



MILITARY LAW REVIEW

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Lieutenant Colonel Colby C. Vokey, USMC

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MILITARY LAW REVIEW

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ARTICLE 107, UCMJ: DO FALSE STATEMENTS REALLY HAVE TO BE OFFICIAL?

LIEUTENANT COLONEL COLBY C. VOKEY, USMC¹

Getting to the bottom of things like that was impossible. You just had to take the practical view that a man always lied on his own behalf, and paid his lawyer, who was an expert, a professional liar, to show him new and better ways of lying.²

I. Introduction

In 1950, Congress passed the Uniform Code of Military Justice (UCMJ),³ providing a comprehensive system of military justice applicable to all the armed forces. Through this landmark legislation, Congress specifically addressed offenses involving falsehoods by service members. Such falsehoods have always proven contrary to the ideals of trust and integrity vital to the maintenance of military discipline. Falsehoods and

1. Judge Advocate, United States Marine Corps. Presently assigned as the Regional Defense Counsel for the Western Region of the United States. Master of Laws, 2003, The Judge Advocate General's School, U.S. Army; J.D., 1998, University of North Dakota; B.S., 1987, Texas A&M University. Previous assignments include Student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 2002-2003; Legal Services Support Section, 1st Force Service Support Group, Camp Pendleton, California, 1998-2002 (Officer in Charge, Legal Services Support Team E; Officer in Charge, Legal Services Support Team D; Senior Defense Counsel); Inspector-Instructor, Headquarters Battery, 14th Marines, Dallas, Texas, 1992-1995; Officer in Charge, Classified Files and Special Correspondence, 3d Marine Division, Okinawa, Japan, 1991-1992; Executive Officer, Battery L, 2d Battalion, 12th Marines (10th Marines), Operation Desert Shield/Storm, Saudi Arabia/Kuwait, 1991; 4th Battalion, 12th Marines, 3d Marine Division, Okinawa, Japan, 1989-1991 (Assistant Battalion Operations Officer, Adjutant, Battery Fire Direction Officer). Member of the bars of Texas, North Dakota, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 51st Judge Advocate Officer Graduate Course.

2. JAMES GOULD COZZENS, *THE JUST AND THE UNJUST* 330 (1942).

3. Act of May 5, 1950, ch. 169, 64 Stat. 107 (current version at 10 U.S.C. §§ 801-946).

false statements by service members are “condemned by military law as much for [their] unsoldierly qualities as for the deceit and fraud [they] may accomplish. A falsehood can never be interpreted as an innocent act.”⁴

In order to address acts by service members involving falsehoods, Congress enacted three specific punitive articles in the UCMJ that cover these offenses. These three articles are: Article 107, False official statements; Article 131, Perjury; and Article 132, Frauds against the United States.⁵ Additionally, a service member could be charged with an offense involving a falsehood under either Article 133, Conduct unbecoming an officer and gentlemen, or Article 134, General article.⁶ This article concerns only Article 107, which proscribes the making of false official statements.

Service members often make false statements. Not all such statements, however, violate Article 107. In establishing Article 107, Congress provided that, “[a]ny person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.”⁷ The President of the United States thereafter promulgated the *Manual for Courts-Martial* (MCM)⁸ to implement the UCMJ and provide supplemental rules. In the *MCM*, the President broke down the statute into four elements, established maximum possible punishments, and provided amplifications, explanations and definitions to aid practitioners and service members in understanding the UCMJ.⁹

The first element of the offense, as listed in the *MCM*, states “[t]hat the accused signed a certain *official* document or made a certain *official* statement.”¹⁰ Criminalizing false language under Article 107 requires the

4. Robert S. Stubbs II, *Falsehoods*, JAG J., Mar. 1955, at 14, 18.

5. UCMJ arts. 107, 131, 132 (2002).

6. *Id.* arts. 133, 134. See Captain Kenneth M. Abagis, *The False Statement: A Comparative Study of 18 U.S.C. 1001 and Article 107, Uniform Code of Military Justice 5* (1961) (unpublished thesis, The Judge Advocate General’s Legal Center and School, U. S. Army) (on file with The Judge Advocate General’s Legal Center and School Library, Charlottesville, Virginia).

7. 10 U.S.C. § 907 (1956).

8. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM].

statement be “official.” The officiality of a certain statement depends on the facts of each case. Consider the following five scenarios:

1. In order to be excused from her apartment lease, a Marine lance corporal falsely tells her landlord that her father was killed in the September 11, 2001 terrorist attack on the Pentagon.¹¹

2. An airman tells another airman that he was a star running back on his high school football team when, in fact, he was only the water boy.

3. A soldier lies to a civilian police officer during a state investigation concerning his involvement in a fight and shooting involving a senior non commissioned officer at an off-post bar and trailer park.¹²

4. In order to impress a civilian girl, a corporal falsely alters his leave and earnings statement to reflect a higher salary than he really receives.

5. A military recruiter lies to a civilian police officer during a state

9. *Id.* The following excerpt from part IV, ¶ 31 of the *MCM* sets out the elements of proof and some of the explanation that corresponds with Article 107, UCMJ:

b. *Elements.*

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.

c. *Explanation.*

(1) *Official documents and statements.* Official documents and official statements include all documents and statements made in the line of duty.

Id.

10. *Id.* (emphasis added).

11. Gov't Mot. to Reconsider Ruling on Article 134 Preemption, *United States v. MarksJones* (Camp Pendleton 2002) (an unreported special court-martial that resulted in an acquittal) (on file at Legal Service Support Section, 1st Force Service Support Group, Camp Pendleton, California).

12. *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994) (holding that oral statements by a soldier to civilian law enforcement officers, who were conducting a state investigation concerning an off-post altercation and shooting involving another service member, were not *official* under Article 107).

investigation into a fatal automobile accident involving another recruiter and a recruit.¹³

In each of the five scenarios, the service member made a false statement. The issue, however, is whether or not each false statement is “official” and thereby capable of sustaining a conviction under Article 107. Today, service members face a continually expanding application of the term “official” under Article 107. This article examines the scope of Article 107. Specifically, the article focuses on the first element of the offense, which limits proscribed conduct under Article 107 to “official” statements. Although the article reviews cases involving the so-called “exculpatory no” doctrine, that doctrine is not discussed in this article.¹⁴

Part II of this article analyzes a recent case applying Article 107, *United States v. Tefteau*.¹⁵ *Tefteau* involved a Marine Staff Sergeant (SSgt) who lied to civilian police officers concerning an automobile accident involving another Marine and a recruit.¹⁶ Affirming the conviction, the United States Court of Appeals for the Armed Forces (CAAF) found that SSgt Tefteau’s false statements to Winfield, Kansas police officers were made in the line of duty and therefore “official” under Article 107.¹⁷

Part III examines the background and history of the UCMJ and Article 107. In particular, this section reviews the congressional debates and activities surrounding the enactment of the UCMJ, in order to shed some light on the purpose and meaning of Article 107. Additionally, the article discusses the drafting and promulgation of the *MCM*. The *MCM* implements the UCMJ and provides explanations and definitions for the application of Article 107.

Part IV looks at a similar civilian federal statute, Section 1001 of Title 18 of the United States Code (§ 1001).¹⁸ The federal courts have dealt with

13. *United States v. Tefteau*, 58 M.J. 62 (2003).

14. *United States v. Hutchins*, 18 C.M.R. 46 (C.M.A. 1955); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957); *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988); *United States v. Solis*, 46 M.J. 31,34 (1997). The “exculpatory no” doctrine is based on the premise that an accused should not be prosecuted for making false statements to law enforcement officials by simply denying guilt or wrongdoing. *See United States v. McCue*, 301 F.2d 452 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962). Although this doctrine is found in military cases involving Article 107 offenses, the “exculpatory no” defense does not directly concern the officiality of false statements.

15. *Tefteau*, 58 M.J. at 62.

16. *Id.*

17. *Id.* at 69.

this falsity offense, in one form or another, since the close of the Civil War.¹⁹ The military courts have followed § 1001 federal case law since 1955, regularly comparing § 1001 to Article 107 in order to define military officiality.²⁰

Part V reviews other recent case law surrounding the officiality requirement of Article 107. Additionally, § 1001 and Article 107 treat oral and written statements somewhat differently. This article addresses these differences and shows how the military courts have further departed from Congress' original intent in enacting Article 107.

Finally, Part VI proposes a test to determine the officiality requirement of Article 107. This test focuses on both the capacity of the person making the statement and the identity of the recipient of the statement. The article concludes that false statements to civilians, by service members not in the actual performance of their duties, are not "official." Military courts now expand the scope of Article 107 well beyond what was written or intended by Congress, partially due to a blind reliance on the federal courts' interpretation of § 1001. Military courts should now place appropriate limits on Article 107 through a clear and unambiguous definition of "official."

II. *United States v. Teffeu*²¹

A. Background

Marine SSgt Charles E. Teffeu was a military recruiter assigned to the Marine Corps recruiting substation in Wichita, Kansas.²² His duties included making weekly contact with recruits awaiting entry on active duty under the Delayed Entry Program. Ms. Jennifer Keely and Ms. Jennifer Toner were two such recruits. They enlisted in the U.S. Marine Corps, and both had another Marine, SSgt James Finch, as their military

18. 18 U.S.C. § 1001 (2000).

19. Christopher E. Dominguez, Note, *Congressional Response to Hubbard v. United States: Restoring the Scope of 18 U.S.C. 1001 and Codifying the "Judicial Function" Exception*, 46 CATH. U. L. REV. 523, 531 (1997).

20. Lieutenant Colonel Bart Hillyer & Major Ann D. Shane, *The "Exculpatory No" – Where Did It Go?*, 45 A.F. L. REV. 133, 151 (1998).

21. 58 M.J. 62 (2003).

22. *Id.* at 63-64.

recruiter. Both Ms. Keely and Ms. Toner had already enlisted and were awaiting their call to active duty.²³

On 2 January 1997, the two female recruits contacted SSgt Finch and SSgt Teffeau and made plans to celebrate Ms. Keely's impending departure for boot camp.²⁴ On the morning of 3 January, SSgt Teffeau notified his supervisor, Gunnery Sergeant (GySgt) Quilty, that he would accompany SSgt Finch to the town of Winfield, Kansas to visit two recruits. During this trip to Winfield, SSgt Teffeau was going to conduct recruiting duties in nearby Ark City.²⁵ Prior to arriving at Ms. Toner's home, the two recruiters stopped at a gas station where SSgt Finch purchased a case of beer.²⁶ Staff Sergeant Teffeau placed the beer in the trunk of the government sedan in which they were traveling. Just prior to 1100, the two recruiters arrived at the home of Ms. Toner.²⁷ A few minutes later, Ms. Keely also arrived at Ms. Toner's home, driving her own Ford Mustang.²⁸

At Ms. Toner's home, the two recruiters, still in uniform, each drank a quantity of Jack Daniels bourbon. Ms. Keely drank schnapps.²⁹ Ms. Toner supplied all of the alcohol consumed at the residence.³⁰ Ms. Toner did not drink any alcohol, because she had the flu and had to work in her civilian job later that day.³¹ The two recruiters and Ms. Keely continued drinking for almost three hours.³² At 1350, Ms. Toner informed the recruiters and Ms. Keely that they had to leave, as she had to be at work at 1400.³³ The recruiters changed out of their uniforms prior to departing Ms. Toner's home.³⁴

Staff Sergeant Teffeau, SSgt Finch and Ms. Keely then proceeded to Winfield Lake to continue their celebration.³⁵ Staff Sergeant Finch rode

23. *Id.* at 64.

24. *Id.*

25. Supplement to Petition for Grant of Review at 2, *United States v. Teffeau*, 58 M.J. 62 (2003) (No. 02-0094/MC) (Appellant's Brief).

26. *Teffeau*, 58 M.J. at 64.

27. Brief on Behalf of Appellee at 4, *United States v. Teffeau*, 58 M.J. 62 (2003) (No. 02-0094/MC).

28. Appellant's Brief, *supra* note 25, at 4-5.

29. *Teffeau*, 58 M.J. at 64.

30. Appellant's Brief, *supra* note 25, at 2.

31. *Teffeau*, 58 M.J. at 64.

32. *Id.*

33. Appellee's Brief, *supra* note 25, at 4.

34. *Teffeau*, 58 M.J. at 64.

35. *Id.*

with Ms. Keely in her Ford Mustang, while SSgt Teffeau drove the government sedan.³⁶ Several hours later, the three departed Lake Winfield. Staff Sergeant Teffeau stopped at a convenience store and changed a flat tire on the government sedan.³⁷ About the same time, Ms. Keely and SSgt Finch were involved in a car accident after Ms. Keely's Mustang skidded 243 feet and hit a tree. Ms. Keely was killed and SSgt Finch was injured. Ms. Keely's blood-alcohol content (BAC) was determined to be 0.07. SSgt Finch's BAC was 0.14.³⁸

Due to the fatality and alcohol involvement, police officers from Winfield conducted an official police investigation into the circumstances surrounding the car accident.³⁹ The Commanding Officer of the 8th Marine Corps District also directed a command investigation into the accident. The investigations were conducted independent of each other.⁴⁰

As part of their official accident investigation, Winfield police officers interviewed SSgt Teffeau concerning his knowledge of the circumstances surrounding the accident. Staff Sergeant Teffeau went to the Winfield police station for the interview, accompanied by his supervisor, GySgt Quilty. During the questioning, SSgt Teffeau was in uniform. Staff Sergeant Teffeau made several false statements to the Winfield police officers. As a result, the Marine Corps charged SSgt Teffeau with three specifications in violation of Article 107.⁴¹

At trial, SSgt Teffeau moved to dismiss the Article 107 specifications for failure to state an offense.⁴² The defense claimed that SSgt Teffeau's statements to the civilian investigators were not official, because the civilian investigators were not enforcing military law. Therefore, SSgt Teffeau was neither acting in the line of duty nor under any military duty or obligation to speak to them.⁴³ During the motion, the prosecution argued that the term "official" was not restricted to the party receiving the statement. Instead, the prosecution stated that the officiality of a false statement can be based on its issuing authority *rather than on the person receiving it or*

36. *Id.*

37. Appellant's Brief, *supra* note 25, at 3.

38. *Teffeau*, 58 M.J. at 64.

39. *Id.* at 67.

40. *Id.* at 69; Appellant's Brief, *supra* note 25, at 11.

41. *Teffeau*, 58 M.J. at 68.

42. *Id.*

43. Appellant's Brief, *supra* note 25, at 11.

the purpose for which it is made.⁴⁴ The military judge expressly adopted the prosecution's legal analysis.⁴⁵

In denying the motion, the military judge concluded that the accused's statements "were made in the line of duty because they directly related to the performance of his military duties as a Marine recruiter assigned to the local area wherein the alleged offenses took place."⁴⁶ The military judge, however, failed to adequately explain how the act of making statements to civilian police officers was "in the line of duty" for a military recruiter. After the presentation of evidence, members of SSgt Tefteau's general court-martial found him guilty of making these false official statements in violation of Article 107.⁴⁷

B. Service Court Decision

There was no question as to the falsity of the statements made to the civilian investigators. Staff Sergeant Tefteau lied to the Winfield police officers, who were conducting an investigation in accordance with Kansas state law. The issue on appeal was whether or not SSgt Tefteau's statements to state criminal investigators were "official" within the meaning of Article 107. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) agreed with the trial court, affirming SSgt Tefteau's conviction for making false official statements.⁴⁸

Staff Sergeant Tefteau argued on appeal that Article 107, like the similar federal statute, 18 U.S.C. § 1001, was intended only to protect departments and agencies of the United States from deceptive practices.⁴⁹ For this proposition, SSgt Tefteau cited *United States v. Johnson*,⁵⁰ a 1994 Army Court of Military Review (ACMR) case that overturned an Article 107 conviction of a soldier who also lied to state police officers conducting a criminal investigation.⁵¹ Since SSgt Tefteau's false statements to Winfield police were part of an independent state criminal investigation, he

44. *United States v. Tefteau*, 55 M.J. 756, 758 (N-M. Ct. Crim. App. 2001), *rev'd on other grounds*, 58 M.J. 62 (2003) (App. Ex. II, at 2).

45. *Id.*

46. *Tefteau*, 58 M.J. at 68 (citing Record at 76).

47. *Id.* at 63.

48. *Tefteau*, 55 M.J. at 760.

49. *Id.* at 759.

50. 39 M.J. 1033 (A.C.M.R. 1994).

51. *Id.*; *Johnson*, 39 M.J. 1033 (A.C.M.R. 1994).

argued that such statements could not corrupt or pervert the functions of any military department or agency. Thus, false statements to civilian officials conducting their own investigation of a car accident did not directly affect the functioning of the Marine Corps and were not “official.”⁵²

The Navy-Marine Corps court disagreed with appellant’s argument and openly rejected the reasoning of *Johnson*. Instead, that court relied on two higher court cases, *United States v. Hagee*⁵³ and *United States v. Smith*.⁵⁴ Both the *Hagee* and *Smith* cases, however, involved the alteration of government documents and their subsequent submission to private parties. Equating SSgt Teffeau’s false statements to false statements created by the falsification of official documents, the NMCCA then wrote that the identity of the recipient of false statements is irrelevant.⁵⁵ The court further concluded that “[p]rivate parties and local officials *should* be able to rely with equal confidence on the integrity of both” official United States documents and oral assertions made by a service member.⁵⁶ While this may be a desired moral result, it is not the law. Such a conclusion would make any false statement by a service member to any private party a *per se* violation of Article 107. To be criminal under Article 107, false statements must be “official.”⁵⁷

The NMCCA next issued its holding, correctly stating that an “intentionally deceptive statement made by a service member *in the line of duty* to a private party or a local official is within the scope of Article 107.”⁵⁸ The question then before the court was whether SSgt Teffeau’s statements were made in the line of duty and therefore official. The court, however, did not primarily focus on the circumstances surrounding the making of the statements. Instead, it looked to the underlying misconduct surrounding the meeting with Ms. Keely and Ms. Toner.⁵⁹ Accordingly, the court pointed out that SSgt Teffeau was on government business at the time he visited the recruits. While this fact was relevant to the other offenses, SSgt Teffeau’s duty status at the time he visited the recruits should not be relevant to whether his later false statements to the Winfield police were offi-

52. *Teffeau*, 55 M.J. at 759.

53. *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993).

54. *United States v. Smith*, 44 M.J. 369 (1996).

55. *Teffeau*, 55 M.J. at 760.

56. *Id.* (emphasis added).

57. UCMJ art. 107 (2002).

58. *Teffeau*, 55 M.J. at 760 (emphasis added).

59. *Id.*

cial. Rather, the court should have asked whether SSgt Teffeu's *act* of speaking with Winfield police officers was an *act* in the line of duty.

Instead, the court made a big leap in logic. It focused on Winfield investigators' knowledge that SSgt Teffeu was in the military at the time of the questioning. Equating the police officers' knowledge of appellant's military status to a determination that the statements were in the line of duty, the court stated that "any statements the appellant decided to provide in response to questioning by the Winfield police investigators about the events preceding the fatal auto accident *would touch inevitably upon his official duties at the time as the investigators attempted to determine the cause of the accident.*"⁶⁰ Such reasoning, however, is flawed. Using the NMCCA's rationale, any service member could be convicted of violating Article 107 for making false statements as long as the recipient of the statement was aware of that service member's military status.

C. The CAAF Decision

Staff Sergeant Teffeu then appealed his case to the CAAF. The CAAF certified the issue of:

[w]hether the lower court misapplied the law, and in the process created a conflict with the Army Court of Military Review's decision in *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994), in finding that appellant's statements to civilian police officers investigating an automobile accident were made "in the line of duty" for purpose of Article 107, UCMJ.⁶¹

The court answered this question in the negative, affirming SSgt Teffeu's conviction for violating Article 107. The CAAF, however, came to this conclusion in a different manner than the lower court. The court recited Article 107 and next defined "official" statements as those "made in the line of duty."⁶² The court did not define the phrase, "in the line of duty."

60. *Id.* (emphasis added).

61. *United States v. Teffeu*, 58 M.J. 62, 63 (2003). The CAAF granted review of three issues in the case. Issue II was the subject issue concerning officiality of false statements. Issue I concerned a question of material variance in relation to an Article 92 violation. Issue III dealt with the viability of a defense to the offense of false official statement based on the paragraph 31c(6)(a) of Part IV of the *MCM*. *Id.* *MCM*, *supra* note 8, pt. IV, ¶ 31c(6). Neither Issue I nor III is discussed in this article.

62. *Teffeu*, 58 M.J. at 68. *See MCM*, *supra* note 8, ¶ 31c(1).

The court only said that the President did not intend to “limit ‘line of duty’ in this context to the meaning those words may have in other, non-criminal contexts.”⁶³

Next, the court concluded that the appellant was acting in the line of duty in making his false statements to Winfield police officers.⁶⁴ The court relied on a number of factors in reaching this conclusion.⁶⁵ The appellant was a canvassing military recruiter. He knew the two women recruits and SSgt Finch as a direct result of his official duties as a recruiter. Appellant traveled to Winfield, Kansas on 3 January 1997 with SSgt Finch as part of his duties as a military recruiter. Appellant reported this travel to his supervisor, GySgt Quilty. Both he and SSgt Finch arrived at Ms. Toner’s residence in uniform to meet both women.⁶⁶

Furthermore, in support of its conclusion, the court cited a number of factors related to the questioning at the Winfield police station.⁶⁷ The appellant arrived for the questioning in uniform. Gunnery Sergeant Quilty accompanied him. The court also noted there was a “parallel” military investigation into the appellant’s activities.⁶⁸ Finally, the CAAF also emphasized that some of the other misconduct from the civilian investigation subjected the appellant to military criminal liability, noting that the Winfield investigation was “of interest to the military and within the jurisdiction of the courts-martial system.”⁶⁹ In light of the above-mentioned factors, the court determined that the appellant’s statements were made “in the line of duty,” and therefore, found that the statements were “official” within the meaning of Article 107.⁷⁰

63. *Teffeau*, 58 M.J. at 68 (explaining the President’s intent not to limit the phrase, “line of duty.” The court highlighted several of these non-criminal contextual uses, such as; “‘line of duty’ determinations made to determine a servicemember’s entitlement to medical care at government expense, to determine entitlement to disability compensation at a physical evaluation board, or to determine Government liability under the Federal Tort Claims Act, 28 U.S.C. § 2671-72 (2002)”). See, e.g., U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) 2-23, 2-24 (3 Oct. 1990); U.S. DEP’T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION 5 (4 Oct. 2002).

64. *Teffeau*, 58 M.J. at 69.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Of note, SSgt Teffeau was not charged with any violations of state laws in his trial by court-martial.

70. *Id.*

The CAAF's findings invite criticism. First, much of the courts' focus surrounds the subject of the conversation instead of Staff Sergeant Teffeau's official military status or duties at the time the statements were made. At the time of the questioning, SSgt Teffeau was not performing duties as a canvassing recruiter. He was being interviewed as a witness to an accident investigation that occurred within the investigatory jurisdiction of the Winfield police. Nonetheless, the court concluded there was a military nexus between the statements and his duties, stating that his responses "bear a clear and direct relationship to" his official duties.⁷¹ As the court pointed out, SSgt Teffeau was not ordered or directed by the military to speak with the Winfield police.⁷² Ultimately, the court failed to adequately explain how SSgt Teffeau was discharging his duties as a recruiter or service member by making a statement to civilian investigators.

Additionally, the court highlighted the military command investigation and the military officials's interest in SSG Teffeau's actions on the day of the accident.⁷³ The court, however, failed to adequately explain how a "parallel" military investigation was relevant to the false statements made to Winfield police.⁷⁴ Although false statements to military officials may result in independent Article 107 violations, such statements have no bearing on the criminality of separate false statements to civilian police. Winfield police officers were conducting their own, independent accident investigation. While the Marine Corps may have had an interest in the results of the police investigation, the reverse was not necessarily true. Winfield law enforcement and the state of Kansas would have little or no interest in whether SSgt Teffeau violated purely military offenses, such as violation of general orders or dereliction in the performance of his duties.⁷⁵

Looking behind the decision, the CAAF opinion leaves a number of unanswered questions. First, there was a noticeable absence of legal analysis; factual determinations and conclusions comprised the bulk of the opinion. Despite the court's reference to *United States v. Johnson*,⁷⁶ the

71. *Id.*

72. *Id.* at 68.

73. *Id.*

74. *Id.*

75. In addition to the three Article 107 specifications for making false statements to Winfield police officers, SSgt Teffeau was also convicted at trial of conspiring to violate a general order, failing to obey a lawful general order, dereliction of duty, making false official statements to military officials, and obstructing justice, in violation of Articles 81, 92, 107, and 134, UCMJ. *Id.* at 63.

CAAF failed to discuss, distinguish or compare *Johnson*. In fact, the only cite to *Johnson* is found in an insignificant and inaccurate citing signal at the end of the decision.⁷⁷ *Johnson* cited over forty years of U.S. Supreme Court and military decisions in support of its conclusions of law.⁷⁸ In *Teffeau*, the CAAF referred to little precedent of any kind.

While the court purported to define the term “official,” that definition merely recited paragraph 31c(1) of Part IV of the *MCM*.⁷⁹ Paragraph 31c(1) simply says that a statement is “official” if that statement is “made in the line of duty.”⁸⁰ No other attempt was made to define the word “official.”⁸¹ The CAAF also failed to define the phrase “in the line of duty.” The court simply concluded that since the underlying events had their origin in his official duties, SSgt Teffeau was “in the line of duty” when making statements to Winfield police.

Finally, the CAAF’s decision left open many questions concerning the relationship between Article 107 and § 1001. Starting in 1955, soon after the enactment of the UCMJ, military courts have turned to the § 1001 federal false statement statute for guidance in interpreting Article 107.⁸² In *Teffeau*, the CAAF ignored, without explanation, a long line of military decisions that compare Article 107 to § 1001.⁸³ The court merely stated that “the scope of Article 107 is more expansive than its civilian counter-

76. *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994).

77. *Teffeau*, 58 M.J. at 69 (citing *Johnson*, using a *See, e.g.* citing signal, for the proposition that the court “reject[s] any absolute rule that statements to civilian law enforcement officials can never be official within the meaning of Article 107”). The opinion, however, in *Johnson* reveals no such assertion. In fact, the Army court specifically considered situations in which statements to civilian law enforcement officials would sustain a conviction under Article 107. That court said, “[w]e can envision situations where a service member may be prosecuted for making false statements to state or nonmilitary federal officials acting on behalf of the armed forces . . . [and] may be found to have violated Article 107.” *Johnson*, 39 M.J. at 1036 n.3.

78. *Johnson*, 39 M.J. at 1035.

79. *Teffeau*, 58 M.J. at 68.

80. *MCM*, *supra* note 8, ¶ 31c(1).

81. *Webster’s Unabridged Dictionary* provides several relevant definitions of the word “official”: “[1] of or pertaining to an office or position of duty, trust or authority: official powers; and [2] authorized or issued authoritatively: an official report.” *RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY* 1345 (2d ed. 1998).

82. *United States v. Hutchins*, 18 C.M.R. 46 (C.M.A. 1955). *Hutchins* first linked the two statutes by announcing that the purpose of Article 107 was the same as § 1001. That purpose was “to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. *United States v. Gilliland*, 312 U.S. 86, 93 (1941).

part, 18 U.S.C. § 1001.”⁸⁴ Furthermore, the court reasons that the scope is more expansive because “the primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law.”⁸⁵ While this “primary purpose” statement may be true as to military criminal law, that premise simply means the two statutes “differ in significant respects.”⁸⁶ Accordingly, interpretation of Article 107 should not be blindly “based upon or dependent upon Section 1001 or cases arising thereunder.”⁸⁷ Aside from discussing the alleged expansiveness of Article 107, the CAAF made no other reference to § 1001.

In deciding *Teffeau*, the CAAF relied heavily on facts leading up to and surrounding the accident to determine the officiality of the statements to the civilian police officers.⁸⁸ But the lack of legal analysis and specific conclusions of law left practitioners guessing as to the meaning of the terms “official” and “in the line of duty.” Although the CAAF said it examined Staff Sergeant Teffeau’s conduct “in light of the *language and purposes* of Article 107,” the court failed to identify or discuss the *language* or the *purposes* of Article 107.⁸⁹ To fully address the shortcomings of *Teffeau*, it is necessary to look at the history and background of the UCMJ and Article 107 and the purpose and similarities of the federal statute, 18 U.S.C. § 1001.

83. See *Hutchins*, 18 C.M.R. at 46; *United States v. Smith*, 44 M.J. 369 (1996); *United States v. Stallworth*, 44 M.J. 785 (1996); *Johnson*, 39 M.J. at 1033; *United States v. Dorsey*, 38 M.J. 244 (C.M.A. 1993); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Ellis*, 31 M.J. 26 (C.M.A. 1990); *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957).

84. *Teffeau*, 58 M.J. at 68.

85. *Id.* at 68 (citing *United States v. Solis*, 46 M.J. 31, 34 (1997)). This cite to *Solis*, an Article 107 case involving the “exculpatory no” doctrine, however, is inaccurate, at best. *Solis* stands for the proposition that Article 107 and § 1001 are significantly different, not that Article 107 is necessarily more expansive than § 1001. *Solis*, 46 M.J. at 34.

86. *Id.*

87. *Id.*

88. *Teffeau*, 58 M.J. at 69.

89. *Id.* (emphasis added).

III. History of the UCMJ and Article 107

A. Pre-UCMJ Military Justice Systems

Militaries have used their own systems of justice for centuries. Some systems established to enforce discipline in armed forces predate written codes of law.⁹⁰ The Romans developed a formal and organized system to deal with misconduct within its armies which would serve as a template for many subsequent military codes.⁹¹ In 1621, King Gustavus Adolphus of Sweden produced the first known written military code when he published his 167 articles for the maintenance of order.⁹² Following the evolution of the courts of chivalry from the Middle Ages and the promulgation of King Adolphus' written code, the British developed their own military justice model.⁹³ Over a period of several centuries, the British court-martial system evolved to include several key themes. These themes included the development of military due process, the restriction of court-martial jurisdiction to cover only soldiers, and the inclusion of legislatures in the military justice process.⁹⁴

The American court-martial system originally imitated the British model.⁹⁵ In 1775, the Continental Congress adopted a new American code for maintaining order and discipline of the Army and Navy, based almost entirely on British military law.⁹⁶ Since 1775, American military justice has maintained a legal code and court system substantially different and separate from legal systems governing American civilians.⁹⁷

Two distinct and separate codes governed the American armed forces prior to 1950.⁹⁸ The Army had the Articles of War;⁹⁹ the Navy used the Articles for the Government of the Navy.¹⁰⁰ Both the Army¹⁰¹ and Navy¹⁰²

90. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-4, at 13 (4th ed. 1996).

91. *Id.* at 15.

92. *Id.* at 15-17.

93. *Id.* at 17.

94. *Id.* § 1-5, at 22-23.

95. *Id.* at 19.

96. EDWARD M. BYRNE, *MILITARY LAW* §§ 104, 107, at 4, 8 (3d ed. 1981).

97. CATHY PACKER, *FREEDOM OF EXPRESSION IN THE AMERICAN MILITARY: A COMMUNICATION MODELING ANALYSIS* 108 (1989).

98. BYRNE, *supra* note 96, at 4, 8.

99. Act of June 4, 1920, ch. 227, 41 Stat. 787, 10 U.S.C. §§ 1471-1593, *repealed by* UCMJ, *infra* note 114.

100. Act of April 2, 1918, 40 Stat. 501, *repealed by* UCMJ, *infra* note 114.

systems addressed crimes involving falsehoods and certain types of false statements. These prohibitions were narrower in scope, however, than those currently found in Article 107 of the UCMJ.¹⁰³

B. Enactment of the UCMJ

After World War II, the public became increasingly discontent with the existing military criminal justice system.¹⁰⁴ Over twelve million Americans were under military law at the peak of the war.¹⁰⁵ During World War II, the U.S. military services convened 1.7 million courts-martial.¹⁰⁶ This staggering number of military courts-martial resulted in great criticism from the press, Congress, and the large population of new World War II veterans.¹⁰⁷

In 1948, James Forrestal, Secretary of the newly formed Department of Defense, appointed a new committee to write a modern unified legal code for all the armed services “with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions.”¹⁰⁸ The committee was chaired by Edward Morgan, a professor of the Harvard Law School and former Army lieutenant colonel in the Judge Advocate General’s department during World War I.¹⁰⁹ The result of the Morgan Committee’s efforts was the submission of a bill to Congress to provide a UCMJ applicable to all the armed forces.¹¹⁰

101. Articles of War 56 and 57, 10 U.S.C. §§ 1528-29 (1948).

102. Articles 8(14) and 8(1) of Articles for the Government of the Navy, 34 U.S.C. § 1200 (1934). The Navy code was also commonly referred to as the “Rocks and Shoals.” BYRNE, *supra* note 96, at 5.

103. See LOUIS F. ALYEA, *MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR* (1949) (citing Articles of War 56, False Muster, and 57, False Returns).

104. PACKER, *supra* note 97, at 109.

105. *Id.*

106. *Id.*

107. *Id.* at 110.

108. WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 34 (Kennikall Press 1973).

109. The Papers of Edmund M. Morgan, Jr., Special Collection & University Archives, The Jean and Alexander Heard Library, Vanderbilt University, available at http://www.library.vanderbilt.edu/speccol/morgane_bio.shtml (last visited July 4, 2004).

110. H.R. 2498, 81st Cong. (1949).

Subcommittees of the Committees on Armed Services of both the House of Representatives and the Senate held lengthy hearings on the issue of a new military justice system. However, “the primary foci of the hearings and the subsequent House and Senate [floor] debates were the proposed Court of Military Appeals and command control over military courts-martial.”¹¹¹ With the emphasis on individual rights and civilian oversight of military courts, “very little discussion . . . of the punitive articles that would be used by the military” occurred during congressional consideration of the UCMJ.¹¹² In fact, one of the purposes of the proposed code was the “listing and definition of offenses, redrafted and rephrased in modern legislative language.”¹¹³ The Code was to bring civilian supervision and increased procedural and due process rights but not substitute civilian offenses for military ones. The proposed punitive articles included a brief commentary and references to applicable Army Articles of War and Articles for the Government of the Navy.¹¹⁴ One of the articles proposed by the Morgan Committee was Article 107: “False official statements,”¹¹⁵ which Congress adopted when it enacted the UCMJ.¹¹⁶ Other than the simple rephrasing of a few non-substantive words, the Morgan Committee’s (and Congress’) false official statement statute remains unchanged to this day.¹¹⁷

In April of 1950, Congress passed the UCMJ, containing punitive articles based primarily on the Army’s Articles of War.¹¹⁸ The new Code became law on 5 May 1950 and by 31 May 1951 was in full force and effect.¹¹⁹ As mentioned above, Congress scarcely mentioned the punitive articles, either in committee or during floor debates. Article 107 was no exception. No substantial discussion of the false statement statute took place.¹²⁰ Because of the limited discussion by Congress of Article 107, the legislative record offers little as to the intent or meaning of the false official statement prohibition. One must examine other sources to understand the purpose and meaning of the law that continues to criminalize false official speech.

111. PACKER, *supra* note 97, at 113.

112. *Id.*

113. 81 CONG. REC., vol. 95, pt. 5, at 5718 (May 5, 1949), *reprinted in* Department of the Navy Judge Advocate General, Congressional Floor Debate on the Uniform Code of Military Justice, at 4 (1959) (statement of Rep. Brooks).

114. H.R. 2498, 81st Cong. (1949), *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1467 (1985).

115. *Id.*

C. History of False Official Statement as a Punitive Article

Gustavus Adolphus provided the first written falsehood offense in his 1621 code, in which he delineated the act of “false muster” as an offense, or military crime.¹²¹ The British later prohibited the same offense.¹²² Mirroring the British Code, the first American Articles of War also listed the offense of “false muster.”¹²³ The U.S. Army had another prohibition

116. The proposed Article 107 draft by the Morgan Committee, as submitted to Congress in H.R. 2498, read as follows:

ART. 107. False Official Statements.

Any person subject to this Code who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing the same to be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct.

References:

AW 56, 57
AGN Art. 8(14)
Proposed AGN, Art. 9(24)

Commentary:

This Article consolidates AW 56 and 57. It is broader in scope in that it is not limited to particular types of documents, and its application includes all persons subject to this Code.

The Article extends to oral statements, and the mandatory dismissal for officers has been deleted.

H.R. REP. NO. 4080, 81st Cong. (1949), *reprinted in* 2 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1467-68 (1985).

117. *Id.*; UCMJ art. 107 (2002).

118. Act of May 5, 1950, ch. 169, 64 Stat. 107 (current version at 10 U.S.C. §§ 801-946); *see* BYRNE, *supra* note 96, at 9.

119. *Id.*

120. In fact, other than the proposed code, there was only one direct reference specifically concerning Article 107. That one reference came from John J. Finn, Judge Advocate, Department of the District of Columbia of the American Legion. Mr. Finn merely expressed to the Senate subcommittee, among other things, that Article 107 should also encompass those who direct the signing of a false official statement, in addition to the one who actually signs the statement. *To Establish a Uniform Code of Military Justice: Before the Subcomm. of the Comm. on Armed Services*, 81st Cong. 189-90 (May 9, 1949).

121. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* app. III, art. 121 (William S. Hein & Co., 2d ed. 2000) (1920).

122. JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* § 3006, at 727 (1953).

against false returns by accountable officers in order to protect the funds and equipment of the Army.¹²⁴ Although operating from a distinct and separate code, the Articles for the Government of the Navy, the Navy also developed a false muster provision similar to the one held by the Army.¹²⁵ Additionally, the sea service had another specific offense entitled, “falsehood.”¹²⁶ This Navy “falsehood” was a false official statement made with the intent to deceive.¹²⁷ The Army also punished similar false statements but did so under their general article.¹²⁸ The Navy’s “falsehood” offense, however, required that the statement be a material one.¹²⁹ The Army, on the other hand, held that materiality was not required and that knowledge of the falsity was not an element, as was required in the Navy courts-martial.¹³⁰

Morgan’s UCMJ committee reviewed and consolidated all of these various falsehood offenses into Article 107. Article 107 broadened the scope of the previous Army and Navy articles in several ways. First, Article 107 eliminated the limitations of the offense to particular types of documents. Second, it made the offense applicable to all persons subject to the UCMJ, not just officers. Next, it omitted any materiality requirement, as previously required by Navy law.¹³¹ Finally, the new Article 107 covered oral statements as well as written ones.¹³²

In addition to enacting the new Code, Congress also directed the President to implement the new military justice system. In turn, the President promulgated the 1951 *Manual for Courts-Martial United States* as Executive Order 10,214 on 8 February 1951.¹³³ Under the direction of the Office of the Secretary of Defense, representatives from the armed services combined efforts to draft the *MCM*.¹³⁴ Prior to drafting the *MCM*, the services conducted a review of the entire UCMJ. The *MCM* drafters’ review

123. Art. 49 of AW of 1775.

124. AW 18 of 1806; AW 8 of 1874; AW 57 of 1916 and 1920.

125. A.G.N. 8(14) of 1874.

126. *Id.* 8(1) of 1874.

127. SNEDEKER, *supra* note 122, at 728.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. H.R. REP. NO. 4080 (1940), *reprinted in* 2 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1467-68 (1985).

133. LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL UNITED STATES 1951, at V (History, Preparation and Processing) (reprinted 1958).

134. *Id.*

included brief commentaries on each of the punitive articles.¹³⁵ The comments concerning Article 107 were substantially the same as those found in the Morgan Committee report.¹³⁶

The *MCM* drafters' comments state that Article 107 was derived from Articles of War 56 (False Muster) and 57 (False Returns) and Articles 8(14) (False Musters) and 8(1) (Falsehoods) of the Articles for the Government of the Navy.¹³⁷ The comments also mentioned, as is emphasized by the courts today, that Article 107 was to be broader in scope than its predecessor Army and Navy articles.¹³⁸ Article 107, however, is only broader "*in that it applies to all persons subject to the code instead of only to officers, and also it is not limited (where documents are involved) to particular types of documents and extends to oral statements.*"¹³⁹

Missing within the congressional debates and hearings, committee reports, and *MCM* drafters' notes is any direct reference to any federal stat-

135. *Id.*

136. The comments from the *MCM* drafters on Article 107, as prepared by Commander William A. Collier during Conference No. 12e-f, were as follows:

186 False official statements.—Article 107 is derived in part from Articles of War 56 and 57 and is closely related to similar provisions of law now governing the Navy and the Coast Guard. This article is broader in scope than the specified articles of war in that it applies to all persons subject to the code instead of only to officers, and also it is not limited (where documents are involved) to particular types of documents and extends to oral statements. On the other hand, it does not cover the second sentence of Article of War 57, which is directed against a deliberate or negligent failure to render a return, nor does this article include the clauses of Articles of War 56 and 57, which provides for the mandatory punishment of dismissal.

Articles 8(14) and 8(1), A.G.N., (False musters, Falsehood), which are comparable to Article 107 do apply to every person in the Navy.

Id.

137. *Id.*

138. *Id.*

139. *Id.* (emphasis added). While broadening the scope of Article 107 in several respects, the comments actually place some limitations on its scope. "On the other hand, it does not cover . . ." *Id.*

utes used as a model or reference in the drafting of Article 107.¹⁴⁰ In other words, Congress neither relied upon nor referred to 18 U.S.C. § 1001 in the enactment of Article 107.

