities, labor, and technology, industry profitability, distribution networks, pricing systems, target markets, and other competitive-

significant variables. Those conditions identified as restraining competition will be noted in the report as "significant competitive factors."

Proposed Amendment to DFARS 207.103(d):

Program Managers and Contracting Officers shall consider and address in the acquisition plan the industry analysis, when such analysis is required under DFARS 210.002. The acquisition plan will address each "significant competitive factor" addressed in the industry analysis, or any other barrier to competition identified by the local, special, or agency Competition Advocate, by considering the effect on firms of the estimated value (or size) of the procurement, the contract type, basis for other than full and open competition, contract financing, technical and data rights reprocurement packages, the specifications or statements of work, performance and delivery schedules, design architecture, government-furnished property, subcontractor competition, component breakout, leader-follower contracting, cost accounting standards, and other appropriate authorities in the FAR or agency supplement.

Proposed Amendment to DFARS 203.303:

1. Program Managers and Contracting Officers shall submit a request for review to the DUSD (IA&I) of any joint venture, teaming arrangement, strategic alliance, intellectual property license, leader-follower arrangement, partnership, association, or other collaboration between competitors in markets defined under DFARS 210.002 under the following conditions and after review of the servicing legal advisor when:

a. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that evidences a violation of antitrust law (see FAR 3.103);

b. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that has the potential to cause anticompetitive harm, as set out in Section 3.31 of the *Federal Trade Commission and the U.S. Department of Justice Antitrust Guidelines for Collaborations Among Competitors* (April 2000);

c. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that restricts access to any other offeror for an end-item (product) or service at any level

when only one firm has been identified for that end-item (product) or service pursuant to DFARS 210.002;

d. Any such collaboration that is not yet effective is proposed by an offeror on a DOD procurement and contains a provision that entitles one or more parties to the collaboration to exclusive rights to the output or efforts of a single firm or other legal entity; or

e. Any such collaboration that is not yet effective is proposed by a current contractor and one of the conditions in a or b, above, exists.

2. All other DOD employees shall report any of the collaborations set out above to the cognizant Program Manager or Contracting Officer for submission of a request for review.

3. The request for review shall include, in addition to a copy of any documents establishing the collaboration or other memoranda reflecting oral collaborations, a brief discussion of any facts and the program or Contracting Officer's opinion pertaining to:

a. Any efficiencies generated by the collaboration that may benefit DOD, including relevance of any related "significant competitive factors" or barriers to entry included in the acquisition plan or solicitation (DFARS 207.103(d));

b. A copy of the market analysis and any industry analysis used in preparing the acquisition plan; and,

c. Any representations made by procurement officials to offerors or contractors regarding the proposed collaboration.

4. Contracting Officers shall not conduct discussions with offerors or proceed with negotiations (unless parties to the collaboration are found to be outside the competitive range for reasons other than those related to the existence of the collaboration) until the DUSD (IA&I) replies to the request for review. Contracting Officers shall follow any guidance provided by the DUSD (IA&I) or the Department of Justice or the Federal Trade Commission in the reply.

5. Any collaboration with provisions addressed in DFARS 203.303(3) suspected to be already in effect shall be reported pursuant to DFARS 209.406-3 or DFARS 209.407-3 and DODD 7050.5.

6. The DUSD (IA&I) shall coordinate all requests for review with the DOD Office of General Counsel, and forward such requests with appropriate comment and opinion to the Antitrust Division, Department of Justice and the Federal Trade Commission, as those two agencies direct. When the Department of Justice or the Federal Trade Commission forward any Hart-Scott-Rodino filing notices to the DOD for a collaboration that otherwise does not qualify for merger review under DODD 5000.62, the DUSD (IA&I) will notify the cognizant contracting or program offices of

such notice and direct that they submit a request for review in accordance with this section.

STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS[1]

REVIEWED BY MAJOR SUSAN K. ARNOLD[2]

Justice Robert Jackson approached the podium in Courtroom 600 and glanced at his opening statement. His secretary had affixed a note that said "Slowly" to remind the Justice, acting as an allied prosecutor in Nuremberg, to speak slowly so that the simultaneous translator could keep pace with him.[3] He began his famous opening statement.

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[4]

The world sat on the edge of its seat and all eyes were on Justice Robert Jackson as he delivered his opening salvo before the International Military Tribunal in Nuremberg. The Nuremberg Tribunal is the watermark by which all other efforts at war crimes trials are judged. Gary Bass's examination of war crimes trials is unique because he takes the reader through the political process behind the establishment of war crimes trials. His analysis stops when the prosecutor reaches the podium for his opening statement. What happens in the courtroom is a legal matter, and Bass is

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1. GARY JOHNATHAN BASS, STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS (2000).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. JOSEPH E. PERISCO, NUREMBERG, INFAMY ON TRIAL (1994).

4. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1995).

concerned with the political decisions that make a trial possible, impossible or impractical.

Bass shows the reader that Nuremberg was not the first effort at a major war crimes trial. He dispels the myth that Nuremberg "invented" the charge of "crimes against humanity." Jackson's prose was brilliant and it begs to be quoted, recited or used as a title for a book. But Nuremberg, as Bass shows us, was neither the first, nor the last war crimes trial, although he persuasively argues that it was the best. It might be dismissed as victor's justice, but as Bass cleverly says, if you have the right victor, then victor's justice can still be justice.[5]

Bass's main premise is that a war crimes trial is a political, not a legal process. His book is meticulously researched and his argument is persuasive. The main fault with his argument is that it is overstated and overly ambitious. He does not stop with the claim that war crimes trials are a political rather than a legal decision. He goes on to articulate five propositions that he claims are applicable, in varying degrees, to war crimes trials. His argument is logical and persuasive within the confines of the introduction. When he applies these propositions to the historical examples that he highlights, however, they are too forced to be persuasive.

The book is organized into seven parts. In his introduction Bass describes the five propositions that he claims apply to each war crimes trial. Five historical chapters follow the introduction, each focusing on a different war crimes trial: St. Helena in 1815 for the Bonapartists; Leipzig following WWI for the Kaiser and key Germans; Constantinople, also following World War I, for the Turks responsible for the slaughter of Armenians; the International Military Tribunal in Nuremberg; and, finally, the

5. BASS, *supra* note 1, at 5. Bass discusses the indefinite detention of Turks pending trial for the Armenian massacre. He quotes Ahmed Bey Agayeff, "I demand neither mercy nor pity: I demand justice, English justice!!" *Id.* at 134.

There was a gulf between Soviet bloc show trials and a true war crimes trial. The Soviets wanted a "trial" for the defendants at Nuremberg, but initially balked at U.S. notions of a complete trial. Stalin said that they had already declared the defendants guilty at Nuremberg and merely needed to proclaim the inevitable death sentence. *Id.* at 199. *See also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992). A real trial involves risk and assuming that risk is a political decision.

International Court for the Former Yugoslavia. These historical chapters are followed by an Epilogue.

In the introduction Bass states, repeats and adjusts his principal theme. At one point he says that the "core argument of this book . . . is that some leaders [have war crimes trials] because they, and their countries, are in the grip of a principled idea."[6] That principled idea is the legalism found in liberal states. At the close of the introduction, he makes another claim, which really is the main theme of his book. The book, Bass says, "is mostly interested in the politics that underpin (and undermine) international law."[7] This more modest statement should have been his main theme. Politics drives an international war crimes trial, and there are too many factors involved in international politics to allow Bass's five propositions to apply to every scenario over the course of a few hundred years. These propositions certainly reflect factors behind the political process, but Bass should have asserted his more modest proposal as his main theme.

After reading Bass's book, the modern lawyer should realize that politics, not the "law," controls until the war crimes trial actually begins. Every aspect of an international trial will be driven by politics, and the international lawyer cannot expect to extrapolate domestic criminal experiences into the international arena. With that said, however, Bass should have been more restrained as he outlined his argument in the introduction. Experienced prosecutors know that it is a fatal mistake to promise evidence in an opening statement and then fail to deliver the evidence during the trial. This is a self-inflicted wound; Bass sets the reader's hopes high with his five propositions, but fails to deliver the evidence.

Of the five propositions that Bass outlines, he really proves only two in the body of the book. This review examines each of these propositions in the order that Bass presents them.