Since its enactment in 1950, Congress has made several changes to the UCMJ. The language of Article 107, however, remains unchanged.¹⁴¹ On the other hand, there have been several changes in the *MCM*'s analysis of Article 107 since the *Manual* was first promulgated in 1951.¹⁴² First, the 1951 and 1969 versions of the *MCM* did not include the text of the actual statute within either's discussion of the punitive articles.¹⁴³ The format consisted of two paragraphs.¹⁴⁴ The first, entitled "Discussion," provided definitions, explanations and considerations for the offense.¹⁴⁵ The second paragraph, entitled "Proof," broke the actual statute down into separate elements to be proven.¹⁴⁶

Since 1984, the reformatted *MCM* included Part IV, which covers the punitive articles.¹⁴⁷ Within each punitive article, the *MCM* provides 6 paragraphs: (a) Text (of the actual statute); (b) Elements; (c) Explanation; (d) Lesser included offenses; (e) Maximum punishment; and (f) Sample specifications.¹⁴⁸ In paragraph 31 of Part IV, which covers Article 107, portions of the text in paragraphs (b) through (f) have changed through the years.¹⁴⁹ Some of the original 1951 text remains but other language has been added or deleted.¹⁵⁰ There is, however, one sentence describing offi-

140. In the *Congressional Record*, general statements indicated that "many sources" were consulted in preparing the UCMJ, including the "Revised Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various states and voluminous reports on military and naval justice which [had] been made in recent years by various distinguished persons." 81 CONG. REC., vol. 95, pt. 5, at 5718 (May 5, 1949), reprinted in Department of the Navy Judge Advocate General, Congressional Floor Debate on the Uniform Code of Military Justice, at 4 (1959).

As to Article 107, however, there is no evidence to suggest that other non-military sources of law were considered in writing this particular statute. Specifically, there is no mention or reference anywhere to the then existent and well-established federal false statement statute, 18 U.S.C. § 1001 (1948).

141. *MCM*, *supra* note 8, pt. IV, ¶ 31.

142. *Id.* app. 25.

143. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter *MCM* 1951] and MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969) [hereinafter *MCM* 1969].

144. *MCM* 1951, *supra* note 143 and *MCM* 1969, *supra* note 143.

145. *MCM* 1951, *supra* note 143 and *MCM* 1969, *supra* note 143.

146. *MCM* 1951, *supra* note 143 and *MCM* 1969, *supra* note 143.

147. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984) [hereinafter *MCM* 1984].

148. *See, e.g.*, *MCM*, *supra* note 8, ¶ 31.

149. *Id.* app. 25 (providing executive orders directing changes to the *MCM*).

ciality that has remained unchanged. “Official documents and official statements include all documents and statements made in the line of duty.”¹⁵¹

IV. Comparison of 18 U.S.C. § 1001 to Article 107, UCMJ

A. The Initial Link between § 1001 and Article 107

While Article 107 of the UCMJ is derived from prior military codes, the military courts often compare it to the federal false statement statute, 18 U.S.C. § 1001. Specifically, the military courts turn to § 1001 to define Article 107’s officiality requirement.¹⁵² Although the two statutes have comparable language, nothing within the legislative history of the UCMJ links Article 107 to § 1001.¹⁵³ Instead, that link was first forged in the early UCMJ case of *United States v. Hutchins*.¹⁵⁴ In *Hutchins*, the accused was an Army major who was charged with lying to an investigating officer appointed to look into the circumstances surrounding the death of the accused’s jeep driver, Corporal (CPL) Grout.¹⁵⁵ Corporal Grout’s death occurred when his jeep overturned. The accused made a sworn statement to the investigating officer that the CPL did not have permission to drive the jeep on the occasion of his death. Based partly on the statement of the accused, the investigating officer concluded that the corporal’s death was not “in the line of duty.”¹⁵⁶ The accused later admitted that he actually ordered the CPL to drive to the division headquarters on the evening of the accident.¹⁵⁷

After his court-martial conviction for violating Article 107, Major Hutchins appealed his case, arguing there was no violation of Article 107 in that his statement to the investigating officer was not material to the investigation.¹⁵⁸ The issue before the court was whether a false statement

150. *Id.*

151. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), (1969), (1984), and (2002).

152. Abagis, *supra* note 6, at 14.

153. Lieutenant Brent G. Filbert, *Article 107, Uniform Code of Military Justice: Not a License to Lie*, ARMY LAW., Mar. 1995, at 3, 15.

154. 18 C.M.R. 46 (C.M.A. 1955).

155. *Id.* at 47.

156. *Id.*

157. *Id.* at 48.

158. *Id.*

must be about a “material” matter to sustain an Article 107 conviction.¹⁵⁹ The Court of Military Appeals (COMA) answered in the negative and affirmed the conviction. In the analysis portion of the opinion, however, the court struggled with an apparent conflict of authority between Army and Navy law, as it existed prior to the enactment of the UCMJ.¹⁶⁰ To resolve this dispute, the court turned to the federal code for assistance.¹⁶¹

The COMAs’ Chief Judge Quinn stated that “[s]ome further support for holding that the falsity must be in respect to a material fact may also be found in the *general analogy* between Article 107 . . . and section 1001, Title 18 of the United States Code.”¹⁶² This court stated that “some similarity of language in section 1001 and Article 107 is undeniably present.”¹⁶³ The *Hutchins* court then went even further towards cementing the two statutes together. Having said that the two statutes were “generally analogous,” the court then cited federal court and Supreme Court decisions that previously interpreted the purpose of § 1001. The court found that this interpreted purpose of § 1001 also “succinctly states the purpose of Article 107.”¹⁶⁴ Thus the inseparable link between Article 107 and § 1001 was born.

B. The Origins of 18 U.S.C. § 1001

Since *Hutchins*, the military courts have interpreted Article 107 using the federal courts’ construction of § 1001.¹⁶⁵ To fully understand the link between the two statutes, it is necessary to review the history and treatment of § 1001 in the federal courts. Section 1001, Title 18 of the United States Code, in pertinent part now provides:

- (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States, knowingly and willfully-

159. *Id.* at 47.

160. *Id.* at 49.

161. *Id.* at 50.

162. *Id.* (emphasis added).

163. *Id.* at 51. It is clear, however, that this court was only making a *general analogy* between the two statements. Chief Judge Quinn also went on to say, “[b]ut there is also a difference in language which might require a difference in result.” *Id.*

164. *Id.*

165. Filbert, *supra* note 153, at 4.

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.¹⁶⁶

The federal statute, that would later become § 1001, began as an attempt to stem the tide of false claims and inflated claims against the federal government pertaining to Civil War activities.¹⁶⁷ As a result, Congress passed the False Claims Act in March of 1863.¹⁶⁸ This statute criminalized both the act of presenting a false claim for payment to the federal government and the act of making false statements to facilitate payment of a false claim.¹⁶⁹ In 1918, Congress slightly expanded the scope of the False Claims Act by including government corporations under the umbrella of the Act.¹⁷⁰

In 1934, during the Great Depression and in response to the “hot oil” scandals, Congress broadened the scope of the act by deleting the previ-

166. 18 U.S.C. § 1001(a) (2000).

167. Dominguez, *supra* note 19, at 531.

168. Act of Mar. 2, 1863, 12 Stat. 696. This Act made it a crime for:

any person in the land or naval forces of the United States . . . [to] make for cause to be made, or present or cause to be presented for payment of approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; . . . any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement certificate, affidavit, or deposition knowing the same to contain any false or fraudulent statement or entry.

Id.

Of note, military officers and service members were among those specifically targeted by the language of the Act. *Id.*

169. *Id.*; Dominguez, *supra* note 19, at 532.

170. Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015; Dominguez, *supra* note 19, at 533.

ously required element of pecuniary or property loss.¹⁷¹ This 1934 Act proscribed not only false financial claims but also prohibited all false statements “in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.”¹⁷²

The first reported case to interpret Congress’s 1934 amendment was *United States v. Gilliland*.¹⁷³ *Gilliland* involved defendants charged with making false statements to the Interior Department regarding the petroleum trade. On appeal, the Supreme Court determined that Congress’s intent in broadening § 1001 was to ensure the efficacy of the ever-increasing federal regulatory system.¹⁷⁴ The Court then concluded that the purpose of the 1934 amendment was to “protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described” in the statute.¹⁷⁵

171. *United States v. Lange*, 528 F.2d 1280, 1284 (5th Cir. 1976). This change was made

at the behest of the Secretary of the Interior, that the scope of the act was broadened to cover the statements on reports submitted in accordance with Interior Department regulations regarding the interstate transportation of oil. Prior to the 1934 amendment, there was no law prohibiting the filing of such statements. Indeed the Supreme Court had held prior to 1934 that the act applied only to false statements made in a claim against or to defraud the government.

Hillyer & Shane, *supra* note 20, at 135; *see also* *United States v. Cohn*, 46 S. Ct. 251 (1926).

172. 18 U.S.C.A. § 35 (West 1934). The amended statute provided as follows:

[O]r whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used in any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.

Id.

173. 312 U.S. 86 (1941).

174. *Id.*; *see also* *Friedman v. United States*, 374 F.2d 363, 366 (8th Cir. 1967); *Lange*, 528 F.2d at 1284.

175. *Gilliland*, 312 U.S. at 93.

The *Gilliland* decision signaled the Court's belief that Congress had intended to protect the federal government by expanding the application of the prior false claims statute to all falsifications and frauds against the federal government. Thereafter, in 1948, Congress again revised the statute, separating the crime of false claims from false statements.¹⁷⁶ The false statement portion of the 1948 amendment became Section 1001 of Title 18 of the United States Code.¹⁷⁷

In the following years, the courts faced repeated cases challenging the scope of § 1001. In particular, the courts had to define the words "department" and "agency" and the phrase "in any matter within the jurisdiction of any department or agency of the United States."¹⁷⁸ In 1955, the Supreme Court again tried to define the scope of § 1001 in *United States v. Bramblett*.¹⁷⁹ Bramblett was a U.S. Congressman convicted of violating § 1001 for making false and fraudulent representations to the disbursing office of the U.S. House of Representatives.¹⁸⁰ He challenged the conviction by asserting that the House of Representatives Disbursing Office was not an "agency or department" and therefore he could not be charged with a § 1001 violation for false statements made to this office.¹⁸¹ The Court disagreed, holding that § 1001 applied to the legislative and judicial branches, as well as to the executive.¹⁸²

This application of § 1001's "agency or department" language would stand for forty years.¹⁸³ However, in 1995, the Supreme Court struck

176. 18 U.S.C. § 1001 (1948). The false statement statute then read as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Id.

177. *Id.*; Hillyer & Shane, *supra* note 20, at 135.

178. *See, e.g.*, *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953) (holding that a false statement, not under oath, to FBI agents conducting a criminal investigation was not the kind of "matter" that Congress intended to criminalize under 18 U.S.C. § 1001).

179. 348 U.S. 503 (1955).

180. *Id.* at 505.

181. *Id.* at 508.

182. *Id.*

183. Dominguez, *supra* note 19, at 535.

down *Bramblett* in *Hubbard v. United States*.¹⁸⁴ In *Hubbard*, the appellant challenged his conviction for filing unsworn papers, which contained falsehoods, in federal bankruptcy court.¹⁸⁵ The Court changed course and held that § 1001 does not apply to either the judicial or legislative branches.¹⁸⁶ Finding that the *Bramblett* Court had interpreted § 1001 too broadly, the *Hubbard* Court emphasized the need to apply the statute's plain language unless there is an "indication that doing so would frustrate Congress' clear intention or yield patent absurdity."¹⁸⁷

After the Court set aside Hubbard's conviction, both the U.S. House of Representatives and the U.S. Senate reacted quickly. In 1996, the 104th Congress amended the statute to specifically include false statements made to the judicial and legislative branches. Since then, § 1001 has remained unchanged.¹⁸⁸

While the meaning of "agency or department" now appears to be well defined, litigants frequently test § 1001's other jurisdictional parameters. Almost any reading of § 1001 leads a reader to the conclusion that false statements to a federal executive agency concerning a matter directly involving that agency violate the federal statute. But the phrase "in any matter within the jurisdiction of the executive, legislative, or judicial branches (and the former departments or agencies) of the United States" causes the courts great difficulty in determining what is and is not within an agency or departmental jurisdiction.

For example, assume a private businessman falsely tells the head of the Department of Energy (DOE) that the oil he is selling to the DOE is a high grade of oil, when actually it is of low grade, the difference greatly affecting the price. The statement was made directly to the DOE, a department of the executive branch, concerning the direct purchase of oil by the U.S. government. Clearly, this would entail a "matter within the jurisdiction of the executive . . . branch of the United States," as required by the statute.¹⁸⁹

184. 514 U.S. 695, 715 (1995).

185. *Id.* at 697-98.

186. *Id.* at 715.

187. *Id.* at 701, 703 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 570 (1994) (Souter, J., dissenting)).

188. 18 U.S.C. § 1001 (2000). For the current full text of this statute, *see supra* note 162.

189. *Id.*

Now assume that the false statement was not made to the DOE. Instead, in a sale to an independent private company not acting as an agent of the United States, the private businessman simply annotates an invoice with a handwritten certification of the quality of oil he is selling.¹⁹⁰ Like any similar business that buys and sells petroleum, this private company is required to inform the DOE of the oil sale and the quality certifications pursuant to the DOE's authority to regulate the oil industry.¹⁹¹ The example is now more complicated. Do the invoices submitted by the private businessman to a private company become a "matter within the jurisdiction" of a department or agency of the United States merely because the DOE performs a minimal regulatory function in reviewing the invoices from a private transaction?¹⁹²

This is an issue that federal courts face year after year. The question is whether Congress intended to prohibit false statements that may be only remotely connected to the federal government. The seminal case interpreting what constitutes "matters within the jurisdiction" of a federal branch of government is *United States v. Rodgers*.¹⁹³ Defendant Rodgers falsely reported to the Federal Bureau of Investigation that his wife had been kidnapped. He then made another false report to the U.S. Secret Service she was involved in a plot to kill the President of the United States.¹⁹⁴ The trial court found him guilty of making false statements. Rodgers appealed his § 1001 conviction, however, on the grounds that his statements were not "matter[s] within the jurisdiction of a department or agency of the United States" because the two federal law enforcement agencies did not have "the power to make final or binding determinations."¹⁹⁵

Speaking for a unanimous Court, then Justice Rehnquist stated that there is no requirement for a department or agency that receives false statements to be the one that makes "final or binding determinations."¹⁹⁶ Both

190. *United States v. Wolf*, 645 F.2d 23, 24 (10th Cir. 1981).

191. *Id.*

192. *Id.* at 25 (holding that the false invoices, while not made directly to a governmental agency or department, were a "matter within the jurisdiction" of a federal agency). Such statements were within the scope of § 1001 because they "directly concerned a regulatory or contractual scheme in which the federal government acted as a supervisor." *Id.*

Additionally, a false statement does not need to be made directly to a federal agency or department if federal funds are involved. *United States v. Lewis*, 587 F.2d 854 (6th Cir. 1978); *United States v. Petullo*, 709 F.2d 1178 (7th Cir. 1983).

193. 466 U.S. 475 (1984).

194. *Id.* at 477.

195. *Id.* (citing *Friedman v. United States*, 374 F.2d 363, 367 (8th Cir. 1967)).

196. *Rodgers*, 466 U.S. at 481.

of the subject investigative agencies had a federal statutory basis for conducting the investigation and there was a valid legislative interest in protecting the integrity of such official inquiries.¹⁹⁷ Ensuring broad interpretation reach for the statute, Justice Rehnquist stated that the language of § 1001 “covers all matters confided to the authority of an agency or department.”¹⁹⁸

Since that landmark case, the courts generally have construed § 1001 very broadly.¹⁹⁹ In addition to *Rodgers*, the Supreme Court and the federal courts have crafted some other useful guidance in interpreting § 1001. The currently undisputed purpose of the statute is “to protect the authorized functions of governmental agencies from the perversion which might result from the deceptive practices described” in the statute.²⁰⁰

False statements do not have to be made directly to a federal agency or agent in order to fall within the scope of § 1001. On the other hand, reason would seem to dictate that jurisdiction would require a nexus between the prohibition of making false statements and an actual governmental role, such as the existence of a regulatory or supervisory function.²⁰¹ As the Supreme Court directed, the term “jurisdiction” as found in § 1001, however, should not be “narrowly construed.”²⁰² In application, “jurisdiction” should be read to be synonymous with “power” to act upon information when it is received.²⁰³

197. *Id.* at 481-82.

198. *Id.* at 479.

199. *United States v. Jackson*, 26 M.J. 377, 379 (C.M.A. 1988).

200. *United States v. Gilliland*, 312 U.S. 86, 93 (1941). *See also United States v. Fern*, 696 F.2d 1269 (11th Cir. 1983) (noting that the purpose of the statute is to protect the government from fraud and deceit and the reach of § 1001 covers all materially false statements, including non-monetary fraud, made to any branch of the government).

201. *See Friedman v. United States*, 374 F.2d at 363, 364 (8th Cir. 1967) (stating that, “if the Government is to regulate, it must be able to protect its regulatory functions from those who would utterly destroy these functions by presenting false information”).

202. *Rodgers*, 466 U.S. at 480.

203. *United States v. Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967). *See United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983) (holding that it is “the existence of federal supervisory authority that is important, not necessarily its exercise”).

C. Modern Comparison of § 1001 and Article 107

1. Early UCMJ Cases and § 1001

Beginning with *United States v. Hutchins*,²⁰⁴ the military courts often looked to federal cases involving § 1001 for help in defining the scope of Article 107. Just a few years after *Hutchins*, the COMA again relied upon § 1001 and federal case law to solve military specific issues in the case of *United States v. Aronson*.²⁰⁵ Airman First Class (A1C) Aronson was entrusted with maintaining the base trailer park fund at the base where he was assigned but stole money from that fund.²⁰⁶ After a shortage in the fund was discovered, military criminal investigators questioned Aronson. Aronson lied to Air Force investigators, stating that he did not take any of the money.²⁰⁷ The Air Force charged and convicted A1C Aronson of larceny of the money and making false statements to military investigators.²⁰⁸ On appeal, the issue before the COMA was whether false statements to military law enforcement are “official” and therefore fall under the purview of Article 107.²⁰⁹

In affirming the decision of the Air Force appellate court and upholding the conviction, the COMA held that such false statements to investigators by someone who had a duty to account for a base trailer fund were “official.”²¹⁰ The court also strengthened the link between Article 107 and § 1001 by finding “the word ‘official’ used in Article 107 [was] the substantial equivalent of the phrase ‘any matter within the jurisdiction of any department or agency of the United States’ found in § 1001.”²¹¹

204. 18 C.M.R. 46 (C.M.A. 1955).

205. 25 C.M.R. 29 (C.M.A. 1957).

206. *Id.* at 31.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 34.

211. *Id.* at 32.

2. *Strengthening of the Bond Between § 1001 and Article 107*

The military courts continued their reliance on and deference to the line of cases referencing the federal civilian statute.²¹² In *United States v. Jackson*,²¹³ the COMA reaffirmed the bond between the two statutes. *Jackson* involved a non-suspect who lied to military investigators during an investigation in order to protect her friend, who was the subject of the investigation.²¹⁴ Affirming the conviction, the *Jackson* court said that “in view of the close relationship between Article 107 and 18 U.S.C. § 1001 . . . we conclude that Article 107 should be interpreted in a manner consistent with *Rodgers*.”²¹⁵

The linkage of Article 107 with § 1001 continues today, with military courts continually citing § 1001 and corresponding federal court decisions to solve false official statement riddles within the military justice system.²¹⁶ What started as a “general analogy” to a federal statute, in order to provide “some support” for an early UCMJ case, has become something more akin to the blood pact made between Tom Sawyer and Huckleberry Finn.²¹⁷ And while numerous military court opinions cite the similarities between the two statutes, few describe any major differences.²¹⁸

212. *United States v. Osborne*, 26 C.M.R. 215 (C.M.A. 1958). *But see United States v. Dozier*, 26 C.M.R. 223 (C.M.A. 1958) (finding there can be no perversion of a government function from a false statement “that was incapable of affecting or influencing such function”) (quoting *Freidus v. United States*, 223 F.2d 598 (D.C. Cir. 1955)).

213. 26 M.J. 377 (C.M.A. 1988).

214. *Id.* at 378.

215. *Id.* at 379 (citing *United States v. Rodgers*, 466 U.S. 475, 479 (1984), for the proposition that the language of § 1001 “covers all matters confided to the authority of an agency or department”).

216. *See, e.g.*, *United States v. Teffeau*, 58 M.J. 62 (2003); *United States v. Stallworth*, 44 M.J. 785 (1996); *United States v. Smith*, 44 M.J. 369 (1996); *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994); *United States v. Dorsey*, 38 M.J. 244 (C.M.A. 1993); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Ellis*, 31 M.J. 26 (C.M.A. 1990).

217. MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* 57 (Dover Publications., Inc. 1998) (1876) (swearing to never speak of the murderous actions of Injun Joe, after drawing blood from their palms with a knife).

218. *Jackson*, 26 M.J. at 379 (stating there is a “close relationship between Article 107 and 18 U.S.C. 1001—a *relationship often adverted to by this Court*”) (emphasis added). *But see United States v. Solis*, 46 M.J. 31, 34 (1997) (stating that “our opinions have made it clear that Article 107 differs from Section 1001 in significant respects”).

3. Contrast of Federal and Military Statutes

Several major differences between Article 107 and § 1001 exist. First, convictions for violations of § 1001 require proof of an additional element not found anywhere in Article 107; the materiality of false statements.²¹⁹ Second, while both address falsehoods, the actual language of the two statutes differs significantly. Article 107 is only applicable to those subject to the UCMJ and makes specific mention of proscribed falsehoods, such as “record, return, regulation, and order.”²²⁰ All of these terms have a unique connection to military service. More importantly, though, Congress specifically used the term “official” to describe applicable documents and statements.²²¹ On the other hand, § 1001 makes no mention of the word “official” anywhere in paragraph (a) of the statute.²²² Additionally, § 1001 covers statements made in any matter within the jurisdiction of the three branches of the federal government.²²³

As discussed previously, the origins of the two statutes also differ greatly. Section 1001 originated as a method to combat false claims and statements that caused the United States pecuniary and property loss during the Civil War and, later, during the “hot oil” scandals of the Great Depression.²²⁴ Article 107 was a consolidation of Army and Navy statutes that primarily dealt with uniquely military offenses, such as false muster, false returns, and false statements inherently military in nature.

Finally, the purpose and value of the statutes is actually very different. While each attempts to punish and deter fraud and deceit, the distinct nature of the armed forces and its inherent internal focus require that punitive articles, such as Article 107, be viewed from the unique vantage point of the military. While both the armed forces and federal government desire and value the truth as a virtue, truthfulness in the military is more than an

219. *Solis*, 46 M.J. at 34.

220. *Id.*

221. *Id.* As the term “official” is in the title of the statute itself, it is absolutely clear that Congress intended the crime to cover only those statements that were, in fact, “official.” See 50 U.S.C. § 701 (1950) (original UCMJ statute); 10 U.S.C. § 907 (1956) (revised section of UCMJ). See also WAYNE R. LEFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.2, at 115 (1986) (explaining that “[s]ometimes a statute’s title throws some light on the meaning of an ambiguous statute”).

222. 18 U.S.C. § 1001 (2000).

223. *Id.*

224. Hillyer & Shane, *supra* note 20, at 135.

aspiration. Integrity within the ranks of military organizations is integral to accomplishing their most basic mission of fighting in combat.

As military courts repeatedly acknowledge, the “primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law.”²²⁵ It is the ideal of integrity itself within the military ranks that must be protected.²²⁶ On the other hand, the purpose of § 1001 is simply to protect government agencies and departments from those who would try to defraud or deceive them.

V. Survey of Modern Article 107 Case Law

A. Military Justice Decisions Since *Jackson*

While military courts relied upon the breadth of § 1001 to expand the scope of Article 107, over the past twenty years false official statement cases have explored the outer limits of statutory interpretation. Shortly after the 1988 *Jackson* decision, the COMA again wrestled the meaning of “official.”²²⁷ Air Force Senior Airman (SrA) Ellis was pending an administrative discharge for his negligent maintenance of survival kits for F-16 fighter planes.²²⁸ With the aid of his girlfriend, SrA Ellis sent an anonymous letter to his command. This letter was purportedly from another member of the unit, who was now supposedly accepting responsibility for the improperly maintained survival kits.²²⁹ Senior Airman Ellis sent the

225. *Solis*, 46 M.J. at 34.

226. *See also* 81 CONG. REC., vol. 95, pt. 5, at 5718 (May 5, 1949), *reprinted in* Department of the Navy Judge Advocate General, Congressional Floor Debate on the Uniform Code of Military Justice, at 20 (1959) (statement of Rep. Vinson).

Now, why was this bill assigned to the Armed Services Committee rather than to the Judiciary Committee? The answer lies in the fact that life in the armed forces differs from civilian life. The objective of civilian society is to make people live together in peace and in reasonable happiness. The object of the armed forces is to win wars. This being so, military institutions necessarily differ from civilian society. Every American cherishes his right to rebuff the orders of the boss. But the same act in the military is an offense. In civilian life, if you do not like your job you quit. The same act in the military constitutes desertion and, in time of war, may be punished by death. In civilian life, a group of workers may walk off the job in protest. In the armed forces that act is mutiny and may be punished by death. These examples point out and emphasize the fundamental difference between civilian society and the military. They are differences that must be preserved.

Id.

227. *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988).

228. *United States v. Ellis*, 31 M.J. 26, 27 (C.M.A. 1990).

letter in hopes that it would exculpate him and he could avoid the pending administrative separation.²³⁰

In affirming Ellis' conviction under Article 107, COMA followed the *Jackson* court's adherence to § 1001 interpretation, as stated in *United States v. Rodgers*.²³¹ Although SrA Ellis claimed anonymous statements are inherently unreliable and not "official," the court sustained the conviction even though there was no "official duty" to make the statement.²³² The statement was "official" because SrA Ellis "believed that official action would be taken by the recipients" who were Air Force personnel "acting within the scope of their duties" when they received and acted upon the false statement.²³³

In the 1993 case *United States v. Caballero*,²³⁴ the court again tried to grasp officiality when it addressed whether purely oral false statements by a sailor to his first class petty officer were "official." In *Cabellero*, the accused falsely stated he departed for the physical therapy clinic.²³⁵ The court correctly found that the appellant's false statements were "official" under Article 107.²³⁶ In its holding, the court addressed whether Congress intended Article 107 to cover oral as well as written statements. The COMA found the "clear language of Article 107 includes both 'signed . . . official documents' and the 'making [of] any other . . . official statement,' [and] therefore Congress expressly proscribed both written and oral statements in Article 107."²³⁷

The court approved the lower NMCCMR, holding that the statements were "official" because recipients of the statements were responsible for the accountability of the appellant. Such a theory of responsibility is based on the "well-established concept of supervisory military authority."²³⁸ The

229. *Id.*

230. *Id.*

231. *Id.* (citing *Jackson*, 26 M.J. 377 (citing *United States v. Rodgers*, 466 U.S. 474 (1985))).

232. *Ellis*, 31 M.J. at 27.

233. *Id.* at 28.

234. 37 M.J. 422 (C.M.A. 1993).

235. *Id.* at 424.

236. *Id.* at 425.

237. *Id.* at 424. Relying on the plain language of the statute to determine oral statements are expressly subject to Article 107 seems to be an unnecessary step. A review of the 1948 Morgan Committee draft UCMJ, as considered by Congress, and the *Legal and Legislative Basis, Manual for Courts-Martial 1951* clearly indicates the intent to extend the false official statement statute to cover oral statements. *Id.*

COMA then referred to the Explanation section of paragraph 31, *MCM*, stating “a false official statement includes all statements made in the line of *military* duty.”²³⁹ However, the court fell short of defining the phrase “in the line of duty.” Instead, the court used the phrase to reemphasize the established rule that there need not be a “duty to account” to sustain a conviction under Article 107.²⁴⁰

In *Caballero*, the appellant made the statements “in the line of duty.” They were “official” for two reasons. First, the appellant’s statements were made to a superior concerning a military matter, his place of duty.²⁴¹ Second, the recipients of the statements were military leaders acting in their supervisory capacity.²⁴² Therefore, a statement’s officiality is based on the identity of the recipient and the position, rank or status of the service member at the time he makes the statement.

One year later, the ACMR turned its attention to a soldier convicted of making false official statements of a different sort. In *United States v. Johnson*,²⁴³ Specialist (SPC) Johnson was charged with a violation of Article 107 for making false statements to a state police officer. While at an off-post bar, SPC Johnson started an argument and physical fight with Sergeant First Class Rylant.²⁴⁴ Sergeant Rylant pulled out a knife and chased Johnson, who ran several hundred feet to his off-post trailer home.²⁴⁵ Johnson then retrieved a pistol and fired several shots into the air and ground.²⁴⁶ Later, when a civilian policeman interviewed Johnson, he denied having any knowledge of the incident.²⁴⁷ Charged with violating Article 107, Johnson moved for a finding of not guilty at trial based on his assertion that the statement was not “official.”²⁴⁸ In denying the motion, the military judge equated officiality to the § 1001 phrase “covering any matter within the jurisdiction of any department or agency of the United

238. *Caballero*, 37 M.J. at 425.

239. *Id.* (emphasis added); *MCM*, *supra* note 8, pt. IV, ¶ 31c(1).

240. *See Jackson*, 26 M.J. at 379. The *Caballero* court also cited a federal case interpreting § 1001 in the same manner, keeping the marriage of the two statutes strong. *United States v. Plasencia-Orozco*, 768 F.2d 1074 (9th Cir. 1985).

241. *Caballero*, 37 M.J. at 423.

242. *Id.*

243. 39 M.J. 1033 (A.C.M.R. 1994).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1035.

States” and found the statement to the police officer was “official.”²⁴⁹ Once again, the court dissected the meaning of the word “official.”²⁵⁰

The Army appellate court reversed Johnson’s Article 107 conviction, holding that such a statement to a civilian police officer was not “official” and that “neither the Uniform Code of Military Justice nor the Manual for Courts-Martial satisfactorily defines the term ‘official’ to encompass the factual situation in this case.”²⁵¹ The *Johnson* court then reaffirmed the previously held purpose of Article 107, as borrowed from § 1001, “to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.”²⁵² The court also cited *United States v. Disher*²⁵³ for the proposition that a false statement “must be about and pertain to a matter within the jurisdiction of [*the armed forces*] of the United States” to constitute a violation of Article 107.²⁵⁴

Finally, the court also renewed the long-standing false official statement requirement, as adopted from § 1001, that a statement that violates Article 107 must “pervert an authorized function of a government agency in furtherance of a *military* interest.”²⁵⁵ Johnson lied to a state police officer, a Texas official; the policeman was enforcing the laws of his state, not military law. Accordingly, Johnson’s false and intentionally deceitful statement “neither perverted nor corrupted the functions of an agency of the armed forces or any agency authorized to act on behalf of the armed

249. *Id.*

250. *But see* *United States v. Lynn*, 50 M.J. 570 (N-M. Ct. Crim. App. 1999). Incredibly, the Navy-Marine Corps Court of Criminal Appeals declared that “the meaning of the word ‘official’ contained in the term ‘official statement’ was within the common knowledge of mankind.” *Id.* at 574. Ironically, the court failed to provide this “common knowledge” definition in its opinion. *Id.*

251. *Johnson*, 39 M.J. at 1035.

252. *Id.* at 1034; *United States v. Hutchins*, 18 C.M.R. 46, 51 C.M.A. 1955) (quoting *United States v. Gilliland*, 312 U.S. 86, 93 (1941)); *accord* *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957); *United States v. Arthur*, 25 C.M.R. 20 (C.M.A. 1957). The court also acknowledged expanding the scope of Article 107 so that it applied to “all matters confided to the authority of an agency or department.” *Jackson*, 26 M.J. at 379 (quoting *United States v. Rodgers*, 466 U.S. 475, 479 (1984)).

253. 25 C.M.R. 683 (A.B.R. 1958).

254. *Johnson*, 39 M.J. at 1035 (citing *Disher*, 25 C.M.R. at 686) (emphasis added).

255. *Id.* at 1035 (emphasis added).

forces.”²⁵⁶ Therefore, Johnson’s statements were not “official” and did not violate Article 107.²⁵⁷

B. False Official Document Cases

Another class of false official statement cases causes great problems for military courts and produces inconsistent or illogical results. These cases involve the making of false documents. The term “document” encompasses many different forms of written statements, including records, returns, regulations, orders, and other official documents.²⁵⁸ When a service member signs or utters a false document and that document is made in the line of duty, it is “official” and falls within the purview of Article 107.²⁵⁹

In *United States v. Ragins*,²⁶⁰ the COMA faced a false official document case that did not involve an actual government document. Navy Chief Petty Officer Ragins was assigned to the commissary store at a naval shipyard.²⁶¹ His duties included receiving food shipments from commercial vendors.²⁶² While on duty at the commissary, the accused conspired with a civilian bakery deliveryman to falsify invoices for bread deliveries.²⁶³ The accused receipted for bread purportedly delivered to the commissary, as shown by the invoices, but the deliveryman sold the bread to third parties.²⁶⁴ At trial, the accused pleaded guilty to a charge under Article 107 for signing the false invoices for bread deliveries.²⁶⁵ On appeal, Chief Ragins claimed his plea was improvident, claiming the invoices

256. *Id.* The court acknowledged an Article 107 conviction could be sustained for false statements to a state policeman if that state official is acting on behalf of the military. *Id.* at 1036. Furthermore, the court also said “false statements to non-military federal investigative agencies may also be prosecuted *but not under Article 107*. Instead, the third, crimes and offenses not capital, clause of Article 134 could be used to incorporate the allegation of 18 U.S.C. [§] 1001” (alteration in original). *Id.*

257. *Id.* The court also did not rule out the possibility that Johnson could have been convicted for these false statements as a clause 1 or 2 offense under Article 134. *Id.* at 1038.

258. UCMJ art. 107 (2002).

259. MCM, *supra* note 8, pt. IV, ¶ 31c.

260. 11 M.J. 42 (C.M.A. 1981).

261. *Id.* at 43.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 44.

were not official statements but only receipts given to the baking company.²⁶⁶

The court disagreed, citing the fact that it was Chief Ragins's duty to sign the invoices for bread deliveries.²⁶⁷ The COMA looked to § 1001 and federal precedent in order to determine the officiality of the invoices. The court opined that "official," as used in Article 107, was the substantial equivalent of the § 1001 phrase "in any matter within the jurisdiction of any department or agency of the United States." Finding that § 1001 case law did not require false statements to be actually submitted to a department or agency of the United States, the court reasoned that Chief Ragins's statement was utilized in a matter that was within the jurisdiction of the military.²⁶⁸ The invoice need not be a military document. A military department or official need not actually receive it. The accused acted in his capacity as a military commissary store worker. Because it was his military duty to sign such invoices, the invoices were "official" under Article 107.²⁶⁹

In *United States v. Simms*,²⁷⁰ the ACMR also faced a case where the recipient of a false document was a private party and the document was not of the military kind. The appellant was convicted of making a false document by signing his commander's name to an Army Emergency Relief (AER) loan form without authority.²⁷¹ While its mission is to provide financial assistance and counseling to military members, the AER is a private, non-profit corporation.²⁷² In order to receive a loan from the group, AER requires that the member's commander recommend approval of the loan and sign the loan form.²⁷³

Similar to the result in *Ragins*, the Army court found that Sergeant (SGT) Simms' forged loan form constituted an "official" document.²⁷⁴ The court focused on the capacity of the one who makes such recommendations for loan forms. In this case, only military commanders sign such forms. Although SGT Simms placed his commander's signature on the

266. *Id.* at 43.

267. *Id.* at 44.

268. *Id.* at 45.

269. *Id.* at 44.

270. 35 M.J. 902 (A.C.M.R. 1992).

271. *Id.* at 903.

272. *Id.* at 904.

273. *Id.*

274. *Id.*

form without permission, the capacity of the one who issues such statements is controlling.²⁷⁵ The signed form is an “official” military document, because the required signature is a function of a military commander in the discharge of his military duties. Sergeant Simms was attempting to discharge these duties himself.

Over the next few years, the highest military court heard two false document cases that further expanded the reach of Article 107. In 1993, the COMA decided *United States v. Hagee*.²⁷⁶ In *Hagee*, the accused wrote a set of fake travel orders for two friends. The friends gave the false orders to their civilian landlord to get out of a housing lease. In upholding the conviction for violation of Article 107, the COMA cited that “close relationship” between Article 107 and § 1001.²⁷⁷ The court then pointed out that § 1001 case law contained instances of crimes which involved the use of false papers to victimize private parties.²⁷⁸ Unfortunately, the COMA did not discuss the ambit of similar § 1001 cases. Instead, the court’s reasoning was entirely contained within a large quote from *United States v. Meyers*,²⁷⁹ a 1955 federal district court § 1001 case. The *Hagee* court did not appear to focus on the facts at bar nor provide a scintilla of

275. *Id.*

276. *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993).

277. *Id.* at 486; *see also* *United State v. Jackson*, 26 M.J. 377, 379 (C.M.A. 1988).

278. *Hagee*, 37 M.J. at 486.

279. *Id.* at 486-87; *United States v. Myers*, 131 F. Supp. 525, 531-32 (N.D. Cal. 1955) (holding that the use of a U.S. Government Certificate of Release of Motor Vehicle Form 97 by the Deputy Property Disposal Officer at an Army arsenal, to effect the registration of his private vehicle with the state of California, involved a “matter within the jurisdiction of any department or agency of the United States,” and thus a violation of § 1001.) In contrast to *Hagee*, the accused in *Myers* signed the form in his official capacity as the Deputy Property Disposal Officer. The duties of his office included the submission of such forms to the state authorities. The accused in *Myers* simply abused his position of authority within the U.S. government by executing the duties of his office to receive personal gain. *Id.*

In contrast, the accused in *Hagee* did not issue others travel orders for the purpose of submission to state government offices. Travel orders, identification cards, leave and earnings statements, and other military personnel documents are often used by service members for a variety of purposes in dealing with private parties. However, the primary purpose of such government documents is to allow the military member to perform his military duties. The submission of such documents to military authorities or to non-military parties when executing military duties would render such documents “official.” *Hagee*, 37 M.J. at 486-87; *Jackson*, 26 M.J. at 379; *see also* *United States v. Collier*, 48 C.M.R. 789 (C.M.A. 1974). A document submitted to a private party for personal reasons, such as obtaining civilian leases, car loans, or insurance, are not “official.” Such a document does not “pervert an authorized function of a governmental agency acting in furtherance of a military interest.” *United States v. Johnson*, 39 M.J. 1033, 1035 (A.C.M.R. 1994).

factual analysis. Instead, after quoting *Myers*, the court simply held the false duty orders to be “official.”²⁸⁰

At first glance, *Hagee* appears very similar to *Ragins* and *Simms*. On closer examination, one important distinction appears. Although signed without authority, the accused in *Hagee* made a document that purported to be “official” and caused that document to be provided to a private party.²⁸¹ In both *Ragins* and *Simms*, the documents were of a type that military purpose was to provide private parties with information.²⁸² In *Hagee*, the travel orders were not used in accordance with the purpose of military travel orders. The false orders were used by the friends of the accused for a personal reason: to get out of a contractual obligation.²⁸³ Because a civilian lease is not about and does not pertain “to a matter within the jurisdiction of [the armed forces] of the United States,” it appears the COMA erred by finding the false orders “official.”²⁸⁴

The highest military court continued its expansion of “official” documents in *United States v. Smith*.²⁸⁵ In *Smith*, the accused falsely made an employment verification letter, a military leave and earnings statement, and a military identification card.²⁸⁶ He submitted these three documents to a civilian car dealer to obtain a car loan.²⁸⁷ The accused was convicted of three specifications of making false official statements in violation of Article 107. The CAAF correctly cited to *Ragins* for the proposition that statements to private parties can be “official” if made for a government purpose or if the government is accountable for the representations.²⁸⁸ However, the court followed the rationale in *Hagee* and found government-issued forms “official,” regardless of the actual purpose for which the documents were transmitted to a private party. The court failed to adequately explain how a civilian car loan application “pervert[ed] an authorized function of a government agency acting in furtherance of military interest.”²⁸⁹ Instead, CAAF further expanded the scope of Article 107 by

280. *Hagee*, 37 M.J. at 487.

281. *Id.* at 485.

282. *United States v. Ragins*, 11 M.J. 42, 44 (C.M.A. 1981); *United States v. Sim*, 35 M.J. 902, 903 (A.C.M.R. 1992).

283. *Hagee*, 37 M.J. at 485.

284. *United States v. Disher*, 25 C.M.R. 683, 686 (A.B.R. 1958); *Johnson*, 39 M.J. at 1035.

285. *United States v. Smith*, 44 M.J. 369 (1996).

286. *Id.* at 370.

287. *Id.*

288. *Id.* at 372; *United States v. Ragins*, 11 M.J. 42, 44 (C.M.A. 1981).

289. *Johnson*, 39 M.J. at 1035.

stating that one of purposes of the statute was to offer “*broad protection . . . to government and military documents.*”²⁹⁰

Over the last twenty years, the military courts have expanded Article 107’s application. They continue to find a wide variety of false statements, made to private parties and non-military authorities, to be “official” statements. While military courts have been consistent in looking toward § 1001 and its related precedent for help in interpreting Article 107, they have been inconsistent in their application of both federal and military case law. Aside from occasionally substituting language from § 1001, military courts have failed to adequately define officiality as required by Article 107.

VI. Proposed Test for Officiality under Article 107

First, officiality is a question of law to be decided by a court.²⁹¹ It has been almost fifty years since military courts first tried to define the deceptively simple word “official.” Aside from recognizing the President’s explanation that “official” statements and documents are those “statements and documents made in the line of duty,” the military courts supply no consistent guidance or definitions to determine officiality.²⁹² In order to prevent virtually every false statement by a service member from becoming a violation of Article 107, the courts should focus on the circumstances surrounding the statement *at the time the statement is made*.

290. *Smith*, 44 M.J. at 372.

291. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK para. 3-31-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

Whether a statement or document is official is normally a matter of law to be determined as an interlocutory question. However, even though testimony concerning officiality may be uncontroverted, or even stipulated, when such testimony permits conflicting inferences to be drawn, the question should generally be regarded as an issue of fact for the members to resolve.

Id.

292. See *United States v. Lynn*, 50 M.J. 570, 573 (N-M. Ct. Crim. App. 1999) (finding “[t]he fact that the statement [is] not made in the line of duty is *totally irrelevant*” in a case involving Article 107) (emphasis added). Just two years later, that same court would decide *United States v. Tefteau*, holding that “an intentionally deceptive statement made by a service member in the line of duty to a private party or a local official is within the scope of Article 107, UCMJ.” *Tefteau*, 55 M.J. 756 (N-M. Ct. Crim. App. 2001), *rev’d on other grounds*, 58 M.J. 62 (2003).

To do so, a court should ask two questions: (1) To whom is the statement made? and (2) In what capacity was the declarant serving at the time of the statement?²⁹³ The first question is fairly straightforward. If the statement is made to a military authority (a military superior or other service member acting pursuant to his or her duties), then any statement made is likely to be “official.”²⁹⁴ Courts must distinguish, however, official statements from social ones. Statements that are purely social in character can never be “official.”²⁹⁵

While there is a strong inference of officiality for statements made to military supervisors, statements made to non-military authorities and private parties should be presumed to not be “official,” absent a showing that the service member was discharging his duties. The military courts should not expand the scope of Article 107 in order to encompass as many different forms of false statements as possible. Criminal statutes must be narrowly construed.²⁹⁶ For cases involving statements to non-military authorities and private parties, courts should find the declarant service

293. See BENCHBOOK, *supra* note 291 (providing military judges some guidance on defining the nature of an “official” document).

For a document to be regarded as official, it must concern a governmental function and must be made to a person who in receiving it is discharging the functions of his or her particular office, or to an office which in receiving the document or statement is discharging its functions.

Id.

294. See *United States v. Osborne*, 26 C.M.R. 235, 237 (C.M.A. 1958) (Latimer, J., dissenting) (stating “[i]t is quite necessary to a properly functioning military establishment that subordinates be required to furnish certain information to those in authority”).

295. “‘Official’ means that the statements were not made in a conversation of a social character.” SNEDEKER, *supra* note 122, at 728.

296. See LEFAVE, *supra* note 221, at 108 (restating the age-old rule of statutory interpretation: “criminal statutes must be strictly construed in favor of the defendant”). “[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id.

member to be acting in a military capacity in order to declare a statement as “official.”

The second question of the proposed officiality test requires the court to determine in what capacity the declarant was serving at the time the statement was made. An “official” statement is one “made in the line of duty.”²⁹⁷ Under this premise, a statement cannot be “official” unless the declarant was acting in accordance with his rank, position or status as a military service member at the time of the making of the statement. There must be a nexus between the making of the statement and the scope of the declarant’s duties at the time of the statement. The determination of officiality cannot be established merely because the context of the statement concerns or touches upon military matters.²⁹⁸ An “official” statement can only be made while acting in a military capacity or pursuant to military authority.²⁹⁹

For written documents, the second question requires some additional considerations. In examining written false statements, the focus should remain on the capacity of the service member at the time the document is passed or uttered to another. False documents subject to Article 107 scrutiny may take the form of standard military forms, papers with special military insignias or seals, or letters with official military letterhead. The form of the false document, however, does not make the statement official, *per se*. The making of a false official statement to a private party occurs when the statement is made or presented *to* the private party. The actual act of altering a military identification card may, in itself, constitute a violation of the UCMJ.³⁰⁰ The presentation of that falsified identification card to one’s mother, however, does not mean that statement (made at the time the document is presented to mom) is “official.” An official statement is one that is made *while* in the line of duty.³⁰¹

297. MCM, *supra* note 8, pt. IV, ¶ 31c; *Teffeau*, 58 M.J. at 68.

298. *Contra Teffeau*, 58 M.J. at 69.

299. *See* United States v. Johnson, 39 M.J. 1033, 1035 (A.C.M.R. 1994).

300. *See, e.g.*, UCMJ art. 123 (2002) (Forgery). Article 123—Forgery, in pertinent part, reads as follows:

Any person subject to this chapter who, with intent to defraud – (1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice . . . is guilty of forgery and shall be punished as a court-martial may direct.

Id.

Consider the five scenarios presented in the Introduction under this proposed officiality test:

1. In scenario one, a Marine lance corporal falsely told her landlord that her father died in the Pentagon attack in an attempt to nullify her lease.³⁰² Looking at the first question of the proposed officiality test, the statement was made to a civilian landlord. The landlord was acting as a private party and did not receive the statements as a representative or agent of the U.S. military. The second question of the test would require determining the capacity in which the lance corporal was serving at the time of the statement. In this case, the lance corporal was acting in a personal capacity in a landlord-tenant transaction. While the subject of her conversation may have touched upon a military incident or concerned her current situation at her unit, she was not acting pursuant to her duties or any military orders by speaking with her landlord. Thus, the statement cannot be “official.”

2. In the second scenario, an airman told another airman that he had been a high school football star when he was actually only the water boy. In this case, the airman was speaking with another airman in a conversation that appears to be social. As statements that are social in character are not made in the line of duty, the statement of the airman, while false, was not “official.”³⁰³ Therefore, there is no need to look to the second half of the test. However, if that other service member were the airman’s commander, then it would become necessary to determine the capacity of the airman in making the false statement. The duties of a commander and the senior-subordinate relationship would likely make this statement an “official” one. The airman would be providing information to a commander whose responsibility is to know her subordinates, understand their capabilities and weaknesses, and look out for their welfare.

3. In the third scenario, a soldier lied to a civilian police investigator about his involvement in a fight and shooting at an off-

301. See *Johnson*, 39 M.J. at 1035.

302. Gov’t Mot. to Reconsider Ruling on Article 134 Preemption, *United States v. MarksJones* (Camp Pendleton 2002) (an unreported special court-martial that resulted in an acquittal; on file at Legal Service Support Section, 1st Force Service Support Group, Camp Pendleton, California).

303. SNEDEKER, *supra* note 122, at 728.

post location. This scenario comes from the case, *United States v. Johnson*.³⁰⁴ The answer to the proposed officiality test's "to whom" query is obvious: the accused made the false statement to a civilian police officer who was "not a military criminal investigator nor was he acting on behalf of the armed forces."³⁰⁵ Absent some substantial evidence that the accused was acting within the scope of his military duties, such a statement is not an "official" one. Examining the capacity of the accused in this case, it is apparent that he was not acting pursuant to military orders or authority when making the statement. The police officer was questioning a person reportedly involved in a civil incident within civilian police jurisdiction. The accused's capacity was that of a civilian witness/suspect at the time of the statement. The fact that the subject of the statement involved an altercation with a senior non commissioned officer does not determine the statement's officiality. Moreover, the falsity of the statement affected the ability of state law enforcement; the statement did not "pervert an authorized function of a governmental agency acting in furtherance of a military interest." Therefore, the statement is not "official."³⁰⁶

4. In scenario four, a corporal falsely altered his leave and earnings statement (LES) to impress a civilian girl. If one were to strictly follow the court in *United States v. Hagee*,³⁰⁷ one would conclude that this corporal was actually guilty of violating Article 107. According to the *Hagee* court, "[n]othing in the plain language of this statute limits its scope to deceptions in which the United States is the intended or actual direct victim."³⁰⁸ The use of a falsified LES to deceive a private party, albeit a potential girlfriend, would still violate Article 107 because it is the United States who is actually "victimized by the threat to the integrity of its official documents and to the good-faith reliance to which its

304. *Johnson*, 39 M.J. at 1035 (holding that oral statements by a soldier to civilian law enforcement officers, who were conducting a state investigation concerning an off-post altercation and shooting involving another service member, were not *official* under Article 107).

305. *Id.* "As a police investigator for Harker Heights, a governmental body chartered under the laws of the State of Texas, his authority extended to enforcing the laws of that jurisdiction only." *Id.*

306. *Id.* at 1035-36.

307. *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993).

308. *Id.* at 485.

official documents are—and must be—entitled.”³⁰⁹ However, such a result in this scenario would border on the absurd. Applying the two-part officiality test, one reaches a more rational and reasonable conclusion. First, the statement was clearly made to a private party. This statement, *made* at the time the LES was shown to the girl, was one of a social character and cannot be “official.” Although the corporal’s statement took the form of a United States document, he was not acting in a military capacity or within the scope of his duties. He was no more than a hopeful paramour.

5. Scenario five involved a military recruiter who lied to a civilian investigator about a fatal automobile accident involving another recruiter and a recruit. This scenario, of course, came from *United States v. Teffeau*.³¹⁰ In that case, the CAAF found that Staff Sergeant Teffeau’s actions leading prior to the automobile accident provided the necessary connection to the military to declare his subsequent statement to civilian police officers as “official.”³¹¹ Furthermore, the subject of Staff Sergeant Teffeau’s statements inevitably touched upon his duties as a recruiter since he was required to explain why the other recruiter and potential enlistee were together on that fatal day. Largely due to Staff Sergeant Teffeau’s other misconduct and actions prior to the accident, the CAAF found that his later statements to police were made in the line of duty and, therefore, “official.”³¹² As mentioned earlier in the article, the problem with this rationale is the timing of the statement. Officiality of statements to non-military authorities or private parties must be based on circumstances existing at the time of the statement. Officiality cannot be based merely on earlier misconduct that happens to be one topic of discussion during a state police questioning.³¹³

309. *Id.* at 487.

310. *United States v. Teffeau*, 58 M.J. 62 (2003).

311. *Id.* at 69.

312. *Id.* at 63. Staff Sergeant Teffeau was also convicted of conspiring to violate a general order, failing to obey a lawful order, dereliction of duty, making false statements to military officials, and obstructing justice, in violation of Articles 81, 92, and 134, UCMJ. *Id.*

313. Appellant’s Brief, *supra* note 25. “They [Winfield police] interviewed Appellant because he was a witness concerning an accident who incidentally happened to serve in the military.” *Id.*

Applying the officiality test to the facts of this case produces a different result. First, the statements were made to a state policeman, a non-military authority who was not acting on behalf of the military. As a result, there must be some substantial evidence to overcome a presumption that such a statement is not “official.” The second prong requires the determination of SSgt Tefteau’s capacity *at the time* he *made* the statement. There is no question that he committed misconduct under the UCMJ in his dealings, as a military recruiter, with the recruits. *At the time the statement was made*, SSgt Tefteau, however, was not acting as a recruiter. The police were not seeking his expertise as a military recruiter nor asking him to recruit at the time of the statement. He was not questioned because he was a recruiter. As with *Johnson*,³¹⁴ SSgt Tefteau was interviewed as a witness to a state criminal accident investigation.³¹⁵ The making of the statement was not within the scope of his military duties. His statement was not an action based on his position, rank or status as a member of the armed forces. He was a civilian witness. Thus, he did not make the statement while in the line of duty. The statement should not have been considered “official.”

VII. Conclusion

When faced with charges involving Article 107, courts must make greater efforts to determine officiality by identifying the recipient of statements and focusing on the military capacity of the accused declarant. Not all false statements by service members are “official.” Courts must not hesitate to strike down those statements that are legally insufficient to sustain an Article 107 conviction. Even if not found to be a violation of Article 107, there may be other alternatives available to punish such falsehoods.³¹⁶ In short, Congress did not pass Article 107 to protect state or local governments from false statements made to any civilian authority; it did so to protect the military from intentionally deceptive statements and documents.

The history of falsehood offenses and the enactment of the UCMJ and Article 107 show that Congress did not contemplate punishing a wide variety of false statements to private parties. The courts, however, now face many situations where service members are criminally charged with lying to persons other than military authorities. For many years, the military

314. *United States v. Johnson*, 39 M.J. 1003 (A.C.M.R. 1994).

315. *Tefteau*, 58 M.J. at 67.

courts turned to the federal falsehood statute, 18 U.S.C. § 1001, for assistance in interpreting officiality and determining the purpose of Article 107. Caution must be taken, however, when applying more than a “general analogy” of § 1001 to Article 107.³¹⁷ While the two statutes are somewhat similar in purpose, there are distinct and important differences between them. The purpose of military justice is unique in its need to maintain order and discipline in the ranks of the armed forces.

A special need exists in the military to maintain the highest standards of honor and integrity.³¹⁸ As a result of this need, the UCMJ “proscribes lying to protect the ethical element called ‘honor,’ which is critical to unit cohesion and combat readiness.”³¹⁹ The aim of the UCMJ is not, however, to proscribe every false statement ever made by service members to private parties. If a false statement is not made while acting in a military capacity, such a statement will likely have no effect on a military unit’s ability to train and fight wars.

316. There are several possible charging options, aside from Article 107, for an accused who utters falsehoods. If the statement is otherwise of a nature that brings discredit upon the armed forces, it can be charged using Article 134. UCMJ art. 134 (2002). *See* United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994) (holding the evidence legally sufficient to support the findings of guilty of the offense of making a false speech, which caused discredit to the armed forces). In *Stone*, the accused wore his Army uniform and spoke to two assemblies at a high school. He falsely told school students and faculty that, while participating in Operation Desert Storm, he parachuted into Baghdad as leader of a Special Forces team, that he had been in Iraq in 1990 before the outbreak of hostilities, and that the students may be in danger because terrorists may retaliate against him. *Id.* at 421.

False statements to civilian federal investigative agencies may also be prosecuted as a Clause 3, Article 134 violation for violating § 1001. UCMJ art. 134; *see Johnson*, 39 M.J. at 1036 n.3. Of course, a United States District Attorney may also prosecute such § 1001 violations in federal court. *See, e.g.,* United States v. Rodgers, 466 U.S. 475, 477 (1984) (permitting the prosecution of Rodgers in a Missouri federal district court by holding that § 1001 “clearly encompasses criminal investigations conducted by the FBI and the Secret Service).

Additionally, false statements to state officials, as in *Teffeau*, may be pursued by states in their own state courts. *See, e.g.,* TEX. PENAL CODE § 37.08 (2002) (False Report to Peace Officer or Law Enforcement Employee); VA. CODE ANN. § 18.2-460 (2003) (Obstructing Justice [by making materially false statement or representation to a law-enforcement officer]).

317. United States v. Hutchins, 18 C.M.R. 46, 50 (C.M.A. 1955).

318. United States v. Harrison, 20 M.J. 710, 712 (A.C.M.R. 1985).

319. *Id.*

TAKING THE NEXT STEP: AN ANALYSIS OF THE EFFECTS THE OTTAWA CONVENTION MAY HAVE ON THE INTEROPERABILITY OF UNITED STATES FORCES WITH THE ARMED FORCES OF AUSTRALIA, GREAT BRITAIN, AND CANADA

MAJOR CHRISTOPHER W. JACOBS¹

*The International Campaign to Ban Landmines (ICBL) continues to believe the legality of State Party participation in joint operations with an armed force that uses antipersonnel mines is an open question, and that participation in such operations is contrary to the spirit of the treaty. The ICBL has called on States Parties to insist that non-signatories not use antipersonnel mines in joint operations, and to refuse to take part in joint operations involving use of antipersonnel mines.*²

I. Introduction

The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction [hereinafter Ottawa Convention]³ opened for signature on 3 December 1997, and entered into force on 1 March 1999.⁴ As of 1 February 2004, one month shy of the Ottawa Convention's five-year anniversary, 141

1. Judge Advocate, U.S. Army. Professor, Administrative and Civil Law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. LL.M. 2004, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D. 1994, Marquette University School of Law; B.A., 1991, Marquette University. Previous assignments include Chief, Administrative Law, Combined Arms Center, Fort Leavenworth, Kansas, 2001-2003; Trial Counsel, First Infantry Division, Wuerzburg, Germany, 2000-2001; Deputy Legal Advisor, Task Force Falcon, Kosovo, Yugoslavia, 1999-2000; Chief, Claims, First Infantry Division, Wuerzburg, Germany, 1999; Legal Assistance Attorney, First Infantry Division, Kitzingen, Germany, 1998-1999; Trial Defense Counsel, Eighth United States Army, Yongsan, Republic of Korea, 1997-1998; Trial Defense Counsel, Second Infantry Division, Camp Red Cloud, Republic of Korea, 1996-1997; Soldiers' Legal Counsel, Walter Reed Army Medical Center, Washington, D.C., 1995-1996. Member of the bars of Wisconsin, the Eastern District of Wisconsin, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 52d Judge Advocate Officer Graduate Course.

2. International Campaign to Ban Landmines, *Landmine Monitor Report 2001: Toward a Mine-Free World* (Aug. 2001), available at <http://www.icbl.org/lm/2001/> [hereinafter *ICL Landmine Report 2001*].

states are parties and an additional nine have signed but have yet to ratify the convention.⁵

Each State Party to the Ottawa Convention “undertakes never under any circumstances: to use anti-personnel mines; to develop, produce, or otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”⁶ Furthermore, “each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of th[e] Convention.”⁷ In short, the Ottawa Convention bans States Parties⁸ from using anti-personnel landmines (APL).

Major powers, including the United States, Russia and China, have not signed the Ottawa Convention. A few countries, however, in regions of tension—the Middle East and South Asia—opted to participate.⁹ In explaining why the United States was unable to ratify the Ottawa Convention, President Clinton declared, “As Commander-in-Chief, I will not send our soldiers to defend the freedom of our people and the freedom of others without doing everything we can to make them as secure as possible.”¹⁰ In negotiations preceding the signing of the Ottawa Convention, the United States sought inclusion of two specific measures for the benefit of U.S. forces: an adequate transition period for U.S. forces to phase out the use of APL in favor of to-be-devised alternative technologies and a modification of the definition of “anti-handling device” to encompass the U.S. arsenal of anti-tank (AT) mines.¹¹ The United States refused to sign the Ottawa

3. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Ottawa Convention].

4. Arms Control Association, *The Ottawa Convention at a Glance* (April 2004) at <http://www.armscontrol.org/factsheets/ottawa.asp>.

5. *Id.*

6. Ottawa Convention, *supra* note 3, art. 1.

7. *Id.*

8. The Ottawa Convention refers to the parties as “States Parties” or “State Party.” *See generally id.*

9. Arms Control Association, <http://www.armscontrol.org/factsheets/ottawa.asp>, *supra* note 4.

10. *See* Press Conference, The White House Office of the Press Secretary, Remarks by the President on Landmines (Sept. 17, 1997), available at <http://www.fas.org/asmp/resources/govern/withdrawal91797.html> [hereinafter Press Conference].

11. *Id.*

Convention when neither of these measures was included in the final draft.¹²

Despite the U.S.'s decision, many of its allies either ratified or acceded to the Ottawa Convention. For example, within the only security alliance that links the United States and Canada with their European Allies—the North Atlantic Treaty Organisation¹³—the United States is the only member not to ratify or accede to the Ottawa Convention.¹⁴ This article outlines procedures for analyzing issues that may arise during joint operations with armed forces of nations that have signed, ratified, or acceded to the Ottawa Convention. In addition, this article offers three case studies as examples. The three countries studied are Australia, the United Kingdom, and Canada.¹⁵ While these nations all ratified the Ottawa Convention, they do not implement it in the same manner, deepening interoperability issues. Utilizing the procedures detailed in this article,

12. *Id.*

Now, we were not able to gain sufficient support for these two requests. The final treaty failed to include a transition period during which we could safely phase out our antipersonnel land mines including in Korea. And the treaty would have banned the antitank mines our troops rely on from the outskirts of Seoul to the desert border of Iraq and Kuwait—and this, in spite of the fact that other nations' antitank systems are explicitly permitted under the treaty.

Id.

13. See North Atlantic Treaty Organisation, *Welcome to NATO*, at <http://www.nato.int/> (providing background information on NATO). Various NATO members focus on the effect the Ottawa Convention will have on their ability to participate in NATO operations, rather than focusing on the ability to operate with U.S. forces. This article is not limited to joint operations in a NATO context, however, the Ottawa Convention may also affect reciprocal security commitments established between the United States and its NATO allies.

14. On 25 September 2003, Turkey acceded to the Ottawa Convention, becoming the last member of the North Atlantic Treaty Alliance (NATO), aside from the United States, to submit to the landmine ban. See Lieutenant Colonel Barfield, *Antipersonnel Land Mines Law and Policy*, ARMY LAW., Dec. 1998, at 25 n.133; see also Vahit Bora, *Turkey and Greece Ban Landmines*, SOUTHEAST EUROPEAN TIMES, Oct. 23, 2003, available at <http://www.balkantimes.com/html2/english/031023-VAHIT-001.htm>.

15. Canada ratified the Ottawa Convention on 3 December 1997, the same day the convention opened for signature. The United Kingdom ratified the convention on 31 July 1998. Australia ratified the convention on 14 January 1999. ICBL, *Ratification Updates*, at <http://www.icbl.org/ratification> (last visited Mar. 15, 2004) (listing countries that have signed, ratified or acceded to the Ottawa Convention).

military personnel can better analyze and plan for interoperability effects resulting from differing interpretations of the Ottawa Convention.

II. Background

A. Current U.S. Anti-Personnel Landmine Policy

Landmines have had a devastating effect on individuals and communities around the world.¹⁶ As a result, the international community has taken steps to reduce the damage caused by landmines. In 1999, Captain (CPT) Andrew C.S. Efaw, Judge Advocate, U.S. Army, authored an article entitled *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*.¹⁷ In that article, CPT Efaw provides an excellent overview of the lingering problems created by APL use,¹⁸ the tactical and strategic need for APL by the U.S. military,¹⁹ and efforts by the international community to restrict landmine use through international legislation.²⁰

Captain Efaw discusses “three attempts . . . to control the landmine crisis through international agreement.”²¹ The three attempts are: the

16. See generally United Nations Mine Action, Advocacy and Conventions, *Statement of United Nations Secretary General Kofi Annan*, (Apr. 1999), at http://www.mineaction.org/misc/dynamic_overview.cfm?did=317.

From my experience in peacekeeping, I have seen first-hand the literally crippling effects of landmines and unexploded ordnance on people and communities alike. Not only do these abominable weapons lie buried in silence and in their millions, waiting to kill or maim innocent women and children; but the presence – or even the fear of the presence – of a single landmine can prevent the cultivation of an entire field, rob a whole village of its livelihood, place yet another obstacle on a country’s road to reconstruction and development.

Id.

17. Captain Andrew C.S. Efaw, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87 (1999).

18. “[T]he problem of landmines claiming unintended victims remains serious and tragic, ‘a pandemic of global proportions.’” *Id.* at 94 (citing Office of Humanitarian Demining Programs, Bureau of Political-Military Affairs, U.S. Dep’t of State, *Hidden Killers: The Global Landmine Crisis* ch.1 (1998)).

19. *Id.*

20. *Id.* at 106.

Landmines Protocol (or Protocol II)²² of the 1980 United Nations Convention on the Prohibitions and Restrictions on the Use of Certain Conventional Weapons (UNCCW);²³ Amended Protocol II;²⁴ and the Ottawa Convention.²⁵

Captain Efaw concludes that “Amended Protocol II provides the most practical solution to the landmines crisis . . . [because it] strikes a balance between meeting military needs and protecting civilians, recognizing that correct employment of anti-personnel landmines, rather than a wholesale ban, strikes that balance.”²⁶ The U.S. position recognizes the military necessity of APL. As a result, the U.S. strategy for reducing the harmful effects of landmines focuses on the responsible use of APL.²⁷ The Ottawa Convention, on the other hand, is representative of a larger movement to declare the use of APL unlawful *per se*. While this is a lofty ideal, dispute remains as to whether this is the best method to remedy the APL problem, especially with nations (both States Parties and non-States Parties) that have little regard for the problems caused by the indiscriminate use of APL. Rather than disputing CPT Efaw’s conclusions, this article focuses on the real world fallout caused by the divergence in international opinion

21. *Id.* at 107; *see also* Barfield, *supra* note 14.

22. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529 [hereinafter Protocol II].

23. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.S. TREATY DOC. NO. 103-25, 1324 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter UNCCW].

24. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art.2, U.S. TREATY DOC. NO. 105-1, 35 I.L.M. 1206 [hereinafter Amended Protocol II].

25. Ottawa Convention, *supra* note 3.

26. Efaw, *supra* note 17, at 147.

27. COMM. ON ALTERNATIVE TECH. TO REPLACE ANTIPERSONNEL LANDMINES ET AL., ALTERNATIVE TECHNOLOGIES TO REPLACE ANTIPERSONNEL LANDMINES 15 (Nat’l Academy Press 2001) [hereinafter ALTERNATIVE TECHNOLOGIES].

Although the use of landmines by U.S. forces did not create the current humanitarian crisis, the U.S. government has taken strong actions toward mitigating the effects of indiscriminate use of APL around the world. These actions include a ban on exports, assistance with clearance of mines (also called demining), assistance to victims, and a search for alternatives to APL.

Id.

on the effect the Ottawa Convention will have on the ability of States Parties to engage in joint military operations with U.S. forces.

While the United States has not signed or acceded to the Ottawa Convention, the United States is a party to other international treaties that regulate the use of landmines. The United States ratified Protocol II of the UNCCW on 24 March 1995²⁸ and Amended Protocol II of the UNCCW on 20 May 1999.²⁹ In addition to the obligations created by ratification of these treaties, U.S. forces are also constrained in their use of APL by national legislation, diplomatic statements, and Presidential Decision Directives (PDD).³⁰ President Bush announced a new U.S. policy on landmines on 27 February 2004.³¹ Pursuant to this new policy:

The United States has committed to eliminate persistent landmines of all types from its arsenal.

The United States will continue to develop non-persistent anti-personnel and anti-tank landmines. As with the current United States inventory of non-persistent landmines, these mines will continue to meet or exceed international standards for self-destruction and self-deactivation. This ensures that, after they are no longer needed for the battlefield, these landmines will detonate or turn themselves off, eliminating the threat to civilians.

The United States will continue to research and develop enhancements to the current technology of self-destructing/self-deactivating landmines to develop and preserve military capabilities that address our transformational goals.

28. U.S. Dep't of State, *A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2003*, at <http://www.state.gov/s/1/24224.htm> (last visited Sept. 14, 2004).

29. *Id.*

30. See U.S. ARMY EUROPE (USAREUR), REG. 525-50, ARMS CONTROL COMPLIANCE para. 18.b (11 Mar. 2003) [hereinafter AE REG. 525-50].

31. See Bradley Graham, *Bush Plans to Ban Only Some Land Mines*, WASH. POST, Feb. 27, 2004, at A1; see also U.S. Dep't of State Office of Political-Military Affairs, *New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers*, (27 Feb. 2004), at <http://www.state.gov/t/pm/rls/fs/30044.htm> [hereinafter New United States Policy on Landmines].

The United States will seek a worldwide ban on the sale or export of all persistent landmines to prevent the spread of technology that kills and maims civilians.

Within one year, the United States will no longer have any non-detectable mine of any type in its arsenal.

Today, persistent anti-personnel landmines are *only* stockpiled for use by the United States in fulfillment of our treaty obligations to the Republic of Korea. Between now and the end of 2010, persistent anti-vehicle mines can only be employed outside the Republic of Korea when authorized by the President. After 2010, the United States will not employ either of these types of landmines.

Within two years, the United States will begin the destruction of those persistent landmines that are not needed for the protection of Korea.

Funding for the State Department's portion of the U.S. Humanitarian Mine Action Program will be increased by an additional 50 percent over FY03 baseline levels to \$70 million a year, significantly more than any other single country.³²

The new policy reverses the previous policy of President Clinton that the United States might sign the Ottawa Convention by 2006 "[i]f viable alternatives to APLs and mixed antitank mine systems are developed and fielded."³³ Several remnants from the previous policy, however, remain, including the following:

While the United States values and pursues humanitarian goals, it will take the necessary precautions to ensure U.S. military personnel and the civilians whom they are defending are adequately protected. [And,] U.S. policy does not prohibit . . . the training and use of the M18 Claymore mine in the command detonated mode.³⁴

32. New United States Policy on Landmines, *supra* note 31.

33. *See* AE REG. 525-50, *supra* note 30, para. 18.b.

34. *Id.*

The current U.S. policy on landmines does not comply with the Ottawa Convention. First, in contravention of the Ottawa Convention's ban on the use of APL, U.S. forces currently use APL in the demilitarized zone in Korea, and may continue to do so indefinitely.³⁵ Second, U.S. forces may use self-destructing APL and self-destructing AT mines, individually (pure) or in mixed systems, in current and future military operations around the world. Third, the only landmines in the current U.S. arsenal that are not prohibited by the Ottawa Convention are both the Claymore mines when used in the command-detonated mode and also any of the AT mines when used without anti-handling devices.³⁶ Lastly, in contravention of the Ottawa Convention's prohibition on the stockpiling of APL, "[t]he Pentagon maintains a stockpile of about 18 million land mines . . . The U.S. arsenal of 10.4 million antipersonnel mines is third in size, after those held by China and Russia."³⁷ In at least one notable respect, however, the current U.S. policy exceeds the provisions of the Ottawa Convention in that it prohibits U.S. forces from using non-persistent anti-vehicle mines as well as non-persistent anti-personnel mines.³⁸

B Joint Operations

United States forces' authorization to employ APL under certain conditions raises questions about whether U.S. forces can engage in multinational operations with its allies that are States Parties to the Ottawa Convention, and how such operations will be structured. In the context of this article, joint operations refers to combined or multinational operations involving the United States and another nation. Because nations interpret international law through their own national perspective, coalition partners may have different positions with respect to many operational legal issues.³⁹ The Ottawa Convention is no exception—each State Party has its own interpretation of its obligations under the treaty.

35. Presidential Policy Directive No. 64, *Humanitarian Demining* (May 1998).

36. ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 5.

37. Graham, *supra* note 31.

38. "President Bush has charted a new course by addressing the entire threat to innocent civilians from the lingering nature of persistent landmines--both anti-personnel and anti-vehicle." New United States Policy on Landmines, *supra* note 31.

39. Brigadier General Jerry S.T. Pitzul, Judge Advocate General, Canadian Defense Force, *Operational Law and the Legal Professional: A Canadian Perspective*, 51 A.F. L. REV. 311, 317 (2001).

The issue of joint operations involving States Parties and non-States Parties has not escaped the attention, and the ire, of non-governmental organizations (NGOs).⁴⁰ Several NGOs united in 1992 to form the International Campaign to Ban Landmines (ICBL).⁴¹ Each year the ICBL issues the Landmine Monitor Report on the status of the Ottawa Convention and matters related to its implementation by States Parties. In the report, the ICBL tracks the compliance of States Parties with the ICBL's interpretation of the "spirit" of the Ottawa Convention.⁴² Based on the

40. Major General Jarvis D. Lynch, Jr., *Landmines, Lies, and Other Phenomena*, PROCEEDINGS, May 1998.

Non-governmental organizations (NGOs) are legion in terms of both numbers and purposes. Many perform services ranking on par with Doctors Without Borders, an organization recognized with admiration by General Schroeder for its work in Rwanda and elsewhere. But all is not perfect. Some of these organizations...have an anti-U.S. bias; some have people who are anti-American activists; and some have agendas inimical to U.S. interests.

Nobel Peace Prize winner Jody Williams [co-founder of the International Campaign to Ban Landmines] had ties to El Salvador's communist guerillas and has made no secret of her part in an anti-U.S., pro-communist agitation operation. During a Cable News Network "Crossfire" program of 10 October 1997, when asked about American forces risking their lives, Williams responded that, "A soldier is only one part of larger society." The inference is that the American fighting man may be less important than others.

Id.

41.

The ICBL, formally launched in 1992 by a handful of nongovernmental organizations (NGOs), is presently made up of over 1,400 organizations in 90 countries worldwide. With its launch, the ICBL called for a ban on the use, production, trade and stockpiling of antipersonnel mines (APMs), and for increased resources for mine clearance and for victim assistance. An unprecedented coalition, the Campaign has brought together human rights, humanitarian mine action, children's, peace, disability, veterans, medical, development, arms control, religious, environmental and women's groups who work locally, nationally, regionally and internationally to achieve its goals.

ICBL, *Landmine Monitor Report 1999: Toward a Mine-Free World* (May 1999), available at <http://www.icbl.org/lm/1999/icbl>.

42. In June 1998, the International Campaign to Ban Landmines established "Landmine Monitor," a unique and unprecedented societal based reporting network to systematically monitor and document nations' compliance with the 1997 Mine Ban Treaty and the humanitarian response to the global landmine crisis. Landmine Monitor complements the existing state-based reporting and compliance mechanisms established by the Mine Ban Treaty. See ICBL, *Landmine Monitor*, at <http://www.icbl.org/lm/> (last visited Mar. 16, 2004).

divergence of interpretations of various provisions of the Ottawa Convention, there does not appear to be any common understanding among the States Parties. Arguments that invoke the “spirit” of the Ottawa Convention merely serve to highlight differing interpretations.

In light of these differing interpretations, this article outlines a procedure for analyzing the effect the Ottawa Convention will have on States Parties’ ability to engage in joint operations with U.S. forces. The procedure divides the concept of “joint operations” into eleven factors. These factors are: Authority to Engage in Joint Operations; Command and Control; Rules of Engagement (ROE); Operational Plans; Operations on Previously Mined Terrain; Obligation to Clear Minefields; Training; Transit; Stockpiling; Employment and Use of Anti-vehicle Mines with Anti-handling Devices; and Employment and Use of Claymore Mines.⁴³

1. Authorization to Engage in Joint Operations with a Non-State Party

The threshold issue is whether military forces of the respective States Parties can engage in joint operations with U.S. forces (a non-State Party). While each of the eleven factors concerns “joint operations,” this first factor is used to analyze national legislation and interpretation of the Ottawa Convention so as to either permit or prohibit States Parties from engaging in joint operations with non-States Parties. The expression of permission or prohibition is evident in specific national declarations or, in their absence, in the manner in which States Parties interpret the Ottawa Convention’s definition of “assist.”

According to the plain language of Article 1, “Each State Party undertakes never under any circumstances to use anti-personnel mines...[or] to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Unfortunately, the term “assist” is not defined within the treaty itself.⁴⁴ Faced with conflicting interpretations, the ICBL advised States Parties to reach a common under-

43. This analysis is modeled after the structure of the Canadian Army Training and Doctrine Bulletin on APL, with three additional sub-factors. Canadian Directorate of Army Training, *The Banning of the Anti-Personnel Mine*, ARMY DOCTRINE & TRAINING BULL., Feb. 1999, at 8 [hereinafter ADTB].

44. Article 2 of the Ottawa Convention contains the definitions section. Only five terms were explicitly defined in the Ottawa Convention: anti-personnel mine, mine, anti-handling device, transfer, and mined area. Ottawa Convention, *supra* note 3, art. 2.

standing. The ICBL noted the following in the Landmine Monitor Report 1999:

A number of countries, including Australia, Canada, New Zealand, and the United Kingdom, have adopted legislative provisions or made formal statements with regard to possible participation of their armed forces in joint military operations with a treaty non-signatory that may use antipersonnel mines. As has been noted by Australia and the UK, the likely non-signatory is the United States. The ICBL is concerned that these provisions and statements, while understandably intended to provide legal protection for soldiers who have not directly violated the treaty, are contrary to the spirit of a treaty aimed at no possession of antipersonnel mines, in that they contemplate a situation in which treaty States Parties fight alongside an ally that continues to use antipersonnel mines...

In each of these cases, government officials have stated that the intent is to provide legal protections to their military personnel who participate in joint operations with a non-signatory who may utilize APMs [anti-personnel mines]. The ICBL does not cast doubt on the stated motivations of these nations; it does not believe that these provisions and statements are intended to undermine the core obligations of the treaty.

However, there is serious concern about the consistency of these provisions and statements with the treaty's Article 1 obligation[s]...The ICBL is concerned that these provisions and statements go against the spirit of a treaty aimed at an end to all possession and use of antipersonnel mines. Adoption of this type of language could be interpreted to imply acceptance of, rather than a challenge to, the continued use of APMs by the United States or other non-signatories. The ICBL calls on treaty signatories to insist that any non-signatories do not use antipersonnel mines in joint operations.⁴⁵

Over time, the ICBL has hardened its position on the ability of States Parties to engage in joint operations. The Landmine Monitor Report 2000 added that States Parties should "refuse to take part in joint operations that

45. *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at Introduction.

involve the use of antipersonnel mines.”⁴⁶ In the Landmine Monitor Report 2001, the ICBL stated that “As parties to the treaty, they [States Parties] should state categorically that they will not participate in joint operations with any force that uses antipersonnel mines.”⁴⁷ In the face of increasing joint operations involving the United States and States Parties, however, the ICBL muted its tone somewhat in the Landmine Monitor Report 2002.⁴⁸

Absent an unambiguous declaration by a State Party that it may engage in joint operations with non-States Parties, the analysis focuses on the State Party’s interpretation of “assist” in Article 1 of the Ottawa Convention. States Parties that narrowly interpret this term have better standing to engage in joint operations with U.S. forces. For example, a State Party that narrowly interprets “assist” to only encompass active or direct assistance in the laying of mines has more leeway to engage in joint military operations with a non-State Party than a State Party that interprets “assist” to also include indirect assistance.⁴⁹

46. ICBL, *Landmine Monitor Report 2000: Toward a Mine-Free World* (Aug. 2000), available at <http://www.icbl.org/lm/2000/>.

47. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

48. ICBL, *Landmine Monitor Report 2002: Toward a Mine-Free World* (Aug. 2002), available at <http://www.icbl.org/lm/2002/>.

The ICBL continues to believe that the legality of State Party participation in joint operations with an armed force that uses antipersonnel mines is an open question, and that participation in such operations is contrary to the spirit of the treaty. The ICBL calls on States Parties to insist that any non-signatories do not use antipersonnel mines in joint operations, and to refuse to take part in joint operations that involve use of antipersonnel mines. All States Parties should make clear the nature of their support for other armed forces that may be using antipersonnel mines, and make clear their views with regard to the legality under the Mine Ban Treaty of their military operations with these armed forces.

Id. at Introduction: Banning Antipersonnel Mines.

2. *Command and Control*

The second factor is the effect the Ottawa Convention may have on command and control during joint operations. The issues are manifold: Can U.S. commanders assume command of armed forces of States Parties? Can U.S. commanders authorize armed forces of States Parties to use munitions prohibited by the Ottawa Convention? Can non-U.S. commanders authorize U.S. forces under their command to use munitions prohibited by the Ottawa Convention? As with the first analytical sub-factor, these issues arise from varying interpretations of Article 1. The more narrowly a State Party interprets the prohibitions of Article 1, the less likely the State Party will have problems with command and control by or of U.S. forces. For example, if an officer of a State Party serves in a coalition chain of command involving U.S. forces, that he or she may not be able to authorize U.S. forces to employ APL if doing so constitutes “assistance” as interpreted by that officer’s nation.

3. *Rules of Engagement*

Closely related to the issue of command and control is the third analytical factor, the effect the Ottawa Convention may have on the ROE during joint operations. Because each State Party undertakes never to use APL and never to assist anyone to engage in prohibited activity, States Parties may find that they cannot operate under coalition ROE that specifically authorize the use of APL. This may be true even though the ROE do not mandate the use of any particular weapons system, but merely grant such authority to subordinate commanders.

In preparing for military operations, military planners must be careful to incorporate the differing legal constraints placed upon coalition part-

49. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

[T]he question has been raised as to what “assist” means in the treaty’s Article 1. A number of governments have interpreted this to mean “active” or “direct” assistance in actual laying of mines, and not to other types of assistance in joint operations, such as provision of fuel or security. This narrow interpretation of assistance is of concern to the ICBL; in keeping with the spirit of a treaty aimed at total eradication of the weapon, interpretation of assistance should be as broad as possible.

ners. For example, the ROE Annex to the initial Task Force Falcon operation order in Kosovo stated:

Participation in multinational operations may be complicated by the respective treaty obligations of its participants, i.e., other members in a coalition may be bound by treaties not binding the U.S., and vice versa. U.S. forces will operate in conformity with the treaties binding upon them, and will not be bound by treaties which the U.S. is not a party to.⁵⁰

The operation order of the U.S.-led European Command (EUCOM), clarified this point one level higher than the Commander of the Kosovo Force (KFOR) (COMKFOR) :

The conduct of military operations is controlled by the provisions of international and national law. Within this framework, the North Atlantic Treaty Organization (NATO) sets out the parameters within which the Kosovo Force (KFOR) can operate. ROE are the means by which NATO provides direction to commanders at all levels governing the use of force. Nothing in these ROE requires any persons to perform actions against national laws to which they are subject. National forces may issue amplifying instructions, or translations of the Aide-Memoire or Soldiers Cards to ensure compliance with their national law. Any such amplifying instructions must be developed in consultation with the Joint Force Commander (JFC) or Commander KFOR (COMKFOR) and not be more permissive than the authorized KFOR ROE.⁵¹

By declaring that “nothing in [the] ROE requires any persons to perform actions against national laws to which they are subject,”⁵² the ROE remained flexible enough for coalition partners to engage in joint operations with the United States. This holds true even when the commander of the joint force is not from the United States.⁵³ Thus, the use of ROE that

50. OPERATION JOINT GUARDIAN, TASK FORCE FALCON OPORD 99-01, ANNEX E, RULES OF ENGAGEMENT para. 5a(2) (1999).

51. UNITED STATES COMMANDER IN CHIEF, EUROPE, OPLAN 4250-99 Annex C, Appendix 6 para. 3a(1) [hereinafter USCINCEUR OPLAN 4250-99] (1999).

52. *Id.*

53. At the time USCINCEUR OPLAN 4250-99 went into effect, the Commander of KFOR was LTG Sir Michael Jackson, British Armed Forces.

neither authorize nor prohibit the use of APL may enable States Parties to engage in joint operations with U.S. forces under a common set of ROE.