Bass's first proposition states that "it is only liberal states, with legalistic beliefs, that support *bona fide* war crimes tribunals."[8] This is certainly his strongest point, and he easily supports it with all of the cited historical examples. Although lawyers can become paralyzed in their own legal reasoning,[9] Bass shows that liberal, legalistic states refuse to abandon concepts of due process and evidentiary standards even when it means risking

6. BASS, *supra* note 1, at 7.
7. *Id.* at 35.
8. *Id.* at 28.

acquittals. But it is also this commitment to legalism that makes the trial a legitimate apparatus for administering justice to war criminals—these are not totalitarian show trials.[10]

Bass's second proposition is specious. He claims that "even liberal states tend not to push for a war crimes tribunal if doing so would put their own soldiers at risk."[11] Fair enough, but on the next page, when Bass goes on to describe this proposition, he uses a catchy, but inapposite illustration. Bass calls this second proposition the "Scott O'Grady phenomena." Bass articulates this proposition by juxtaposing America's Herculean effort to rescue a downed Air Force pilot with its refusal to intervene on behalf of the people of Srebrenica. All of this is true, interesting, and well written, but it fails to support his second proposition because it is unrelated to states' decisions to hold war crimes trials.[12]

Despite this detour, Bass's second proposition is still relevant. It would have been interesting for Bass to juxtapose the domestic political decisions with international political decisions in this regard. Specifically, domestic law enforcement officers are routinely placed in dangerous circumstances to apprehend fugitives. Society expects them to do exactly that. Because the domestic criminal offender is a threat to domestic society, pursuit of that offender is a self-centered political decision. In the international arena, the decision to apprehend and try a suspect is often a purely moral, political decision. Slobodan Milosevic poses no threat to the United States of America. He is not a murder suspect who is free to walk

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9. *Id.* at 130. Bass describes a debate concerning the liability of one of the Turks for the Armenian massacre. The British High Commissioner in Constantinople, Somerset Calthorpe described the legalistic dilemma. "Djavid Bey was undoubtedly deeply implicated in the crimes of which he is accused, and his moral responsibility is enormous. There is, however, a lack of definite proof against him, and it will probably be a matter of considerable difficulty to prove his individual responsibility". *Id.* In other words, the leaders know he's responsible, but they just can't prove it.

10. *See supra* note 5.

11. BASS, *supra* note 1, at 28.

12. It does beg the question of liability of the various states to intervene to save victims. War crimes trials would not be necessary if there were no war crimes. Is the United States or any other superpower liable for her inaction? A recent article delivers a blistering criticism of the Clinton White House during the massacres in Rwanda. *See* Samatha Power, *Bystander to Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 84.

down Main Street USA. The political impetus to put him on trial is strictly moral; it is the right thing to do.[13]

Bass's third proposition is the weakest of the five. He states that "there is a distinctly self-serving undertone to liberal campaigns for international justice,"[14] or as he restates it, "Putting Citizens Before Foreigners."[15] The problem with this proposition is that Bass's historical examples demonstrate the opposite. These trials involve nations trying to protect others, rather than their own citizens. Constantinople addressed the slaughter of Armenians by the Turks, and the British pushed for the trial; the Americans orchestrated Nuremberg; and The Hague Tribunal represents an international community joining to condemn mainly Serbian practices in Yugoslavia. It certainly seems like states would always act in their own citizens' interest, but this is not borne out by Bass's examples.

Bass's fourth proposition is related to the third, and he proves this proposition quite effectively. He claims that "liberal states are most likely to support a war crimes tribunal if public opinion is outraged by the war in question."[16] He would have been better off if he stopped there, but Bass goes on to say that "they are less likely to support a war crimes tribunal if only elites are outraged."[17] Bass's defense of this second statement is imprecise. In the Nuremberg chapter of the book, Bass references public opinion polls that show a majority of Americans favored "punishment" for the Germans.[18] Americans did not want to have a trial, they wanted the Nazis executed, enslaved, or tortured.[19] It is not necessary to have general public outrage; it is sufficient, politically, to have only elite outrage. Punishment and trial are two completely different ideas. Right now in America, the vast majority of citizens want to punish Osama Bin Laden, but that does not mean they want to see him in federal court. After World War II, many citizens and leaders favored the summary execution of the Nazi lead-

13. Milosevic was not in the custody of The Hague at the time the book was published.

14. BASS, *supra* note 1, at 28.

15. *Id.* at 30.

16. *Id.* at 28.

17. *Id.*

18. *Id.* at 160.

19. *Id.* at 183.

ership. Punishment does not always equate to a trial, especially when a trial has uncertain results.

Even with that discrepancy, Bass's point about outrage is perceptive. Outrage provides the political will, the momentum for such an event. Proposition one, the legalism of liberal states, must join proposition four, outrage, if there is to be any action. As Bass sums up, "legalism without outrage could result in a dreary series of futile legal briefs."[20] During the chapter on The Hague Tribunal, Bass chronicles the ebb and flow of international enthusiasm. Where there was little outrage, there was little action; the court was merely a skeleton. On the other hand, outrage without legalism may result in summary execution or other Draconian measures. Therefore, Bass argues effectively that legalism and outrage are the driving political forces behind a genuine war crimes trial.

Bass's final proposition involves the role of nongovernmental organizations. These organizations are largely a post-World War II phenomena. Their value, according to Bass, is that they "can be effective in pushing for a tribunal by shaming liberal states into action and providing expertise."[21] Bass describes the role of nongovernmental organizations in the Balkan states, and he demonstrates their worth to the international legal community. It is likely that these organizations will continue to have a role in war crimes trials, but their recent emergence makes it hard to support a proposition that they are essential to those trials.

Despite the problems with some of Bass's five propositions, *Stay the Hand of Vengeance* is an excellent book for anyone interested in international law or politics. In the right circumstances, a war crimes trial is far superior to the other alternatives: inaction or vengeance. A certain cathartic effect results from the trial. In addition, Bass, as a political scientist and journalist, provides a fresh perspective to a subject area that is dominated by a legal focus. Bass is correct to examine the politics behind these trials, and lawyers, historians and political scientists will appreciate his book.

Bass's skill as a journalist reveals itself in the chapter concerning The Hague.[22] His writing finds a natural pace that transports the reader to the courtroom to observe the defendant's mannerisms and the physical surroundings of the tribunal itself. Bass reduces the barbarian to a self-con-

20. *Id.* at 31.
21. *Id.* at 28.
22. Bass has covered the proceedings at The Hague for *The Economist*.

scious and sometimes inattentive defendant. The reader wonders, along with Bass, how this seemingly harmless person could be responsible for so much suffering.

In contrast, Bass's historical writing is more labored. His analysis is sharp, and the book has been meticulously researched, but his historical writing does not have the same tempo as the introduction or The Hague chapter. His historical discussion also presumes a high level of background knowledge. Because of this presumption, Bass rattles off the names of obscure figures without pausing to clearly identify the person or his political affiliation. This problem is acute during the Constantinople chapter. Bass first acknowledges that history has ignored the trial for the Armenian slaughter, but then seems to forget his statement as he recites relevant names and places in quick succession. He exacerbates this problem by mentioning many people only once, preventing the reader from gaining familiarity with the individual through context. The reader's attention is divided between Bass's arguments and this cast of characters.[23] This confusion is unfortunate because Constantinople is a forgotten event, and important lessons can be learned from this abortive attempt at a war crimes trial.[24] An easy remedy for this would have been a glossary containing a brief description of individuals and political parties. If Bass publishes a second edition, especially in light of Milosevic's appearance at The Hague, a glossary would be a helpful addition.

Bass teaches the reader that "crimes against humanity" were first asserted as a criminal charge after World War I, not during Nuremberg. Bass then contradicts himself by crediting at least three people with initially coining the phrase, the Canadian prime minister,[25] England's Lloyd George,[26] and the Russian foreign minister Sergei Sazonov.[27] Thus, the ideas made famous by Nuremberg were hatched in earlier trial efforts, but

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23. In the opening pages of the chapter, Bass mentions a litany of individuals, barely pausing to identify them. BASS, *supra* note 1, at 108-14.

24. Many Turks were imprisoned, but most were released once the British realized that support for the trial had languished. One British estimate said that forty-three Turks had been accused of involvement in Armenian massacres and all eventually were freed. *Id.* at 143.

25. *Id.* at 66.

26. *Id.* at 68.

27. *Id.* at 115. The Russian foreign minister used the phrase in reference to the Armenian massacre while the other two gentlemen cited above were describing Kaiser Wilhelm's actions.

the reader must look beyond Bass's cast of characters to glean this historical lesson.

The five trials that Bass highlights provide important historical perspective and lessons for lawyers. Unfortunately, because he focuses so completely on the politics behind the trial, he overlooks some rudimentary legal details. In the chapter concerning St. Helena, for example, Bass never tells the reader what criminal charges would be leveled against the Bonapartists. Certainly they would not have been charged with waging a war of aggression; colonialism was still rampant, and war was routinely used as a method for states to assert their political will. Although Bass carefully analyzes the debate over the Bonapartists' fate, he omits information about the possible charges against them. Even though the book is about politics, the reader still needs a brief legal background concerning the underlying events.

Bass's coverage of the Nuremberg trial provides a fresh perspective. Rather than merely genuflecting in front of the tribunal, Bass highlights Chief Justice Harlan Stone's criticism of the trial. Stone commented that "Jackson is away conducting his high-grade lynching party in Nuremberg. . . . I hate to see the pretense that he is running a court and proceeding according to common law."[28] The Nuremberg Tribunal is rarely criticized today, but in 1945, the Chief Justice of the U.S. Supreme Court referred to it as a farce. Although the Chief Justice was criticizing the trial, his words demonstrate Bass's first proposition. He wasn't bothered by the idea of punishing the Nazis, he was concerned that his principled ideas of liberal legalism were being distorted in order to exact revenge on the Nazis. The results, however, proved the legitimacy of the Nuremberg war crimes trials; the Allies risked acquittal to remain true to their domestic legal mores.[29] Perhaps the Chief Justice was reassured after the outcome, but legalism was his primary concern.[30]

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28. *Id.* at 25 (quoting HARLAN FISKE STONE: PILLAR OF THE LAW 716 (1956)).