4. Operational Plans

The fourth factor is the effect the Ottawa Convention may have on a State Party's ability to participate in the planning of joint operations involving U.S. forces. United States forces are authorized to use APL in certain limited circumstances.⁵⁴ States Parties that assist in preparing operational plans that account for U.S. forces' ability to use APL could be viewed as violating Article 1's prohibition on "assisting" another party in activity that violates the Ottawa Convention. As with several of the other factors, this factor is less problematic in joint operations with U.S. forces if States Parties narrowly interpret Article 1 to only prohibit "assistance" in relation to the actual emplacement of APL.

5. Operations on Previously Mined Terrain

The fifth factor is the effect the Ottawa Convention may have on a State Party's ability to operate on previously mined terrain. In other words, what use, if any, may States Parties make of existing minefields? Article 1 clearly prohibits the use of APL.⁵⁵ As previously discussed, however, States Parties have the latitude to interpret the terms "use" and "assist" very narrowly and solely in relation to the emplacement of mines.⁵⁶ Arguably, under a narrow interpretation, after the mines have been emplaced, the Ottawa Convention does not prohibit a States Party from using the minefield (offensively or defensively) as it would use any natural terrain obsta-

54. See U.S. Dep't of State, *Bloomfield Details Landmine Policy Changes*, Feb. 27, 2004, at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=February&x=20040227183138adynned0.9025537&t=livefeeds/wf-latest.html> (providing outline the Administration's new U.S. policy on landmines). As one of the policies stated goals, ensuring that the military has the defensive capabilities it needs to protect U.S. and friendly forces on the battlefield, the President pledges that after 2010 the U.S. will use neither long-lasting or "persistent" anti-personnel nor persistent anti-vehicle landmines and that any use of persistent anti-vehicle landmines outside Korea between now and the end of 2010 will require Presidential authorization. *Id.*

55. Ottawa Convention, *supra* note 3, art. 1.

56. See *supra* notes 44 and 51; see discussion *infra* pp. 58-61.

cle. Under a broad interpretation of the term “use,” however, the opposite result would occur.

Article 1, paragraph a, of the Ottawa Treaty specifically bans the “use” of anti-personnel landmines. The United States had defined the word “use” as meaning emplacement, that is the physical placement of an anti-personnel landmine on the ground. Other countries that have signed the Ottawa Treaty differ in their interpretation of the word “use.” Specifically, comments made by Canada during the Treaty negotiations in Oslo, suggested that if the signatory receives a tactical benefit from a landmine then that would violate Article 1 regardless of who placed the mines. Under this view, U.S. coalition partners who are Parties to the Ottawa Treaty would have to clear any U.S. mines that may exist on ground that they control.⁵⁷

6. *Obligation to Clear Minefields*

The sixth factor is whether or not States Parties have an obligation to clear minefields that they encounter within their Area of Responsibility (AOR). This factor is closely related to the previous factor because instead of taking offensive or defensive advantage of an existing minefield, the Ottawa Convention arguably creates an obligation upon the State Party to clear the minefield. Article 5 states that “[e]ach State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.”⁵⁸ As with other key provisions, the phrase “under its jurisdiction or control” is open to interpretation. The nature of the military operation, however, may render such an obligation impossible to perform during the military conflict. During the recent Operation Iraqi Freedom, for example, the movement by coalition forces northward towards Baghdad was undertaken so quickly that coalition forces likely did not have time to stop and clear existing minefields not impeding the forces’ movements.

57. Christian M. Capece, *The Ottawa Treaty and Its Implication on U.S. Military Policy and Planning*, 25 BROOKLYN J. INT’L L. 183, 200 (1999).

58. Ottawa Convention, *supra* note 3, art. 5.

7. Training

The seventh factor is the effect the Ottawa Convention may have on States Parties' ability to engage in training with U.S. forces involving the use of APL. This factor can be further subdivided into two areas. The first area is States Parties' ability to engage in training with U.S. forces on how to react when encountering a minefield presumably laid by the opposing forces. According to Article 3, "Notwithstanding the general obligations under Article 1, the retention or transfer of a number of APL for the development of and training in mine detection, mine clearance or mine destruction techniques is permitted."⁵⁹ Necessarily encompassed in this provision is the ability to conduct training, including training with a non-State Party, for the purpose of mine detection and clearance.⁶⁰

The second area is States Parties' ability to engage in training with U.S. forces on the manner in which U.S. forces (or any non-State Party coalition partner) may employ APL during joint operations.⁶¹ The ability to engage in such training is subject to differing views. This type of training could be viewed as "assisting" a non-State Party in the use of a prohibited item contrary to Article 1. It could also be viewed as necessary training, although not directly specified in Article 3, so that non-States Parties can engage in joint operations without running afoul of their treaty obligations.⁶² For example, such training could be used by States Parties to determine the exact nature of support they can and cannot provide outside the stress of actual combat. Military planners need to account for issues raised in such training before the start of real world operations.

59. *Id.* art. 3.

60. *Id.*

61. Capece, *supra* note 57, at 198-99.

In addition to the actual use of these weapons [landmines], their removal will deny military commanders the ability to train with essential weapons systems during combined and multilateral military exercises. Being denied this ability is all the more crucial since America's likely adversaries--Russia, China, Iraq, Iran, North Korea, India--have not signed the Ottawa Treaty and therefore [sic] their military commanders will continue to utilize the landmine in their war planning.

Id.

62. *See* Ottawa Convention, *supra* note 3, art. 3.

8. *Transit*

The eighth factor is the effect the Ottawa Convention may have on States Parties' ability to permit non-States Parties to transit APL across their territory. According to Article 1b, "Each State Party undertakes never under any circumstances to develop, produce, otherwise acquire, stock-pile, retain or transfer to anyone, directly or indirectly, anti-personnel mines."⁶³ The term "transfer" is one of only five terms Article 2 defines.⁶⁴ According to Article 2, "'Transfer' involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines."⁶⁵

According to the Landmine Monitor Report 2001:

The United States has also discussed with a number of treaty States Parties the permissibility of the US transiting mines through their territory. A debate has emerged over whether the treaty's prohibition on "transfer" of antipersonnel mines also applies to "transit," with some States Parties maintaining that it does not. This would mean that US (or other nations) aircraft, ships, or vehicles carrying antipersonnel mines could pass through (and presumably depart from, refuel in, restock in) a State Party on their way to a conflict in which those mines would be used. The ICBL believes that if a State Party willfully permits transit of antipersonnel mines which are destined for use in combat, that government is certainly violating the spirit of the Mine Ban Treaty, is likely violating the Article 1 ban on assistance to an act prohibited by the treaty, and possibly violating the Article 1 prohibition on transfer.⁶⁶

As an example of the divergence of opinion between States Parties, "France, Denmark, Slovakia, South Africa, and Spain have indicated tran-

63. *Id.* art 1.

64. *Id.* art. 2.

65. *Id.*

66. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

sit is prohibited . . . [whereas] Canada, Norway, Germany, and Japan indicate that this is permitted.”⁶⁷

9. Stockpiling

Closely related to the issue of transit is the issue of stockpiling of APL. In conjunction with the prohibition on stockpiling of APL in Article 1b is the requirement to destroy stockpiled APL—Article 4.⁶⁸ According to Article 4, “Except as provided in Article 3,⁶⁹ each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control.”⁷⁰ What is not clear from the text of the Ottawa Convention, however, is whether a State Party is prohibited from permitting a non-State Party to stockpile its APL within the territory of the State Party. Unfortunately, the Ottawa Convention does not define “jurisdiction and control.”

According to the Landmine Monitor Report 2001: “The ICBL believes that it would violate the spirit of the treaty for States Parties to permit any government or entity to stockpile antipersonnel mines on their territory, and would violate the letter of the treaty if those stocks are under the jurisdiction or control of the State Party.”⁷¹ The underlying issue that remains open to interpretation is whether the stockpiled APL is under the jurisdiction and control of the State Party. As with other provisions of the Ottawa Convention, there is a split of opinion among States Parties.

The United States has antipersonnel landmines stored in at least five nations that are States Parties to the Mine Ban Treaty [Ottawa Convention]: Germany, Japan, Norway, Qatar, and United Kingdom at Diego Garcia . . . Germany, Japan, and the United Kingdom do not consider the US mine stockpiles to be under their jurisdiction or control, and thus not subject to the provisions of the Mine Ban Treaty or their national implementation measures. Norway, through a bilateral agreement with the US,

67. *Id.*

68. Ottawa Convention, *supra* note 3, art. 4.

69. Article 3 permits States Parties to retain and transfer “the minimum number [of anti-personnel landmines] absolutely necessary . . . for the development of and training in mine detection, mine clearance, or mine destruction techniques.” *Id.* art. 3.

70. *Id.* art. 4.

71. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

has stipulated the mines must be removed by 1 March 2003, which is the deadline for Norway to comply with its Mine Ban Treaty Article 4 obligation for destruction of antipersonnel mines under its jurisdiction and control.⁷²

By claiming that it does not maintain jurisdiction or control over a given area, a State Party may permit U.S. forces to stockpile APL within the State Party's borders.⁷³ For example:

Regarding stockpiling or transit of AP mines by a State not Party on its territory, Germany said there are specific prohibitions against this. It stated further that the Convention is not applicable to foreign military forces in Germany due to the fact that, under a 1954 agreement, US forces based in Germany are not under German jurisdiction or control.⁷⁴

10. Anti-Vehicle Mines with Anti-Handling Devices

The tenth factor is the effect the Ottawa Convention's definition of anti-vehicle mines (AVM) with anti-handling devices (AHD) has on the ability of U.S. forces to use its current inventory of AVM in joint operations involving State Parties. According to Article 2:

"Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.⁷⁵

72. *Id.*

73. The ICBL noted with disapproval that "Germany, Japan, and the United Kingdom did not even mention the existence of US antipersonnel mine stocks in their Article 7 reports." *Id.*

74. Geneva Int'l Centre for Humanitarian Demining, *Intersessional Work Programme 2001-2002: Standing Comm. on the General Status and Operation of the [Ottawa] Convention Meeting Report*, at http://www.gichd.ch/pdf/mbc/SC_may02/SCGS_Meeting_Report_27_31_May_02a.pdf (last visited Mar. 18, 2004) [hereinafter GICHD].

75. Ottawa Convention, *supra* note 3, art. 2.

The Ottawa Convention defines “anti-handling device” as “a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.”⁷⁶

According to the U.S. Army doctrinal manual on landmines, Field Manual 20-32, *Mine/Countermine Operations*:

Antihandling devices perform the function of a mine fuse if someone attempts to tamper with the mine. They are intended to prevent someone from moving or removing the individual mine, not to prevent reduction of the minefield by enemy dismounts. An antihandling device usually consists of an explosive charge that is connected to, placed next to, or manufactured in the mine. The device can be attached to the mine body and activated by a wire that is attached to a firing mechanism. U.S. forces can use antihandling devices only on conventional AT [anti-tank] mines.⁷⁷

During the drafting of the Ottawa Convention, the ICBL raised concerns that AVM with AHD pose the same threat to civilians as APL.⁷⁸ The draft definition was eventually changed.

To address this concern, which was shared by many government delegations, negotiators changed the draft definition of AHD (which had been identical to the one in CCW Protocol II) by adding the words “or other wise intentionally disturb” . . . It was emphasized by Norway, which proposed the language, and others, that the word “intentionally” was needed to establish that if

76. *Id.*

77. U.S. DEP'T OF ARMY, FIELD MANUAL 20-32, MINE/COUNTERMINE OPERATIONS ch. 1 (29 May 1998).

78. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

During the Oslo treaty negotiations in 1997, the ICBL identified as “the major weakness in the treaty” the sentence in the Article 2 Paragraph 1 definition of antipersonnel mine that exempts antivehicle mines (AVMs) equipped with antihandling devices (AHDs)...The ICBL expressed its belief that many [AVMs] with [AHDs] could function as [APLs] and pose similar dangers to civilians.

Id.

an AVM with an AHD explodes from an unintentional act of a person, it is to be considered an antipersonnel mine, and banned under the treaty. This language was eventually accepted by all delegations without dissent.⁷⁹

Despite the ICBL's assertion that the language was accepted without dissent, varied interpretations remain as to what it actually means. There are two issues involving the differing interpretations of AVM with AHD. The first is whether the definition of AVM within the Ottawa Convention is controlling or whether AVM should be regulated by Amended Protocol II. The second stems from the following language: "[m]ines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person."⁸⁰ Some States Parties interpret the definition of AVM to focus on the "intent" of the mine.⁸¹ Other States Parties focus on the "effect" or "function"⁸² of the mine.⁸³ The International Campaign to Ban Landmines recognizes that there are differing interpretations of AVM.

The ICBL has expressed concern that there has not been adequate recognition by States Parties that AVMs with AHDs that function like antipersonnel mines are in fact prohibited by the Mine Ban Treaty, nor discussion of the practical implications of this. The ICBL has repeatedly called on States Parties to be more explicit about what types of AVMs and AHDs, and what deployment methods, are permissible and prohibited. The ICRC, Human Rights Watch, Landmine Action (UK), and the German

79. *Id.*

80. Ottawa Convention, *supra* note 3, art. 2.

81. *See generally Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

82. The terms "effect" and "function" focus on the fact that the mine could be triggered by the unintentional act of an unsuspecting civilian. *Id.*

83. GICHD, *supra* note 74.

Austria pointed out that there are two different approaches with regard to interpreting Article 2. The approach that focuses on the purpose for which a mine was designed excludes AV mines with sensitive fuses or sensitive AHDs from the scope of the Convention, while the approach that focuses on how the mine functions would include such mines. In Austria's view, both approaches are compatible with a good faith interpretation of Article 2.

Id.

Initiative to Ban Landmines have all produced lists and publications regarding AVMs of concern.⁸⁴

“All three existing AT [anti-tank] mines [in the U.S. arsenal] are usable under the Ottawa Convention, but APL munitions could not be used to protect them.”⁸⁵ The lingering issue is whether States Parties will interpret the Ottawa Convention’s definition of anti-personnel mine to permit or prohibit the current arsenal of U.S. AT mines with AHD.

II. Claymore Mines⁸⁶

The eleventh, and final, factor is the effect of the Ottawa Convention on the use of Claymore mines in joint operations.

A “Claymore mine” is a generic term for a round or rectangular directional fragmentation munition that can function either in a command-detonated or victim-activated mode. They are mostly mounted above ground level and are designed to have antipersonnel effects. However, some of the larger variants of this type can be used to damage light vehicles. When operated in the command-detonated mode, they do not meet the definition of an anti-personnel mine in the Mine Ban Treaty. However, use of Claymore-type mines with a tripwire as an initiating device is prohibited. States Parties have not adopted a common practice regarding reporting of stockpiles of Claymore-Type mines and what measures they have taken to ensure that the mines are not configured to function in a victim-activated mode.⁸⁷

United States forces have Claymore mines at their disposal. The 1980 United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons (UNCCW) limits the use of certain weapons that may cause unnecessary suffering or have indiscriminate effects.⁸⁸

84. *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 46. The ICBL is concerned about the lack of reporting of prohibited AVMs with AHDs within the jurisdiction of States Parties. “Since some AVMs with AHDs are prohibited because they function like AP mines, there should be Article 7 reporting on any stockpiling or destruction of such mines.” *Id.* at Introduction: Banning Antipersonnel Mines.

85. ALTERNATIVE TECHNOLOGIES, *supra* note 27.

86. Commonly referred to as “Claymores.”

87. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

Protocol II⁸⁹ of the convention covers land mines (including APL) and amended Protocol II regulates the use of these mines by U.S. forces.⁹⁰ Under Amended Protocol II,

[A]ll non-remotely delivered APL [must] be self-destructing or self-neutralizing unless they are employed within controlled, marked, and monitored minefields that are protected by fencing or other means to keep out civilians. These areas must also be cleared before they are abandoned. These restrictions, however, do not apply to claymore weapons if they are: (1) employed in a non-command detonated (tripwire) mode for a maximum period of seventy-two hours, (2) located in the immediate proximity of the military unit that emplaced them, and (3) the area is monitored by military personnel to ensure civilians stay out of the area. If a claymore weapon is employed in a tripwire mode that does not comply with these restrictions, it will be regarded as an APL and must meet the restrictions for an APL.⁹¹

Only the Claymore APL, which is activated by a man-in-the-loop, can be used under the terms of the Ottawa Convention.⁹² United States forces' use of non-command detonated Claymores in accordance with Amended

88. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.S. TREATY DOC. NO., 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523

89. Protocol On Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529.

90. The United States is a party to the UNCCW and ratified amended Protocol II to the convention.

91. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO., 105-1, at 37, 35 I.L.M. 1206; *see also* Barfield, *supra* note 14, at 24.

92. ALTERNATIVE TECHNOLOGIES, *supra* note 27. The ICBL is concerned about the lack of reporting of Claymores.

Claymore mines are legal under the Mine Ban Treaty as long as they are command detonated, and not victim-actuated (used with a tripwire). States Parties that retain Claymores must use them in command-detonated mode only. . . . States Parties should take the technical steps and modifications necessary to ensure command detonation only, and should report on those measures.

Landmine Monitor Report 2001: Toward a Mine-Free World, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

Protocol II during joint operations, however, may conflict with the obligations of a coalition partner that is a State Party to the Ottawa Convention.

C. Attempts to Gain Consensus

In addition to its annual exhortations in the Landmine Monitor Reports, members of the ICBL took an additional step to gain consensus of States Parties at the fourth meeting of the Intersessional Standing Committee on the General Status and Operation of the Mine Ban Treaty. At this meeting, Human Rights Watch,⁹³ seeking a better understanding of what is and is not prohibited by the Ottawa Convention, developed a detailed series of questions concerning joint operations involving States Parties and non-States Parties.⁹⁴

The efforts of the ICBL, however, to establish such a consensus (and to reinforce the ICBL's interpretation of what is prohibited by the Ottawa Convention) have not succeeded. The ICBL's call for "treaty signatories to insist that any non-signatories do not use antipersonnel mines in joint operations"⁹⁵ has gone unheeded. After four years of imploring States Parties to "sort out the different understandings about what acts are permitted and which are prohibited,"⁹⁶ the ICBL made the following observations:

Events since entry into force concretely demonstrated the necessity of reaching a common understanding. Since 1 March 1999,⁹⁷ States Parties have participated in joint combat operations with the forces of non-States Parties or armed non-state actors wherein antipersonnel mines were reportedly used by the non-State Party or non-State actor; States Parties have placed

93. *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41 (noting that Human Rights Watch was one of the founders of the ICBL).

94. See GICHD, *Joint Operations and the Mine Ban Treaty - Memorandum for Delegates to the Fourth Meeting of the Intersessional Standing Committee on the General Status and Operation of the Mine Ban Treaty*, app. A (May 11, 2001), at http://www.gichd.ch/pdf/mbc/SC_may01/speeches_gs/08_Art1_Joint%20Operations%20Memo%20to%20Delegates%20May%202001.pdf.

95. *Landmine Monitor Report 1999*, *supra* note 41.

96. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

97. March 1, 1999, was the "first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession [was] deposited." Accordingly, it is the day the Ottawa Convention entered into force. Ottawa Convention, *supra* note 3, art. 17.

their forces under the operational command of a non-State Party; States Parties have participated in joint training and peacekeeping operations with non-State Parties; and, non-States Parties have transferred antipersonnel mines stockpiled in a State Party and transited them across the territory of other States Parties for possible use in combat.⁹⁸

Since the Ottawa Convention entered into force, Australia, Great Britain, and Canada have engaged in multinational military operations with U.S. forces. These operations include the Kosovo Force (KFOR); Operation Enduring Freedom (OEF) in Afghanistan, and Operation Iraqi Freedom (OIF). This article will now use the eleven factors previously discussed to analyze the effect of the Ottawa Convention on the relationship between U.S. forces and the forces of Australia, Great Britain, and Canada during joint operations. The analysis will begin with an examination of each nation's respective declarations⁹⁹ to the Ottawa Convention, national implementing legislation,¹⁰⁰ diplomatic policy pronouncements, and implementing guidance.

III. Australia

A. National Ottawa Convention Implementing Guidance

The Australian Foreign Minister, Honorable Alexander Downer, signed the Ottawa Convention on 3 December 1997.¹⁰¹ Pursuant to its obligation under Article 9 of the Ottawa Convention,¹⁰² the Australian Parliament passed national implementation legislation on 10 December 1998. This legislation is known as the Anti-Personnel Mines Convention Act

98. *Landmine Monitor Report 2003: Toward a Mine-Free World* (Aug. 2003), available at <http://www.icbl.org/lm/2003/>.

99. Article 19 of the Ottawa Convention states that “[t]he Articles of this convention shall not be subject to reservations.” Ottawa Convention, *supra* note 3, art. 19. Each signatory, however, was able to issue a Declaration upon ratification of the Ottawa Convention to explain that signatory's understanding of certain provisions of the treaty. Instead of issuing a Declaration upon ratification, Canada issued an Understanding.

100. Pursuant to Article 9 of the Ottawa Convention, “Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.” Ottawa Convention, *supra* note 3, art. 9.

101. See *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at *Australia—Mine Ban Policy*.

1998 (APMCA).¹⁰³ The APMCA was signed into law on 21 December 1998, with a commencement date of 1 July 1999.¹⁰⁴

According to a National Interest Analysis¹⁰⁵ (NIA) prepared after signature but prior to Australia's ratification of the Ottawa Convention,

The decision to sign the Convention last December held some difficulties for the Government. Anti-personnel mines represent a significant tactical capability that has had a well-established place in ADF plans for the conduct of military operations. Finding alternatives will involve a costly research and development effort. As alternative technology does not yet exist and is some years away, the ADF for this period could face an increased risk of casualties, especially if deployed overseas, and a potentially reduced capacity for coalition operations in certain circumstances.¹⁰⁶

102. "Each state party shall take appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control." Ottawa Convention, *supra* note 3, art. 9.

103. Anti-Personnel Mines Convention Act, Act No. 126, 1998 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/amca1998346/ [hereinafter APMCA].

104. See Australasian Legal Information Institute—Commonwealth Consolidated Acts, *Anti-Personnel Mines Convention Act 1998—Notes* (July 29, 2002), available at http://www.austlii.edu.au/au/legis/cth/consol_act/amca1998346/notes.html.

105. All treaty actions proposed by the Government are tabled in Parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international law to the terms of the treaty. When tabled in Parliament, the text of proposed treaty actions are accompanied by a National Interest Analysis (NIA), which explains why the Government considers it appropriate to enter into the treaty. Australasian Legal Information Institute, *Australia and International Treaty Making Kit*, at <http://www.austlii.edu.au/au/other/dfat/infokit.html#Heading638> (last visited Mar. 19, 2004).

106. Parliament of Australia—Parliamentary Library, *Bills Digest No. 61 1998-99 Anti-Personnel Mines Convention Bill 1998*, available at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd061>. (containing the text of the NIA for the APMCA) [hereinafter APMCA NIA].

Upon its ratification of the Ottawa Convention on 14 January 1999,¹⁰⁷ Australia issued the following Declaration to the Ottawa Convention:

It is the understanding of Australia that, in the context of operations, exercises or other military activity authorized by the United Nations or otherwise conducted in accordance with international law, the participation by the ADF, or individual Australian citizens or residents, in such operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention.¹⁰⁸

Australia further declared:

It is the understanding of Australia that, in relation to Article 1(a), the term ‘use’ means the actual physical emplacement of anti-personnel mines laid by another State or person. In Article 1(c) Australia will interpret the word ‘assist’ to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities, ‘encourage’ to mean the actual request for the commission of any activity prohibited by the Convention, and ‘induce’ to mean the active engagement in the offering of threats or incentives to obtain the commission of any activity prohibited by the Convention.

It is the understanding of Australia that in relation to Article 1(1), the definition of “anti-personnel mines” does not include command detonated munitions. In relation to articles 4, 5(1), and (2), and 7(1)(b) and (c), it is the understanding of Australia that the phrase “jurisdiction or control” is intended to mean within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of antipersonnel mines, but does not include the tem-

107. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1999 Austl. T.S. No. 3, *available at* <http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html> [hereinafter Ottawa Convention (Austl.)].

108. *Id.*

porary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.¹⁰⁹

Australia's ability to engage in joint operations with non-signatories was the subject of much discussion during debate of the proposed legislation in the House of Representatives of the Australian Parliament. The main point of contention centered on Section 7(3) of the APMCA. Section 7(1) prohibits placing, possessing, developing, producing, acquiring, stockpiling, moving, or transferring ownership or control of APL.¹¹⁰ As an enumerated exception to Section 7(1), Section 7(3) states:

Subsection (1) does not apply to anything done by way of the mere participation in operations, exercises or other military activities conducted in combination with an armed force that: (a) is an armed force of a country that is not a party to the Convention; and (b) engages in an activity prohibited under the Convention.¹¹¹

This exception also applies "to operations, exercises or other military activities, whether or not conducted under the auspices of the United Nations."¹¹²

During debate in the Australian House of Representatives, Mr. Laurie Ferguson argued that,

[Section]

7(3) . . . is a bit of an out for Australia in regard to its involvement with allies who utilise landmines...In other words, if we are involved with an ally who still has refused to ratify, to sign, et cetera, Australia is then essentially allowed to be an onlooker, a passive participant, et cetera. That indicates moral problems for Australia--these countries failing to basically come on board.¹¹³

109. *Id.*

110. APMCA, *supra* note 103, sec. 7(1).

111. *Id.* sec. 7(3). "However, [a] defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code.)" *Id.*

112. *Id.* sec. 7(4).

113. Laurie Ferguson, Address at the 39th Parliament, First Session, Commonwealth of Australia Parliamentary Debates (Nov. 26, 1998), *available at* <http://www.aph.gov.au/hansard/rep/dailys/dr261198.pdf>.

The Australian Minister of Foreign Affairs, The Honorable Alexander Downer, responded as follows:

The next issue, which a number of members raised, is a very important issue. This is the question of clause 7(3). I want to make a statement about that which should provide guidance in the future for how this clause and subclause should be interpreted. So I should like to clarify for the benefit of the House the intent and purpose of clause 7(3) of the bill in regard to joint military operations and the relevant section of the explanatory memorandum.

Clause 7(3) is not intended to be construed as a blanket decriminalisation of the activities listed in clause 7(1). There may be circumstances in which there are military operations carried out jointly with armed forces of a country which is not a party to the convention. In the course of those operations, the armed forces of that country might engage in an activity which would be prohibited under the convention. Clause 7(3) provides that a person to whom the act applies will not be guilty of an offence merely by reason of participation in such combined exercises. However, that subclause does not provide a defence in circumstances where such a person actually carries out one of the prohibited acts in the course of those combined operations . . .

I would like to add for the information of the House that the Australian Defence Force doctrinal and operation manuals will be amended to comply with the prohibitions contained in the bill, including the interpretation of clause 7(1) and (3), which I have just laid before the House. The mandatory instruction contained in these publications will have the force of law under the Defence Force Discipline Act 1982 as general orders...So it is perfectly obvious that the reason this subclause (3) is inserted is of the need for Australia to have the capacity to operate with a country that might not be a signatory to the convention. Obviously, the best example imaginable is the United States, but that does not mean the Australian Defence Force personnel, in participating with the United States forces, can contravene subclause (1).¹¹⁴

In keeping with Mr. Downer's directive for the Australian Defence Forces (ADF) to update doctrine and operational manuals, Australia's

Article 7 Report¹¹⁵ for the reporting period 1 January 2002 to 31 December 2002, indicated that in addition to the APMCA, Australia promulgated Training Information Bulletin (TIB) Number 86 entitled *Conventions on the Use of Landmines: A Commanders Guide*.¹¹⁶ This bulletin “provides commanders and staff with an interpretation of revised policy on landmines, booby traps and improvised explosive devices and their application to military operations.”¹¹⁷ Because this bulletin carries an Australian classification of restricted, it was not used in the preparation of this article.¹¹⁸ According to the Article 7 Report, the Australian Department of Defense also promulgated Defgram, Number 196/99 entitled *Ottawa Landmines Convention – Defence Implications and Obligations*. Defgram Number 196/99 is an information document, conveying to the defense organization its obligations under the Ottawa Convention.¹¹⁹

B. Analysis of Joint Operations Involving U.S. and Australian Defense Forces

1. Authority to Engage in Joint Operations

As indicated in Australia’s Declaration to the Ottawa Convention and in section 7(3) of their implementing legislation, the ADF are clearly authorized to engage in joint operations with U.S. forces.¹²⁰ What is not

114. The Honorable Alexander Downer, Minister of Foreign Affairs, Address at the 39th Parliament, First Session, Commonwealth of Australia Parliamentary Debates (Nov. 26, 1998), available at <http://www.aph.gov.au/hansard/reps/dailys/dr261198.pdf>. [hereinafter Downer Speech].

115. Article 7 Reports originate from Article 7 of the Ottawa Convention which states that States Parties “shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on [among other things] the national implementation measures referred to in Article 9.” Ottawa Convention, *supra* note 3, art. 7.

116. AUSTRALIAN DEFENCE FORCE, TRAINING INFO. BULL. NO. 86, CONVENTIONS ON THE USE OF LANDMINES: A COMMANDERS GUIDE (Oct. 1999).

117. *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 46, at *Australia—Mine Ban Policy*.

118. For military personnel dealing with interoperability issues between the United States and Australian forces, *TIB 86* is on file with the Center for Law and Military Operations, United States Army Judge Advocate General’s Legal Center and School, Charlottesville, VA.

119. United Nations Institute for Disarmament: Anti-Personnel Landmines, *Article 7 Reports—Australia* (reporting for time period Jan. 1, 2002 to Dec. 31, 2002), available at <http://disarmament2.un.org/MineBan.nsf/>.

120. See APMCA, *supra* note 103, sec. 7(3).

clear, however, are the details of such a cooperative arrangement. In their Declaration to the Ottawa Convention, Australia interpreted the Article 1 terms “use,” “assist,” “encourage,” and “induce” very narrowly.¹²¹ This narrow interpretation focused on “actual and direct physical participation,” “actual request,” and “active engagement” in defining those actions prohibited by the convention.¹²² According to the Declaration, “permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities” is not prohibited.¹²³

2. *Command and Control*

Due to the narrow interpretation of Article 1, the ADF should be able to assume command and control of U.S. forces. Under Australia’s Declaration to the Ottawa Convention and sections 7(1) and (3) of the APMCA, the ADF commander, however, could not order, request, or suggest that subordinate U.S. forces employ landmines—to do so would violate Australia’s obligations under Article 1 of the Ottawa Convention and could serve as the basis for criminal liability under the Commonwealth Criminal Code.¹²⁴

Similarly, Australia’s narrow interpretation of Article 1 should also permit Australian forces to serve under the command and control of a U.S. commander. The U.S. commander could use Australian forces to provide security for U.S. forces in the act of emplacing APL.¹²⁵ The Australian forces themselves, however, could not be directly involved in placing the mines.¹²⁶

The most likely command and control relationship between U.S. and Australian forces, however, is one marked by cooperation rather than subservience. The following policy statement from the Australian Embassy

121. *See* Ottawa Convention (Austl.), *supra* note 107.

122. *Id.*

123. *Id.*

124. *See generally* APMCA, *supra* note 103, sec. 7, 32; Ottawa Convention (Austl.), *supra* note 107.

125. “In Article 1(c) Australia will interpret the word ‘assist’ to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention.” Ottawa Convention (Austl.), *supra* note 107.

126. *Id.*

in Washington D.C. concerns the cooperative effort between U.S. and Australian forces in Iraq:

The Chief of the Defence Force has full command of the ADF at all times, including all Australian Forces deployed to the Middle East Area of Operations. The commander of the Australian Middle East Area of Operations (Brig. Maurie McNairn) exercises national command over ADF forces deployed as part of Operation Falconer in the Middle East. At the unit level, ADF forces remain at all times under the command of their Australian commanding officers...Those members serving with United States forces have received a brief on their obligations under the Ottawa Convention and the Anti-personnel Mines Convention Act."¹²⁷

When asked to explain how Australian troops would remain under Australian command during OIF when "the whole general command is going to be American,"¹²⁸ the Australian Minister of Defence, Senator Robert Hill, explained:

Well the same way really as to how it's worked in the war against terror say in Afghanistan. In this instance the coalition will be lead [sic] by the United States, but our forces are commandeered by Australians right from the Ground through to Canberra. So the United States as leader of the coalition may task the Australian force but the task would have to be accepted by the Australian commander. And if it's outside of our rules of engagement or our targeting directive, then the commander would say no.¹²⁹

3. Rules of Engagement

The ROE in place during a joint operation or a coalition operation involving U.S. and Australian forces must not violate Australian law. During OEF and OIF, this issue was avoided altogether as coalition-wide ROE did not exist. Each coalition partner operated under its own national

127. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *Australia—Mine Ban Policy* (citing Land Mine Use by Non-States Parties in Joint Operations, an undated policy statement).

128. *Interview with Senator the Honorable Robert Hill, Australian Minister for Defence* (ABC Radio's AM Program broadcast, Feb. 23, 2004).

129. *Id.*

ROE.¹³⁰ This is likely to be the model for future coalition operations involving the United States and Australia. In the unlikely event, however, that the United States and Australia operate under a common set of ROE, the best option may be to leave landmines out of the ROE altogether. This would enable the United States to deal with the use of APL as a matter of national self-defense.¹³¹

An Associated Press report issued shortly before OIF indicated that “[w]hen Australia’s Cabinet agreed at an emergency meeting . . . to commit 2,000 military personnel deployed in the Middle East to the U.S.-led war against Iraq, it also signed off on rules governing how Australian forces would wage war.”¹³² The article went on to state the following:

Earlier this week, Defense Minister Robert Hill told Parliament Australia’s rules of engagement were more “restricted” than America’s, meaning that Australian forces had to be “more restrained in our targeting than the United States.” Alfred Boll, a specialist in military law at the Australian National University, said differing rules of engagement could make cooperation in the field more difficult, but it was unlikely to be a major impediment. “It’s less a legal issue than a practical issue, it involves greater coordination and planning than anything else,” he said.¹³³

The Australian Defence Forces will probably operate under their own national ROE when engaging in future operations with U.S. forces, however, this is unlikely to have much of an impact on the overall operation. There may be certain tasks, however, that the ADF cannot undertake

130. E-mail from Paul Cronan, Group Captain (Austl.), Headquarters, Australian Theatre J06, to Catherine Wallis, Squadron Leader (Austl.), Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, U.S. Army (on file at CLAMO) [hereinafter Cronan Email]. Having attended the U.S. Army, Central Command (CENTCOM) ROE Conferences, Australia drafted its ROE to be as consistent as possible with U.S. ROE as to permit the maxim level of interoperability without running afoul of Australian law. *Id.*

131. Coalition partners in joint operations are not limited by the coalition ROE in their ability to resort to national notions of the inherent right of self-defense. Resort to this authority, however, only applies to the ability of non-States Parties’ ability to use APL. The members of the ADF would still be constrained by their national legislation.

132. Peter O’Connor, *Australian Soldiers Under Stricter Rules of War than U.S. Forces*, A.P., Mar. 20, 2003, available at http://www.banminesusa.org/news/983_afghan/964_afghan.html.

133. *Id.*

because of their obligations under the Ottawa Convention. These issues are likely to be resolved or greatly minimized during the planning and staff coordination phase of the operation.

4. Operational Plans

Australia's interpretation of the Ottawa Convention does not prohibit ADF personnel from participating on a planning staff with U.S. forces. While members of the ADF can participate on a joint staff, they are prohibited from drafting operations orders directing any person to commit an act that violates section 7(1) of the APMCA.¹³⁴ During OIF, Australia reiterated its position by stating that members of the ADF "will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations."¹³⁵ The participation of members of the ADF in operational planning involving the use of APL must be distinguished from participation in ROE conferences, as evidenced by Australia's participation in CENTCOM ROE conferences in preparation for OIF.¹³⁶

5. Operations on Previously Mined Terrain

Australian Defence Force personnel can engage in joint operations on previously mined terrain provided ADF are not directly involved in the placement of APL and the joint operation does not occur on Australian soil. Australia's Declaration addressed this issue stating that "operation or control" "does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons."¹³⁷

6. Obligation to Clear Minefields

Based on two provisions within the APMCA, it is unlikely the ADF would feel obligated by the Ottawa Convention to clear minefields from its AOR. The first provision, APMCA's definition of transfer of ownership or control, states that, "in relation to an anti-personnel mine, [it] does not

134. See generally APMCA, *supra* note 103.

135. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *Australia—Joint Operations*.

136. Cronan E-mail, *supra* note 130.

137. Ottawa Convention (Austl.), *supra* note 107.

include the transfer of the ownership or control of land containing emplaced anti-personnel mines.”¹³⁸ This is consistent with Australia’s Declaration to the Ottawa Convention that the phrase “jurisdiction or control...does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.”¹³⁹ Therefore, it is not a violation under section 7 for the ADF to “transfer ownership or control of an anti-personnel mine, whether directly or indirectly, to another person”¹⁴⁰ by relinquishing responsibility for an area contaminated with APL to U.S. forces.¹⁴¹

The second provision is the exception enumerated in the APMCA for failing to deliver up APL. A person is guilty of an offense under section 9(1) of the APMCA if, “the person is knowingly in the possession of an [APL] and the person does not deliver the mine, without delay, to a member of the ADF...for destruction or permanent deactivation.”¹⁴² The exception, however, states that subsection 1 is not applicable if the person is possessing the APL in circumstances that are not prohibited by section 7.¹⁴³ As previously discussed, section 7(3) contains an exception from criminal liability for anything done by way of mere participation in joint operations with a non-State Party.¹⁴⁴ Thus, because it is not an offense for the ADF to relinquish responsibility for land contaminated by APL and it is not an offense for members of the ADF to fail to deliver APL in their possession for immediate destruction, the ADF are unlikely to feel compelled to clear all minefields within its AOR.

7. Training

Australian Defence Forces can engage in training with U.S. forces. The exception in section 7(3), which clears the way for the ADF to engage in joint operations with non-States Parties, uses the following language: “participation in operations, exercises or other military activities.”¹⁴⁵ Because “training” falls under the rubric of “other military activities”¹⁴⁶ it

138. APMCA, *supra* note 103, sec. 4.

139. Ottawa Convention (Austl.), *supra* note 107.

140. APMCA, *supra* note 103, sec. 7(1).

141. *See generally id.*; Ottawa Convention (Austl.), *supra* note 107.

142. APMCA, *supra* note 103, sec. 9(1).

143. *Id.* sec. 9(2).

144. *Id.* sec. 7(3).

145. APMCA, *supra* note 103, sec. 7(3).

146. *Id.*

is, therefore, authorized. The Minister of Foreign Affairs, however, offered the following interpretation: “[subsection 7(3)] does not provide a defence in circumstances where such a person actually carries out one of the prohibited acts in the course of those combined operations.”¹⁴⁷ Hence, members of the ADF are permitted to train with U.S. forces, but cannot engage in activities that under the guise of training they otherwise would not be permitted to do in an operational setting.

8. *Transit and Stockpiling*

Australia is not listed as one of the nations in which the United States maintains stockpiles of APL. Therefore, the issue of stockpiling is moot. Because the United States has stockpiles of APL in Korea, Japan, and Diego Garcia,¹⁴⁸ it is unlikely that the United States will need to stockpile APL on Australian territory or transit APL through Australian territory.

If, however, U.S. forces need to transit APL through Australian territory, the answer depends on whether the “territory” in question lies inside or outside of the borders of Australia. According to Australia’s Declaration to the Ottawa Convention,

[t]he phrase ‘jurisdiction or control’ is intended to mean within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of anti-personnel mines, but does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.¹⁴⁹

The declaration is careful to distinguish between “sovereign territory,” wherein there is no question of Australia’s jurisdiction and control, and “foreign” territory, whereupon the ADF may only have temporary occupation.¹⁵⁰ In light of this distinction, Australia is not likely to permit U.S.

147. Downer Speech, *supra* note 114.

148. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United States of America - Stockpiling*.

149. Ottawa Convention (Austl.), *supra* note 107.

150. *Id.*

forces to transit APL over its sovereign territory, but may permit U.S. forces to transit APL through an Australian AOR in a foreign nation.

9. *Anti-Vehicle Mine with Anti-Handling Device*

The APMCA qualifies the definition of APL:

[A] mine that is designed, intended or altered so as to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, and that is equipped with an anti-handling device, is taken not to be an ‘anti-personnel mine’ as a result of being so equipped.”¹⁵¹

This definition focuses on the intent of the mine and not the effect of the mine. Because the current U.S. arsenal of AT mines with AHD in a pure munition¹⁵² are designed to destroy vehicles, the ADF is less likely to take issue with them. Australian Defence Forces will focus on the intent of the U.S. AT mine, not on the possible effects of the employment of the U.S. mine.

Australia, would, however, take issue with mixed U.S. landmine munitions.¹⁵³ In mixed munitions, the APL does not qualify as an AHD unless it is “part of, linked to, attached to or placed under the mine.”¹⁵⁴ This is not the case in mixed U.S. landmine munitions, therefore the ADF would not be able to use or plan for the use of such munitions.

10. *Claymore Mines*

The Australian Declaration to the Ottawa Convention’s definition of APL does not include command detonated munitions.¹⁵⁵ Accordingly, “[t]he Australian Army continues to use and train with command-deto-

151. APMCA, *supra* note 103, sec. 4.

152. See ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 1. As opposed to a mixed munition, which combine both AT mines and APL in the same munition and are typically used against an enemy force that is mostly mounted, but is accompanied by significant numbers of dismounted soldiers. *Id.*

153. Such munitions include the Ground Emplaced Mine Scattering System (GEMSS), the Modular-Pack Mine System (MOPMS), the Gator, and the Volcano. *Id.* at 3.