29. This resulted in acquittals and variations in findings and sentencing. Of the twenty-one men who were physically present in the dock, three were fully acquitted, eleven were acquitted on at least one count of the indictment, and the rest were found guilty of all counts on which they were indicted. Additionally, of the eighteen who were sentenced, eleven were condemned to death, three received life sentences, and four received term between ten and twenty years of confinement. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 524-89 (1995).

30. Bass observes, "It is only in retrospect that Nuremberg has become unimpeachable." BASS, *supra* note 1, at 203.

Finally, Bass demonstrates that outrage also fueled the Nuremberg Tribunal. The evidence presented by Allied prosecutors further outraged an already inflamed public. Those who may have been uncertain at the outset were certainly convinced by the close of the Allied case as the German's own documents revealed the Nazi atrocities. Thus, Bass uses Nuremberg to make an exceptional argument for the propositions of legalism and outrage, but his other three propositions do not fare as well when applied to Nuremberg or the other major war crimes trials.

In summary, Gary Bass's *Stay the Hand of Vengeance* provides an important political and historical study. The author's only fault was ambition—he outlined a precise theory that was too rigid to withstand application over two hundred years. Bass convinces the reader, however, that political forces will mold the war crimes trial process and, ultimately, when legalism and outrage can join together, the world will witness justice.

KOSOVO—WAR AND REVENGE[1]

REVIEWED BY MAJOR KERRY L. ERISMAN[2]

In Kosovo, history is not really about the past, but about the future. He who holds the past holds the future.[3]

Hundreds of books and articles have been written about the conflict in the Balkans throughout history; dozens cover the tumultuous 1990s alone. Tirn Judah's *Kosovo—War and Revenge* stands apart for its exceptional analysis of the role that Kosovo has played in the historic struggle between Serbians and Albanians. It is especially useful for judge advocates, particularly those who deploy to the Kosovo region, because it provides crucial insight into the region's history and puts the current conflict into context. This review first analyzes the overall strengths of the book, followed by an examination of several limitations, which prospective readers should keep in mind.

The book's greatest strength is its thorough and detailed explanation of how Kosovo became the flashpoint in the historic battle between Serbians and Albanians, a conflict which ultimately shattered the former Yugoslavia.[4] This explanation is essential to military personnel serving in the region because the strategic importance of Kosovo is not readily apparent to an uninformed observer. The nearby province of Montenegro appears more vital to Yugoslavia's continued existence for without it, the country would be landlocked. Yet Kosovo has remained the cherished prize in the longstanding struggle between Serbs and Albanians.

In *Kosovo—War and Revenge*, Judah explains that Kosovo attained such importance due in large part to the emphasis placed on it by Slobodan Milosevic.[5] Notwithstanding the province's uncertain strategic worth, Milosevic was determined to hold onto it at all cost, even if it meant the suffering of his own people. Judah demonstrates this by quoting from var-

1. TIM JUDAH, KOSOVO—WAR AND REVENGE (2000).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. JUDAH, *supra* note 1, at 2.

4. *Id.*

5. *Id.* at 33-60.

ious speeches given by Milosevic over the years. An illustration is found in a quote taken from a speech given during a protest rally in 1987. Milosevic, then head of the Serbian Communist Party, urged Kosovo Serbians:

> Comrades . . . you should stay here. This is your country, these are your houses, your fields, your gardens, your memories . . . . It has never been a characteristic of the Serbian . . . people to retreat in the face of obstacles . . . . Yugoslavia does not exist without Kosovo! Yugoslavia would disintegrate without Kosovo! Yugoslavia and Serbia are not going to give up Kosovo.[6]

This statement was made eleven years before Milosevic became the moving force behind the diabolical slaughter of thousands of innocent Kosovo Albanians. The rhetoric from the 1987 speech provides clear insight into Milosevic's feelings about Kosovo and the lengths he would eventually go to keep it from splitting from Serbia.

According to Judah, Milosevic was concerned not with creating a "greater Serbia," but with perpetuating his own power by dominating all of Yugoslavia.[7] To further support this idea, Judah spends considerable time looking at Milosevic's background because, in his view, one must understand the power hungry Serbian leader in order to understand the 1999 conflict.[8]

Judah shows Slobodan Milosevic to be a diabolical, manipulative dictator whose tactic was to win at all costs.[9] He describes how Milosevic became president by manipulating a long-time friend and forcing him to resign as Serbia's president.[10] Milosevic then immediately "destroyed the prospects of Serbia's transition to democracy"[11] and set out to "unite Serbia by abolishing the autonomy of the provinces" (Montenegro and Kosovo) and "protect[ing] the Serbs of Kosovo."[12] Slowly, he eroded Kosovo's rights and laws.[13] He passed laws that prevented Albanians from buying land or houses,[14] created an all-Serbian police force in Kosovo, and

6. *Id.* at 53.
7. *Id.* at 56-57.
8. *Id.* at 33-60.
9. *Id.*
10. *Id.* at 54.
11. *Id.*
12. *Id.* at 55.
13. *Id.* at 62.

ordered the police to take over the television and radio stations.[15] He shut down the Kosovo Albanian's daily newspaper and imposed the Serbian education curriculum on Albanian students.[16] He followed these acts by implementing an educational rationalization plan that basically eliminated Albanian children's chance of attending secondary schools.[17] Finally, Milosevic dissolved the Kosovar parliament.[18] In describing these tactics, Judah enables the reader to understand the lengths to which Milosevic was willing to go in order to hold onto his power. This provides a necessary background to understanding Milosevic's willingness to subject his country to prolonged destruction during the NATO air strikes.

A second factor which separates this book from others on the same topic is Tim Judah's unique understanding of the Balkan region. Originally from London, he lived in Belgrade from 1990 until 1995 covering the region for the *London Times* and *The Economist*.[19] This gives Judah a distinct perspective and allows him to provide facts unavailable to authors who are not as familiar with the region. For example, Judah uses his first-hand knowledge of the area to explain why so little was reported in the Western press about the events occurring in the Balkans during the late 1980s and 1990s.[20] He provides a detailed description of that period's political climate, which clarifies why so little information was transmitted to the rest of the world about the plight of the Kosovar people for almost a decade.[21]

A third strength of the book is its analysis of NATO's air war against Yugoslavia.[22] Judah evaluates the actions of NATO and Milosevic during this time. He describes why Milosevic held out as long as he did, and why the campaign was not as successful for NATO as it could have been. Both

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 63.
18. *Id.* at 65.
19. *Id.* at xvii.
20. *Id.* at 64-65.
21. *Id.*
22. NATO developed a phased air campaign for air operations against Serbia after negotiations repeatedly failed to reach a peaceful settlement. True to his previous leadership style, Slobodan Milosevic decided to "gamble" with his countrymen's lives, "risk the bombs and go for broke." *Id.* at 227. The attacks began on 24 March 1999 with forty military targets being struck the first night.

explanations are important for anyone dealing with the Balkan conflict because they provide important lessons for any future campaigns.

Judah details how both NATO and Milosevic miscalculated their respective positions. Sources in Belgrade told Judah that Slobodan Milosevic defied NATO "because he believed the Russians would supply him with . . . advanced weapons systems."[23] What Milosevic did not know was that Russia had earlier told the United States that they would do nothing if NATO were to bomb.[24] On the other hand, the United States and other NATO countries began the air campaign believing that it would "only last a few days."[25] Unfortunately, NATO air strikes were not entirely effective. Because Serbia had numerous anti-aircraft weapons, NATO routinely kept its planes at a ceiling of 15,000 feet to avoid being shot down.[26] This did not cause problems in hitting stationary targets, but "made it very difficult to hunt down the small groups of men and equipment" that were wreaking havoc in Kosovo.[27] In the end, NATO bombed Serbia for seventy-eight days rather than "a few days," and Slobodan Milosevic "backed down" because his "calculations had failed."[28]

Should any similar campaigns be necessary in the future, this understanding of the mistakes made by both sides will be very useful. One such lesson is that the strategy of "bombing-lite"[29] was not the right course of action to end the campaign in a matter of days. Given the fact that it was ineffective on the small bands of soldiers hiding in houses who constituted the main threat to Kosovo, a "massive blow at the beginning, rather than a slow build-up" would likely have been more effective.[30] Additionally, it is important to remember the importance of the Kosovo province to Serbians and the measures they will take to gain or retain control over it.

While *Kosovo—War and Revenge* is well worth reading for the in-depth coverage it gives to the Balkan conflict, several drawbacks require further reading from additional sources. First, while the book purports to be based largely on eyewitness accounts and personal interviews, a check of the notes section reveals this is not the case. Judah relies mostly on sec-

23. *Id.* at 183.
24. *Id.*
25. *Id.* at 228.
26. *Id.* at 265.
27. *Id.*
28. *Id.* at 279.
29. *Id.* at 256.
30. *Id.* at 257.

ondary sources such as books and articles about the topic rather than more primary ones. For instance, he describes the death, torture, and destruction inflicted on the Kosovar Albanians by Serbian soldiers and police using what he describes as "eyewitness accounts."[31] The eyewitness descriptions that he quotes, however, do not come from interviews he personally conducted, but from reports taken by other journalists.[32] Given the contemporary nature of his topic,[33] it would have seemed relatively easy, and perhaps even necessary, to speak to some of the people who were directly impacted by these events. He then could have used his own knowledge to ask different follow-up questions to support his theories and supplement the already existing interviews. A true first-hand account would have made the images he tries to convey much more powerful and riveting. Judah does not address this seemingly obvious gap in his research, leaving a disappointing hole in an otherwise thoroughly researched book.