154. Ottawa Convention, *supra* note 3, art. 2.

155. Ottawa Convention (Austl.), *supra* note 107.

nated Claymore mines, and, according to the Department of Defence, has restrictions in place on their use in other than command-detonated mode.”¹⁵⁶ As previously stated, U.S. forces, in limited circumstances, are authorized to use Claymore mines in the trip-wire mode. For the ADF, however, the Ottawa Convention prohibits such use.

Australia halted operational use of AP mines on 15 April 1996, though it retains for operational use a stockpile of command-detonated Claymore mines. Use of command-detonated Claymore mines is allowed under the treaty, but not use of Claymores with tripwires. In September 1999, the Australian Defence Force confirmed that it had brought command-detonated Claymore mines to East Timor as part of its peacekeeping mission.¹⁵⁷

Therefore, members of the ADF cannot be directly involved in emplacing Claymores in trip-wire mode. As with other forms of APL, though, the ADF could provide indirect support such as security for U.S. forces that emplace Claymores in the trip-wire mode.

IV. The United Kingdom

A. National Ottawa Convention Implementing Guidance

The United Kingdom (UK) signed the Ottawa Convention on 3 December 1997, and deposited its instruments of ratification with the Secretary-General of the United Nations on 31 July 1998,¹⁵⁸ with the following Declaration:

It is the understanding of the Government of the United Kingdom that the mere participation in the planning or execution of operations, exercises or other military activity by the United Kingdom’s Armed Forces, or individual United Kingdom nationals, conducted in combination with armed forces of States

156. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *Australia—Mine Ban Policy*.

157. *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 46, at *Australia—Use*.

158. United Nations Institute for Disarmament, *Status of Multilateral Arms Regulations and Disarmament Agreements—Mine-Ban Convention—United Kingdom of Great Britain and Northern Ireland*, at <http://157.150.197.56/TreatyStatus.nsf> (last visited Mar. 20, 2004) [hereinafter *Status of Mine-Ban Convention—Great Britain*].

not party to the [said Convention], which engage in activity prohibited under that Convention, is not, by itself, assistance, encouragement or inducement for the purposes of Article 1, paragraph (c) of the Convention.¹⁵⁹

Pursuant to its obligation under Article 9 of the Ottawa Convention, the UK enacted the Landmines Act 1998 on 28 July 1998,¹⁶⁰ to become effective on the date the Ottawa Convention went into full force and effect.¹⁶¹ In 2001, the UK enacted secondary legislation under the Landmines Act extending its provisions to British Overseas Territories.¹⁶² Among the most controversial provisions of the British Landmines Act is Section 5, which provides the following:

A person is not guilty of a [violation of this Act] in respect of any conduct of his which (a) takes place in the course of, or for the purposes of, a military operation . . . or the planning of such an operation; and (b) is not, and does not relate to, the laying of anti-personnel mines in contravention of the Ottawa Convention.

In proceedings for [an offense under the Act] in respect of any conduct it is a defence for the accused to prove that: the conduct was in the course of, or for the purposes of, a military operation or the planning of a military operation; the conduct was not the laying of an anti-personnel mine; at the time of the conduct he believed, on reasonable grounds, that the operation was or would be an operation to which this section applies; and he did not suspect, and had no grounds for suspecting, that the conduct related to the laying of anti-personnel mines in contravention of the Ottawa Convention.

This [defense] applies to a military operation if: it takes place wholly or mainly outside the United Kingdom; it involves the participation both of members of Her Majesty's armed forces

159. Declaration of the United Kingdom of Great Britain and Northern Ireland 391(1998) [hereinafter Declaration of the United Kingdom of Great Britain and Northern Ireland].

160. Landmines Act, 1998 (Eng), available at http://www.bailii.org/uk/legis/num_act/la1998103.txt [hereinafter the British Landmines Act].

161. The Ottawa Convention went into full force and effect on 1 March 1999.

162. *Landmine Monitor Report 2002: Toward a Mine-Free World*, supra note 48, at United Kingdom—Stockpiling and Destruction.

and of members of the armed forces of a State other than the United Kingdom; and the operation is one in the course of which there is or may be some deployment of anti-personnel mines by members of the armed forces of one or more States that are not parties to the Ottawa Convention, but in the course of which such mines are not to be laid in contravention of that Convention. . . .

For the purposes of this section the laying of anti-personnel mines is to be taken to be in contravention of the Ottawa Convention in any circumstances other than those where the mines are laid by members of the armed forces of a State that is not a party to that Convention.¹⁶³

In July 1998, the House of Commons library drafted a research paper on the proposed Landmines Bill.¹⁶⁴ This research paper offered the following interpretation of Section 5:¹⁶⁵

Clause 5 allows exemptions from prosecution under Clause 2 for British troops involved in joint operations with non-States Parties. The operation must take place “wholly or mainly outside the United Kingdom” and must be one in which APMs [anti-personnel mines] have been or may be deployed by non-States Parties, but in which APMs are not to be laid in contravention of the Convention (ie by a State Party).

British personnel would not in these circumstances be allowed to lay APMs, under Clause 5 (2)(b) and 5 (5). However, other conduct which would otherwise be an offence is allowed if it “takes place in the course of, or for the purposes of, [such] a military operation...or the planning of such an operation.”

The Clause is designed to remove any potential legal difficulty arising from the cooperation of British forces with those of other countries, which are not parties to the Convention and still include APMs in their arsenals. Within NATO, this includes Turkey and the USA. British forces might, for example, escort

163. British Landmines Act, *supra* note 160, sec. 5.

164. PAUL BOWERS ET AL., HOUSE OF COMMONS LIBRARY RESEARCH PAPER 98/74, THE LANDMINES BILL (1998). “Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff.” *Id.* at i.

165. The term “section” is also referred to as “clause” in the research paper.

US military convoys containing APMs or build bridges over which such convoys are driven.¹⁶⁶

Since the passage of the British Landmines Act, further interpretation of the act and the Ottawa Convention by British ministry officials has expanded the UK's initial narrow interpretation of the Ottawa Convention. For example, at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative issued the following statement:

The United Kingdom has a broad interpretation of assistance under the terms of Article 1 of the Convention. Unacceptable activities include: planning with others for the use of anti-personnel mines (APM); training others for the use APM [sic]; agreeing [sic] Rules of Engagement permitting the use of APM; agreeing [sic] operational plans permitting the use of APM in combined operations; requests to non-States Parties to use APM; and providing security or transport for APM. Furthermore, it is not acceptable for UK forces to accept orders that amount to assistance in the use of APM.

UK forces should not seek to derive direct military benefits from the deployment of APM in combined operations. It is not, however, always possible to say in advance that military benefit will not arise where this results from an act that is not deliberate or pre-planned.¹⁶⁷

The Landmine Monitor Report 2003 was cautiously optimistic about the apparent shift in the UK's position, stating that,

The Ministry of Defence also reported to Parliament on 24 February 2003 that, "United Kingdom Forces will not provide any assistance for the use of antipersonnel landmines." However, it earlier stated that "the mere participation in the planning or execution of operations, exercises or other military activity by the UK's Armed Forces, or individual UK nationals, conducted in combination with armed forces of States not party to the Ottawa

166. *Id.* at 30.

167. GICHD, *Ottawa Convention Standing Comm. on the General Status and Operation of the Convention - United Kingdom Intervention on Art. 1* (May 16, 2003), at http://www.gichd.ch/pdf/mbc/SC_may03/speeches_gs/UK%20Art%201.pdf [hereinafter *General Status and Operation of the Convention—United Kingdom*].

Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement.” Landmine Action and other campaigning organizations continue to argue against this definition of assistance, and believe that Section 5 of the Landmines Act 1998 could serve as a loophole in the prohibition against use.¹⁶⁸

It is not clear whether the apparent shift in the UK’s position is an actual policy change or a diplomatic maneuver. The research paper commissioned by Parliament prior to the passage of the British Landmines Act, provides:

Critics have argued that Clause 5 “amounts to an exemption or reservation from the Ottawa Convention which allows no reservations (Article 19).” It is open to question whether other States Parties would view the matter in these terms, and whether Clause 5 would be seen as either inconsistent with the UK’s obligations under the Convention or, more generally, inconsistent with the spirit of the Convention.

If it is intended merely to facilitate co-operation by allowing British personnel to “turn a blind eye” to American policy on APMs, then this might not be seen as contradicting the obligation on the British Government to discourage the use of APMs and to promote accession to the Convention. This might be the case in particular if, at the diplomatic level, the UK actively supported the Convention and urged the USA to become party to it. If it led to greater involvement, then problems might arise. Other States Parties might take up the procedures for verification of compliance and settlement of disputes as set out in Articles 8, 10 and 11 of the Convention. A definitive opinion might then be sought from the International Court of Justice. If this were to go against the UK, then the Government would have the choice of amending domestic legislation or withdrawing from or seeking to amend the Convention.¹⁶⁹

While the actual position of the British Government may shift with the political climate, the British Landmines Act clearly takes a very narrow

168. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom - Mine Ban Policy*

169. BOWERS ET AL., *supra* note 164, at 31 (citations omitted).

interpretation of the key language within the Ottawa Convention. This bodes well for the prospect of joint operations involving British and U.S. forces.

B. Analysis of Joint Operations Involving U.S. and British Forces

1. Authority to Engage in Joint Operations

As evidenced by the close cooperation between U.S. and British forces in Kosovo, Afghanistan, and Iraq, British forces are clearly authorized to engage in joint operations with U.S. forces. The United Kingdom left no doubt of its intention to engage in joint operations with the United States in its declaration to the Ottawa Convention and its subsequent implementing legislation.¹⁷⁰ One major difference between the British interpretation and the Australian interpretation, however, is that the British consider providing security for APL to be a violation of the Ottawa Convention.¹⁷¹ It is not clear, however, if this only applies to security for the APL or if it also applies to providing security for U.S. forces emplacing APL.

2. Command and Control

The Ottawa Convention does not prohibit U.S. forces from falling under the command of British forces or *vice versa*, as evidenced by Operation Joint Guardian.

The nineteen member nations of NATO, along with twenty other troop contributing nations (TCNs), combined to conduct Operation Joint Guardian, the NATO peacekeeping mission in Kosovo. . . . The NATO-led Operation Joint Guardian fell under the political direction and control of the North Atlantic Council (NAC). Military control of KFOR [Kosovo Forces] included a command structure that began with NATO's Supreme Allied Commander, Europe (SACEUR), General Wesley Clark, who was dual-hatted as U.S. Commander-in-Chief, European Command (CINCEU-

170. See generally British Landmines Act, *supra* note 160; Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 159.

171. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom—Mine Ban Policy* (explaining that providing security or transport for APM is an unacceptable activity).

COM). SACEUR designated NATO's Allied Rapid Reaction Corps (ARRC) Commander, Lieutenant General Sir Michael Jackson, from the United Kingdom, as the first Commander, Kosovo Forces (COMKFOR). KFOR consisted of five Multi-National Brigades with troops from all nineteen NATO member nations as well as twenty other troop contributing nations...[to include] the U.S.-led "Task Force Falcon."¹⁷²

Thus, a U.S. four-star general commanded a British three-star general who commanded a U.S. one-star general.

This does not mean, however, that such command relationships are without reservation. British forces, for example, are prohibited by the Ottawa Convention from requesting non-States Parties to use APM and from accepting orders that amount to assistance in the use of APM.¹⁷³ In the above example, the British three-star general would not be able to approve a request from the U.S. one-star general to employ APL. Such a request would have to be forwarded up the chain-of-command to the U.S. four-star general for decision. Alternatively, the U.S. one-star commander could unilaterally make such a decision relying upon the inherent right of self-defense under U.S. law.

3. Rules of Engagement

The Operation Joint Guardian example emphasizes the need to develop ROE that take into consideration the different legal constraints placed upon TCNs. According to a British representative's statement at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the United Kingdom cannot agree to ROE that permit the use of APL.¹⁷⁴ Coalition ROE can be developed using language similar to that used in the Kosovo ROE. For example, "Nothing in these ROE requires any persons to perform actions against national laws to which they are subject. National forces may issue amplifying instructions, or translations of the Aide-Memoire or Soldiers Cards to ensure

172. CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES—LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001, 84-7 (11 Dec. 2001).

173. See British Landmines Act, *supra* note 160, sec. 2.

174. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

compliance with their national law.”¹⁷⁵ The best option may be to leave landmines out of the ROE altogether.

4. *Operational Plans*

According to a statement rendered by the British representative at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the UK cannot agree to operational plans that permit APL use in combined operations.¹⁷⁶ As pointed out by the ICBL, this must be viewed in conjunction with the UK’s Declaration to the Ottawa Convention that, “the mere planning or execution of operations, exercises or other military activity by the UK’s Armed Forces...conducted in combination with armed forces of States not Party to the Ottawa Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement.”¹⁷⁷

This language gives the UK latitude to engage in planning joint operations, provided those plans do not direct British forces to commit an act prohibited by the Ottawa Convention.

5. *Operations on Previously Mined Terrain*

According to a statement rendered by the British representative at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, “UK forces should not seek to derive direct military benefits from the deployment of APM in combined operations. It is not, however, always possible to say in advance that military benefit will not arise where this results from an act that is not deliberate or pre-planned.”¹⁷⁸ When read in light of British forces’ ability to engage in planning for joint operations, the statement indicates that British forces may be

175. USCINCEUR OPLAN 4250-99, *supra* note 51.

176. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

177. Status of Mine-Ban Convention—Great Britain, *supra* note 158; see *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom—Mine Ban Policy*.

178. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

able to take advantage of existing minefields if British forces were not involved in planning for or emplacing the minefield at issue.

6. *Obligation to Clear Minefields*

In light of the narrow interpretation given certain provisions of the Ottawa Convention by the British Landmines Act,¹⁷⁹ it is unlikely that the UK would feel obligated to clear a minefield created by U.S. forces before relinquishing control of the minefield.

7. *Training*

Britain's Declaration to the Ottawa Convention clearly states that, "the mere planning or execution of operations, exercises or other military activity by the UK's Armed Forces...conducted in combination with armed forces of States not Party to the Ottawa Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement."¹⁸⁰ This implies that mere participation in training exercises is not prohibited. British forces, however, cannot train others for the use of APL.¹⁸¹

8. *Transit and Stockpiling*

In a letter dated 19 November 2003,¹⁸² the Chair, Bar Human Rights Committee, Peter Carter, referenced a previous letter which stated,

[I]t is clear that the stockpiling of US antipersonnel mines on UK territory, including Diego Garcia, or the transit of antipersonnel mines across UK territory would constitute a breach of our obli-

179. See British Landmines Act, *supra* note 160.

180. Status of Mine-Ban Convention—Great Britain, *supra* note 158.

181. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

182. Letter from Peter Carter, Chair, Bar Human Rights Committee, to Honorable Jack Straw, Secretary of State for Foreign and Commonwealth Affairs (Nov. 19, 2003) available at <http://www.barhumanrights.org.uk/pdfs/Jack%20Straw%20DG.pdf> (quoting Letter from Honorable Adam Ingram, Minister of State for the Armed Forces, to Diana Princess of Wales Memorial Fund and the ICBL (Feb. 25, 2003)) [hereinafter Letter to Secretary of State for Foreign and Commonwealth Affairs].

gations under the Ottawa Convention. . . . The United States...has assured us that it will respect our international treaty obligations. Any landmines that may be on US naval ships or military aircraft are not under the jurisdiction or control of the UK. However, if antipersonnel mines were off-loaded on to land, e.g. to be transferred from ship to aircraft, this would not be consistent with our Ottawa Convention obligations.¹⁸³

The letter earlier insinuated that the British government did not consider the U.S. ships at Diego Garcia to be under the “jurisdiction or control” of the British government because the ships were moored just beyond the three mile territorial limit.¹⁸⁴ At the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative stated,

In the view of the UK, permitting transit across UK territory would amount to assistance under the terms of Article 1. Certain assessments of the UK’s position on this matter have, however, been inaccurate. If APM are on foreign naval ships in the territorial waters of a UK Dependent Territory, these naval ships remain the sovereign territory of the state in question. In the UK’s legal interpretation such APM are not on UK territory provided they remain on the ships.¹⁸⁵

Thus, even though the U.S. ship may be located in the territorial waters of the UK, the ship and its contents will not be considered to be under the UK’s jurisdiction and control. Therefore, the UK would not violate its obligations under the Ottawa Convention in permitting the U.S. to transmit APL through the UK’s territorial waters. As evidenced by the letter from Peter Carter to the British Secretary of State for Foreign and Commonwealth Affairs,¹⁸⁶ members of the British legal community have closely monitored this issue.

183. *Id.*

184. *Id.*

185. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

186. *See* Letter to Secretary of State for Foreign and Commonwealth Affairs, *supra* note 182.

9. *Anti-Vehicle Mines with Anti-Handling Devices*

According to a research paper commissioned by British Parliament prior to passage of the British Landmines Act,

Clause 1 includes a list of definitions used in the Bill, reproducing the definitions contained in Article 2 of the Ottawa Convention. Article 2 and Clause 1 makes an important distinction between landmines “designed to be detonated by the presence, proximity or contact of an individual,” ie APMs (which are prohibited by Article 1 of the Convention), and landmines “designed to be detonated by the presence, proximity of [sic] contact of a vehicle” ie Anti-Tank Mines (which are not). ATMs are also not prohibited if they are fitted with anti-handling devices which are intended to prevent them from being intentionally neutralized or tampered with.¹⁸⁷

At the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative further stated,

On the definition of anti-personnel mines in the Convention, the UK does not accept that certain so-called sensitive fuses for anti-vehicle or anti-tank mines are banned by the Convention. We have indicated that we are prepared to address any humanitarian issues that might arise from such fuses in the CCW or other appropriate fora. To take forward such discussions in a positive way the requirement is for evidence on the nature of humanitarian concerns, which has generally not been forthcoming.

To return to so-called legal arguments on the definition of anti-personnel mines is a retrograde step (sic). Differences on detailed interpretation of treaties is a normal situation. We have worked closely on our legal interpretation of the definition, as we did at the Oslo conference, and are confident in our interpretation. If we are to move forward on fuses, we need to look at the substantive humanitarian issues and not get bogged down in a fruitless search for an elusive consensus.¹⁸⁸

187. BOWERS ET AL., *supra* note 164, at 29.

188. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

The UK has taken a strong position that the Ottawa Convention does not apply to AT mines with AHD, even though such mines may be fitted with fuses that can be triggered by the unintentional acts of people, thereby rendering the AT mine equivalent to an APL.¹⁸⁹ This represents a narrow interpretation of the restrictions applicable to AT mines. This interpretation also focuses on the “intent” of the mine and not the “effect” of the mine. Accordingly, the UK is not likely to have a problem engaging in joint operations with U.S. forces wherein the U.S. forces employ the U.S. arsenal of pure AT mines. As is the case with Australia, however, the UK’s Ottawa Convention obligations will prevent it from using or planning for the use of mixed AT munitions.

10. Claymore Mines

A directional weapon, including the Claymore mine, is not prohibited under the British Landmines Act if it is detonated by deliberate human command.¹⁹⁰ Thus, British forces can engage in joint operations with U.S. forces and command-detonated Claymores may be employed by either force. British forces, however, cannot take part in the limited use by U.S. forces of Claymores triggered by trip-wires because the mine is not detonated by deliberate human command.¹⁹¹

Overall, the UK’s implementing legislation represents the narrowest interpretation of the prohibitions of the Ottawa Convention. In light of the conflicting guidance put forth by the British Government, however, the UK’s position on landmines appears highly susceptible to political influences. Thus, what may appear to be a permissive policy with regard to joint operations between UK and U.S. forces is, in fact, subject to political uncertainty.

189. See *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom - Mine Ban Policy*.

190. BOWERS ET AL., *supra* note 164, at 29.

191. *Id.* See generally *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at *United Kingdom—Mine-Ban Policy*.

V. Canada

A. National Ottawa Convention Implementing Guidance

Canada became the first state to ratify the Ottawa convention by signing and depositing its ratification documents with the United Nations on 3 December 1997.¹⁹² The decision to sign and ratify the Ottawa Convention faced considerable opposition from the leadership within the Canadian military.

Canadian military leaders tried in vain to battle then-foreign affairs minister Lloyd Axworthy's initiative to have Canada destroy all its stocks of antipersonnel landmines. . . . At the time the military warned a ban on such weapons would put Canadian soldiers' lives at risk and result in heavy casualties.¹⁹³

After ratifying the Ottawa Convention, the Canadian Military sought to determine whether any operational effectiveness was lost and if so, to explore alternative means in compliance with the Ottawa Convention.¹⁹⁴

192. United Nations Institute for Disarmament, *Status of Multilateral Arms Regulations and Disarmament Agreements—Mine-Ban Convention—Canada*, at <http://157.150.197.56/TreatyStatus.nsf> (last visited Mar. 20, 2004) [hereinafter *Status of Mine-Ban Convention—Canada*].

193. David Pugliese, *Troops Could Be Charged for Landmines Violations*, OTTAWA CITIZEN, Jan. 30, 2002, at 1.

Canadian generals such as Jean Boyle and Maurice Baril fought against the destruction of the devices, arguing they have a role to play in protecting Canadian troops. Defence leaders noted in the past, Canada has always used anti-personnel landmines properly and only against military targets. The cost of eliminating the landmines, warned one Canadian Forces report, "will be high in terms of casualties to Canadian soldiers. . . . [I]n September 1996, Gen. Baril, then head of the army, warned the army would not be able to carry out its assignments if anti-personnel landmine stocks were destroyed. Gen. Baril recommended that Canada's relatively small stockpile of 90,000 such landmines be decreased only by one-third by 2000. But a year later, Mr. Axworthy has succeeded in persuading the government to announce the destruction of all Canadian anti-personnel landmines, and Gen Baril--just promoted to Chief of the Defence Staff--had a significant change of mind. He called anti-personnel mines the "weapon of a coward," sparking an uproar among Canadian Second World War veterans, who counted on the devices as part of the arsenal used to defeat the Nazi regime.

Id.

A study conducted by students at the Royal Military College of Canada concluded that significant combat capability was lost as a result of the removal of APL from the Canadian arsenal.¹⁹⁵

In a Statement of Understanding upon the signing and ratification of the Ottawa Convention, the Canadian government provided the following statement:

It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1(c).¹⁹⁶

The UK's Declaration is virtually identical to Canada's Statement of Understanding.¹⁹⁷ The conciliatory nature of the Statement of Understanding reflects the Canadian military's opposition to ratification of the Ottawa Convention.

Pursuant to its obligation under Article 9 of the Ottawa Convention,¹⁹⁸ Canada enacted the Anti-Personnel Mines Convention Implemen-

194. Royal Military College of Canada, *Anti-personnel Landmines—Has an Operational Capability Been Lost?* (May 7, 2003), at http://www.rmc.ca/academic/gradrech/military5_e.html [hereinafter RMC]. “This report is an unofficial document. The views expressed in the report are those of the authors and do not necessarily reflect the opinion or policy of the Royal Military College, the Canadian Forces, the Department of National Defence or the Government of Canada.” *Id.*

195. *Id.*

196. *Understanding of Canada*, in UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 2003 391, ST/LEG/SER.E/22 (2004) [hereinafter Ottawa Convention (Can.)].

197. *Compare id.*, with Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 159.

198. “Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.” Ottawa Convention, *supra* note 3, art. 9.

tation Act (Canadian Landmines Act).¹⁹⁹ According to the Canadian Landmines Act, a party is not prohibited from the following: “participation in operations, exercises or other military activities with the armed forces of a state that is not a party to the Convention that engaged in an activity prohibited under [this act], if that participation does not amount to active assistance in that prohibited activity.”²⁰⁰

The legal implications of the Canadian Landmines Act on joint operations were detailed in a Canadian Army Doctrine and Training Bulletin (ADTB).²⁰¹ The conclusions set out in the ADTB indicate that Canada, despite being a core group member and a driving force behind the Ottawa Convention, has interpreted the effects of the Ottawa Convention on joint operations very narrowly. The ADTB can be summed up as follows:

The effect of The Ottawa Treaty on Canadian soldiers serving on operations is far reaching. Now, and in the future, troops will not use, request, even indirectly, or encourage the use of APL. In combined operations, Canada will not agree to Rules of Engagement, or operational plans, which authorise use of APL. Canadian staff may not participate in planning the use of APL and Canadians who are in positions of command will not authorise non-Canadian subordinates’ to use APL. This in no way precludes non-signatories from using APL in defending their contingents.²⁰²

B. Analysis of Joint Operations Involving U.S. and Canadian Forces

The Judge Advocate General of the Canadian Defense Forces addressed the issue of interoperability when participating in an alliance. Brigadier General Pitzul²⁰³ explained that,

Nations are bound by customary international law but they are not bound by treaty law unless they have signed and ratified a particular treaty.²⁰⁴ Even in a coalition of the closest allies, there

199. Anti-Personnel Mines Convention Implementation Act, 1997, C.S. ch. 33 (Can.) [hereinafter Canadian Landmines Act].

200. *Id.* at 6(d).

201. ADTB, *supra* note 43.

202. *Id.*

203. Since delivering the speech, General Pitzul was promoted to the rank of major general.

will inevitably be international legal treaties that have a direct impact on the planning of, training for, and conduct of an operation that some coalition partners will be bound by and others will not . . . The same interoperability concerns apply equally to the [Ottawa Convention] . . . The interoperability issues are obvious although participation in a coalition operation with non-APM signatories is not prohibited. It is Canada's clearly stated national view that in the context of operations, exercises or other military activity sanctioned by the UN or otherwise conducted in accordance with international law that mere participation with nations who engage in the use of APMs would not in itself be considered to be assistance, encouragement or inducement and therefore not a breach of the APM Convention. As a result, it is a challenge that must be managed.²⁰⁵

Canada's interpretation of its obligations under the Ottawa Convention has not been without detractors. In December 1998, the human rights organization, Mines Action Canada (MAC),²⁰⁶ analyzed Canada's compliance with the Ottawa Convention during the convention's first year. In its first report on compliance, MAC stated, "Among signatories, it is unfortunate that some NATO allies, including Canada, are yielding to American pressure and interpreting the treaty's prohibition on transfer not to include

204. The ICBL, however, has taken a much broader view of the application of the provisions of the Ottawa Convention to non-States Parties,

While non-state actors are not bound directly by the Mine Ban Treaty, non-state combatants involved in armed conflict are bound by customary international humanitarian law as well as Protocol II Additional to the Geneva Conventions of 1949. The ICBL has, since its inception, held the view that APMs were already banned under customary law and Protocol II, thus non-state actors would also be legally bound to give up this illegal weapon.

Landmine Monitor Report 1999: Toward a Mine-Free World, *supra* note 41.

205. Pitzul, *supra* note 39, at 316-17.

206. Mines Action Canada is a key member organization of the ICBL. Mines Action Canada, *The Landmines Ban Treaty: Year Zero* (Dec. 10, 1998), available at <http://www.minesactioncanada.com/documents/088.html>.

'transit' of American mines through a country."²⁰⁷ Mines Action Canada also noted the following:

Canada . . . pledged \$100 million over five years last December [1997] for treaty implementation, including assistance for demining and mine victims...Lack of transparency on the part of governments makes it difficult to know where the money is going and to assess how usefully it is being spent. It is thought that a high ratio around the world (17% in Canada) is being channeled into research and development of new "mine action" technologies...However, some of the research that is being funded under the flag of "mine action" may have more relevance to military operations than humanitarian demining . . . In Canada, there are indications that some of the money allocated for treaty implementation is being considered for the promotion and development of military replacements for anti-personnel mines. MAC strongly opposes such a use of the Canadian Landmines Fund.²⁰⁸

The press also monitors the Canadian Forces use of landmines. According to the Inter Press Service, "[a]fter leading the world to adopt an anti-landmine treaty, Canada quietly broke the spirit of the agreement when its military officials allowed United States troops to lay mines around Canada's camp in Afghanistan."²⁰⁹ Michael Byers, a professor of international law at Duke University, concluded:

207. *Id.* para. 3.1.

208. *Id.* para. 3.4.

209. Mark Bourrie, *Afghanistan: Canada "Betrayed Spirit of Landmine Treaty,"* INTER PRESS SERVICE, Apr. 11, 2003, available at LEXIS, News Library.

Michael Byers, a professor of international law at Duke University . . . reports in the current issue of the 'London Review of Books' that the U.S. military "ordered" the Canadians to put landmines around their camp during the U.S.-led "war" against al-Qaeda terrorists in 2001-02. When the Canadians refused, citing the international landmine treaty, the U.S. troops offered to lay the mines. The Canadians agreed . . . A senior Canadian military officer who served in Afghanistan confirmed Byers' claim. The officer, who served at the Canadian base in Kandahar and asked to be unnamed, said the mines were "an integral part of the defence perimeter of the Canadian base."

Id.

[I]n terms of this particular incident (in Afghanistan), I would not say at the moment that Canada violated its obligations. It is just that from a policy perspective it is inconsistent to be a strong supporter of the ban on landmines and to be putting your soldiers into positions where landmines are used to protect them.”²¹⁰

Clearly Canada recognized that ratification of the Ottawa Convention would affect its ability to engage in joint operations with the United States. In order to maintain its position as the driving force behind the Ottawa Convention and simultaneously attempting to allay some of the concerns of its military, Canada issued a Statement of Understanding that permitted engaging in joint operations with non-States Parties.²¹¹ Canada’s narrow interpretation of some of the provisions of the Ottawa Convention, as evidenced in the ADTB on APL, further increased the scope of Canada’s ability to engage in joint operations. This narrow interpretation, however, is counterbalanced by the media’s close scrutiny of Canadian forces activities with non-States Parties during joint operations.

1. Authority to Engage in Joint Operations

“Canada may participate in combined operations with a state that is not party to the Convention, however, Canadian troops will not use, request, even indirectly, or encourage the use of anti-personnel mines by others.”²¹² While this policy authorizes participation in joint operations, it recognizes that such participation is necessarily circumscribed by the Ottawa Convention. When read in conjunction with the remaining policy pronouncements in the ADTB, Canada’s position appears to enable Canadian forces to operate with non-States Parties, even when the parties actively utilize APL during the joint operation.²¹³ The distinction drawn by Canada is that Canadian forces cannot, themselves, be actively involved in the decision by the non-States Party to use APL.²¹⁴

210. *Id.*

211. *See generally* Ottawa Convention (Can.), *supra* note 196.

212. ADTB, *supra* note 43.

213. *See Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at *Canada—Mine Ban Policy*.

214. *Id.*

2. *Command and Control*

“The use of anti-personnel mines will not be authorized in cases where Canada is in command of a combined force. Likewise, if Canadian Forces Personnel are being commanded by other nationalities, they are prohibited from participating in the use of, or planning for the use of anti-personnel mines.”²¹⁵ Canadian forces personnel can assume command over the forces of non-States Parties and serve under the command of such forces. The Canadian force commander, however, cannot direct the forces of the non-State Party to use munitions prohibited by the Ottawa Convention. For this reason, Canada’s interpretation of the scope of the prohibitions define the scope of their ability to exert command and control. When serving under the command of a non-State Party, Canadian forces cannot undertake any taskings or missions that would cause them to violate the Canadian Landmines Act. Therefore, pre-operational planning, to include the drafting of common or parallel ROE, will be crucial to the success of the operation.

3. *Rules of Engagement*

Canada’s position on combined ROE is fairly permissive, possibly the most permissive of the nations studied in this article. According to the ADTB,

When participating in combined operations, Canada will not agree to the Combined Rules of Engagement section that would authorize the use by the combined force of anti-personnel mines. This would not, however, prevent states that are not signatories to the Anti-Personnel Mine Convention from using anti-personnel mines for the defence of their contingents . . . The right of states which are not signatories or party to the Anti-Personnel Mine Convention to use anti-personnel mines is not prevented by the convention.²¹⁶

The plain language of this policy indicates that Canadian forces can agree to common ROE with U.S. forces. The only limitation, however, is that Canadian forces cannot agree to that portion of the ROE that permits U.S. forces to employ APL. As suggested by Canada’s reference to the

215. ADTB, *supra* note 43.

216. *Id.*

right of a nation to take certain actions (such as the use of APL) in self-defense, the issue of APL is best left unsaid in the ROE. Canada explicitly recognizes the right of non-States Parties to use APL, especially with regard to self-defense.²¹⁷

4. *Operational Plans*

The development of combined ROE is closely linked to the ability to engage in joint operational planning. The Canadian Army Doctrine and Training Bulletin expressly permits members of the Canadian forces to serve on multinational planning staffs.²¹⁸ The main caveat, however, is that personnel “may not participate in planning for the use of anti-personnel mines.”²¹⁹ The Canadian Army Doctrine and Training Bulletin also clarified Canada’s position on participating on a joint planning staff that is planning for the use of APL wherein it stated, “This would not prevent a state that is not a signatory or party to the Anti-Personnel Mine Convention from participating in a multi-national force or planning the use of anti-personnel mines by its own forces for strictly national purposes. Canadian Forces personnel will not be involved in such planning.”²²⁰ Thus, Canadian forces can participate on a planning staff with U.S. forces, but cannot participate in the specific portion of the planning process in which the use of APL is considered. Such involvement enables Canadian forces to be fully informed of the actions of its coalition partners, while still adhering to the Ottawa Convention.

5. *Operations on Previously Mined Terrain*

The provisions of the ADTB with regard to operations on previously mined terrain are fairly explicit.

Canadian troops may take over operational responsibility for an area in which anti-personnel mines have previously been laid. If self-neutralizing or self-destructing anti-personnel mines have been used, Canada will not seek their replacement once they expire. If the anti-personnel mines are not self-neutralizing or

217. *See generally id.*

218. “Canadians may participate in operational planning as members of a multinational staff.” ADTB, *supra* note 43.

219. *Id.*

220. *Id.*

self-destructing, Canada will only monitor the minefield and maintain the marking, but will not conduct the maintenance thereof. Under no circumstances shall a Canadian request or encourage the use of anti-personnel mines in an area planned for occupation by Canadian troops.²²¹

In light of President Bush's new policy that U.S. forces will only use self-destructing APL and AT mines (outside of Korea),²²² Canada's position is straightforward—Canada can assume responsibility for an area that had been previously mined by U.S. forces. Once the U.S. landmines self-destruct, however, Canada will not replace them. The next logical question is: does Canada bear an affirmative obligation to clear the minefield rather than simply to monitor the minefield until the mines self-destruct?

6. *Obligation to Clear Minefields*

As with many legal issues, the answer to the question posed in the previous paragraph is, "it depends." According to the ADTB,

Responsibility for clearing minefields will depend upon the circumstances. There is no legal obligation to clear mines simply because Canada is conducting operations in an area of responsibility during peace support or other operations. An obligation may arise at the cessation of hostilities depending upon circumstances such as the degree of control exercised over the territory, the terms of any peace accord or other bilateral or multilateral agreement.²²³

In contrast to Australia's focus on the "jurisdiction or control" language of the Ottawa Convention to avoid any affirmative obligation to clear landmines from territory over which it only maintains temporary control,²²⁴ the Canadian position infers that such an obligation may exist.²²⁵ Given

221. *Id.*

222. New United States Policy on Landmines, *supra* note 31.

223. ADTB, *supra* note 43.

224. *See* Ottawa Convention (Austl.), *supra* note 107.

225. *See generally* Canadian Landmines Act, *supra* note 199.

the temporary nature of self-destructing landmines,²²⁶ however, this is likely to be a moot point with regard to U.S. landmines.

7. *Training*

Canada's position with regard to training is clear: "Countermine training is permitted. The Anti-Personnel Mine Convention specifically permits signatories to retain a small number of antipersonnel mines for research and development and training in mine detection, mine clearance and mine destruction techniques."²²⁷ The Canadian policy does not permit Canadian forces to engage in training exercises in a manner that would violate other provisions of the Ottawa Convention or the Canadian Landmines Act.²²⁸ For example, Canadian forces would not be able to serve on a planning staff for a training exercise that planned for the employment of APL.

8. *Transit*

Canada does not interpret the Ottawa Convention to prohibit U.S. forces from moving their arsenal of APL or AT mines across Canadian territory or through Canadian waters. Canada distinguishes between the transfer and the transit of APL.²²⁹ Specifically, the ADTB defines the transit of APL to be, "the movement of anti-personnel mines within a state, or

226. New United States Policy on Landmines, *supra* note 31, at 3.

Self-destructing/self-deactivating landmines have been rigorously tested and have never failed to destroy themselves or become inert within a set time. Furthermore, all are battery operated. In the event that a self-destructing/self-deactivating mine malfunctions, the battery will die at a set period of time (90 days for example) and render the mine inert.

Id.

227. ADTB, *supra* note 43.

228. One of the enumerated exceptions to the prohibitions listed in the Canadian Landmines Act is that, "participation in operations, exercises or other military activities with the armed forces of a state that is not a party to the Convention that engage in an activity prohibited under subsection (1) or (2) [is not prohibited] if that participation does not amount to active assistance in that prohibited activity." Canadian Landmines Act, *supra* note 199, sec. 6.

229. See *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 44, at *Canada—Mine Ban Policy*.

from a state, to its forces abroad.”²³⁰ Canada, however, discourages this practice.²³¹

The Canadian Army Doctrine and Training Bulletin is consistent with the Canadian Landmines Act, which states, “No person shall . . . transfer to anyone, directly or indirectly, an anti-personnel mine.”²³² The term “transfer” with regard to APL includes, “in addition to the physical movement of anti-personnel mines, the transfer of title to and control over anti-personnel mines, but does not include the transfer of territory containing emplaced anti-personnel mines.”²³³ The Canadian Landmines Act’s definition of transfer implies physical movement by someone to whom the Canadian Landmines Act applies. Therefore, a fair interpretation of the Canadian Landmines Act is that it does not prohibit the government of Canada from passively permitting U.S. forces to move landmines across Canadian territory.

9. *Stockpiling*

According to the Canadian Landmines Act, “No person shall . . . stockpile anti-personnel mines.”²³⁴ Unfortunately, the Act does not define the term “stockpile” or the term “person.”²³⁵ Thus, it is not clear whether the Canadian Landmine Act’s prohibition on stockpiling applies to a stockpile belonging to another nation that is located in Canadian territory. Because the United States does not have APL stockpiled on Canadian territory,²³⁶ however, this issue is moot.

10. *Anti-Vehicle Mines with Anti-Handling Devices*

Canada has interpreted the types of AT mines with AHD that are prohibited by the Ottawa Convention very broadly. An anti-personnel mine is defined as a mine designed to be exploded by

230. ADTB, *supra* note 43.

231. “Canada . . . discourages the use of Canadian territory, airspace or territorial waters for the purpose of transit of anti-personnel mines.” *Id.*

232. Canadian Landmines Act, *supra* note 199, sec. 6.

233. *Id.* sec. 2.

234. *Id.* sec. 6.

235. *See id.* sec. 2.

236. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. The Canadian interpretation of this definition cues on the concept of “an innocent act,” meaning that any explosive device set off by an innocent act, such as walking through an area, is considered to be an anti-personnel mine. Anti-tank mines (a mine designed to be exploded by the presence, proximity or contact of a vehicle and that will damage or destroy the vehicle) are not included in the Ottawa Convention.

The impact of the Anti-Personnel Mine Convention is that no mine or device that can be exploded by an innocent act can be employed by the Canadian army. Therefore, all anti-personnel mines and tilt rod fuzes in our inventory were destroyed, and the employment of explosive booby traps as a substitute for anti-personnel mines is prohibited. However, anti-handling devices that are part of, linked to, attached to, or placed under an anti-tank mine that detonates the mine when it is tampered with or intentionally disturbed are permitted. An example of an anti-handling device is a switch connected to explosives such that when the anti-tank mine is disturbed, the explosives detonate.²³⁷

Because Canada’s interpretation of prohibited AT mines is so broad, it is unlikely that Canadian forces could use or plan for the use of the current arsenal of U.S. AT mines equipped with AHD. The AHDs on U.S. AT mines are not “part of, linked to, attached to, or placed under” the AT mines.²³⁸ Accordingly, U.S. AT mines are capable of being set off by an innocent act.

11. Claymore Mines

“Command detonated mines or explosive devices, such as the Claymore, are not banned.”²³⁹ Therefore, Canadian forces can engage in joint operations with U.S. forces wherein either force uses command-detonated Claymores. The use of Claymores, however, in a trip-wire mode by U.S. forces would be regarded by Canada as a violation of the Ottawa Conven-

237. ADTB, *supra* note 43.

238. *Id.*

239. *Id.*

tion's prohibitions.²⁴⁰ Accordingly, Canadian forces could take no part in the use of Claymores in the trip-wire mode.

VI. The Road Ahead

It is all too easy to view the Ottawa Convention as an anomaly in the area of international law. "The movement to ban landmines captured the imagination of NGOs and governments around the world and challenged and changed decades-old assumptions about the conduct and consequences of armed conflict."²⁴¹ As such, it can be seen as a unique event brought about by a confluence of events; not least of which was the untimely death of Britain's Princess Diana. Princess Diana supported the ban on landmines.²⁴² Her death brought increased awareness to the cause she championed—the devastation caused by the indiscriminate use of landmines.²⁴³

This view, however, may be too simplistic. The Ottawa Convention may also be viewed as the first manifestation of a larger divergence in the way the United States and its allies view international law.

In more recent years. . . fissures have opened between America and Europe over what the laws of war require with respect to when it is permissible to launch an armed attack, how warfare must be waged, and how the relevant legal norms should be enforced. Today, these disagreements are so fundamental that America and its partners in Europe can be said to operate under different legal codes. The core of this divergence can be traced to efforts . . . both to leash the dogs of war and make the laws of combat more humane by mimicking the rules governing domestic police activities, in which deadly force is always the last resort and must not be applied in an "excessive" manner. In the

240. See *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 44, at *Canada—Use*.

241. Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Production of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction*, 9 *COLO. J. INT'L L. & POL'Y* 371, 377 (1998).

242. See Jenny Lange, *Celebrities and Landmines*, 6.1 *J. OF MINE ACTION* (Apr. 2002), at <http://www.hdic.jmu.edu/journal/6.1/index.htm>.

243. Lynch, *supra* note 40.

process, “humanitarian” concerns were to be elevated above considerations of military necessity and national interest.²⁴⁴

The United States has remained true to the traditional concepts of *jus ad bellum* and *jus in bello*.²⁴⁵ The decision of the United States to adhere to more traditional notions “can be traced to recognition by the United States that the world remains a dangerous place, and that adoption of a ‘policing’ model for warfare would hamper, if not cripple, America’s ability to defend itself-and its allies.”²⁴⁶

Ultimately, with regard to the issue of joint operations,

The United States and its allies can simply acknowledge that, because of the policy choices they have made in accordance with differing principles, they are now subject to different international law norms. While Americans cannot expect Europeans to ignore the commitments they have made, Europeans cannot expect the United States to comply with rules it has not accepted. This does not mean that joint action and operations are impossible, but it does mean that the range of areas in which U.S. and allied forces can act together has narrowed.²⁴⁷

This dichotomy can also be applied to the debate over the Ottawa Convention. The United States refused to sign and ratify the Ottawa Convention because it understood that doing so would place certain humanitarian principles above traditional notions of military necessity.²⁴⁸ Unfortunately, landmines give military forces certain advantages and capabilities that cannot, at present, be obtained by other means. When used in a discriminate and responsible fashion, APL do not cause the type of devastation which served as the impetus behind the Ottawa process.²⁴⁹

In recent years, joint operations involving U.S. forces and the forces of States Parties have continued, despite the prohibitions of the Ottawa Convention. As the preceding analysis of Australia, Great Britain, and Canada has shown, the Ottawa Convention has certainly caused the United

244. David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NATIONAL INTEREST (2003) (noting the existence of a substantial body of law governing both the right to initiate combat (*jus ad bellum*) and how armed force is applied (*jus in bello*)).

245. *Id.* at 2.

246. *Id.*

247. *Id.* at 19.

248. *See* Press Conference, *supra* note 10.

States and its allies to modify their approach to joint operations. Ultimately, however, joint operations continued.

One possible reason for the failure of the Ottawa Convention to prevent the use of APL in joint operations involving States Parties is because the Ottawa Convention was drafted in an atmosphere in which exceptions, regardless of how practical, were not accepted. “[T]he greater priority was a total ban on landmine use with no exceptions, no loopholes, and no reservations.”²⁵⁰ As a result, the practice of “no exceptions, no loopholes, no reservations” became a double-edged sword that forced States Parties to narrowly interpret certain provisions of the Ottawa Convention in keeping with their national interests.

In order to continue to engage in joint operations with U.S. forces, Australia, Great Britain, and Canada narrowly interpreted various provisions of the Ottawa Convention so as not to prohibit certain conduct. As detailed in this article, this practice has not escaped the attention of determined NGOs. Non-governmental organizations, such as the ICBL profess to know the true “spirit” of the Ottawa Convention, and make every effort to convince States Parties of the “intended” meaning of the Ottawa Convention’s provisions. These NGOs have played an unprecedented role in the formation of the Ottawa Convention, and will have even more of an opportunity to shape the future of the Ottawa Convention. Article 12 of the Ottawa Convention provides:

A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention . . . All States Parties to this Convention shall be invited to each Review Conference. The purpose of the Review Conference shall be . . . [among other things] to review the operation and status of th[e] Convention.²⁵¹

249. ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 15.

Although the use of landmines by U.S. forces did not create the current humanitarian crisis, the U.S. government has taken strong actions toward mitigating the effects of indiscriminate use of APL around the world. These actions include a ban on exports, assistance with clearance of mines (also called demining), assistance to victims, and a search for alternatives to APL.

Id.

250. Roberts, *supra* note 242, at 389.

251. *Id.*

The first Review Conference is scheduled to occur in November 2004. The future of joint operations may be severely affected if this conference results in the tightening of the imprecise language within the Ottawa Convention that nations have utilized to continue to engage in joint operations with the United States.

VII. Conclusion

The Ottawa Convention represents an attempt by the international community to eliminate the catastrophic consequences caused by the indiscriminate use of APL through an outright ban on APL. While supporting the humanitarian ideals behind the Ottawa Convention, the United States was unable to sign or accede to the convention because the convention failed to account for two issues indispensable to the United States' ability to satisfy its security obligations. Most allies of the United States, to include every member of NATO, have ratified or acceded to the convention.

In spite of the prohibitions of the Ottawa Convention, the United States has continued to engage in joint operations with its allies. This article focused on three such nations: Australia, Great Britain and Canada. By dividing the concept of "joint operations" into eleven factors, this article analyzed the operational effects of the Ottawa Convention on joint operations involving U.S. forces and forces of the three named countries.

The operational effects were slightly different for each studied nation. The differences were due to the manner in which each country interpreted key provisions of the Ottawa Convention, as described in national implementing legislation and policy pronouncements. While varying in minor respects, the cumulative effect appears to be *de minimus*—each country has developed methods to enable it to continue to engage in joint operations with U.S. forces. These methods take the form of narrow interpretations of key provisions within the Ottawa Convention. The provisions are, for the most part, interpreted in such a manner that the prohibited conduct is either rendered permissible, or is acknowledged without assent. Joint operations have been affected due to the additional constraints placed on allied forces for the use of landmines. Through detailed planning, however, taking into consideration the national differences identified in this article, the United States will be able to continue to operate successfully with its Allies in joint operations.

**THE U.S. MILITARY GOVERNMENT AND THE
ESTABLISHMENT OF DEMOCRATIC REFORM,
FEDERALISM, AND CONSTITUTIONALISM DURING
THE OCCUPATION OF BAVARIA, 1945-47**

LIEUTENANT COLONEL WALTER M. HUDSON¹

I. Introduction

In the spring of 1945, the United States Army established a military government in Bavaria, a German state (*Land*) caught in a maelstrom of defeat and near-anarchy. Its public works, courts, and school systems had broken down completely. Cities and towns lay in waste. Allied air attacks destroyed 80 percent of Munich, Bavaria's once proud capital, and its population had fallen from 830,000 to 475,000.² The Americans who captured the city described it as a place of desolation and despair: "People came out of their roofless, windowless apartments or cold cellars and, as if by reflex,

1. Judge Advocate General's Corps, United States Army. Chief, Military Law Office and Instructor, Command and General Staff College, Fort Leavenworth, KS. This article is an edited version of a thesis presented to the faculty of the U.S. Army Command and General Staff College to satisfy, in part, the requirements for a Master of Military Art and Science degree in military history in 2001.

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2. U.S. MILITARY POLICE SCHOOL, CASE STUDIES ON FIELD OPERATIONS OF MILITARY GOVERNMENT UNITS 77 (1950) [hereinafter *CASE STUDIES*]. An American postwar observer described Germany as "a country without cities. The countryside is practically untouched and in many spots as picturesque as ever. But in a physical and to a large degree psychological sense, the cities no longer exist." JULIAN BACH, *AMERICA'S GERMANY: AN ACCOUNT OF THE OCCUPATION* 17 (1946).

began to move along the streets. From force of habit, some lined in front of food stores that did not open. . . . They were all dazed, scarcely moving to avoid the American tanks and artillery that rumbled past.”³

In many ways, Bavaria had been the region of Germany most resilient to National Socialism.⁴ Yet it was also the wellspring of the Nazi movement.⁵ Hitler wrote *Mein Kampf* in Landsberg Prison after leading the unsuccessful 1923 Munich *Putsch*. He held huge Nazi Party rallies in the northern Bavarian city of Nuremberg. His retreat house was in the mountain resort of Berchtesgaden, near the Austrian border. Despite Bavaria’s separatism and Catholicism, Nazi ideology had nonetheless made inroads into Bavarian life, from schoolbooks and youth groups to professional organizations.⁶ In the midst of all this, the U.S. Army, as the military government from 1945 to 1947, was to rebuild Bavaria physically and, perhaps even more dauntingly, reform it politically.⁷

A. Setting the Stage

When the Allies defeated and occupied Germany in the spring of 1945, the major powers agreed that there was to be no repeat of 1918.⁸ Germany was never again to emerge as a belligerent, dictatorial state. Germany was not simply to be defeated; it was to become a wholly new nation. But what that new nation would be was not at first certain. Under the influence of Secretary of Treasury Henry Morgenthau, there were proposals put forth within President Franklin D. Roosevelt’s administration to “pastoralize” Germany.⁹ It was also uncertain what kind of government Germany

3. BACH, *supra* note 2, at 17.

4. Until 1806, Bavaria consisted of Upper and Lower Bavaria and the Upper Palatinate, areas that were completely Catholic. In 1806, Bavaria formed an alliance with Napoleon and as a result acquired Franconia to the north and Swabia (Schwaben) to the east, predominately Catholic areas. After the Bismarck Constitution of 1871, Bavaria became part of the German nation, but retained special rights and preserved its monarchy. Bismarck’s *Kulturkampf* (the conflict between the German government under Bismarck and the Roman Catholic Church) occurred in the 1870s when he attempted to attack Catholic institutions throughout Germany. His attempts backfired and Catholicism emerged more powerful than before. GEOFFREY PRIDHAM, *HITLER’S RISE TO POWER: THE NAZI MOVEMENT IN BAVARIA, 1923-1933*, 1-11 (1973); D. R. DORONODO, *BAVARIA AND GERMAN FEDERALISM* 1-4 (1992). It should be noted that Bavaria did not feel the weight of the *Kulturkampf* as strongly as did other German regions, notably Prussia. ALLAN MITCHELL, *REVOLUTION IN BAVARIA, 1918-1919: THE EISNER REGIME AND THE SOVIET REPUBLIC* 12 (1965).

would have. Indeed, at the Allied war conferences at Quebec and Yalta, democratization of Germany was not a high priority.¹⁰

As the defeat of Germany became evident, however, democratization moved to the center of America's occupation policy. Set forth in *United States Joint Chiefs of Staff Directive (JCS) 1067*, democratization later became official policy that the major Allied powers at the Potsdam Conference in the summer of 1945 ratified and clarified.¹¹ Taken together, JCS 1067 and the Potsdam Declarations indicated that political life would

5. Following Germany's surrender in November 1918, a short-lived radical Socialist and Marxist regime succeeded the toppled Bavarian monarchy (House of Wittelsbach). It was initially led by Kurt Eisner (assassinated in February 1919 by an archconservative) and then followed, in April 1919, by a Soviet style regime. Bavarian and other German paramilitary units suppressed it in May 1919. The impact of the Soviet style government had an immense impact on Bavarian political consciousness:

It would be hard to exaggerate the impact on political consciousness in Bavaria of the events between November 1918 and May 1919, and quite especially of the *Räterepublik* [the Soviet style government briefly established in April 1919]. At its very mildest, it was experienced in Munich itself as a time of curtailed freedom, severe food shortages, press censorship, general strike, sequestration of foodstuffs, coal, and items of clothing, and general disorder and chaos. But of more lasting significance, it went down in popular memory as a "rule of horror" (*Schrenksherrschaft*) imposed by foreign elements in the service of Soviet communism.

IAN KERSHAW, HITLER, 1889-1938: HUBRIS 114 (1998). The Eisner regime and the short-lived Bavarian Soviet also fanned the fires of anti-Semitism and xenophobia, Eisner and prominent figures in the Soviet regime being "non-Bavarian" Jews. ROBERT S. GARNETT, LION, EAGLE, AND SWASTIKA: BAVARIAN MONARCHISM IN WEIMAR GERMANY, 1918-1933, 41 (1991). See also MITCHELL, *supra* note 4, *passim*. The subsequent 1919 constitution of the Weimar Republic took most of the remaining vestiges of Bavarian autonomy away, tying Bavaria to the more leftwing central government in Berlin. Throughout the 1920's, a strong right-wing backlash took hold in Bavaria, with many Bavarians believing Bavaria should be a "cell of order" against the liberal and Marxist north. PRIDHAM, *supra* note 4, at 7; KERSHAW, *supra*, at 169, 171; GARNETT, *supra*, at 51-64. Despite the rightwing reaction, throughout the 1920s, most Bavarians rejected Nazism. Instead, the rightwing, populist Catholic Bavarian People's Party (BVP), formed in 1918, and emerged as the dominant political force. PRIDHAM, *supra* note 4, at 322. Voting patterns indicated that support for Nazism was weak or lukewarm in Bavaria throughout the decade, more so in the more Catholic south. There was a gradual, steady nine year increase of the Nazi vote from 1924 to 1933. *Id.* Although Bavaria averaged a far higher percentage of the vote at the beginning of Nazism in 1924 (16% to 6.5% for Germany overall), in the March, 1933 elections, Bavaria's percentage of the electorate voting for Nazism was actually slightly *less* than the overall German electorate (43.1% to 43.9% for Germany overall). *Id.* The Nazis finally broke the BVP hold in old Bavaria when it consolidated its national power in 1933. *Id.* at 4.

resume in Germany, an autonomous government would at some point be restored, and the form of government would be democratic.¹²

Restoring a democratic government to Germany was a formidable challenge that many thought would take a generation.¹³ For twelve years, the Nazi government strove to achieve a society based on the principle of *Gleichschaltung*, forced synchronization, in which all aspects of life—familial, communal, professional, religious, and governmental—fell under a centralized, pyramidal governmental system of control and coercion. The Nazi regime sought submission to the *Führerprinzip*—absolute loyalty to Hitler: youths were taught to honor Hitler before their parents, the Reich co-opted religious clergy, and professional organizations turned into adjuncts of the Nazi Party.¹⁴

The victorious Allies thus reckoned that military defeat was not sufficient. Political changes had to occur to help ensure Germany would never again fall under the totalitarian spell. One particularly American

6. While the BVP emerged as the dominant political force in Bavaria in the 1920s, the Nazi party nevertheless made significant inroads in Bavaria during that decade. Though BVP Bavarian Minister-President Eugen von Knilling stated in May 1923 that, “The enemy stands left, but the danger [stands] on the right,” Bavaria had become a postwar haven for rightwing extremists throughout Germany. KERSHAW, *supra* note 5, at 197. Nazism, with its fiercely anti-communist, anti-liberal, and anti-Semitic rhetoric, appealed to many Bavarians, despite the fact that some Nazi propaganda, such as that by Julius Streicher, was as anti-Catholic as it was anti-Semitic. PRIDHAM, *supra* note 4, at 24. Those Bavarians whose autonomous Bavarian, Catholic identities were not as pronounced generally were less likely to join the BVP and more likely to vote for the Nazi party. *Id.* at 321. After Hitler took power in 1933, however, many in the BVP—and some in the Bavarian Catholic hierarchy—found common cause with some Nazism, in particular approving its destruction of the despised Weimar Republic, which many Bavarians considered weak, ineffectual, and Marxist-leaning. KERSHAW, *supra* note 5, at 488.

7. The American zone included the German states (*Länder*) of Hesse, Wuerttemberg-Baden, Bavaria, the north German cities of Bremen and Bremerhaven, and one sector of Berlin. The British occupied Hamburg, Lower Saxony, North Rhine-Westphalia, and Schleswig-Holstein; the French occupied Baden, Rhineland-Palatinate, and Wuerttemberg-Hohenzollern; and the Soviet Union occupied Brandenburg, Mecklenberg, Saxony, Saxony-Anhalt, and Thuringia. The military government of Germany consisted of American, French, British, and Russian headquarters and organizations. Military government representatives of each nation formed the Allied Control Council (ACC), which promulgated joint policy and plans, which were subsequently executed in each nation’s respective zone. See EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY passim* (1975).

8. A review of any of the major conferences reveal the Allies intentions in this regard. See UNITED STATES DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT YALTA AND MALTA passim* (1955) [hereinafter *CONFERENCES AT YALTA AND MALTA*].

solution to the totalitarian problem was to restore German government along decentralized, federalist lines. A federalist-type government, in which the *Länder* (the German provinces, separately called *Land*) and local governments possessed substantial powers themselves, would create structural impediments to totalitarian centralism.¹⁵ Federalism would allow local cultures within each *Land* to revive and act as buffers and mediators against an encroaching, centralized state.¹⁶ A federalist-style government of divided local and state governments also was something within the realm of German experience. Prior to 1871, Germany had been a loosely knit confederation of states, and even during the Weimar Republic years, *Länder* had retained some autonomous powers.¹⁷

The Allied occupiers would not be bound by legal restraints in their occupation mission and thus swept aside any possible restraints in international law, embodied in the Hague Conventions. Article 43 of the 1907

9. The fullest exposition of the Morgenthau Plan is found in a Treasury Department briefing book dated 9 September 1944, dramatically entitled "Program to Prevent Germany from Starting a World War III." The Morgenthau Plan for restructuring German government stressed a permanent dissolution of the modern German state, restructuring it as a loose confederation along pre-1871 lines:

The military administration in Germany in the initial period should be carried out with a view toward the eventual partitioning of Germany. To facilitate partitioning and to assure its permanence, the military authorities should be guided by the following principles: (a) Dismiss all policy-making officials of the Reich government and deal primarily with local governments. (b) Encourage the reestablishment of state governments in each of the states (*Länder*) corresponding to 18 states into which Germany is presently divided and in addition make the Prussian provinces separate states. (c) Upon the partition of Germany, the various state governments should be encouraged to organize a new federal government for each of the newly partitioned areas. Such new governments should be in the form of a confederation of states, with emphasis on states' rights and a large degree of local autonomy.

"Program to Prevent Germany from Starting a World War III"/Briefing Book Prepared in the Treasury Department, September 9, 1944 in UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE AT QUEBEC, 1944, 129-30 (1972) [hereinafter Conference at Quebec].

10. HAROLD ZINK, *AMERICAN MILITARY GOVERNMENT IN GERMANY* 167 (1947). A review of the published papers from Yalta and Quebec reveal that the term "democratization" is never specifically referred to in any of the documents dealing with the future occupation of Germany. CONFERENCE AT QUEBEC, *supra* note 9 *passim*; UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT MALTA AND YALTA, *supra* note 8, *passim*.

Hague Conventions required that occupants “restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁸ But the Allies had no

11. After several drafts, the final version of JCS 1067 that became occupation policy was approved on 12 May 1945. This version is entitled “Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany, May 10, 1945.” *Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany, May 10, 1945*, in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985, 15-32 (1985). The final version of JCS 1067 listed among its “basic objectives”:

B. Germany will not be occupied for the purpose of liberation but as a defeated enemy nation. . . . In the conduct of your occupation and administration you should be just but firm and aloof. You will strongly discourage fraternization with the German officials and population. C. The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany’s capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.

Id. at 16.

12. ZINK, *supra* note 10, at 167; JOHN GIMBEL, THE AMERICAN OCCUPATION OF GERMANY 15 (1968). According to Herbert Feis, the political programs that President Truman proposed at Potsdam were little different from those in JCS 1067 that Eisenhower and Lucius Clay used to guide them during the occupation. HERBERT FEIS, BETWEEN WAR AND PEACE: THE POTSDAM CONFERENCE 241 (1960). The ten features of Truman’s proposal were: (1) Germans had to unconditionally submit to orders of the Allied Control Council (ACC) and the zone commanders; (2) Germany would be completely disarmed and military forces forbidden forever; (3) National Socialism would be extinguished as a government, party, and ideal, meaning that all Nazis would be removed from private and public office; (4) all Nazi laws and decrees that were discriminatory on grounds of race, creed, political opinion were nullified; (5) individuals accused of war crimes would go before a jointly formed tribunal; (6) the formation of a central German government was indefinitely postponed, but the ACC might use governmental administrative machinery for national economic policies; (7) the German political structure would be decentralized and local responsibility developed; (8) all political parties except those of a Nazi character would be allowed to function freely; (9) education in Germany would be controlled and directed in ways to further democratic ideas and forms of government and society, and eventual peaceful cooperation with other nations; and (10) and steps would be taken to assure freedom of speech, press, religion, and trade-union organizations subordinate to the Allied Control Council for security reasons. *Id.* at 242.

13. No one more so than Henry Morgenthau. See MICHAEL BESCHLOSS, THE CONQUERORS 70-81 (2002).

intention of abiding by the totalitarian Nazi laws, or restoring the laws of the Weimar Republic--the state that crumbled weakly under Hitler's grip. Instead, based on the concept of *debellatio* or subjugation, the Allies held that Germany did not fall under the Conventions because, totally subjugated, with its institutions

14. RICHARD MERRITT, *DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945-1949* 393 (1995). IAN KERSHAW, *THE NAZI DICTATORSHIP: PROBLEMS IN PERSPECTIVES OF INTERPRETATION* 161-217 (4th ed. 2000). Note, however, that Kershaw contends that the Nazi social revolution never in fact occurred. *Id.* at 178-79.

15. As stated in a special report to the U.S. Military Governor, U.S. Zone 2:

“Centralization” and “decentralization” are reverse aspects of the single process of distributing the powers and functions of government. In democratic political theory, the source of all power and therefore of all functions is the people. Democratically established centralized and decentralized structures differ not in the basic source of their powers, therefore, but in the levels to which that power is assigned. On the other hand, U.S. policy holds that, however democratically conceived, the powers exercised by a centralized government are deprived of their democratic vitality directly as they are removed from their popular source and thus enable minority groups to seize and exploit the instrumentalities of government for warlike purposes. Conversely, powers exercised close to those from whom they have been obtained are less apt to confuse means for end, more apt to preserve a sense of responsibility to the people.

OFFICE OF MILITARY GOVERNMENT FOR GERMANY (UNITED STATES) (OMGUS), *CENTRAL GERMAN AGENCIES: SPECIAL REPORT TO THE MILITARY GOVERNOR, U.S. ZONE 2* (1946) (on file at the Combined Arms Research Library (CARL), Fort Leavenworth, KS) [hereinafter *CENTRAL GERMAN AGENCIES*].

16. According to the Interdivisional Group on German Governmental Structures, composed of political science academics, and established under OMGUS to examine how the German government had traditionally been organized and to propose new governmental models, the German government would be considered decentralized when the following conditions were met: (1) All power would be recognized as originating from the people; (2) such power would be granted by people primarily to the *Länder* governments and only in specifically enumerated and approved instances to a federal government; (3) a substantial number of functions would be delegated by the *Länder* to the *Kreise* (roughly comparable to American counties) and *Gemeinden* (small towns and villages); and (4) all residual powers would remain in the *Länder* or would be reserved to the people. *Id.*

17. As described by D. R. Doronodo, “The individual states were rather well represented in the *Bundesrat*, the designated organ of imperial collective sovereignty. Indeed, its members were more ambassadors of the states than legislators.” DORONODO, *supra* note 4, at 1.

18. Hague Convention No. IV, Respecting the Laws and Customs of War on Land, art. 43, October 18, 1907, 36 Stat. 2277.

destroyed, Germany no longer legally existed as a nation-state at all.¹⁹

Despite such legal justification, however, unrestrained attempts to create a new German society and culture did not occur within the American zone. The Morgenthau Plan reforms were not significantly implemented.²⁰ Rhetorical claims to the contrary, American occupiers primarily sought to change German government, not to transform German culture. While there were programs in reeducation along democratic lines and efforts at social reorientation, they were remarkably modest in the American zone.²¹ Furthermore, while the United States would set up a military government in its zone, and while the American military would set about establishing democratic government, it did so, for the most part, without dictating which political parties should prevail. The military gov-

19. Eyal Benevisti points out that a fundamental distinction between the German and Japanese surrenders was that Japanese sovereignty still existed, whereas the German government had totally disintegrated. EYAL BENEVISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 92 (1993). As defined by Morris Greenspan, subjugation (*debellatio*) “embraces not merely the occupation of the territory of the state, but its actual annexation, so that the legal title passes to the conqueror.” MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 601 (1959). *Debellatio* indicates a final and irretrievable defeat, with no standing army in the field attempting to restore the country to its former “owner.” Furthermore, *debellatio* derives “purely from the act of conquest itself” and does not require any consent from the defeated belligerent. *Id.* at 601-02. Greenspan points out, however, that: “Calling an occupation a subjugation [*debellatio*] will not avail the occupant as a means of evading the obligations of an occupant imposed by international law.” *Id.* at 215. Benevisti contends that the concept of *debellatio* is outdated, in light of modern concepts of human rights, and a corresponding diminished concept of governmental entities as the legal bodies recognized under international law: “This doctrine has no place in contemporary international law, which has come to recognize the principle that sovereignty lies in a people, not in a political elite.” BENEVISTI, *supra*, at 95. Others, however, still hold that international law does give military authorities the power to amend or repeal a wide variety of laws “prejudicial to the welfare and safety of their forces.” Brigadier General Uri Shoham, *The Principle of Legality and the Israeli Government in the Territories*, 153 MIL. L. REV. 245, 263 (1996).

20. Secretary of War Henry Stimson vigorously resisted the Morgenthau Plan, and President Roosevelt vacillated on promulgating it as policy. Lucius Clay, deputy director of the office of War Mobilization and Reconversion (1944), deputy chief of the U.S. military government in Germany (1945—47), commander of U.S. troops in Europe (1947), and director of operations in the Berlin blockade as U.S. military governor (1947—49), purportedly never actually read the proposed plan. JEAN EDWARD SMITH, LUCIUS D. CLAY, *AN AMERICAN LIFE* 220 (1990).

21. MERRITT, *supra* note 14, at 387. While there were attempts at reforming certain aspects of German culture, such as the educational system in Bavaria, they were relatively modest. These modest attempts ultimately failed due to Bavarian resistance and also because of lack of American desire to push for complete reform. See JAMES F. TENT, *MIS-SION ON THE RHINE* 110-163 (1982).

ernment did not affiliate with particular political parties or movements within Germany, and did not choose sides.²² In the American zone, the U.S. military government set conditions for democracy and set limits on how far the Germans could go in restoring it, but to a great degree, allowed Germans to achieve democratic government themselves.²³

22. This is the view of one principal postwar German occupation historian, Earl F. Ziemke. See ZIEMKE, *supra* note 7, at 360. The scholar Richard Merritt concludes that the United States had a mission to “limit the spread of socialism in western Germany” and therefore did “play favorites.” MERRITT, *supra* note 14, at 264. It should be noted, however, that the U.S. government also recognized that part of mission success was creating an appearance of impartiality as much as possible. For example, Brigadier General Walter J. Muller, the Office of Military Government for Bavaria (OMGB) Director, required that Wilhelm Hoegner, Bavaria’s second U.S. appointed Minister-President, place Communist party members in his cabinet. While Hoegner placed only one to a significant post, it was one of the most public and important, the so-called “Minister without Portfolio” who was charged with overseeing denazification. See EDWARD N. PETERSON, *THE AMERICAN OCCUPATION OF GERMANY: RETREAT TO VICTORY* 227 (1977). Additionally, a communication from Clay to the War Department is evidence that he refused to provide “all out assistance” to the majority “mainstream” parties:

There is a group of officials of military government here who believe strongly that military government should grant much greater support to the [Christian Democratic Union] CDU and [Social Democratic Party] SPD parties in Berlin against the Socialist Unity Party. . . . I do not agree with this group that we should provide all out assistance to the CDU and SPD parties. If we did this, military government would have clearly violated its announced principles of complete political neutrality and such action would be misunderstood in Germany and would prove a step backward in teaching democracy. Moreover, it would weaken the strength of our protests against corresponding Soviet action and we are not in a position to compete on equal terms in Berlin.

LUCIUS D. CLAY, *Lucius D. Clay for War Department, CC 2135 (Secret) U.S. Aid for CDU and SPD* (August 20, 1946), in 1 *THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949*, at 256-57 (Jean Edward Smith, ed. 1974).

23. This is not to say that the American military government abdicated ultimate authority. In Nuremberg, for example, Colonel Charles Andrews, the military government detachment commander, authorized the Nuremberg governmental authorities to promulgate legislation with the following restrictions: all such legislation had to be examined by military government officials and were subject to U.S. approval; the American military government had the authority to nullify any laws; and no German legislation could contain anything that would suggest it was issued at the behest of, or approved by, the military government. Boyd L. Dastrup, *U.S. Military Occupation of Nuremberg, Germany, 1945-1949*, 143-144 (1980) (Ph.D. dissertation, Kansas State University) (on file with Kansas State University), *later published as* *CRUSADE IN NUREMBERG: MILITARY OCCUPATION, 1945-1949* (1985).

The ultimate goal was the unification of all the German *Länder* in the zones into a new German nation.²⁴ But what the Americans sought to establish in their own zone, and hoped would become the model for all Germany, was a decentralized, federalist constitutional democracy. This plan partially succeeded. The Soviet zone did not unify with the western zones. Instead it formed its own centralized Communist government. The *Länder* in the three western zones unified, however, in 1949, and the governmental model they adopted, in many significant ways, was federalist.²⁵

Bavaria had a vital role to play in this process. It was the largest and most populated *Land* in the U.S. zone.²⁶ It also had a strong tradition of independence, and had, prior to the Nazi ascendance in 1933, political parties that sought to maximize Bavarian governmental autonomy.²⁷ Of all the German provinces, it appeared to be a natural place for federalism and decentralization to take root in postwar Germany.²⁸ Bavaria, however, also had a tradition of separatism, and as perhaps the most conservative region of Germany, still had monarchist, antidemocratic elements. The American military government thus had a unique challenge. It sought to encourage federalism and constitutionalism in Bavaria without interfering directly in Bavarian politics, and yet at the same time it sought to steer Bavaria away from reactionary separatism.²⁹

From 1945 to 1947, perhaps the primary architect of democratic reform in the U.S. zone was Lieutenant General Lucius D. Clay, who served as Deputy Military Governor of Germany but was, for all intents

24. There were, in fact, significant differences in governmental administration in each zone. In the British zone, for example, the tendency was not to assimilate into the normal local government agencies many special services. National field offices instead performed such services. Furthermore, the British gave almost no economic powers to the *Länder* in their zone, and also kept control of transportation, health services, and education functions. In the French zone, levels below the *Länder* level of government had virtually no governmental administrative bodies. In the Soviet zone, the military government kept complete control over all aspects of government. CENTRAL GERMAN AGENCIES, *supra* note 15, at 5.

25. A U.S. military government document described federalism as follows: "In order for a federal organization to work, it is essential that the state boundaries provide firm economic and sociological areas which can sustain the states as strong units in a federal system." OFFICE OF MILITARY GOVERNMENT FOR GERMANY (UNITED STATES), THE CIVIL ADMINISTRATION OF U.S. ZONE, GERMANY (1946) (on file at the CARL, Fort Leavenworth, KS). The main tenets of German federalism are found in Articles 30 and 31 of the German "Basic Law" adopted in 1949. Article 30 states that "The exercise of *Land* governmental powers and the discharge of governmental functions shall be incumbent on the *Länder* insofar as this Basic Law does not otherwise prescribe or permit." Article 31 begins by stating that "Federal law shall override Basic law." GRUDGESETZ (GG) arts. 30, 31.

and purposes, the American viceroy there. Clay, however, received little instruction from Washington policy makers on how to accomplish this. Indeed, he was to admit years after his service in Germany that he received no guidance from any executive agency on how to achieve German gov-

26. Unlike many of the other *Länder* following the surrender, Bavaria kept most of its area and population. The *Land* was administratively subdivided into five separate districts known as *Regierungsbezirke*: (1) Mainfranken (also known as Unterfranken) in the northwest; (2) Ober and Mittelfranken running from northeast to southwest (along with Mainfranken comprising the more Protestant Franconia); (3) Oberpfalz and Niederbayern in the east; (4) Oberbayern in the south, along the Austrian border; and (5) Schwaben in the southwest, along the border of Wuerttemberg-Baden. Those five *Regierungsbezirke* were further divided into either *Landkreise*, in predominantly rural areas (roughly approximate to an American county), or *Stadtkreise*, cities usually with a population of 20,000 or more not under *Landkreis* control. A *Landkreis* further subdivided into smaller communities called *Gemeinden*, villages or rural areas with a few thousand people. Each of these subdivisions of the Bavarian *Land* had a form of government, headed by either chief executives or community councils. During the Third Reich, however, governmental functions had become almost entirely administrative, and the appointed governmental entities simply implemented directives from Berlin. For a U.S. military government understanding of German community structure, see OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, CIVIL ADMINISTRATION DIVISION, CIVIL ADMINISTRATION QUESTION AND ANSWER BOOK 3 (1947) (from the papers of Walter J. Muller, Box 13, Vol. 2, on file with the Hoover Archives, Stanford University). Bavaria lost its Rhineland Palatinate (*Pfalz*) region. It became incorporated into the French zone. The old Bavarian Rhineland Palatinate region differed significantly from other parts of the French zone, not the least of which were its Catholic, conservative tendencies, as opposed to those of the "Protestant and Socialist majority" in other parts of the zone. F. ROY WILLIS, *THE FRENCH IN GERMANY, 1945-1949* 100 (1962).

27. The Weimar BVP was the most powerful party in Bavaria at the time, and advocated greater rights for individual *Länder*. PRIDHAM, *supra* note 4, at 67-9. Hitler had criticized the BVP in *Mein Kampf* for its attempts "to preserve special rights for the Bavarian State out of small-hearted, particularistic motives." ADOLF HITLER, *MEIN KAMPF* 574 (Ralph Manheim, trans., Houghton Mifflin 1971) (1926). He devoted a chapter of *Mein Kampf* to attacking federalism and concluded the chapter with these words:

National Socialism as a matter of principle must lay claim to the right to force its principles on the whole German nation without consideration for previous federated state boundaries, and to educate it in its ideas and conceptions. Just as the churches do not feel bound and limited by political boundaries, no more does the National Socialist idea feel limited by the individual state territories of our fatherland.

The National Socialist doctrine is not the servant of individual federated states, but shall some day become the master of the German nation. It must determine and reorder the life of a people, and must, therefore, imperiously claim the right to pass over boundaries drawn by a development we have rejected. The more complete the victory of its ideas will be, the greater may be the particular liberties it offers internally.

Id. at 577-78.

ernmental decentralization.³⁰ Mainly drawing on *JCS 1067* and the Potsdam Declarations, Clay and his military government staff prepared plans for democratic restoration. In a letter written in 1946 to Lieutenant General O. P. Nichols, the director of the War Department's Civil Affairs Division, Clay set forth his interpretation of U.S. policy for German government reconstruction:

The United States believes in a decentralized German government in accordance with the Potsdam Agreement. It proposes therefore the establishment of a Germany composed of a small number of states, each of which would have a substantial responsibility for self-government. These states would be permitted to form a confederation or federal type of government, which, however, would be given the requisite powers to achieve true economic unity. The United States recognizes the right of the German people to participate in the determination of their governmental structure which, however, must come within the general provision for decentralization agreed at Potsdam.³¹

In order to achieve this vision of a federalized Germany, Clay further stated it would be necessary for the several *Länder* to draft and for their citizens to approve democratic constitutions and to "provide for some delegation of governmental responsibility to county and community levels."³²

Such a process in the midst of an impoverished, devastated Germany might reasonably be thought of as the job of one or more generations. Fur-

28. The OMGB came to these conclusions in its own study of Catholicism in Bavaria. Bavaria remained an essentially agrarian *Land*, with a great deal of its population dispersed in the countryside, and not concentrated in heavy industries, which were natural targets for socialist and Communist politicians. Furthermore, its strong Catholicism formed a natural bulwark against Communist-style centralization of any sort. Office of Military Government for Bavaria, Intelligence Division, Analysis Branch, *The Catholic Church in Bavaria in TREND: A MONTHLY REPORT OF INTELLIGENCE ANALYSIS AND PUBLIC OPINION*, Nos. 13-14. (1946) (National Archives Record Group No. 260.71, on file at the National Archives, College Park, MD).

29. *See supra* note 5.

30. SMITH, *supra* note 20, at 244. John Gimbel contends that major discrepancies existed between policy and practice for most of the 1945-47 occupation period. Only after the revocation of *JCS 1067* and its replacement with another policy document, *JCS 1779*, were policy and practice consistent. GIMBEL, *supra* note 12, at 1-2.

31. Letter from Lucius D. Clay to O.P. Echols (July 19, 1946), in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 240.

32. *Id.* at 241.

thermore, Clay had on his own military government staff many officials who were leading exponents for radical societal reconstruction. Clay, however, came to the conclusion that many of the ambitious plans of the social reformers were unworkable. He called the more ambitious reformers “zealots for reforms that go far beyond anything that’s ever been done in [the United States].”³³ Rather, against the advice of many reformers, Clay determined to begin democratic reform—which meant giving German political autonomy—as soon as possible.³⁴

Within weeks of the surrender, basic governmental functions in the U.S. zone *Länder* had been reestablished and the appointed officials empowered to act according to their positions.³⁵ In several speeches to the

33. In an interview conducted by Jean Edward Smith, Clay stated:

One of the real problems in running an occupation is your own people. They want to be Czars. They resent very bitterly when they suggest to the Germans that certain things be done and the Germans don’t do them. This is one of the hardest things you have to face in an occupation situation: your own staff are zealots, and they’re often zealots for reforms that go far beyond anything that’s ever been done in your own country.

SMITH, *supra* note 20, at 244.

34. Letter from Lucius D. Clay to John McCloy, (September 16, 1945), in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 77.

35. Dr. James R. Newman, Military Governor and later Land Commissioner for Hesse, described the general procedure by which military government officials restored local governments:

Mayors (*Buergermeisters*) and county presidents (*Landraete*) were selected from previously furnished lists. Generally, the Military Government officer called in the town or county priest or minister, the local school-teacher, and a few local citizens and asked them to suggest a *Buergermeister* or *Landrat*. After several conferences, as much investigation as possible, and clearance of political questionnaire, a provisional administrative chief was selected, and he in turn appointed other provisional leaders, such as police and fire chiefs, food office head, local clerk, motor vehicle supervisor, and other needed officials. Through these appointed officials, the local Military Government Officers began to bring order out of complete chaos, restore circulation, remove hazards to life, such as partially destroyed buildings, start cleaning up rubble, and feed the starving population.

JAMES R. NEWMAN, THE STORY OF RECONSTRUCTION AND REORIENTATION AT THE GRASS ROOTS LEVEL OF CIVIL AFFAIRS AND MILITARY GOVERNMENT (1949), *quoted in* J. F. J. GILLEN, U.S. MILITARY GOVERNMENT IN GERMANY: AMERICAN INFLUENCE ON THE DEVELOPMENT OF POLITICAL INSTITUTIONS 4 (1950) (on file at the CARL, Fort Leavenworth, KS).

Council of Minister-Presidents of the U.S. zone *Länder* (called the *Länderrat*), Clay stated that the *Land* Minister-Presidents, though U.S. appointed, should make their own decisions as much as possible and not turn to the American military government for answers.³⁶ Within months, political parties were legalized. In January 1946, just eight months after the Third Reich had ceased to exist, U.S.-zone Germans voted in local elections. By December of that year, they voted in their respective *Land* legislatures (*Landtag*) and approved their *Land* constitutions.³⁷

Clay and his subordinate military governor directors refined the policies of democratic reform in the fall of 1945. Minister-Presidents were appointed for each U.S.-occupied *Land* (Wuerttemberg and Baden were consolidated as one *Land*) and, in September, each *Land* Minister-President was explicitly authorized to approve and promulgate state legislation that did not conflict with military government policy.³⁸ In August, Clay ordered that the administration of the U.S. zone “should be directed toward the decentralization of the political structure and the development of local responsibility,” with an ultimate goal of an independent democratic Germany.³⁹ To achieve this, self-government at the regional, city, and *Land* level using “representative and elective principles” would return “as rapidly as [was] consistent with military security and the purposes of military occupation.”⁴⁰ In September, Clay directed that the primary American military government relationships would be among the three autonomous *Land* governments and American military government at that level. All instructions passed from Clay to his military government directors and from them to the Minister-Presidents, who would then implement them.⁴¹

36. John Elliott, *Democratization in Germany 1* (February 4, 1948) (National Archives Record Group No. 260.71, on file at the National Archives, College Park, MD). Elliott points out that “[I]n his speeches to the *Länderrat* at Stuttgart, General Clay has encouraged the German minister-presidents to take decisions for themselves instead of referring everything to Military Government in Berlin for settlement.” *Id.*

37. OMGUS, *CONSTITUTIONS OF BAVARIA, HESSE AND WUERTEMBERG-BADEN 2* (1947) (from the papers of Walter J. Muller, Box 13, Item 73 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

38. Military Government Proclamation No. 2, dated 19 September 1945, stated that each *Land* was to have eventual complete legislative, judicial, and executive powers, but that, while democratic institutions were developing, the *Land* Minister-Presidents could approve and promulgate legislation, and that lower executive officials in local governments had similar authority. U.S. MILITARY GOVERNMENT IN GERMANY PROCLAMATION NO. 2 (September 19, 1945).

39. H. H. Newman, *Administration of Military Government in U.S. Zone in Germany* (Aug. 27, 1945) (from the papers of Walter J. Muller, Box 15, Item 90, on file at the Hoover Archives, Stanford University, Palo Alto, CA.).

40. *Id.*

Clay also directed that the Minister-Presidents and their subordinate ministers would have the right to appoint all *Land* officials subject to prior military government approval for political reliability.⁴² Likewise, in September, the Office of Military Government for Bavaria (OMGB) directed that higher authorities in the Bavarian government would issue administrative instructions related to military government laws and directives directly to lower civilian echelons. They would not have to receive formal authorization for the instructions, but only had to ensure that Bavarian government officials submitted information copies to the supervising OMGB authority.⁴³

At the same time, however, Clay's Office of Military Government for Germany (OMGUS) and the OMGB initiated systems and processes to create conditions for federalism.⁴⁴ As the following accounts reveal, the U.S. military government kept overwatch and intervened as necessary to resolve complex questions of federalism and constitutionalism.