Another shortcoming of particular relevance to judge advocates who use this book as a source is the inadequate treatment of the military strategy and technical aspects of the air war. Judah superfluously attempts to address some of these features based on his sources. However, he does not provide a thorough analysis of NATO's military objectives and tactics. Though he attempts to explain why certain targets were selected and struck,[34] he lacks any military background to truly understand the targeting process.[35] He fails to remedy this by including any military sources among his research, quoting instead largely from civilian newspapers.[36] This leads to an insufficient and somewhat skewed description of the process used to develop targets.

Finally, the fact that Tim Judah lived in the region for a considerable amount of time is both an advantage and disadvantage for the book. As discussed above, he was intimately familiar with the region and this provides a clear benefit. It allowed him access to facts and sources that may not have been available otherwise.[37] The downside, though, is that Judah's

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31. *Id.* at 242-43.

32. *Id.* at 242-43 nn.12-15.

33. The book was published one year after the air campaign.

34. JUDAH, *supra* note 1, at 258.

35. For a more comprehensive look at NATO's strategy and actions, judge advocates should supplement Judah's book with General Wesley Clark's book, *Waging Modern War.* WESLEY K. CLARK, WAGING MODERN WAR (2001).

36. JUDAH, *supra* note 1, at 332-33 nn.1-25.

37. *See, e.g.*, *id.* at 58 (citing personal interview with Bujar Bukoshi for a description of Kosovar refugees in other countries).

familiarity with the region and its citizens may have caused him to lose some objectivity and begin to sympathize with the Kosovo Albanians. He appears to have presented a thorough account of the events affecting Kosovo. With the immeasurable suffering and senseless slaughter inflicted on Albanian citizens by the Serbians, however, it would be difficult for anyone to give an entirely impartial account of the events of the past decade in the former Yugoslavia. Thus, while any such bias is certainly understandable, it is important for the reader to keep this potential partiality in mind when considering Judah's interpretation of events.

These limitations notwithstanding, *Kosovo—War and Revenge* is a must read for all Army judge advocates. The American presence in Kosovo that began in 1999 will no doubt continue for many decades. Many judge advocates will find themselves in the rotation to deploy to Kosovo as part of Operation Joint Guardian. It is vital that they understand the history of the region and the actions that led to the air war to effectively deal with future legal issues and understand why NATO's continued presence is necessary to ensure stability in the area. The book effectively lays out these facts and incorporates the legal dilemmas that NATO faced during the "legally intensive" air war.[38] As quoted in the beginning of this review, the key to understanding Kosovo, both its present and its future, is understanding its past. Tim Judah's book provides a key building block to achieving that understanding.

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38. Many of the targets of the air war were dual military and civilian use. *Id.* at 357. These included "factories, oil refineries and depots, roads, bridges, railways, and communications facilities." *Id.* "All governing the laws of war." *Id.* A military attorney would evaluate whether the target's military value was outweighed by "the potential costs of collateral damage." *Id.*

ORDEAL BY SEA: THE TRAGEDY OF THE U.S.S. *INDIANAPOLIS*[1]

REVIEWED BY LIEUTENANT COMMANDER CLYDE A. HAIG[2]

> *No one but a sailor who has watched his ship disappear and leave him floating on the surface of a hostile sea can dare to imagine the awful loneliness that swept over the survivors of the Indianapolis . . . . For most there was the brief moment of relief that came with the realization that they had actually managed to survive the sinking. Then came the sledgehammer blow of disbelief. How was it possible for a ship so large and so strong, a ship that had been through so many battles simply to turn her stern to the sky and vanish so swiftly?*[3]

In *Ordeal by Sea: The Tragedy of the U.S.S.* Indianapolis, Thomas Helm chronicles the harrowing events surrounding the sinking of the armored cruiser U.S.S. *Indianapolis* by an Imperial Japanese submarine in the final days of World War II.[4] In providing a matter-of-fact, detailed account of one of the most catastrophic disasters in U.S. Naval history, Helm grips the reader on separate planes. On one level, *Ordeal by Sea* provides an exacting account of the sinking of one of the largest, heaviest ships in the U.S. arsenal. The reader is exposed to the sudden shock of a torpedo attack on a ship at sea, from the vantage point of the surviving crewmembers. The subsequent horrors encountered by those who successfully abandoned the ship are recounted in excruciating detail, as these men faced the agonies of being left adrift on the open ocean for nearly four days. On a very different level, Helm addresses the unfortunate treatment

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1. THOMAS HELM, ORDEAL BY SEA: THE TRAGEDY OF THE U.S.S. INDIANAPOLIS (Signet 2001) (1963).

2. Judge Advocate General's Corps, United States Navy. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. HELM, *supra* note 1, at 90-91.

4. Originally published in 1963, the June 2001 Signet printing contains an informative Foreword and Afterword by Captain William J. Toti, U.S. Navy, the final captain of a U.S. Naval vessel bearing the Indianapolis name, the submarine U.S.S. *Indianapolis* (SSN 697), decommissioned in February 1998. Captain Toti's contribution to this work provides an invaluable frame of reference for the *Indianapolis* tragedy, written from the perspective of an accomplished high-ranking naval officer.

of the ship's Commanding Officer at the hands of the Navy following the ordeal.

In the Preface, the author asserts that *Ordeal by Sea* is not intended to be "controversial," making an assessment of who was ultimately to blame for the tragedy; rather, it is the "narrative of a warship" and the story of the men who survived her sinking.[5] Helm remains true to this promise by providing a chronicle of the events surrounding the U.S.S. *Indianapolis* tragedy in a candid, unaffected fashion. It is apparent by the end of the book, however, that this straightforward presentation of events lays the groundwork for a controversial topic: the politically motivated and unjust treatment of the commanding officer of the U.S.S. *Indianapolis*, Captain Charles Butler McVay, III.[6]

In addressing the Navy's treatment of Captain McVay, the author goes beyond the book's stated purpose, in effect presenting the reader with two stories. One story, the major focal point of *Ordeal by Sea*, centers on the attack on the *Indianapolis* and the tortuous events leading up to the rescue of the surviving crew. The other story relates to the commanding officer's unfortunate treatment after the rescue. While the author provides a thorough and gripping account of the tragedy suffered by the crewmembers at sea, his discussion of Captain McVay is relatively brief. In addressing the Navy's treatment of Captain McVay, Helm touches upon a number of questions surrounding the sinking of the *Indianapolis* that, he admits, will be "left unanswered."[7] Although these unanswered questions leave the reader puzzled, the tensions that they create may be exactly what the author intended. Whether or not this is the case, the strength of this book lies in the gripping narrative of the ordeal suffered by the *Indianapolis* crew. It is this story, the account of the ship's crew and their struggle for survival against seemingly impossible odds, which makes *Ordeal by Sea* well worth reading. Perhaps no author could bring as much to the story as Helm, a former crewmember of the U.S.S. *Indianapolis*.

At the outset of *Ordeal by Sea*, the author soundly establishes his standing to write about the sinking of the U.S.S. *Indianapolis*. Thomas Helm was stationed aboard the vessel from April 1940 to August 1941, and he made friends with shipmates who were still stationed on her when she

5. HELM, *supra* note 1, at xviii.

6. In his Afterword, Captain Toti grapples with the treatment that Captain McVay received at the hands of the Navy following the disaster, providing incisive insight into Captain McVay's actions from an operational perspective. *Id.* at 193-216.

7. *Id.* at 189.

encountered her final attack.[8] As a former crewmember of the ship, Helm had a special vantage point in writing *Ordeal by Sea*[9]. In addition to searching records contained in numerous Department of the Navy offices, Helm corresponded and talked with most of the 317 survivors of the tragedy, obtaining first-hand accounts of events from those who were present and lived through the ordeal.[10] At the start, the author establishes that *Ordeal by Sea* is not simply the product of academic research—it is the story of a ship written by a former crewmember, a man who had lived aboard the ship and was familiar with its most intricate details.

Ordeal by Sea presents a well-organized account of a ship and the piercing story of her loss. The book provides the reader with a brief history of the *Indianapolis* and an explanation of the setting for the attack. This background information is followed by a chilling description of the events onboard in the moments following the impact of the torpedoes. There is also a vivid description of the heartbreaking, at times terrifying, plight of the crewmembers who survived the torpedo attack, only to be left undiscovered on the open ocean for four days. The book includes the riveting story of the crew's discovery by a Navy PV-1 Ventura patrol bomber, and the heartening rescue of the 317 men who survived. The sobering reality is that this number comprised only a small remnant of the 1196 men who embarked on the final voyage of the U.S.S. *Indianapolis*.[11]

The author does an excellent job in setting the background for the events leading up to the attack on the ship. He notes that the U.S.S. *Indianapolis* saw heavy battle at places like Tarawa and the Marshall Islands during World War II.[12] At one point during the war, she served as the flagship for Admiral Raymond Spruance.[13] Less than three weeks before her demise, however, she was undergoing repairs, "snugged up in the Mare Island Navy Yards" in the San Francisco Bay area.[14] On Thursday, 12 July 1945, the operational plan for the ship was a two-week training followed by deployment to the forward area in the Pacific.[15] Then an unanticipated

8. *Id.* at xvii.

9. In his Foreword, Captain Toti aptly comments on Helm's service aboard the U.S.S. *Indianapolis*: "He understood the ship in ways other authors could not. He got it right." *Id.* at xv.

10. *Id.* at xviii.

11. *Id.* at 182-83.

12. *Id.* at 7.

13. *Id.*

14. *Id.* at 12.

15. *Id.*

order was given to Captain McVay: in four days his ship was to carry a top-secret cargo to the island of Tinian in the Pacific. Unbeknownst to the crew, that cargo would contain the component parts for the atomic bombs later dropped on Hiroshima and Nagasaki.[16]

The *Indianapolis* dutifully completed her urgent mission, promptly delivering her top-secret, highly guarded cargo. She then immediately set off the short distance to Guam for refueling and bringing aboard ammunition. On 28 July 1945, at 0910, the *Indianapolis* embarked for Leyte in the Philippines for a two-week training exercise with Admiral Lynde D. McCormick's unit in preparation for joining a task force off Okinawa.[17] Helm notes that this voyage to Leyte "should have been simple and uneventful," despite a "routine" warning that several submarine contacts had been reported "within two hundred miles of the ship's plotted course."[18]

In addressing the submarine warning, Helm artfully lays the groundwork for Captain McVay's ordeal after the rescue. By Sunday night, 29 July 1945, the *Indianapolis* was midway between Guam and Leyte. Until approximately 1800 that day, Captain McVay had been directing the ship to zigzag enroute to her destination. The practice of zigzagging, a torpedo-evasion measure, entailed steering a ship in a side-to-side pattern enroute to its ultimate destination, instead of steering the ship in a "straight-line course."[19] Fleet orders required that a ship zigzag during periods of good visibility day or night.[20] McVay ordered the ship to cease zigzagging as the night approached because there was ragged cloud cover and poor visibility that showed no signs of improving.[21]

This order to stop zigzagging would be the critical focus of disciplinary proceedings that would take place against McVay for hazarding his ship. Although there was a reported enemy submarine sighting in the area, enemy submarine alerts in that part of the ocean were "as common as barnacles on a ship bottom" and were often reported in error. "[A] chunk of driftwood bobbing along the surface" might be mistaken for a submarine and reported.[22] Helm notes that it was not difficult to become "callous" to

16. *Id.* at 12-14.
17. *Id.* at 16-17.
18. *Id.* at 17.
19. *Id.* at 201.
20. *Id.* at 21-22.
21. *Id.* at 22.
22. *Id.* at 21.

such warnings because if each had been taken seriously, every ship in enemy waters would have spent most of the war in a state very close to general quarters.[23]

As an underlying consideration, many opposed the practice of zigzagging, despite the fact that it was Department of Navy policy. In addition to the obvious burden of increased effort, time and distance engendered by the practice, some questioned its efficacy in avoiding torpedo attack given the advances in radar and range-finding technologies that came about in World War II.[24] In setting the stage for the attack, the same author who promised to avoid controversy and deliver a straightforward narrative of events surrounding the sinking of the *Indianapolis* also accomplishes another, more subtle purpose. He provides an explanation of Captain McVay's decision to cease zigzagging in a candid and straightforward fashion that evidences the captain's sound professional judgment, operational prudence, and common sense.

As Helm goes on to describe the torpedo attack, the reader's focus is ultimately ripped from Captain McVay and locked on to the different experiences of crewmembers stationed throughout the ship. It was just after midnight, 0001 on 30 July 1945, when the first of presumably two torpedoes from Japanese submarine *I-58* slammed into the unsuspecting ship. The author conveys the sense of chaos and terror that existed in those first moments after impact: men fought their way out of the bowels of the ship in "Stygian darkness," struggling through heavy smoke and acrid fumes.[25]

Filling the air, in addition to the smoke, were the cries of the wounded. Men coughed and stumbled on decks that were slick with oil from ruptured pipes, and some men were burned black.[26] In the pandemonium of smoke and fire, the ship was rapidly taking on water—the men who were able frantically abandoned ship. Those in the water saw the stern of the great ship pointing to the sky, towering 250 feet above them. As the ship started to slide beneath the water, there was horror that can only be imagined by those who did not live through it: "the crashing and bang-

23. *Id.*
24. *Id.*
25. *Id.* at 43.
26. *Id.* at 43, 46.

ing of objects tearing loose blended in a hideous discordant symphony with the cries of men trapped inside."[27]

Helm makes it excruciatingly clear that the worst ordeal was yet to come for the hundreds of men who successfully escaped the sinking ship. Although their ship sank in the very early hours of Monday, 30 July 1945, they would not be discovered until the following Thursday. By that time, hundreds of the men would perish from shark attacks, drinking salt water, wounds that they received during the torpedo attack, and sheer exhaustion. Those who were seemingly fortunate enough to have found their way into a lifeboat avoided the sharks, but many of these men began to blister from the sun within the first few hours.[28] After forty hours in the water with nothing to eat or drink, many of the crewmembers began to hallucinate, some killing their shipmates under the firm conviction that these fellow crewmembers were members of the enemy force.[29]

It was not until the morning hours of Thursday, 2 August 1945, that a Navy PV-1 Ventura airplane on a routine patrol sighted the lost crew. Helm recounts the events leading from the survivors' initial sighting to the massive rescue effort that took place throughout the day. His fast-paced description leaves the reader joyful for the men that survived the monstrous ordeal. *Ordeal by Sea*, however, does not end with the rescue.

Following the rescue of the *Indianapolis* survivors, in the days shortly following the close of World War II, public interest grew about the hundreds of lives lost in the *Indianapolis* tragedy. Helm notes: "Newspapers, sparked by influential people, refused to let the story die . . . . When it was obvious that the public at large would not give up, the Navy Department announced . . . that Captain McVay would be court-martialed."[30] The court-martial ultimately found Captain McVay guilty of hazarding his ship's safety by failing to zigzag, and it sentenced him to the loss of one-hundred numbers in grade.[31] This punishment foreclosed the possibility of

27. *Id.* at 89.
28. *Id.* at 138.
29. *Id.* at 128.
30. *Id.* at 186-87.
31. *Id.* at 188.

further promotion for Captain McVay and effectively ended his professional career in the Navy.[32]

By the time Helm recounts these events in the conclusion of *Ordeal by Sea*, he has already covered the issue of zigzagging much earlier in the book, establishing that Captain McVay's order to cease zigzagging on the night of the attack was a reasonable course of action.[33] As he closes *Ordeal by Sea*, Helm highlights the political nature of Captain McVay's court-martial: "In the months that followed [the court-martial], a few top-ranking admirals and many newspapers were not content with the treatment Captain McVay had received."[34] On 23 February 1946, Secretary of the Navy James Forrestal remitted the sentenced against Captain McVay in its entirety, and restored him to full duty in the Navy.[35] Despite this act by the Secretary of the Navy, Captain McVay's life would ultimately be ruined by the stigma of the initial court-martial proceedings.[36]

The book's only weakness derives from Helm's setting a parameter for the book that he later oversteps. Helm starts the book by promising to avoid the controversial issue of assessing who finally was to blame for the tragedy, yet he concludes *Ordeal by Sea* by touching on that very issue. Ultimately, this raises the question of why Helm initially informs the reader that he intends to avoid this controversial topic. Conversely, it is not clear why Helm chose not to affirmatively embrace the issue of Captain McVay's treatment at the outset of the book. While there are no readily apparent answers to these questions, there is a likely explanation for why the author goes beyond the stated parameters of the book and addresses the Navy's treatment of Captain McVay.

Helm is more than a disinterested third party witnessing the events surrounding Captain McVay's court-martial. As a former crewmember,

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32. *Id.* at 188-89.

33. In his Afterword, Captain Toti provides a well-researched and informative analysis of a number of events and issues surrounding Captain McVay's decision not to zigzag on the night of the attack. *Id.* at 193-216.

34. *Id.* at 191-92.

35. *Id.* at 192.

36. In the Afterward, Captain Toti addresses a number of factors surrounding the tragic loss of the *Indianapolis* and her crew, from today's perspective. His analysis of events substantiates, *inter alia*, that Captain McVay's actions were not to blame for the tragedy. In 1968, nearly twenty years after he retired from the Navy, Captain McVay "dressed in his Navy uniform, picked up a toy figure of a sailor, walked on to his front porch, put a handgun into his mouth, and pulled the trigger—yet another victim of a battle that claimed too many." *Id.* at 216.

his underlying loyalty to the ship's captain eventually comes to the fore. Thus, Helm recounts the tragic events of the *Indianapolis*'s final voyage, and then focuses the reader's attention on the politically driven prosecution of Captain McVay, a man whose memory will be forever intertwined with the lost ship as her final commanding officer.