B. Bavaria, the *Länderrat*, and Bizonal Fusion

On 6 September 1946, U.S. Secretary of State James Byrnes gave an important speech in Stuttgart to the assembled Minister-Presidents of the U.S. zone and others. The speech, almost verbatim, adopted many of Clay's ideas about German democracy almost verbatim.⁴⁵ It included a

41. H. H. Newman, Administration of Military Government in U.S. Zone in Germany (Sept. 20, 1945) (from the papers of Walter J. Muller, Box 15, Item 90, on file at the Hoover Archives, Stanford University, Palo Alto, CA).

42. *Id.*

43. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 19 (1945). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

44. This article focuses on the establishment of governmental processes at the highest *Land* level. Other areas in which the U.S. military government was essential included setting rules for the establishment of political parties, to include granting approval for the existence of parties, establishing the right to vote, and supervising elections at the *Gemeinde*, *Landkreis*, and *Stadtkreis* levels. See, e.g., Walter J. Muller, Duties and Responsibilities of *Regierungsbezirk* after 15 December 1945 and Duties and Responsibilities of *Landkreis* and *Stadtkreis* after 15 December 1945 (1945) (from the papers of Walter J. Muller, Box 15, Item 92 at the Hoover Archives, Stanford University, Palo Alto, CA).

45. When asked by his biographer whether he had written Byrnes' address, Clay stated: "It was very close to the messages that I had sent to Washington. But to say that I wrote the speech would not be correct. To say that Mr. Byrnes listened to and accepted many of my ideas and suggestions would be much closer to the truth." SMITH, *supra* note 20, at 387.

near-total endorsement of Clay's policy, to include his policies of establishing an autonomous, elected German government.⁴⁶ Bavarians especially welcomed the central theme of the speech—that Germans should and would govern themselves—along with its lack of animosity.⁴⁷ Some Bavarians also apparently took the speech as a call to arms against Soviet Communism, a sure indication that “the German people are once again called upon to free the world of bolshevism.”⁴⁸ Bavarians polled about Byrnes' speech took it as meaning that Germany's government would be built from the “bottom up.”⁴⁹

Despite these assurances, the American military government did not entirely release control over Bavaria. The *Länderrat*, a governmental organization set up by Clay in the summer of 1945, was composed of the American appointed Minister-Presidents from each of the American zone *Länder*.⁵⁰ The *Länderrat* had been meeting monthly for over a year, primarily to coordinate economic policies, when Byrnes made his Stuttgart speech.⁵¹ The organization, however, seemed contrary in many ways to federalist ideas. According to John Gimbel, the *Länderrat* revealed that the American military government's interest in economic problems

46. “It is the view of the American Government that the German people throughout Germany, under proper safeguards, should now be given the primary responsibility for the running of their own affairs.” James F. Byrnes, Secretary of State, Address at Stuttgart Germany on United States Policy Regarding Germany (Sep. 6, 1946), in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985 (1985).

47. According to a poll of 266 Bavarians taken by the OMGB Information Control Division after Byrnes' speech, 86% of those surveyed responded very favorably (40%) or favorably (46%) to the address. Only 6% reacted unfavorably, and 8% had no opinion. OMGB, Intelligence Division, Analysis Branch, *Reactions to Byrnes' Speech*, in TREND: A WEEKLY REPORT OF POLITICAL AFFAIRS, No. 15 3, 6 (Sept. 17, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD) [hereinafter *Reaction to Byrnes' Speech*].

48. According to an OMGB intelligence analyst,

Common people still imbued with Nazi propaganda and lacking a political sense . . . conclude that Byrnes' words were directed in the first place against Russia, that a war between the United States and the Soviet Union is imminent and that the German people are again called upon to free the world of Bolshevism.

Id. at 4.

49. Perhaps for that reason they were somewhat less enthusiastic of another of Byrnes' proposals, a *Nationalrat* of Minister-Presidents that would meet together on certain issues. Bavarians viewed this proposal skeptically, unless it was checked by a democratically elected parliament. *Id.* at 5.

50. See GILLEN, *supra* note 35, at 91.

“assumed precedence over the grass-roots interest expressed by Germans and Americans alike.”⁵² Bavarians also expressed their concerns over the *Länderrat*'s power, both actual and potential. In January 1946, reports indicated that many saw it as a *de facto* zonal government bent on recentralizing German government and taking away Bavarian autonomy.⁵³

The *Länderrat* could be seen as a measure that might, in the short term, run contrary to federalist principles. Despite this short-term perception, however, American military government policymakers deemed the *Länderrat* necessary for long-term democratic success. As E.H. Litchfield, a prominent member of OMGUS's civil affairs division, stated

In the final analysis, the triumph or failure of the attempt to democratize Germany will be determined by whether American military government can succeed in making western Germany economically prosperous. For democracy is a plant that thrives only in prosperous countries. So long as the German people are on the verge of starvation and economic collapse, democracy can never hope to get a firm foothold in the country.⁵⁴

51. The first meeting of the *Länderrat* took place on 17 October 1945 in Stuttgart, Germany. At this meeting, Clay stated that he did not want to create a “South German state,” but rather believed that administrative coordination among the *Länder* was needed to meet the ultimate goal of establishing Germany as a functioning, autonomous economic unit. See GILLEN, *supra* note 35, at 91. In its charter, the *Länderrat* called for a General Secretariat, who with the help of experts, would deal with matters of common concern in the U.S. zone *Länder*. *Id.* at 92.

52. According to John Gimbel, the official history of the *Länderrat* overstates its contribution to the “establishment of the federal principle in postwar German politics.” GIMBEL, *supra* note 12, at 44. Gimbel instead asserts that, “The case is effectively presented, but it rests mainly on theory and structural considerations, and on selected evidence that minimizes the extent to which the Americans intervened to make the *Länderrat*, and therefore the *Länder*, conform to the larger objectives of the United States in Germany.” *Id.* at 44-45. Gimbel's argument that the *Länderrat* cannot be considered a deliberate “capstone” to a “political program of German self-government starting from the grass roots in the *Gemeinde* and rising to the *Kreise*, to the *Länder*, and then to the entire zone” is correct in the sense that, as he points out, the *Länderrat* came into being months before the *Gemeinde* elections in January 1946. *Id.* at 50-51.

53. According to Gimbel, “Bavarians thought that it assumed too much authority, that it operated as a zonal government, that it required *Land* officials to devote excessive time to meetings and committees, that it was expensive, and that Erich] Rossman [the appointed General Secretariat of the *Länderrat*] was building up a permanent staff.” *Id.* at 40.

54. E.H. LITCHFIELD, DEMOCRATIZATION IN GERMANY 11 (Feb. 4, 1948) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

Indeed, over the course of 1945-46, the *Länderrat* had been the instrument deemed necessary for the maintenance of those services that crossed *Länder* lines, such as the railroads, postal service, and telephone and telegraph services.⁵⁵ It had also been the organization that drafted the Law for the Liberation from National Socialism and Militarism, the first piece of German legislation that dealt with denazification. Because the new denazification policy had to be consistent throughout the U.S. zone, the *Länder-rat* had been the best means to gather *Länder* officials to develop a unified, workable law.⁵⁶

On closer examination, the *Länderrat* could also be seen as an institution that promoted federalism as much as it hindered it. Clay established it to coordinate the U.S. zone *Länder* and eliminate duplication of efforts on matters of immediate concern such as coal shortages. Each Minister-President or his representative had an equal vote among the *Länder*. All agreements had to be unanimous.⁵⁷ As D. R. Doronodo states,

With the *Länder* forced to act collectively, indeed unanimously, in the council to enact ordinances, Munich was relieved of the threat of being coerced into accepting disagreeable measures.

55. GILLEN, *supra* note 35, at 105.

56. On 5 March 1946, General Clay and the Minister-Presidents of the U.S. zone *Länder* signed the Law for Liberation from National Socialism and Militarism. It required all Germans over eighteen to fill out lengthy questionnaires about their past. Additionally, it turned over to the German people the power to try denazification cases. Much like the previous U.S. military government laws and directives, the new law established five classes of Nazis or Nazi affiliates: (1) major offenders, (2) offenders, (3) lesser offenders, (4) followers, and (5) nonoffenders and those exonerated after trial. See OFFICE OF MILITARY GOVERNMENT FOR GERMANY, MONTHLY REPORT OF THE MILITARY GOVERNOR, U.S. ZONE, NO. 842 (Mar. 20, 1946) [hereinafter Monthly Report No. 842]. Beginning in the summer of 1946, Germans in the U.S. zone would try other Germans for Nazi activity and party membership. As John Gimbel states in his study of the occupation of the town of Marburg: "Denazification was placed under German control because it was felt that the local institutions were sufficiently revived by 1946 to permit German participation at this level. Moreover, it offered Germans the responsibility under this new leadership, and to have a stake in the changes that would ensue." JOHN GIMBEL, A GERMAN COMMUNITY UNDER AMERICAN OCCUPATION 3 (1961). Despite procedural similarities, however, the new law gave almost complete authority to the various *Länder* governments. Under it, the so-called Minister for Political Liberation would have responsibility for the administration and control of the denazification procedures. See *id.* at 3; Monthly Report No. 842, *supra*.

57. According to Clay, "The *Länderrat* became a major influence in shaping German political thought. Since it could only function with unanimity, its members learned to compromise the views of the states which they represented in the common good and such compromise is the essence of democracy." Lucius D. Clay, *quoted in* GILLEN, *supra* note 35, at 96.

The organization of the *Länderrat* also provided a continuation, whether intended or not, of the collegiality inherent in the *Bundesrat* [upper house of the German legislature] of the imperial period.⁵⁸

Secretary of State Byrnes' September speech addressed another concern - the lifting of the borders between the Allied zones, virtually sealed off from each other since the surrender in May 1945.⁵⁹ This seemed the next logical step in German economic development. Clay, beginning in the spring of 1946, had already begun to replicate the *Länderrat* model on a larger scale by attempting to create an Allied interzonal agency that would eventually eclipse the zone authorities and agencies.⁶⁰ While nei-

58. DORONODO, *supra* note 4, at 55. Doronodo's comments were similar to those of the Interdivisional Committee on German Governmental Structure, which stated in its 1946 special report that the *Länderrat*

[f]urnished the first opportunity in fifteen years for German officials to practice democracy and democratic methods--the assumption of personal responsibility, the interchange of ideas, the reconciliation of conflicting interests and views, and the value of compromise and concession--and accordingly it has been an invaluable training tool toward our ultimate goal.

CENTRAL GERMAN AGENCIES, *supra* note 15, at 4.

59. "The United States is firmly of the belief that Germany should be administered as an economic unit and that zonal barriers should be completely obliterated so far as the economic life and activity in Germany are concerned." Byrnes, *supra* note 46, at 93. In Byrnes' view, an economic unification did not conflict with Potsdam's decentralization policies:

The Potsdam Agreement wisely provided that administration of the affairs of Germany should be directed toward decentralization of the political structure and the development of local responsibility. This was not intended to prevent progress toward a central government with the powers necessary to deal with matters which would be dealt with on a nation-wide basis. But it was intended to prevent the establishment of a strong central government dominating the German people instead of being responsible to their democratic will.

Id. at 95.

60. The apparent fear was that the artificially created zonal agencies would harden over time and become, in effect, small autonomous governments that would impede ultimate unification and prevent the free flow of raw and manufactured goods. This would have had a disastrous effect on German economic as well as political life. The permanent zonal boundaries would create "a separation of raw materials and semi-finished goods from their processing plants and a separation of component manufacturers from their markets." CENTRAL GERMAN AGENCIES, *supra* note 15, at 7.

ther the French nor Soviets agreed in joining the Allied interzonal agency, the British did.⁶¹ Such an agreement created another avenue for eventual German reunification, and the opening of the industrial Ruhr in the British zone particularly made the U.S.-occupied *Länder* more economically sustainable.⁶² Washington policy makers also thought the idea sound, since an interzonal agency would, by bringing zones together, help relieve the American financing of German recovery.⁶³

Clay saw the formation of the bizonal agency and the subsequent economic unification of the U.S. and British zones as promoting efficiency, but not along typical German and English models.⁶⁴ “The tendency of the Germans is to an almost complete regimentation of German economy and they have considerable British sympathy for this purpose.”⁶⁵ Clay, who had run the U.S. wartime military procurement program, had a thorough knowledge of wartime price controls and did not want to create a heavily staffed centralized agency to dictate all the details of U.S.-British zone economy. Such an agency would be “much too large for broad policy actions and yet many times too small for detailed controls.”⁶⁶ He instead preferred resource allocations on a broad basis, either at the *Länder* or general industry level. “Microcontrol” of resource allocation at plant levels was not only contrary to American models, but, to Clay, could not possibly succeed “without months if not years of effort to establish the requisite organization.”⁶⁷

Bavarian reaction to bizonal merger was skeptical, if not hostile. The British, as expected, pushed for greater economic centralization, something many Bavarians feared.⁶⁸ In September 1946, after Byrnes’ speech, OMGB intelligence reports indicated Bavarians feared British “bureau-

61. The French agreed to a “trizonal” fusion in the summer of 1948, via piecemeal legislation. Willis, *supra* note 26, at 61-66.

62. According to Jean Edward Smith, Clay saw Bizonia as a “way to bypass French and Russian intransigence: a first attempt to put the splintered pieces of Germany back together.” SMITH, *supra* note 20, at 405.

63. GILLEN, *supra* note 35, at 112.

64. LUCIUS D. CLAY, *Bizonal Economic Matters*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 333.

65. *Id.*

66. *Id.*

67. *Id.* A related problem in the bizonal fusion was that, whereas in the U.S. zone, the agencies that would come to form the bizonal organizations came from German-run *Länder* governments, those in the British zone, as of mid to late 1946, still would have to come from the British military government since elections in the British zone lagged significantly behind those in the U.S. zone. GILLEN, *supra* note 35, at 145.

cracy” would “invade” the United States zone.⁶⁹ Reports indicated that the bizonal merger might indeed increase Bavarian separatism, since the merger would require Bavarians to reduce food rations to provide equivalent rations in the British zone to other Germans many Bavarians considered “foreigners” or “outsiders.”⁷⁰ On the other hand, reports also indicated Bavarians saw some benefits to the merger, especially in the need for coal from the Ruhr area and the desire to have a consistent denazification policy.⁷¹

The dilemma between decentralized government and centralized economic planning proved difficult to resolve. What ultimately emerged was somewhat of a compromise. By the spring of 1947, the Americans and British had agreed that the bizonal economic agencies needed broad economic powers, and so the agencies obtained general authority over production, allocation, and distribution, to include rationing policies, and also had the authority to control by executive order a small group of scarce commodities and raw materials, such as coal.⁷² But the allocation of such commodities was largely left up to the individual *Länder* themselves. Thus, for example, while each *Land* received coal allocations for domestic heating, the *Land* had control over how the coal was divided among homes, hospitals, schools, and other domestic places.⁷³ As Clay realized, the bizonal arrangement represented “at least as high a degree of centralization as we had in the United States during the war” although not the near-total centralization the British wanted.⁷⁴ The arrangement, on an even grander scale than the U.S. zone *Länderrat*, also seemed to take away *Land* auton-

68. LUCIUS D. CLAY, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352.

69. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 71 (Sept. 19, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

70. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 69 (Sept. 5, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

71. *Id.*

72. LUCIUS D. CLAY, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352. The formal agreement was signed by U.S. and U.K. representatives in Washington, D.C. on 2 December 1946, with the agreement taking effect on 1 January 1947. Memorandum of Agreement, The United States and United Kingdom, subject: Economic Fusion of their Respective Zones of Occupation of Germany (December 2, 1946), in UNITED STATES DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1944-1985, *supra* note 11, at 110.

73. Lucius D. Clay, *Bizonal Merger: Economic Council*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 352.

omy, and thus worked against the proposed American, and presumably Bavarian, decentralizing principles.⁷⁵

The centralizing powers of the bizonal fusion, however, were not as powerful as they appeared to be. One reason for this was that it went into effect after Germans in the U.S. zones had elected members to their own legislatures (*Landtag*) in December 1946, the kind of "check" that the Bavarians had wanted on Byrnes' proposed *Nationalrat*.⁷⁶ At least within the U.S. zone, rather than military government-appointed officials, bizonal representatives were elected from within the various *Länder* parliaments. Thus each *Land* sent officials to the agencies with the respective *Land* interest in mind. Furthermore, the party that dominated in Bavaria, the conservative Christian Social Union (CSU), and its dominant sister party in northern *Länder*, Konrad Adenauer's Christian Democratic Union (CDU), as majority parties, also became dominant in the bizonal departments and executive councils.⁷⁷ These federalist, capitalist-oriented par-

74. *Id.* The structure that emerged was a twofold organization. First, a U.S.-U.K. bipartite organization, consisting of a bipartite board made up of the U.S. and U.K. deputy military governors and advisors, and a bipartite control office, consisting of a chairman and bipartite groups. The bipartite organization, along with the Allied bank commission and the Joint Export Import Agency, oversaw bizonal economic policy. GILLEN, *supra* note 35, at 143-46. Second, the German bizonal agencies, which carried out U.S.-U.K. zone economic policy. *Id.* The main bizonal agency was the economic council, consisting of 54 members, elected from the *Landtage*, which promulgated economic ordinances, an executive committee, which drafted regulations implementing those ordinances, and bizonal departments, which implemented them. *Id.*

75. The bizonal fusion, as conceived and ultimately enacted, proved contrary to federalism primarily because the establishment of such a central German economic agency that was not "truly" representative of either the German people or the "*Länder* government" did not "satisfy the U.S. policy of devolving as much responsibility to German civil administration agencies as possible." CENTRAL GERMAN AGENCIES, *supra* note 15, at 14. It could also be argued that, whereas the U.S. zone had attempted political decentralization, it had not done the same economically, and that the bizonal was the logical culmination of governmental economic centralization. In contrast to the relative freedom given in political reform, U.S. economic zone policies during the occupation were often activist and interventionist. In Bavaria, for example, while OMGB permitted trade unions, it reserved the right to prohibit strikes and lockouts if they would "jeopardize security or military government policies." CASE STUDIES, *supra* note 2, at 81. By the end of 1946, only one strike took place in Bavaria. The Office of Military Government for Bavaria also set wage and price controls, established a forty-eight hour workweek, and mandated the establishment of unemployment compensation for up to thirteen weeks beginning in January 1947. *Id.*

76. *Reaction to Byrnes' Speech*, *supra* note 47.

77. A.J. RYDER, TWENTIETH CENTURY GERMANY FROM BISMARCK TO BRANDT 479-80 (1973).

ties thus acted as a significant counterweight to the bizonal fusion's centralizing tendencies.⁷⁸

Rather than the bizonal agencies, the *Länderrat*, or the *Land* governments completely dominating as separate entities, what emerged from mid-1946 to early 1947 was a complex three-way relationship among the three, as well as with the respective Allied military governments.⁷⁹ The Office of Military Government for Bavaria attempted to clarify the parameters for each. The Office of Military Government for Bavaria Chief of Civil Administration, Albert Schweizer—in the absence of overarching and connecting legislation—scrutinized Clay's statements in particular to determine those limits.⁸⁰ The *Länderrat*, as a U.S. zone creation, ceased to exercise control over the economic policymaking taken over by the bizonal agencies. The *Länderrat*, however, was still a necessary, if temporary, body in order to “study, recommend, and commend on proposed quadripartite [Allied occupation] legislation.”⁸¹ The bizonal agencies were also viewed as contingent governmental bodies that were not to supercede *Länder* prerogatives: “Military Government will not permit the bizonal agencies to assume state responsibilities and will insist that the

78. *Id.* Ryder calls the bizonal agencies a “shadow government” of the CDU. *Id.* at 479. Initially, the bizonal agencies could only recommend agreed views to the respective *Länder*, which made the administration rather weak. In May, 1947, the two zones agreed that the bizonal economic council could issue ordinances dealing with “public finance, currency, credit banking, and property control.” U.S. ARMY PROVOST MARSHAL GENERAL'S SCHOOL, U.S. MILITARY GOVERNMENT IN GERMANY: FINANCIAL POLICIES AND OPERATIONS 89-90 (1950) (on file at the CARL, Fort Leavenworth, KS). Because the economic council consisted of members elected from the respective *Landtäge*, however, the *Länder* interests were still preserved.

79. Albert C. Schweizer, Relationship between *Länderrat*, Bizonal Agencies, and Land Civil Governments (Feb. 3, 1947) (from the papers of Walter J. Muller, Box 15, Item 91, on file at the Hoover Archives, Stanford University, Palo Alto, CA).

80. *Id.* Schweizer laid out the threefold relationship:

Military government has recently entered into an era where the Minister Presidents of the three *Länder* of the U.S. zone are representative officials, chosen by a popularly elected *Landtag* and responsible thereto. As a corollary, the *Länderrat* is composed of Minister- Presidents who are no longer appointees of Military Government. At the same time this situation has developed, another new situation has come into being through the institution of the bizonal agencies.

Id.

81. *Id.*

responsibility for the execution of bizonal policies (e.g., specific resource allocation) remains with the state governments.”⁸²

American military government thus acted as the mechanism that kept the three governmental entities in harmony.⁸³ More significantly, however, was the growing role of the *Land* governments themselves. By early 1947, when Schweizer distributed his memorandum, the bizonal agencies fully emerged and had begun formulating and implementing policies.⁸⁴ By this time too, the U.S. zone *Länder* had popularly elected legislatures and approved Constitutions. The rights of the states, clearly defined in the state Constitutions, and the voice of the populace, expressed in the *Landtag* representatives appointed to the bizonal councils, thus protected the prerogatives of the *Länder* against excessive centralization.⁸⁵

C. The Bavarian Constitution and the *Landtag*: June–December 1946

Along with the establishment of the bizonal zone, the culminating act of establishing democracy at the *Land* level in the U.S. zone was the election of the *Länder* legislatures (*Landtag*), and the popular approval of *Land* Constitutions, both slated to occur in December 1946. With those completed, the next step would be German reunification. The development of Constitutions would require considerable effort before their ultimate approval, but American policy was, once again, to provide general guidance and allow the respective *Länder* to work out the specific details. In a 23 August 1946 message to the War Department, Clay elaborated on this laissez-faire policy:

We have told the German authorities of the basic principles which we consider necessary to a democratic institution and these principles have been furnished to you and to the State Department. As long as these principles are safeguarded in the constitution, we do not propose to comment on the details or on the governmental procedures established in the constitutions [I]t is of utmost importance that comment and suggested changes given to the constitutional assemblies be at a minimum and limited to violations of the fundamental princi-

82. *Id.*

83. *Id.*

84. *See infra* pp. 136-37 and notes 70-72.

85. *See* CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37 (containing the rights constitutionally reserved to the states).

ples which have been laid out. These constitutions go to the German people as a free creation of their elected representatives and with the least possible taint of military government dictation.⁸⁶

There were seven “minimal essentials” required for the constitutions: (1) political power had to “originate with the people and be subject to their control”; (2) programs and political leadership had to be subject to popular elections frequently; (3) elections had to be competitive, with at least two competing parties; (4) political parties had to be democratic in character and distinct from governmental institutions; (5) basic individual rights had to be defined in the constitution and preserved by law; (6) government could only be exercised through the rule of law; and (7) the constitutions had to provide for “some delegation of governmental responsibility to county and community levels.”⁸⁷ Furthermore, Clay wanted the constitutional articles dealing with individual rights to be reasonably similar for all the U.S. *Länder*.⁸⁸

While setting these requirements, the American military government had to proceed carefully, despite the speed of the democratizing process. If it applied too much pressure or attempted to intervene, the end result might be a populace suspicious of the legitimacy of a document tarred “with the brush of an Allied *Diktat*.”⁸⁹ At the same time, there were real concerns that the Germans might not be ready to make such a huge step towards self-government so soon. In June 1946, Bavarian Minister-President Hoegner stated at a meeting with Brigadier General Walter J. Muller, the OMGB Director, and other OMGB officials that Bavarians did not fully understand constitutional government and would need five years to understand the basis of democratic thinking.⁹⁰ Nonetheless, the process went forward as planned. In February 1946, OMGUS directed each *Land* Minister-President to appoint a preparatory commission, to gather neces-

86. LUCIUS D. CLAY, *Constitutions for Länder in U.S. Zone*, in 1 THE PAPERS OF LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 260.

87. LUCIUS D. CLAY, *U.S. Policy in Germany*, in 1 THE PAPERS OF LUCIUS D. CLAY, GERMANY 1945-1949, *supra* note 22, at 241.

88. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 66 (Aug. 15, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

89. As in a harsh and unilaterally imposed settlement. DORONODO, *supra* note 4, at 39.

90. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 59 (June 27, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

sary bibliographical and documentary materials for the proposed Constitutional Assembly, to gather proposals from the different parties, and to draft an Assembly election law for American military government approval.⁹¹

The Bavarian Constitutional Assembly elections took place on 30 June 1946 at all governmental levels that had already had elections (the *Gemeinde* (village), *Landkreis* (county), and *Stadtkreis* (municipal) levels).⁹² Nearly seventy-two percent of eligible voters participated. As expected, the CSU candidates received a majority of votes (1.5 million or fifty-eight percent).⁹³ The SPD candidates received 785,000 (twenty-eight percent), the KPD, 144,000 (5.8 percent) and the remainder distributed among splinter parties.⁹⁴

On 15 July, the Constitutional Assembly opened at the University of Munich with a requirement to complete a draft constitution no later than 15 September 1946.⁹⁵ Yet to some OMGUS, if not OMGB officials, what seemed to be emerging from the Bavarian Constitutional Assembly was a reactionary document representing Bavarian particularism and a far-right alliance with the Catholic Church.⁹⁶ Undoubtedly the document being pre-

91. Byran L. Milburn, Elections in the U.S. Zone (Feb. 4, 1946) (from the papers of Walter J. Muller, Box 15, Item 90 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

92. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 60 (July 4, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

93. *Id.*

94. *Id.*

95. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 62 (July 18, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

96. PETERSON, *supra* note 22, at 231. Karl Lowenstein of the OMGUS Legal Division described the proposed Bavarian constitution as:

[T]he embodiment of the dream of Bavarian independence nursed for two generations by Bavarian extremists of whom Dr. Hoegner permitted himself to be a tool. If adopted in this form it will be a great political success of the French because it turns the clock back to the Rhenish Confederation of Napoleon. It serves to prevent the reintegration of Bavaria into a decentralized Germany and presents a permanent roadblock to German unity which only inexperienced persons are apt to identify with German centralism. This declaration of Bavarian independence is a thinly veiled declaration of the secession from Germany.

Memorandum, Karl Lowenstein to Roger Wells (11 Dec. 1945) *quoted in* GILLEN, *supra* note 35, at 25.

pared was more conservative than that of the other U.S. zone *Länder*. To many it contained extremist elements of a church-state alliance based on Catholic "corporatist" principles: state-run "confessional" schools; a non-popularly elected senate from private enterprise, churches, and other institutions; a *Staatspräsident* with more autonomy and power than given to a Minister-President; and declarations of near-independent Bavarian "citizenship."⁹⁷ Perhaps the most significant idea developed was the ten percent mandate rule. According to this rule, any party that did not obtain at least ten percent of the vote in any one *Regierungsbezirk* would be shut out of the *Landtag* entirely.⁹⁸ While proponents contended it was a measure to prevent legislative chaos, at least one influential German newspaper saw it as a "trap for all the smaller parties" set by the CSU and SPD to "secure a parliamentary monopoly."⁹⁹

In reality, the document being developed was in keeping with Bavarian political tradition as well as the result of compromise between the right and left parties.¹⁰⁰ When the final Constitution was published, many of its provisions were taken verbatim from the Weimar Constitution and the

97. The Catholic corporatist model was seen by American military government experts as deeply rooted in Bavarian culture:

The attempt of American military Government to eliminate the corporative tradition in the American Zone of Germany faces heavy odds. It is deeply rooted. To Germans the corporative system seems essentially "right." It is regarded as superior to the American system of government bureaus and voluntary occupational associations. Defenders of the corporative tradition in Germany feel that the democratization of the German governmental structure requires only the establishment of democratic procedures within the corporations and the general government. They tend to dissociate the corporative principles from National Socialism except as the Nazi regime developed the principles to an extreme and "coordinated" the corporations into a totalitarian governmental structure by abolishing internal democratic procedures and subjecting the corporations to the chain of command or "leadership" principle.

John D. Holt, *Corporative Occupational Organization and Democracy in Germany*, 9 PUB. ADMIN. REV. 38 (1948), quoted in GILLEN, *supra* note 35, at 38. Bavaria was the only *Land* that proposed such a Senate. *Id.* at 36.

98. GILLEN, *supra* note 35, at 28.

99. *Coalition Problems in the South*, DER MORGEN, Dec. 4, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 at the Hoover Archives, Stanford University, Palo Alto, CA). In Hesse and Wuerttemberg-Baden, parties that failed to receive 5% of votes cast in the June Constitutional Assembly elections obtained no Constitutional Assembly seats. GILLEN, *supra* note 35, at 28.

Bavarian Constitutions of 1919 and 1923.¹⁰¹ Furthermore, the give-and-take between political parties had led to compromises that muted the alleged extremism. For example, public schools would follow the so-called confessional model, but schools would be Catholic, Protestant, or nondenominational depending on the predominant religion in the area.¹⁰²

Regarding the Senate, the Assembly agreed on a compromise between the SPD, which opposed giving a senatorial body any power, and the CSU, which sought for it a strong role. The Assembly agreed there would be a sixty person Senate elected for six-year terms from within public or private corporations. The Senate would include members chosen from trade unions (at the SPD's insistence), as well as representatives from agriculture and forestry, trade and industry, handicrafts, cooperatives, so-called free professions, and religious institutions.¹⁰³ As another compromise, the Senate would have limited rights of participation in matters such as budgets and constitutional amendments.¹⁰⁴

The *Staatspräsident* was to be a strong executive elected directly by the voters rather than the *Landtag*.¹⁰⁵ He was expected to break legislative

100. It should also be noted that two factions had developed within the CSU, representing different views: a "progressive, liberal-conservative, interdenominational group" led by Josef Müller, and a "traditionalist, fiercely moral, Roman Catholic wing," led by Friedrich Schaeffer, Anton Pfeiffer, and Alois Hundhammer. PETER JAMES, *THE POLITICS OF BAVARIA—AN EXCEPTION TO THE RULE* 95 (1995).

101. CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37. It is important to note that of all the *Länder* constitutions, the Bavarian Constitution least resembled the Weimar models. Interestingly, this actually brought forth favorable comments from Carl Friedrich, an academic who worked with OMGUS in political reconstruction. Friedrich feared that the "Weimar" model too much resembled the French system, with a unicameral legislature, acceptance of a multiple party system, and proportional representation. Carl Friedrich, *quoted in* GILLEN, *supra* note 36, at 45. This could lead, in his view, to the same "paralysis and chaos of Weimar, and thus usher in right-wing populist extremism to restore order." *Id.* The Bavarian model, on the other hand, adopted the "much more stable Swiss type" with a bicameral legislature and restrictions on party representation. *Id.*

102. DORONODO, *supra* note 4, at 43.

103. The sixty members were composed of eleven representatives from forestry and agriculture, five from industry and trade, five from handicrafts, eleven from trade unions, four from the press, five from cooperatives, five from religious societies, five from welfare institutions, three from higher education and academies, and six from the *Gemeinde*. GILLEN, *supra* note 35, at 38.

104. DORONODO, *supra* note 4, at 43. According to Doronodo, the main basis of the compromise was the inclusion, at the insistence of the SPD and the Communist Party (KPD), of trade-union representatives in the Senate. *Id.*

105. *Id.* at 44.

deadlocks through demands for referenda and issue emergency decrees in times of crises. The idea aroused suspicions among OMGUS officials and Washington policymakers.¹⁰⁶ Ironically, in many ways, the *Staatspräsident* was more similar to the American model of a chief executive who also acts as head of state. The concept actually caused a split in the CSU, with CSU party leader Josef Müller voting against it, and in an apparent role reversal, the SPD assembly leader voting for the measure.¹⁰⁷ It failed by one vote in the Assembly, and at least one German newspaper reported on the “dissent and fraction” occurring as a result in both the CSU and SPD.¹⁰⁸

The Constitutional Assembly accepted the proposed Bavarian Constitution by a vote of 134 to 18 on 20 September 1946.¹⁰⁹ The *Staatspräsident* idea had been eliminated, but the Minister-President would still act more independently than Minister-Presidents in other *Länder*.¹¹⁰ The two major parties supported and urged voter approval of the document. The KPD publicly proclaimed it a reactionary document, focusing in particular on the ten percent clause, the Senate chamber, and the provisions for confessional or quasi-confessional schools.¹¹¹ Some Washington policymakers also objected to it more than any other *Land* constitution.¹¹²

106. *Id.*

107. *Id.*

108. *The Political Course in Bavaria*, NEUES DEUTSCHLAND, Dec. 1, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

109. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 72 (Sept. 26, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

110. As the introductory comments to the constitutions point out,

The executive power is exercised under the direction of the Minister-President and his Cabinet who are chosen by, and responsible to, the *Landtag*. (The Constitutions of Hesse and Wuerttemberg-Baden clearly provide for the parliamentary form of government; the Bavarian Constitution is somewhat ambiguous on this point and reflects convention [sic] sentiment favoring a more independent type of executive.)

CONSTITUTIONS OF BAVARIA, HESSE AND WUERTEMBERG-BADEN, *supra* note 37, at 2.

111. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 27 (Oct. 31, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

112. GIMBEL, *supra* note 12, at 92. Gimbel also points out that Clay defended the U.S. zone *Länder* constitutions against War and State Department objections to the point that, if Washington policymakers were adamant with their objections, the President would have to decide the matter. *Id.*

The Office of Military Government for Bavaria, however, did not view the document as extreme as its detractors pronounced it to be, and refused the petitions of the KPD and other small parties to eliminate the 10 percent mandate clause.¹¹³ Clay did not view it as extreme as some Washington policymakers did either. Responding to concerns from the Chief of the War Department's Civil Affairs Division, he took issue with unilaterally changing provisions in the proposed Bavarian Constitution:

The proposed changes can be obtained only by military government decree. If such a decree were issued, I believe as a minimum the full support of both major parties in all three states would be lost and the constitutions would go before the people with only single party support. However, we might fail to get the approval of the constitutional assemblies and therefore have to defer the submission of the constitutions to the German people for ratification. It is our belief that the latter occurrence would be disastrous to our accomplishments in government to date.¹¹⁴

Furthermore, Clay disagreed with many of the comments War Department experts offered. He indicated that he could not see how OMGUS could press for a parliamentary style Minister-President, "since in the United States the President does continue in office whether or not he has full party support in Congress."¹¹⁵ He also disagreed with concerns over constitutional provisions regarding suspension of certain civil liberties in periods of emergency. Clay responded that such restrictions did not convey any more authority than many American governmental officials had under martial law and further believed the provision establishing a Constitutional Court would guarantee that individual rights "would not be abused."¹¹⁶ He also added, "Finally we must point out that the constitutional assemblies of the three *Länder* composed of representatives freely elected by the people have devoted three months of sincere and conscientious effort to the drafting of these constitutions. They are major advances over the Weimar constitutions."¹¹⁷

113. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 76 (Oct. 24, 1946). (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

114. LUCIUS D. CLAY, *Constitutions for Länder in U.S. Zone*, in 1 THE PAPERS OF GENERAL LUCIUS D. CLAY, GERMANY, 1945-1949, *supra* note 22, at 270.

115. *Id.*

116. *Id.*

117. *Id.*

Washington policymakers did not alter the proposed constitution, and the OMGB and OMGUS approved the proposed Bavarian Constitution with minimal changes.¹¹⁸ The vote for the Constitution and the *Landtag* was set for 1 December 1946. As it had in the prior elections, OMGB deliberately refrained from making comments approving or disapproving any candidates, despite reports indicating Bavarians were “not yet in many instances capable of using [the democratic right of election].”¹¹⁹ During the fall of 1946, reports indicated the CSU was relatively dormant, perhaps confident in its strength.¹²⁰ The KPD, on the other hand, did the most campaigning of any Bavarian party.¹²¹

When election day arrived, once again voter turnout was heavy, with 76 percent of those eligible participating. The Constitution won approval by 70 percent of votes cast. The CSU once again emerged triumphant and became dominant in the *Landtag*, gaining 104 of 180 seats (52 percent). The SPD gained fifty four seats with 28 percent of the vote, and two smaller parties, the Economic Reconstruction Party and the FPD obtained thirteen (7.39 percent) and nine (5.64 percent) seats, respectively. The KPD was shut out of the *Landtag* entirely, having failed to obtain at least ten percent in any single *Regierungsbezirk*.¹²² The Office of Military Government for Bavaria reports attributed the shutout to the conservative Bavarian peasantry and the strong anti-Communist stance of the Catholic and Protestant churches: “Only one conclusion can remain. The conservative, highly religious Bavarian peasantry rejects any political influence which is at variance with the dogma of its faith. In times of trouble and uncertainty such as these, they continue to seek solace and advice from their local minister or priest.”¹²³

The CSU, the passage of the more conservative Constitution, and the KPD shutout aroused concern among Germans outside Bavaria. Many northern Germans were skeptical of the CSU dominance and concerned about the incoming CSU Minister-President Hans Erhard.¹²⁴ Within Bavaria, there was also concern about the KPD shutout. A Munich news-

118. As evidenced by the final product itself. See CONSTITUTIONS OF BAVARIA, HESSE AND WUERTTEMBERG-BADEN, *supra* note 37.

119. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, NO. 82 (Dec. 5, 1946) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD) [hereinafter Report No. 82].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

paper stated that it was to “be regretted,” because Communist opposition was traditional in the Bavarian *Landtag* and “the Communists can claim the fact of having been the most decisive fighters against National Socialism and doubtless they sacrificed the greatest number of victims in penitentiaries and concentration camps.”¹²⁵

Once again, however, no claims were made that OMGB had turned the results with any sort of overt or covert influence. Furthermore, there were no significant reports of unrest, rioting, or voter fraud.¹²⁶ If the CSU victory and the KPD shutout significantly reduced Communism as an influence in postwar Bavaria, it occurred within the broad parameters OMGUS and OMGB had set. The Bavarians, however, had taken significant actions themselves—party organizing, campaigning and voting. Thus, by the end of 1946, barely eighteen months after the surrender and amidst extreme material deprivation and hardship, Bavarians not only elected governmental officials at all levels, but also approved a democratic, federalist-oriented constitution—significant steps towards a democratic, decentralized German nation.

D. Democratic Reform in Bavaria: An Assessment

Boyd Dastrup, who studied the occupation of Nuremberg, has argued that the military government’s policy in Bavaria was paradoxical in that it used “authoritarian means to establish a democracy.”¹²⁷ It appears, however, that while OMGB resorted to compulsion at times to guide Bavarians away from a radical separatism or antidemocratic extremism, it tried to intervene as seldom as possible.¹²⁸ Rather, the kind of government the American military government wanted for Germany, a federalist democracy, comported well with postwar Bavarian desires. Bavarian political

124. OFFICE OF MILITARY GOVERNMENT FOR BAVARIA, WEEKLY DETACHMENT REPORT, No. 87 (Jan. 9, 1947) (National Archives Record Group No. 260.71 on file at the National Archives, College Park, MD).

125. *Who Will Govern in Bavaria?*, MUNCHNER MITTAG, Dec. 4, 1946 (OMGB Intelligence Branch, trans.) (from the papers of Walter J. Muller, Box 14, Item 86 at the Hoover Archives, Stanford University, Palo Alto, CA).

126. No such references are found in any of the OMGUS or OMGB weekly and monthly reports during this period.

127. Dastrup, *supra* note 23, at 166. This theme has also been explored in other works on the occupation. See JOHN D. MONTGOMERY, FORCED TO BE FREE: THE ARTIFICIAL REVOLUTION IN GERMANY AND JAPAN (1957); John Gimbel, *The Artificial Revolution in Germany*, 76 POL. SCI. Q. 88-104 (1961).

128. See *infra* 144-47.

leaders, especially those in the newly formed CSU, saw advantages in such a governmental structure. While those leaders at times disagreed with the American model in all its respects, such as in its insistence on a nonpopularly elected, advisory Senate, the Bavarian constitution, while more controversial than that of the other *Länder*, was deemed acceptable.¹²⁹

There were, however, more profound difficulties in the American attempt at democratic reform along federalist lines. As John Gimbel points out, the push by OMGUS and OMGB for local and *Länder* elections as well as self-government under *Land* constitutions in turn created resistance to the formation of centralized governmental institutions such as the *Länderrat* and the bizonal economic agencies.¹³⁰ Yet Bavaria had little choice but to accept such arrangements for its own good. Low in industrial goods and raw materials such as coal, it needed other German zones to open their borders in order to revive itself. In turn, those *Länder* needed Bavaria for its agricultural products. In short, the *Länderrat* and bizonal agencies revealed the limits of federalist autonomy and arguably gave the Bavarian government experience in the give-and-take required for a semi-autonomous state to work together, while pursuing its own self-interests.¹³¹

Another criticism is that so-called “grass roots” democracy never took firm hold and that the Americans made misguided efforts to “jump

129. Bavarian influence on the formation of the Federal Republic and the drafting of Germany's Basic Law was especially felt in the adoption of certain federalist principles. Anton Pfeiffer, from the CSU, was the leader of the CDU and CSU fraction at the Parliamentary Council, and Pfeiffer and the other Bavarian representatives insisted on promoting maximum federalism. JAMES, *supra* note 100, at 114. The biggest checks on government centralization in the German government are the Federal Constitutional Court and the Council of Constituent States (*Bundesrat*), which represents the various influences of *Länder* governments and has veto powers over certain laws that could affect financial or administrative interests of the *Länder*. The Basic Law itself contains certain articles (Articles 30, 31, and 50, especially), which provide for a federalist structure. R. Taylor Cole, *Federalism: Bund and Länder*, in *POLITICS AND GOVERNMENT IN GERMANY, 1944-1984: BASIC DOCUMENTS* 325-29 (Carl-Christoph Schweitzer et al. eds. 1995). Federalism's continued vitality, however, is currently a subject of debate in light of the current trend toward European economic and political unification. For an English language description of this debate, see Donald P. Kommers, *The Basic Law: A 50 Year Assessment*, 53 *SMU L. REV.* 487-510 (2000); Helmut Steinberger, *50 Jahre Grundgesetz*, 53 *SMU L. REV.* 494-500 (2000).