Although *Ordeal by Sea* goes beyond its stated purpose, it is a well-written, informative story of one of the most significant losses sustained by the U.S. Navy in a single attack. The greatest strength of this work lies in the way it imparts the crewmembers' experience to the reader. Helm's unaffected, candid writing style places the reader at the scene, on the deck plates of the ship when the torpedoes make contact. The author does more than rehash the record of a Naval disaster—he moves the reader with the agony suffered by the men of the lost ship. It is this human dimension that Helm adds to the story that makes *Ordeal by* Sea so powerful. The reader need not look far to understand why the book has this uncanny human dimension. As a former crewmember of the *Indianapolis,* the story could not be any closer to the author's heart. This is the story of his ship and his shipmates, and Helm convincingly narrates the events as if he was present throughout the final ordeal of the *Indianapolis*.

INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD[1]

REVIEWED BY MAJOR MARK W. HOLZER[2]

Rommel, you magnificent bastard, I read your book!

-General George S. Patton, Jr., as he watched the doomed German armor and infantry of Field Marshal Rommel's 10th Panzer Division advance in Tunisia, North Africa.[3]

This quote highlights the simple proposition that there is no greater insight into how a man approaches a particular subject than to read something he has written on that subject. *Intervention* provides such an opportunity for readers concerned with U.S. foreign policy. The book offers an outstanding overview of the intervention debate by one of the key policymakers in the Bush Administration, Richard Haass, and it provides excellent insight into the Administration's likely approach to using military force. While *Intervention* raises issues that are important to all U.S. citizens, it should be required reading for U.S. military leaders at all levels. This review discusses several positive and negative aspects of *Intervention*, beginning and ending with its strengths.

The main strength of this book is the author's in-depth discussion of factors he considers important to reaching sound intervention policy decisions. In broad form, Haass's thesis is that interventions tend to be successful when a clear purpose is matched with appropriate means and ends, and adequate forces are matched to the challenges of the situation. Other strengths of the book include an excellent historical overview of the intervention debate, the use of actual interventions to illustrate key points, and a discussion of points that are beyond the immediate intervention debate, but that impact upon it. These otherwise strong points are particularly

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1. RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD (1999).

2. United States Army. Currently assigned to the Advanced International Law Studies Program at the Center for Law and Military Operations, Charlottesville, Virginia. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. PATTON (20th Century Fox 1970).

noteworthy because the author not only writes from experience, but is also in a position to affect U.S. foreign policy.

Richard Haass, the current Director of Policy and Planning in the U.S. Department of State, has a great deal of experience in shaping and articulating U.S. intervention policy. His career includes service from 1989 to 1993 as both special assistant to President George Bush and senior director for the Near East and South Asian Affairs on the staff of the National Security Council. Under the previous Bush Administration, Haass was instrumental in developing and articulating U.S. policy during the Persian Gulf conflict. He was awarded the Presidential Citizens Medal for his efforts. When writing both the original 1994 edition and the revised 1999 version of *Intervention*, the author was overseeing the foreign policy program at the Brookings Institution. His other works include *The Reluctant Sheriff: The United States After the Cold War* (1997), and *Economic Sanctions and American Diplomacy* (editor, 1998), as well as numerous other articles on U.S. foreign policy.[4]

The author's background makes him uniquely qualified to discuss "whether" and "how" the U.S. military should be employed to best serve U.S. interests. This is an important discussion because the United States faces potentially unlimited intervention challenges with limited resources. The collapse of the Soviet Union and resulting end of the Cold War led to the absence of a nation capable of countering the United States on a global scale. These events have increased the opportunity and perhaps the temptation for the United States to use its military more freely as a foreign policy tool. Carefully addressing the questions of whether and how to intervene is crucial to successful interventions.

Haass's historical overview of the intervention debate provides one of the book's best aspects, painting a very cogent picture of how we arrived at the current point of debate. He does this, in part, by drawing the reader through the philosophical underpinnings of Western thought regarding the political and legal grounds for going to war. Haass builds a clear roadmap to help the reader understand the ever-strengthening legal and political norms against nations using military force, and he notes that the "overall effect of this body of thought is to make it more difficult politically to go to war and more difficult militarily to fight one."[5] In contrast to this gen-

4. Further information about Richard N. Haass and his other writings can be found at www.brook.edu/scholars/rhaass.htm.

5. HAASS, *supra* note 1, at 9.

eral trend of the declining use of military force in its traditional war-fighting role, Haass describes nations' growing sense of obligation to use military force in support of humanitarian concerns. Matters traditionally thought of as strictly internal are now viewed in a totally new light, significantly complicating the intervention debate.

Haass's historical overview provides a solid basis for the reader to grasp the more difficult questions explored in subsequent chapters, and it serves as a ready reference even after the book has been read. It also highlights several baseline points for his discussion. First, that the effort to define the appropriate role and limit the use of U.S. military forces, in both unilateral actions as well as United Nations and other coalition actions, is an ongoing effort where no consensus exists. Second, that the fundamental debate between graduated response and decisive engagement is not new. Third, that several successive administrations have articulated questions, criteria, or conditions that they felt "must" be addressed prior to using military force. Finally, that each "must address" list appears inadequate from a long-term policy perspective because all the lists were seemingly formed with a specific past incident or brewing situation in mind.

The major fault with this otherwise useful historical overview is that Haass presents previous administrations' points of view in such a muddled manner that they are extremely difficult to compare and contrast.[6] Another problem is that Haass does a poor job of tying each "address" list to the historic situation that prompted its development, and he does not directly relate them to the case studies discussed later. This manner of presentation requires the reader to retrace several pages and make side notes to extract important distinctions and follow the conceptual development.

One of *Intervention*'s strongest features is its use of case studies. Haass brings his book to life and makes his points much more memorable by using historic examples as the main platform for discussing intervention issues. He presents twelve military interventions either considered or actually undertaken by the United States over the past few decades. He uses these experiences to effectively illustrate his main points within the questions of whether and how to use military force as an extension of foreign policy. Haass presents each case in one to seven pages, providing a quick refresher to those who have studied or been involved in the interventions

6. *Id.* at 14-17.

and a succinct history for those who may be less familiar with each of the scenarios.

The interventions initially discussed are: Iran (1979-1981), Lebanon (1982-1984), Grenada (1983), Libya (1986), Persian Gulf shipping (1987-1988), Philippines (1989), Panama (1989-1990), the Gulf War (1990-1991), Northern and Southern Iraq (1992-1993), former Yugoslavia (1991-present), Somalia (1992-1993), and Haiti (1993-1994). In addition to these twelve, he addresses the interventions undertaken or continued since the book was first published in 1994. These later experiences include the aftermath of Haiti (from mid-1994), Bosnia (from mid-1994), Rwanda (1994), the Taiwan Straits (1996), Iraq (1998), Afghanistan and Sudan (1998), and finally Kosovo (1999).

Examining the questions of why and how the United States chose to intervene in each circumstance is not only interesting, but is particularly useful in understanding the basis for the author's cautions and recommendations. Where sufficient time has passed to provide a historical context for commentary on the effectiveness of an intervention, Haass offers such commentary. This section of the book is a particular strength because it provides the greatest insight into why the Bush Administration is likely to deem particular factors more or less important in its intervention determinations.

Another strength that makes the book worth reading and worth keeping as a ready reference is Haass's expansion of the discussion beyond the bounds of whether and how to intervene. The three most interesting areas of this expanded discussion are: weapons of mass destruction (WMD), force size and structure, and public opinion. Haass opines that the presence of WMD in a conflict changes the calculus of intervention so significantly that the United States should devote significant resources to counter-proliferation. His recommendation to maintain sufficient forces to ensure effective unilateral military efforts is framed within a larger discussion advocating cutting costs and spreading the intervention burden through ad hoc coalitions as well as regional organizations.

In addressing public opinion, it is clear that Haass would advise the Administration to be prepared to demonstrate fortitude when making policy decisions concerning the use of military force. He cautions firmly against allowing the media or a collective emotional reaction to events around the world to dictate policy. On the other side of the decision-making process, he clearly believes that although popular and congressional

support are desired, they are not necessary prior to the commitment of U.S. forces. By tying these issues into the book, Haass provides insight into where the Bush Administration is likely to focus its efforts to make intervention a more effective tool of foreign policy.

While *Intervention* is well worth reading overall, a few distractions mar the book. The author presents his guidelines in a very indirect manner, uses imprecise language in several sections, and inexplicably inserts a chapter of definitions into the middle of his discussion. While some readers might find these shortcomings troubling, they do not significantly devalue the book.

The first and most obvious distraction is the chapter inserted in the middle of the book, which Haass devotes entirely to defining the language of the intervention debate. Most of the book maintains a flowing thought process, but this chapter unnecessarily digresses into an area better suited to treatment in an appendix. Another distraction is the author's imprecise use of terminology. For example, although he comments that "'[p]eacemaking' is an imprecise and misleading term,"[7] he uses the term "peacemaking" to describe what is commonly referred to as "peace enforcement" by the military community. Another example of this is found when Haass refers to the use of "portable air-defense systems" by the Somalis to shoot down U.S. helicopters.[8] Most military readers will recognize that the rocket-propelled grenades used to shoot down U.S. helicopters represent World War II technology and are not generally used as, or considered to be "air-defense systems." While these are not major flaws, they do detract from what the author is trying to communicate.

The book's main flaw is Haass's failure to deliver on his promise to present intervention guidelines in a direct manner. While he does present guidelines, the presentation is simply not as straightforward as he implies. Haass makes it fairly clear upfront that readers will be disappointed if they read *Intervention* with a view toward realizing any type of formula approach to foreign policy or to the application of military force as a tool of foreign policy.[9] Instead, Haass argues strongly against stating a definitive set of rules for intervention. He points out that such an approach

7. *Id.* at 59.
8. *Id.* at 95.
9. *Id.* at xii.

would tend to both bind decision makers' hands and embolden potential adversaries to push up to the line drawn by such rules.[10]

After making it clear that he will not present firm intervention rules, Haass affirmatively states that he intends to provide a set of guidelines in the form of questions that can be used to measure the efficacy of any proposed intervention.[11] After reading this, the reader expects to find a list of questions somewhere in the book or at least expects to find questions that can later be compiled into a list. Adding further to this expectation, Haass states that the answers to the questions need not be determinative, but warns that any departure from the guidelines "ought to be carefully considered and justifiable."[12]

After this build up, Haass frustrates the reader because he does not actually pose questions, but rather presents various factors and follows each with a discussion of why he feels they are important and how each might be approached. This strikes the reader as an almost reverse-Socratic method. At the end of most sections, the reader is forced to contemplate what Haass has presented, and to then formulate questions that must be asked to address the concerns Haass has raised. The discussion of internal intervention presents one exception to this general disconnect. Here, the author actually poses questions that can be used as a set of guidelines for internal intervention. Fortunately, Haass's general failure to articulate intervention guidelines does not overshadow the main strength of the book.

Intervention's main strength derives from Haass describing the thought process used to reach an intervention decision and articulating the factors and criteria important to arriving at sound policy decisions. He develops this discussion primarily in two chapters devoted to posing both suggestions and warnings on the intertwined issues of "whether" and "how" to intervene in foreign affairs with military force. Haass separates the two for ease of discussion, but is quick to point out that one cannot reasonably be considered without the other. His discussion produces an excellent breakdown of the subordinate components of the two parts of the intervention debate, and it offers concrete examples of why each is important to consider prior to intervention. For example, the chapter on "whether" to intervene includes a section titled, "Neither Victory Nor an

10. *Id.* at 68.
11. *Id.* at 69.
12. *Id.*

Exit Date Should be Prerequisites."[13] Haass illustrates this point by highlighting the flexibility gained by not promising "victory" in the Gulf War and by highlighting the flexibility lost by setting an exit date in Somalia. The components of the discussion are themselves valuable in gaining insight into how the Bush Administration is likely to approach the intervention problem.

Haass draws from the analyses of the cases presented and concludes that success tends to result when the United States achieves "clarity of purpose, consistency of means and ends, [and] use of adequate forces given objectives and the threats or impediments." Haass clearly understands the gravity of these three factors when he warns that the cost of not achieving consistency between them could be a pattern of failed intervention that would make any future intervention attempts less likely to succeed.[14]

Overall the strengths and utility of this book clearly outweigh its relatively minor flaws. *Intervention* provides an excellent discussion of the issues surrounding the intervention debate and includes a very useful compilation of relevant documents and speeches as appendices. In addition to being interesting and well written, the book is truly worth reading because it offers tremendous insight into the Bush Administration's view on the use of the military. With all of these factors in mind, *Intervention* should be required reading for all U.S. military leaders, and it should be on the bookshelf of every military operational law attorney.

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13. *Id.* at 76.
14. *Id.* at 155.

CARNAGE AND CULTURE LANDMARK BATTLES IN THE RISE OF WESTERN POWER[1]

REVIEWED BY MAJOR CHARLES L. YOUNG III[2]

> *It must be a terrible thing to drown at sea—arms thrashing the waves, lungs filled with brine, the body slowly growing heavy and numb, the brain crackling and sparkling as its last molecules of oxygen are exhausted, the final conscious sight of the dim and fading, unreachable sunlight far above the rippling surface. By day's' end in late September 480 B.C., a third of the sailors of the Persian fleet were now precisely in those last awful moments of their existence. A few miles from the burned Athenian acropolis as many as 40,000 of Xerxes' imperial subjects were bobbing in the depths and on the waves—the dead, the dying, and the desperate amid the wrecks of more than 200 triremes . . . . Their last sight on earth was a Greek sunset over the mountains of Salamis or their grim king perched far away on Mount Aigaleos watching them sink beneath the waves.*[3]

Thus begins *Carnage and Culture*, a riveting account of the development of Western military power. This book explores nine, well-chosen examples of military engagements drawn from across a 2500-year spectrum of Western development.[4] These examples are used to explain the factors contributing to the development of Western military culture and lethality as compared to other traditions in Asia, Africa, and the Americas.[5]

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1. VICTOR DAVIS HANSON, CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER (2001).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. HANSON, *supra* note 1, at 27-28.

4. Hanson chose the battles of Salamis (480 B.C.), Guagamela (331 B.C.), Cannae (216 B.C.), Poitiers (732), Tenochtitlán (1521), Lepanto (1571), Rorke's Drift (1879), Midway (1942), and Tet (1968) as his examples.

5. HANSON, *supra* note 1, at xv.

This book is a joy to read as it explores, from an individual and cultural perspective, historic land, air, and sea battles from all across the globe.

Some readers may cringe at the thought of picking up a 478-page book that has the word "culture" in its title.[6] Hanson quickly places the focus on culture into perspective, however, defining the term as how "military prowess reflects larger social, economic, political, and cultural practices that themselves have little to do with war."[7] One would suspect that an analysis of such high-browed topics as economics and socio-politics would require the studies of grand strategies and major protracted military campaigns. Pleasantly, Hanson focuses instead on individual battles and the fighting experience of the average soldier.[8] As he so eloquently puts it:

> Abstractions like capitalism or civic-militarism are hardly abstract at all when it comes to battle, but rather concrete realities that ultimately determined whether at Lepanto twenty-year old Turkish peasants survived or were harpooned in the thousands, whether Athenian cobblers and tanners could return home safely after their butchery at Salamis or were to wash up in chunks on the shores of Attica.[9]

This is the thesis that binds culture with carnage and the perspective that glues the reader to the pages of this book. Many books on ancient military battles focus primarily on the macro issues of strategy, campaigns, and national politics.[10] Hanson, on the other hand, disagrees with historians who avoid the human element of warfare and those who brush over casualty statistics as abstract numbers. Hanson describes "euphemisms in battle narrative or the omission of graphic killing altogether . . . as a near criminal offense of the military historian."[11] To Hanson the focus of the military historian should be on the wages of war, which to Hanson is ulti-

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6. Though others, like the author of this book review, may be equally attracted to "Carnage" in the title.

7. HANSON, *supra* note 1, at 6.

8. *Id.* at 7.

9. *Id.*

10. *See* H. DELBRUCK, *Warfare in Antiquity*, *in* 1 THE HISTORY OF THE ART OF WAR (1975); J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD (1987).

11. HANSON, *supra* note 1, at 7.

mately killing.[12] Hanson demonstrates this "focus" on the wages of war in his account of the battle of Tenochtitlán. He writes:

> They attacked all the celebrants, stabbing them, spearing them from behind, and they fell instantly to the ground with their entrails hanging out. Others they beheaded: they cut off their heads or split their heads to pieces. They struck others in the shoulders, and their arms were torn from their bodies. They wounded some in the thighs and some in the calf. They slashed others in the abdomen, and their entrails spilled to the ground. Some attempted to run away but their intestines dragged as they ran; they seemed to tangle their feet in their own entrails.[13]

Thus Hanson examines, in graphic detail, the killing that took place on these nine battlefields to "discover how the practice of government, science, law, and, religion simultaneously determines the fate of thousands on the battlefield."[14]

Hanson's work may be critiqued for its unstated premise that the Western method of warfare is, all things considered, superior to that of the non-West. This concept sets the underlying theme for his analysis of all nine military engagements. No matter the victor of the battle, Hanson always concludes the Western way is superior. On the surface, this "cultural chauvinism"[15] may appear to jaundice the finished work. Hanson takes great care, however, to avoid the issues of race, biology, and geography, and he instead focuses on the concepts of civic militarism, democracy, freedom, capitalism, and the importance of landed infantry.[16]

Close analysis of the contents of the book reveals clues that, despite Hanson's efforts, a bit of bias may have slipped in. For example, he takes great care to define the West,[17] but does not offer a corresponding definition of the non-West.[18] This may seem like a trivial detail, but throughout the book there is a noticeable lack of a clear, overarching definition of just what the Western way is being compared to. In his examples, the Western war machines face the Persians at Salamis and Guagamela, Hannibal's Carthaginians at Cannae, the mounted Islamic Saracens at Poitiers, the enraged Aztecs at Tenochtitlán, Ottoman sailors at Lepanto, swarming

12. *Id.* at 7-8.
13. *Id.* at 174 (citing THE BROKEN SPEARS 76 (M. Leon-Portilla ed. 1992)).
14. *Id.* at 8.
15. *Id.* at 15.
16. *Id.*

Zulu tribes at Rorke's Drift, Japanese kamikazes at Midway, and stealthy Viet Cong at Tet. From this collage of non-Western adversaries, the reader is left to deduce the identity of the lethally inferior non-West.

Hanson ultimately concludes that Western methods of warfare prevailed due to the ingredients of freedom, decisive battle, civic-militarism, rationalism, vibrant markets, discipline, dissent, open critique of the government, landed infantry, and scientific exploration. Hanson's analyses of two of those concepts offer insight into this conclusion.

At Salamis, the Western concept of democratic freedom emerged. The Greeks who fought at Salamis elected almost all of their civic leaders by lot.[19] In turn, these leaders recognized that "in the Greek mind the ability to hold property freely, to have legal title to it, and pass it on was the foundation of freedom."[20] This Western concept of land ownership created a vested interest in the outcome of battles. "War [to the Greeks] would hinge on how much freedom was worth and to what degree it could trump the enemies' enormous advantages in numbers, wealth and experience."[21] The 40,000 Persians who were drowned, harpooned, stabbed, or clubbed to death on the shores of the Aegean were all "bandaka,"[22] now known as slaves. Hanson includes an insightful quote from Herodotus:

> As long as the Athenians were ruled by a despotic government, they had no better success at war than any of their neighbors. Once the yoke was flung off, they proved the finest fighters in the world. . . . [T]hey battled less than their best when they

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17. In his Preface, Hanson characterizes "Western" as:

> The culture of classical antiquity that arose in Greece and Rome; survived the collapse of the Roman empire; spread to western and northern Europe; then during the great periods of exploration and colonization of the fifteenth centuries expanded to the Americas, Australia, and areas of Asia and Africa; and now exercises global political, economic, cultural, and military power far greater than the size of its territory or population might otherwise suggest.

Id. preface.

18. *Id.* at 487.
19. *Id.* at 34.
20. *Id.* at 36.
21. *Id.* at 39.
22. *Id.* at 34.

> worked for a master; but as free men each individual wanted to achieve something for himself.[23]

To Hanson, freedom is a "military asset. It enhances the morale of the Army as a whole; it gives confidence to even the lowliest of soldiers; and it draws on the consensus of officers rather than a single commander."[24] Hanson's selection of battles repeatedly emphasizes the Western reluctance to rely on a single commander and the non-West's over-reliance on the despotic power of a single leader. Hanson's non-West paid a terrible price in blood for their over-reliance. Fifty thousand Persians were slaughtered at Guagamela, when Darius III fled before Alexander.[25] Forty thousand Aztecs were filled with abject panic when Cortez and five conquistadors waded into their midst and hacked their leaders to death.[26]

At Guagamela, the concept of decisive battle emerged. Hanson defines decisive battle as the concept of "men seeking their enemies face-to-face, in a daylight collision of armies, without ruse or ambush, with the clear intent to destroy utterly the army across the plain or die honorably in the process."[27] Hanson deduces that decisive battle "evolved in early-eighth century [B.C.] Greece" and was not found earlier or elsewhere."[28] The Persians facing Alexander the Great wanted war to give them social recognition, religious salvation, or cultural status.[29] They preferred the tactics of surprise, ambush, maneuver, and envelopment, all designed to deplete the enemy enough to force his capitulation in the battle.[30] The Persians, unlike Alexander, would not seek to totally annihilate their enemy after routing them in battle. Alexander's new concept of warfare led to battle casualties that boggled the mind. Hanson relates that one-year before Guagamela (331 B.C.), Alexander's army at Issus killed as many as 100,000 Persian soldiers in eight hours of fighting.[31] According to Han-

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23. *Id.* at 47.
24. *Id.* at 55.
25. *Id.* at 73.
26. *Id.* at 183.
27. *Id.* at 92.
28. *Id.*
29. *Id.* at 97.
30. *Id.* at 96.
31. *Id.* at 83.

son's gruesome battle calculus, nearly 300 Persians were killed every minute for eight hours![32]

A year later at Guagamela, Alexander applied the same principles of "shock and frontal collision by walls of highly trained and disciplined foot soldiers."[33] The results were horrifyingly successful. Alexander's disciplined troops stood firm against an overwhelming, numerically superior enemy, counter-attacked, broke the enemy's ranks, caused Darius III to flee for his life, sent the Persians into a panicked retreat, and systematically slaughtered them by the thousands.[34] Hanson's battle calculus reveals that at least 50,000 Persians died that day, compared to only 100 of Alexander's men, a rate of 500 Persians for every Macedonian.[35]

The Western desire for decisive battle and total destruction of the enemy is evidenced in several of the battles Hanson discusses. From Alexander's total destruction of the Persian Empire after Guagamela to the British annihilation of the Zulu tribes, the West has retained a preference for shock warfare and the total destruction of its enemies. Hanson further explores this concept in his analysis of Cortez's battle against the Aztecs at Tenochtitlán.

The Aztecs had traditionally engaged in "Flower Wars"[36] in which battle rituals were largely symbolic. Their tactic, like those of the Zulus and other tribal cultures, was that of envelopment.[37] The Aztecs primarily fought to stun their enemy and then pass them back to second echelon troops who would bind and gag them. These prisoners would then be used either for human sacrifice, slaves, or food.[38] The Aztecs rallied around the "Cihuacoatl," the leader of the Aztec line.[39] Hanson portrays the Spaniards under Cortez as almost complete opposites to the Aztecs. The Spanish had the goal of "killing the enemy out right, pursing the defeated, and ending his will to resist."[40] While under overwhelming attack, separated from their leader, the Spaniards "fell in rank and file, fought in unison with unquestioning discipline, and fired group volleys."[41] This extreme

32. *Id.* at 84.
33. *Id.*
34. *Id.* at 66.
35. *Id.* at 73.
36. *Id.* at 181.
37. *Id.* at 197.
38. *Id.* at 193, 197.
39. *Id.* at 181.
40. *Id.*

difference in culture and warfare ultimately led to the complete annihilation of the Aztec civilization.[42] In describing a battle involving gold, human sacrifice, overwhelming odds, siege warfare, and amphibious assault, Hanson weaves a marvelous story of an incredible saga of human suffering and courage. This chapter alone makes the book a "must read."

Carnage and Culture goes well beyond well-organized analysis and gripping tales of the horrors of war. It also offers the reader unique insight into current events in the United States, specifically the U.S. response to terrorist attacks on the World Trade Center and the Pentagon.[43] Many of the principles discussed in *Carnage and Culture* are evidenced in this current conflict. A recent interview with Osama bin Laden, the prime suspect in the terrorist attacks,[44] illustrates this point. In this interview, bin Laden states:

> Hostility towards America is a religious duty and we hope to be rewarded for it by God, praise and glory be to Him. Praise be to God for guiding us to do jihad in his cause. To call us enemy number one or two doesn't hurt us. What we do care for is to please God, praise and glory be to Him, by doing jihad in his cause and by liberating Islam's holy places from those wretched cowards.[45]

The interview suggests that the terrorists may be seeking the same religious salvation as the Persians facing Alexander at Guagamela, the Saracens facing Charles Martel at Poitiers, and the Ottomans facing the Christian fleet at Lepanto.[46] It also reveals that bin Laden and his associates may seek to drive Western forces from their Muslim homelands, but they fail to state a desire for the total annihilation of Western culture. The essence of terrorist tactics also derives from the non-Western principles of

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41. *Id.* at 207.

42. *Id.* at 228.

43. On 11 September 2001, terrorists crashed two U.S. civilian jet liners into the World Trade Towers in New York City, one into the Pentagon in Washington, D.C., and one in rural Pennsylvania. Over 3000 were killed, and several thousand were wounded.

44. On 18 September 2001, during a national press conference, President George W. Bush called Osama bin Laden a "prime suspect."

45. Transcript of Statement by Osama bin Laden (ABC News Broadcast, June 26, 1999).

46. HANSON, *supra* note 1, at 97.

surprise and ambush, which Hanson repeatedly emphasizes is a non-Western method of warfare.[47]

As for America's response, it could almost be pulled directly from Hanson's text.

Hanson sums up the Western response to terrorism by saying:

> The real atrocity for the Westerner is not the number of corpses, but the manner in which they were killed. We can comprehend the insanity of a Verdun or Omaha Beach, but never accept the logic of far fewer killed through ambush, terrorism, or the execution of prisoners and noncombatants . . . . As long as Westerners engaged the enemy in an open contest of firepower, the ensuing carnage was seen as relatively immaterial: terrorists who shamelessly killed a few women and children, or States that surprised us on a Sunday morning in a bombing attack, usually found mechanized murderous armies of retaliation on their soil and daylight fleets of bombers over their skies. . . . A rogue state that sponsors a terrorist with a vial in Manhattan is still cognizant that its own existence is measured by little more than a fifteen-minute missile trajectory.[48]

As if following the recipe of *Carnage and Culture*, Deputy Defense Secretary Paul Wolfowitz said in a recent press interview: "The United States' retaliation will be sustained, broad, and effective. It's not just simply a matter of capturing people and holding them accountable, but removing the sanctuaries, removing the support systems; it's about ending States who sponsor terrorism."[49]

Carnage and Culture is a well-written, cultural guide to the Western method of warfare. Those who have any interest in military history, past or present, should read this book and watch as its principles play out in the modern world.

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47. *Id.* at 86.

48. *Id.* at 97, 451.

49. *Bush Calls Terrorist Attacks "First War of the 21st Century"*, DAILY PROGRESS (Charlottesville, VA), Sept. 14, 2001, at A-7.

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