130. “Clay's push for local and *Länder* elections and for self-government under constitutions encouraged particularism and states' rights interest groups that resisted his intention to promote economic unity and centralized economic decisions first at the *Länderrat* and then at the bizonal level.” GIMBEL, *supra* note 12, at 69.

start” German democracy.¹³² Clay received criticism from his own staff for establishing structures of democracy within a space of months rather than years. Some critics deemed such measures would be worthless without a large-scale reorientation towards democracy:

Perhaps the greatest weakness in the American efforts in this field lay in their formality. Too much emphasis was placed on the holding of elections, the framing of constitutions and laws, the setting up of the machinery, and other more or less mechanical techniques. Too little attention was given to cultivating Germans disposed to support a democratic system in Germany, filling public offices with able Germans who could be expected to fight for the democratic cause during critical periods of attack in the future, and educating the Germans as to the meaning of representative democracy.¹³³

Such reorientation never occurred within the American zone. Except for denazification, no widespread attempt at “democracy education” occurred.¹³⁴ Joseph Mire, in an OMGUS advisory paper about the German civil service, wrote in 1949 of the need for a “reconstruction of the German society towards a genuinely democratic state”¹³⁵ But by 1949, he was cry-

131. This was made more true by the fact that decisions could only be obtained through unanimous vote from all the *Länder* Minister-Presidents or their representatives, and that the presidency of the *Länderrat* rotated among the *Länder* Minister-Presidents every three months, “thereby working to prevent too great an accumulation of power in any one capital.” DORONODO, *supra* note 4, at 57.

132. See REBECCA BOEHLING, A QUESTION OF PRIORITIES: DEMOCRATIC REFORM AND ECONOMIC RECOVERY IN POSTWAR GERMANY *passim* (1996).

133. ZINK, *supra* note 10, at 185. A related criticism is that the decision to begin a German political revival no sooner than the fall of 1945 was an unnecessary “postponement”:

Public order, a smoothly running bureaucracy, and an expedient material reconstruction took priority for most MG [military government] detachments over any goals of democratization, whether in the form of government accountability to the citizenry or genuine civic participation in government. . . . [O]nce all the cogs of the bureaucratic wheel had been well greased and were functioning smoothly, [the] propitious moment for initiating the process of reconstructing local democracy in Germany was gone.

BOEHLING, *supra* note 132, at 156-57. One could counter that public order, a functioning bureaucracy, and material reconstruction are prerequisites for a healthy and functioning democracy.

134. See *supra* note 21.

ing out far too late. That year, virtually all aspects of American occupation disappeared.

It appears, however, that the social reformers overstated their case considerably in postwar Germany. If Nazism really *was* the expression of the deepest cultural values of the German people, then the reformers' claims would have been borne out by some subsequent rise of militaristic extremism.¹³⁶ Rather, it appears that especially in Bavaria, Nazism represented not the deepest expression of values, but rather a significant departure from Bavarian tradition and experience.¹³⁷ The disasters that the Nazis—many of the most ardent of whom were Bavarians—inflicted upon the world and Germany itself convinced most Bavarians that the federalist democratic model the Americans put forth, with some modifications, was a more viable postwar option and kept with Bavarian political tradition.¹³⁸

Opinion polls and surveys conducted of postwar Germans indicated that they were ready and willing to embrace much of the American occupation policy goals. Unlike the defeat in World War I, only a small number saw the American occupation as a blot on national honor—perhaps because they were disgraced and ashamed by the world's discovery of the crimes against humanity that so many of them had committed.¹³⁹ If the

135. Joseph Mire, Labor Organization in Germany Public Administration and Services, Visiting Expert Series, No. 8 (1949) (from the papers of Walter J. Muller, Box 13, Item 80 on file at the Hoover Archives, Stanford University, Palo Alto, CA).

136. Morgenthau apparently thought that such militarism would reappear. Nearing his death, he told a historian that the United States would "have to fight Germany again before you die." He said this shortly before his own death in 1967. BESCHLOSS, *supra* note 13, at 252.

137. See *supra* notes 4-6.

138. The renowned Third Reich scholar Ian Kershaw argues that Nazism never achieved its purpose of bringing about a true social revolution in Germany. Nazism failed to break down religious allegiances and no evidence suggests that "family structures came anywhere near to breaking down under Nazism." KERSHAW, *supra*, note 14, at 178. Furthermore, while enhancement of existing anti-Semitic and other prejudices undoubtedly occurred, "the growing protest against the 'euthanasia action' and the regime's perception of the need for utmost secrecy in the 'Final Solution' are indirect testimony that exposure to Nazi race values had come nowhere near completely eradicating conventional moral standards." *Id.* at 178-79. Kershaw also examines and critiques the "Goldhagen thesis" that the Holocaust was a natural product of a deeply rooted, racist anti-Semitism in German society. *Id.* at 253-62; see DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS *passim* (1996); see also PETER FRITZCHE, GERMANS INTO NAZIS *passim* (1998) (providing an analysis of how the German people embraced Nazism, not as a "hyperventilated expression of German values," but as a populist movement that sought to rekindle German nationalism prevalent at the outbreak of World War I).

recent Nazi past held nothing but shame, the American model brought forth in Bavaria a sense of renewal, a way to sever the ties, or at least distance itself, from the Third Reich.¹⁴⁰

To a large degree, this severance and renewal occurred. The CSU, and its northern German sister party, the CDU, led by Konrad Adenauer, became the dominant force in postwar German political life, and the CSU subsequently played a major role in drafting the Federal Republic's Constitution, the so-called Basic Law.¹⁴¹ As a result, the Federal Republic put significant checks on the central government's power, which only received powers to it granted by the Constitution itself.¹⁴²

The evidence indicates that Bavarians accepted most of the democratic reforms. It would be incorrect to hold that this ready acceptance

139. MERRITT, *supra* note 14, at 245. In addition to Merritt's analysis of postwar German opinion, American military government Information Control censors reviewed thousands of letters during a four month period:

Based on 21,306 opinions as expressed in 16,048 letters read by Berlin censors between December 1945 and March 1946, the study portrayed the sentiments of the Germans towards each of the occupying powers. Approximately 75 percent of the comments on the American forces expressed satisfaction, whereas a full 80 percent of the remarks on the Russian forces were unfavorable.

Office of Military Government for Germany Information Control Division, Intelligence Summary (ICIS), No. 47 1-4 (June 22, 1946), *cited in* MARGARET L. GEIS & GEORGE J. GRAY JR., *THE RELATIONS OF OCCUPATION PERSONNEL WITH THE CIVIL POPULATION, 1946-1948* 11 (1951) (on file at the CARL, Fort Leavenworth, Kansas).

140. MERRITT, *supra* note 14, at 243. As the German historian Gordon Craig states,

It was not a time conducive to nostalgia, but rather one in which the Occupying Powers encouraged the Germans to reflect upon the consequences of their past political behavior, while they themselves pursued a policy of denazification, disarmament, dismantling and democratization that was designed to prevent a reversion to old ways."

GORDON CRAIG, *THE GERMANS* 35 (1982).

141. Friedrich Glum of the Bavarian Chancellery wrote much of the first draft of the German Constitution, calling it the "Constitution of the United States of Germany." *Quoted in* DORONODO, *supra* note 4, at 79.

142. *Id.* Throughout the Parliamentary Council that led to the creation of the Basic Law and the first Federal Republic government, the SPD stood for strong central government, with powers similar to the old Weimar Republic. The CSU and CDU faction stood for a limited government with "all rights not expressly granted to it reserved to the individual states." GILLEN, *supra* note 35, at 216.

meant that OMGB was unnecessary or even a hindrance in Bavaria, and that the Americans only succeeded when they, in essence, stumbled off the stage.¹⁴³ D. R. Doronodo, who writes positively of the influence of Bavarian federalism on West Germany, gives several reasons for federalism's postwar success, including: no central German government, no hegemonic Prussia, and no ideological division.¹⁴⁴ He makes no mention, however, of the American military government's contribution in setting up the conditions that would allow federalism to flourish in Bavaria, the *Land* most receptive to such a political idea.¹⁴⁵ Edward Peterson, a critic of the occupation, states more openly that the OMGB officials were essentially "irrelevant" in Bavarian political matters.¹⁴⁶ But this begs the question of who, then, *was* relevant. Peterson identifies the real figures as the Bavarian Minister-Presidents: "None so seriously influenced events as to be comparable to minister-presidents in importance."¹⁴⁷ Yet he also asserts that neither Wilhelm Hoegner, the SPD Minister-President for much of the 1945-47 period, nor OMGB, were key players because "political power in Bavaria rested with the Catholic party, the CSU."¹⁴⁸

This consigning of American military government to irrelevance regarding postwar democratization is incorrect. It is more accurate to say that American military government provided the framework for democracy, a framework that Bavarians ultimately accepted. It stressed the need for decentralization and federalism, which Bavarians embraced. Finally, it required a written constitution enshrining individual rights and semiauto-

143. See PETERSON, *supra* note 22, *passim*.

144. DORONODO, *supra* note 4, at 125.

145. *Id.* Doronodo states that "[t]hese circumstances, arising as they did in the wake of war and defeat, conditioned the leading politicians of the western occupation zones to be more amenable to a search for a political organization of the state which would avoid the centralization of the pre-1933 era." *Id.*

146. PETERSON, *supra* note 22, at 215.

147. "What [Minister-President] Hoegner and [General] Muller thought became more and more irrelevant, however. Political power in Bavaria rested in the Catholic party, the CSU." *Id.*

148. *Id.* at 228. It should also be noted that OMGB selected (and, in the case of the first Minister-President, Friedrich Schaeffer, summarily dismissed for allegedly reactionary tendencies) the Bavarian Minister-Presidents. Furthermore, while it permitted the CSU to expand in Bavaria, it also appointed Minister-President Wilhelm Hoegner, a member of the SPD, as Schaeffer's replacement in September 1946. The CSU, while clearly the dominant party in postwar Bavaria, did not have the monopoly on the vote. Its percentage of the popular vote diminished from the time of the first *Gemeinde* elections to the December *Landtag* elections, when it barely achieved an absolute majority with 52.2% of the vote. *Id.* For example, the SPD outpolled the CSU in Munich, 103,912 votes to 97,897, for the *Landtag* elections in December 1946. CASE STUDIES, *supra* note 2, at 83.

nomous local government, which Bavarians voted for by a large margin. Most Bavarians accepted these reforms and have continued to accept them virtually without question for half a century.

The role of Bavarians in the democratizing process was important as well. The Bavarians' stubborn particularism, religious belief, and traditionalist views could prove especially difficult for the Americans. At the same time, these very traits proved beneficial. They provided a means for Bavarians to break away from Nazism. Bavarians looked back to their own history and faith for renewal. Ultimately, Bavaria's unique role in Germany and emphasis on *Land* autonomy helped pave the way for a federalist German state with governmental structures that would provide a counterweight to any future centralizing totalitarianism.

II. Conclusion: Lessons Learned for Future Occupations?

Can lessons be derived from the first years of the American occupation of Germany, and in particular Bavaria, that might be useful in possible future occupations? A simple checklist approach can be dangerous, since historical circumstances vary so significantly. Nonetheless, a recent RAND Corporation study came up with some explicit lessons learned from Germany for Iraq.¹⁴⁹ One can perhaps add four more lessons learned,

149. JAMES DOBBINS, ET. AL., AMERICA'S ROLE IN NATION-BUILDING FROM GERMANY TO IRAQ 3-23 (2003). The seven explicit lessons learned from the occupation of Germany were:

[1] Democracy can be transferred, and societies can, in some situations, be encouraged to change. [2] Defeated populations can sometimes be more cooperative and malleable than anticipated. [3] Enforced accountability for past injustices, through such forums as war crimes tribunals, can facilitate transformation. [4] Dismembered and divided countries can be difficult to put back together again. [5] Defeated countries often need sizable transfers to cover basic government expenditures and quickly provide humanitarian assistance after the conflict. [6] Reparations immediately after the end of the conflict are counterproductive. The economy must grow before a country can compensate the victims of the conflict. [7] Permitting more than one power to determine economic policy can significantly delay economic recovery."

Id. at 20-21.

based upon this study of democratization and federalism in Bavaria from 1945 to 1947.

First, little “social engineering” occurred in Bavaria.¹⁵⁰ The American military government did not accept the Marxist notion that the political was the cultural, and vice versa. Rather, it sought for, and achieved to a large degree, decentralized government, but did so within the framework of Bavarian cultural experience. The military government, for example, did not at all attempt to reform or undermine the confessional school system.¹⁵¹ Instead of alienating the conservative, Catholic and agrarian Bavaria, it saw the region as a place that could foster federalism.¹⁵² Partly as a result, the exclusion of Communist and radical socialist influence in Bavaria, was achieved relatively easily.

Second, and related to the first point, what the American military government sought was not cultural or social revolution, but structural political change.¹⁵³ In achieving this change, the Americans would not be bound by what they would have regarded as a kind of pedantic legalism about what laws would or would not apply. *Debellatio* simply swept all those notions aside.¹⁵⁴ Furthermore, American military government retained, at least during the first two years of the occupation, ultimate control, as evidenced by its power to set the conditions for constitutional approval.¹⁵⁵ Thus, while deliberately not interfering with matters of faith and culture, the Americans had no hesitation in interfering in political or legal matters as they saw necessary.

Third, guidance from above meant less than prompt execution on the ground. General Clay admitted he was given almost no guidance how to carry out the occupation.¹⁵⁶ It is perhaps more accurate to say that the guidance, contained in such documents as the Potsdam Declaration and JCS 1067, was abstract and sometimes platitudinous.¹⁵⁷ Regardless, Clay and the American occupiers simply did not take counsel of the fears of many presumed experts. They launched an ambitious effort to democratize and decentralize almost immediately, probably thinking that any set

150. *See infra* pp. 122-24 and note 21.

151. *Id.*

152. *See supra* note 28.

153. *See supra* note 15.

154. *See supra* note 19.

155. *See infra* pp. 139-42.

156. *See infra* pp. 125-27 and note 30.

157. *See supra* notes 11-12.

plan for constructing democratic federalism was almost sure to be significantly altered very soon in its course.¹⁵⁸ More important was setting democratic federalism in motion. Allowing the mechanics of democratization and decentralization to be put in effect, and allowing the Bavarians to use (and get used to) those procedures, while at the same time keeping ultimate veto power, was the American military government's approach at a kind of "guided" democracy.

Fourth, the American military government did not wear ideological blinders. Clay, for example, clearly thought little of New Deal-type social reformers who wanted to upend German culture.¹⁵⁹ On the other hand, the Americans did not view federalism as the *sine qua non* of Bavarian or German military government in all cases. The establishment of the *Länderrat* to some degree, and even more so of the bizonal merger, was a recognition that economic centralization, at least temporarily, had to occur.¹⁶⁰ This pragmatism perhaps relates back to the previous point. The very lack of guidance was in a profound way a beneficial non-intrusion that provided the American occupiers flexibility in coming up with solutions that perhaps had an improvisatory feel to them. The solutions worked relatively well precisely because they were based upon immediate needs and not set-in-stone, inflexible political philosophies or agendas.

There are no ideal military occupations. The American military government in Bavaria made mistakes during the years 1945-47. However, the opinions of particular columnists, scholars, generals, or statesmen mean much less than history's verdict. Bavaria continues to flourish into the twenty-first century as part of a now united, democratic Germany. If a half-century of peace, prosperity, and democracy is taken as evidence, the reasonable conclusion must be that the American military government's efforts to establish a constitutional, federalist democracy in Bavaria achieved success.

158. *See infra* pp. 128-30.

159. *See supra* notes 33.

160. *See infra* pp. 135-38.

**THE NAME OF WAR: KING PHILIP'S WAR AND THE
ORIGINS OF AMERICAN IDENTITY¹**

MAJOR MATTHEW J. McCORMACK²

"When I came to the place, i found an house burnt downe, and six persons killed, and three of the same family could not be found. An old Man and Woman were halfe in, and halfe out of the house neer halfe burnt. Their owne Son was shot through the body, and also his head dashed in pieces. This young mans Wife was dead, her head skined." The young woman . . . "was bigg with Child," and two of her children, "haveing their heads dashed in pieces," were found "laid by one another with their bellys to the ground, and an Oake planke laid upon their backs." The three missing family members . . . had been taken captive.³

Part murder mystery, part historical inquiry, and part anthropological thesis, *The Name of War* examines the colonial era war between New England Indian tribes and colonists, known as King Philip's War.⁴ The author, Jill Lepore,⁵ theorizes that King Philip's War was caused in part by the colonists' attempt to subjugate the Indians culturally, not only out of a desire to Christianize them, but also because of the colonists' own fear of

1. JILL LEPORE, *THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY* (1999).

2. United States Marine Corps. Written while assigned as a student in the 52d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

3. LEPORE, *supra* note 1, at 74-75 (quoting an unabridged letter from George Ingersoll to Leif Augur (Sept. 10, 1675)).

4. King Philip's War was a bloody struggle between many, although not all, of the New England Indian tribes and the New England colonists. *Id.* at 69-121. The war lasted fourteen months, from the early summer of 1675 to the late summer of 1676. *Id.* at xxv-xxviii. Although the stakes were high for both sides, the Indians' early successes nearly exterminated the colonial presence in New England. *Id.* at 69-121. "In proportion to population, [King Philip's War] inflicted greater casualties than any other war in American history." *Id.* at xi.

5. Jill Lepore currently teaches history at Boston University. *Id.* at Pre-Title Page. She previously taught history at the University of California, San Diego, from 1995 to 1996, and served as a fellow at the Charles Warren Center, Harvard University, from 1996 to 1997. *Id.* Jill Lepore received her Bachelor of Arts degree from Tufts University, Master of Arts degree from University of Michigan, and Doctor of Philosophy degree from Yale University. *Id.*

losing their Christian souls and *Englishness*.⁶ Colonists believed the abhorrent influence of Indian culture had corrupted their *Englishness*.⁷

To show how King Philip's War affected the American identity, Lepore recounts how contemporary authors described the war and how those descriptions influenced later American generations.⁸ Lepore analyzes the injuries caused by King Philip's War and history's interpretation of those injuries. She theorizes "the acts of war generate acts of narration, and that both types of acts are often joined in a common purpose: defining the geographical, political, cultural, and sometimes racial and national boundaries between peoples."⁹ Lepore ultimately suggests the political and cultural boundaries conceived during King Philip's War shaped the American identity.¹⁰

Lepore organizes her thesis by buttressing the four parts of her analysis—Language, War, Bondage, and Memory—between a lengthy introduction and prologue, and an epilogue. The introduction and prologue lay out her analytical framework,¹¹ while the epilogue ties her thesis to the plight of Indians who live in New England today.¹² Between these two ends, Part I "Language"¹³ and Part II "War"¹⁴ establish the core of Lepore's thesis and propel that thesis with her most thought provoking analysis. In contrast, Part III "Bondage"¹⁵ and Part IV "Memory"¹⁶ meander to some degree and provide only ancillary support for the thesis established in Parts I and II.

Lepore's four-part analysis begins in Part I "Language" by explaining the linguistic underpinnings of contemporary reporting on the war.¹⁷ Lepore argues that language was the primary tool used to influence the colonists' self-perception and later views about the war.¹⁸ Colonists, the sole recorders of the war's written history, tried to minimize the perception of

6. *Id.* at 5-7, 11.

7. *Id.*

8. *Id.* at xxii-xxiii.

9. *Id.* at x.

10. *Id.* at iv.

11. *Id.* at ix-xxviii, 1-18.

12. *Id.* at 227-40.

13. *Id.* at 19-68.

14. *Id.* at 69-121.

15. *Id.* at 123-72.

16. *Id.* at 171-226.

17. *Id.* at 19-68.

18. *Id.* at 67-68.

their own cruelty by manipulating the language they used to describe the war.¹⁹ The colonists tried to distinguish their own violence from both the *savagery* of their Indian neighbors and the *cruelty* of their European brethren, the Spanish, during their earlier conquest over Indians in more southern parts of the New World.²⁰ In a war in which New England colonists killed Indian women and children with the same fervor as the Indians employed against colonial *innocents*,²¹ the colonists varnished their own cruel actions with the gloss of “virtue, piety, and mercy.”²²

Lepore argues that colonists were caught in a “Catch-22.” The colonists could either passively lose their cultural identity and allow themselves to become like the Indians, who they regarded as un-Christian barbarians, or wage a war of genocide, like the Indians and Spanish, in an attempt to save their *Englishness*.²³ Ironically, the colonists chose the latter option and fought as savagely and cruelly as the Indians and Spanish ever did.²⁴ To ultimately regain their *Englishness*, the colonists massaged history with the words they used to describe the war.²⁵ Lepore suggests this self-deception formed the core of American identity in the late eighteenth and early nineteenth centuries.²⁶

Despite a normally measured approach, Lepore hits the shoals of hyperbole when she draws analogies between a war of violence and a “war of words,”²⁷ and thereby mistakenly assumes that both the colonists and Indians were aware of, or even cared about, the other’s views about the war.

[T]he war created a world full of distortions, fictions, and confusions. For the colonists, that confusion created a *war of words*. But, whether illiterate or literate, New England’s Indians had little chance to win this kind of war, or even to wage it, since liter-

19. *Id.* at xiv.

20. *Id.* at xiv, 9-13.

21. *Id.* at 7, 87-89.

22. *Id.* at xiv.

23. *Id.* at 11 (“[T]hose ‘true English-men’ who lived in New England found themselves in a very tricky spot. Barbarism threatened them from every direction: if they continued to live peaceably with the Indians, they were bound to degenerate into savages, but if they wage war, they were bound to fight live savages.”).

24. *Id.*

25. *Id.* at 45-68. “If war is a contest of both injuries and interpretation, the English made sure that they won the latter, even when the former was not yet assured.” *Id.* at 68.

26. *Id.* at xiv.

27. *Id.* at 67.

acy itself, and the cultural compromises it entailed, was potentially dangerous In the end, of course, the crucial *rivalry* was not between the competing interpretations [among colonial ministers or differing English newspapers], but between the differing views of the war held by English colonists and Indians.²⁸

Lepore's references to a *war of words* and *rivalry* suggest, without support, that the Indians were making affirmative efforts, through a written or oral history, to counter the colonists' written efforts. Lepore ignores the possibility that the Indians might not have been aware of, or cared about, what the colonists told themselves about the war. It is surprising that Lepore ignores this obvious possibility because other parts of her thesis rest on the Indians' illiteracy.²⁹ Conversely, Lepore suggests, without support, the colonists were aware of, or cared about, what the Indians told themselves about the war. This reference to *rivalry* suggests that colonists wrote with a competitive eye toward how their Indian counterparts might slant their interpretation of the war. Lepore ignores the possibility that the colonists might have written about the war in an unbalanced manner because of either unadulterated hate for the Indians or a sense of moral righteousness toward their cause in keeping both themselves and their foothold colony in the New World alive.³⁰ This critique about Lepore's suggested *war of words* and *rivalry*, however, is not meant to suggest that Lepore frequently rests on hyperbole to support her thesis. Rather, this overstatement is an aberration to Lepore's normally measured approach throughout the book.

Part II "War" examines the cultural differences between the colonists and the Indians and explains how those cultural differences allowed both sides to justify the cruel tactics they embraced.³¹ Lepore examines how each culture's views of property ownership and religion influenced the cause and conduct of the war.³² For example, Lepore argues the Indians targeted the colonists' property during the war not only because it provided physical sustenance and refuge to the colonists, but also because it was

28. *Id.* (emphasis added) (citation omitted).

29. *See, e.g., id.* at 21-47 (arguing the Indians did not produce written accounts of the war because the few literate Indians were more likely than the vast majority of illiterate Indians to be early casualties of the war).

30. *Id.* at 68 ("And even while the English lamented their helplessness against Indian attacks, they took comfort in the knowledge that they controlled the pens and printing presses.").

31. *Id.* at 69-121.

32. *Id.*

crucial to the colonists' conception of self-identity.³³ The colonists' cattle, crops, and houses not only allowed the colonists to survive New England's harsh winters, but

the clothes [the colonists] wore, the houses they lived in, and the things they owned—were a good part of what differentiated the English from the Indians. These were not simply material differences, they were cultural, for every English frock coat was stitched with threads of civility, each thatched roof rested on a foundation of property rights, and every cupboard housed a universe of ideas.³⁴

Through her seamless use of contemporary writings, Lepore demonstrates the Indians understood the considerable emphasis the colonists placed on property. When the Indians burned down entire colonial towns and laid waste to the colonists' cattle, the Indians were purposely targeting the cultural core of colonists' self-identity.³⁵

Parts III and IV provide ancillary support to Lepore's thesis by exploring other aspects of the war and the war's interpretation by later American generations. Part III "Bondage" delves into the consequences suffered by the war's victims who were not killed—those left in captivity, confinement, or slavery.³⁶ Lepore chronicles the behavior of three individuals—a colonial man and woman, and a Christianized Indian—captured by the warring Indians, and examines how the colonists judged the captives' actions while in Indian hands.³⁷ Then, Lepore addresses the confinement and enslavement of the captured Indians.³⁸ Her analysis seems to wander especially as she chronicles the captivity of the three different individuals. Lepore, however, continues to examine contemporary writings to draw conclusions about cultural attitudes and their affect on American identity. None of these conclusions are as poignant or as significant as those in Parts I and II.

Part IV "Memory" concludes the analysis by jumping forward in time and analyzing two occasions when the war was interpreted by later American generations.³⁹ Lepore focuses on interpretations during both the

33. *Id.* at 71-79.

34. *Id.* at 79.

35. *Id.* at 94-96.

36. *Id.* at 123-72.

37. *Id.* at 123-49.

38. *Id.* at 150-70.

American Revolution and the 1830s when a popular play about King Philip's War was released. Without much explanation about why her analysis leaps forward a hundred years to the American Revolution, Lepore shows how the memory of King Philip's War was used during the American Revolution as a propaganda tool against the British. During the 1830s, King Philip's War again resurfaced in the American conscience with the release of the wildly popular play, *Metamora; or, the Last of the Wampanoags*.⁴⁰ Again, Lepore analyzes the American viewpoint at the time, which had shifted to increased sympathy for the Indians of King Philip's War.⁴¹ Although the substance of Parts III and IV is topically related to Lepore's thesis, Parts III and IV shed less light on how the colonists' actions during King Philip's War generated narration that ultimately helped define American identity vis-à-vis the Indians. In fact, the apparent sympathetic shift in attitude during the 1830s toward the Indians who fought King Philip's War effectively undercuts Lepore's suggestion that contemporary narration about King Philip's War had any specific, lasting effect.

Even though Lepore writes her thesis in a scholarly style, her thesis remains exceptionally readable. Lepore's writing is marked by crisp, declarative sentences that fall within well-structured, disciplined paragraphs that generally follow the respective topic sentence. Lepore's cloudless writing style allows her readers to effortlessly comprehend some weighty and complicated ideas. Lepore obviously cares about her readers; unlike some scholarly authors, she does not abandon her readers in a complicated, tangled knot of ideas. Additionally, Lepore's thesis remains exceptionally readable because of the intriguing historical details she weaves into her thesis. The historical details not only support her thesis, but also captivate her readers' imaginations. Liberally using contemporary sources and retaining the quotes' original grammar and spelling, Lepore gives her thesis an air of authenticity and helps transport her readers to colonial times.

Although Lepore's thesis is exceptionally readable and contains many historical details, *The Name of War* is not meant for readers looking for a comprehensive history about King Philip's War. The book's organization is custom-tailored to support Lepore's analysis, rather than organized to describe the war's systematic progression. Throughout, and in support of,

39. *Id.* at 171-226.

40. *Id.* at 191-226.

41. *Id.* at 191-93. "A century and a half later, when *Metamora* debuted in New York in 1829, Philip finally spoke up. As *Metamora* fell, dying, he cried, 'My curses on you, white men!' . . . and white audiences applauded, rapturously." *Id.* at 193.

her analysis, Lepore freely grabs facts about the war with no concern for the war's chronology. Thus, readers are introduced to the war's details in a largely random order. Lepore's organization also leaves much of the war's actual events unmentioned until Part II.⁴² Thus, some readers who are unfamiliar with King Philip's War might be left begging for more general information about the war throughout the book's first quarter to provide context for Lepore's analysis.

Although *The Name of War*'s organization poses difficulties for readers not familiar with King Philip's War, its thesis teaches lessons that can benefit judge advocates and those interested in the military arts, in general. For instance, Lepore's recognition that words can play as important a role as actual violence in war reinforces Clausewitz's teachings that the "moral elements are among the most important in war."⁴³ As such, one can expect warring nations, at the strategic level of war, to target, with words, their opposing populations' moral elements, such as their will to fight.⁴⁴ Nations might even target their own population's moral elements with words in an effort to garner support at home, and even among allies abroad.⁴⁵ Thus, war reporting can have strategic aims and consequences.⁴⁶

42. *Id.* at 69-121.

43. CARL VON CLAUSEWITZ, ON WAR 184 (Michael Howard & Peter Paret eds. and trans., Princeton University Press 1976). "One might say that the physical [elements of war] seem little more than the wooden hilt, while the moral factors are the precious metal, the real weapon, the finely honed blade." *Id.* at 185.

44. TRUONG NHU TANG, A VIETCONG MEMOIR 211 (1985).

[Tactical losses were irrelevant] because the military battlefield upon which the Americans lavished their attention and resources was only one part of the whole board of confrontation. And it was not on this front that the primary struggle was being played out. . . . [I]t was American public opinion—the minds and hearts of the American people—that had to be motivated and exploited.

Id. at 211-12.

45. See, e.g., Emily Wax, *Arab World Is Seeing War Far Differently; Media, Mistrust of U.S. Help Shape Perspective*, WASH. POST, Mar. 28, 2003, at A33 (reporting on U.S. and Arab medias' attempts to influence the world population through selective reporting about Operation Iraqi Freedom).

46. See, e.g., Michael Dobbs, *America's Arabic Voice; Radio Sawa Struggles to Make Itself Heard*, WASH. POST, Mar. 24, 2003, at Style (reporting on a U.S. funded, Arabic-speaking radio station designed to help "struggle for the hearts and minds of 250 million Arabs" during Operation Iraqi Freedom).

In addition to these lessons, Lepore's thesis implicitly raises profound questions. For instance, King Philip's War, as a case study, demonstrates that societies, such as the New England colonists, can abandon their most deeply held values when physical and cultural attacks push these societies close to extinction.⁴⁷ When sufficiently threatened, the colonists fought as savagely as the Indians—Indian women and children were not immune from colonist attack.⁴⁸ Thus, for us today, is the law of war, as an embodiment of *our* society's values, immutable or relativistic?⁴⁹ If we, as a nation, became sufficiently threatened, would the enemy's families become acceptable, or even fair, targets?

Although one might be tempted to respond categorically that innocent families would never be acceptable targets, what if *not* targeting the enemy's families might ultimately lead to one's death, and that of one's family? Remember, for the colonists, the survival of their families and their colonies were at stake. What if the enemy freely targeted your family, regardless of whether you abided by the law of war? Future enemies may not abide by the law of war,⁵⁰ much like the Indians during King Philip's War. Additionally, what if we felt that the enemy's families were *not* as deserving of protection as our own, if for instance we were at war with space aliens? Although killing alien families may sound absurd, the analogy helps us comprehend today why colonists, who believed the Indians were less than human, so easily killed Indian women and children. And today, could the lives of a *human* enemy's families be similarly discounted through the effective use of words? Lepore's thesis suggests, "yes." Thus, when sufficiently tested, the original categorical response may not provide such an intellectually complete answer.

Overall, Lepore's thesis generates some beautifully nuanced insights and interpretations of cultural war. Lepore's intellectual honesty shines when she concedes such an analysis is not so straightforward, particularly with a war fought over two hundred years ago and revealed only through the writings of one party to the conflict.⁵¹ Despite this admitted difficulty,

47. LEPORE, *supra* note 1, at 87-89.

48. *Id.* at 88.

49. *See, e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (stating, "Civilian objects shall not be the object of attack or of reprisals").

50. *See, e.g.*, John Pomfret, *China Ponders New Rules of 'Unrestricted War,'* WASH. POST, Aug. 9, 1999, at A1 (discussing a new book on Chinese military strategy that advocates ignoring the law of war because it is a fundamentally Western concept that provides countries like China "no chance" of victory).

Lepore crafts a sound and intellectually intriguing thesis that deserves all of its critical acclaim.⁵²

51. LEPORE, *supra* note 1, at xi.

52. *The Name of War* won the Bancroft Prize in 1999. See Columbia University, *The Bancroft Prizes*, available at <http://www.columbia.edu/cu/lweb/eguides/amerihist/bancroft.html> (last visited Nov. 17, 2003). Columbia University awards the Bancroft Prize annually to distinguished works in either American History or Diplomacy. *Id.* *The Name of War* also won the Ralph Waldo Emerson Award in 1998. See The Phi Beta Kappa Society, *Book Awards*, available at <http://www.pbk.org/scholarships/books.htm> (last visited Nov. 17, 2003). The Phi Beta Kappa Society awards the Ralph Waldo Emerson Award annually “for scholarly studies that contribute significantly to the intellectual and cultural condition of humanity.” *Id.*

**THE CONQUERORS: ROOSEVELT, TRUMAN, AND THE
DESTRUCTION OF HITLER'S GERMANY, 1941-1945¹**

REVIEWED BY LIEUTENANT COLONEL WALTER M. HUDSON²

The Conquerors is victor's history. It pronounces this in its title. Its first epigraph is from Eisenhower to the German people: "We come as conquerors, but not as oppressors."³ Michael Beschloss, the author, does not cite a single German language document in the hundreds of books, documents, interviews, and papers listed in the bibliography. These omissions, however, do not mar his book. Indeed, his very point is to write this history from the winner's vantage point.

A contrast thus can be made with another recent book, John Dower's *Embracing Defeat: Japan in the Wake of World War II*.⁴ Dower's book won virtually every conceivable literary and historical prize.⁵ But the laurels obscure the clay. A work such as Dower's is groundbreaking and powerful, and yet one can never get beyond the impression that it is an exercise in tweeded sneering at the Americans who occupied and helped rebuild Japan. It may be too much to ask that even gifted historians possess a kind of Shakespearean "negative capability"—the uncanny ability to examine, with supreme objectivity and disinterestedness, historical personages—to let them, ultimately reveal, and perhaps redeem or condemn *themselves*. Few, even the most extraordinary historians are fully capable of this expressive insight.

Beschloss nonetheless possesses that particular quality of mercy in regards to his conquerors to a far greater degree than Dower. They are flawed, yet understandable, and oftentimes admirable overlords. What emerges in *The Conquerors* is that, *contra* Marx, a handful of men—neither impersonal, blind forces nor abstractions disguised as people ("the working class," "the spirit of democracy," "the Volk," etc.)—drove post-war history. Everything else appears secondary. Even plans and policies

1. MICHAEL BESCHLOSS, *THE CONQUERORS: ROOSEVELT, TRUMAN, AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-1945* (2002).

2. United States Army, Chief, Military Law Office and Instructor, Command and General Staff College, Fort Leavenworth, Kansas.

3. BESCHLOSS, *supra* note 1, at xv.

4. JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* (1999)

5. *Embracing Defeat: Japan in the Wake of World War II* was awarded, among others, the 2000 Pulitzer Prize, the 1999 National Book Award, and the 2000 Bancroft Prize.

are ephemeral; mere sketches on National Geographic maps, hastily initialed policy letters, or vague directives with rule-swallowing exceptions. But if human beings, and more specifically, personalities, drive history, that means all human foibles, strengths, and weaknesses come into play. Thus, *The Conquerors* yields the painful lesson that righteous motives may lead to bad ideas, and that mixed motives can achieve good results.

If one is expecting a “greatest generation” hagiography so popular these days, *The Conquerors* disappoints. It shows, at the highest levels, the tangled strands of policy and the inner motives of the American decision makers, and the picture is not always flattering. Roosevelt, in particular, emerges as the dominant personality in this book. Beschloss reveals a complex and charming, yet also secret and devious man. A man with a keen, if superficial, intelligence and an effortless grasp of the world’s geography, Roosevelt seems to have displayed, at times, a casual, near-Olympian indifference to the fate of nations. A man with greater personal knowledge of Germany than any prior president (he visited there eight times in his youth),⁶ he retained a Francophile’s smug disregard for German culture.⁷ In a profound way, he misunderstood that culture: he would prattle on about Prussian militarism, but never really peered into the nihilistic vacuum of Nazism.⁸

Where Roosevelt emerges in all his contradiction is his dealing with the Nazi plans of Jewish genocide. Beschloss reveals what to some may seem as an extreme indifference of Roosevelt (and the American government as a whole) to the mass murder of Jews in Europe.⁹ Beschloss, though, does not engage in the moral preening typical of so many contemporary historians or armchair statesmen. He acknowledges that the Holocaust, as a recognized historical event, was not seared into the collective consciousness of the West until decades after the war was over.¹⁰ Nonetheless, what Beschloss terms “the terrible silence” of Roosevelt remains. Why did Roosevelt, even after having full and ample knowledge of death camps and the plan to exterminate Jews, do nothing and say nothing to stop

6. BESCHLOSS, *supra* note 1, at 9.

7. *Id.*

8. *Id.* at 9-11, 285.

9. *Id.* at 98.

10. *Id.* at 40. Indeed, the use of the term “Holocaust” did not enter common usage in English until the 1960s and 1970s. If one looks at William Shirer’s *Rise and Fall of the Third Reich*, considered the seminal popular English language history on the Nazi regime, the word “Holocaust” is not found in the index or ever referenced. See WILLIAM SHIRER, *RISE AND FALL OF THE THIRD REICH* (Simon & Schuster 1990) (1959).

it for so long? As Beschloss points out, not only did Roosevelt fail to make any speech for over a year-and-a-half, he further failed to set any propaganda machinery in motion to broadcast the crimes.¹¹ The Roosevelt Administration never relaxed immigration policies for Jews—indeed in the entire United States, only one camp, in Oswego, New York, was set up for Jewish refugees.¹²

Yet Beschloss concurs with historian Arthur Schlesinger's assessment that Roosevelt deserved credit more than anyone else for "mobilizing the forces that destroyed Nazi barbarism."¹³ While he does not excuse FDR's conduct, he helps explain it. Some of it may have been, simply, cultural prejudice. Though he counted Henry Morgenthau, Jr. among his closest friends, Roosevelt might be considered, by today's standards, mildly anti-Semitic (and to a lesser degree perhaps, anti-Catholic).¹⁴ As Beschloss points out, perhaps Roosevelt's seeming indifference was really ignorance. Perhaps the truth of the genocide was so terrible, "[Roosevelt] could not comprehend that this was a crime unlike any in history."¹⁵

Furthermore, Roosevelt comes across as a man of almost brutal pragmatism. When told by a Polish underground fighter in no uncertain terms of the Nazi plan to liquidate the Jews, he replies simply: "Tell your nation we will win the war."¹⁶ Roosevelt also calculated the backlash of trumpeting Nazi crimes as well. He "never underestimated the anti-Semitism in American society."¹⁷ Perhaps speaking out against the genocide might have *unleashed* anti-Semitism in America. Roosevelt could have thought that many Americans might ask: why should our boys die for Jewish foreigners?¹⁸

This is uncomfortable, grim, but necessary reading. While it is currently fashionable to vilify certain historical personages of the period for not doing more to stop the Holocaust, Beschloss points out that many were

11. BESCHLOSS, *supra* note 1, at 38-9.

12. *Id.* at 98.

13. *Id.* at 38-9.

14. Beschloss notes that Roosevelt once stated to Morgenthau and Leo Crowley, the Irish Catholic Custodian of Alien Property: "You know this is a Protestant country, and the Catholics and Jews are here under sufferance." *Id.* at 51. The full context and meaning of this statement is not clear.

15. *Id.* at 40.

16. *Id.*

17. *Id.* at 41.

18. *Id.*

perhaps culpable in their silence. Winston Churchill, for all his humane impulses, was only sporadically eager to help the Jews.¹⁹ Beschloss also points out that American Jews, to include those who fully understood what was happening, did little, partly because they did not want to appear to be “special pleaders” and perhaps risk a backlash.²⁰ Beschloss also makes it painfully clear that in the United States during this time, anti-Semitism existed in force among people whose decisions mattered—America’s political elites.²¹

In the midst of what, in retrospect, looks like moral failure, Beschloss introduces the second main figure in the book, Henry Morgenthau, Jr. Before reading *The Conquerors*, this reader had a rather low opinion of Morgenthau. However righteous his anger, the plan named for him to pastoralize Germany would undoubtedly have been catastrophic if implemented as he desired: millions would likely have suffered and died from starvation and privation, and the Soviet Union would have almost assuredly extended its reach into Western Europe.²² Yet Beschloss reveals a complex, and in many ways, admirable man. Morgenthau emerges from the book as its flawed hero.

Morgenthau was regarded as a Roosevelt lackey and yes-man, and as a Secretary of Treasury who knew more about cows than money (he was a wealthy New York landowner). He was a near-perfectly assimilated Jew, embarrassed by his origins.²³ He was also vain and star-crossed in his ambitions, and endlessly manipulable by Roosevelt—one moment confiding in Eleanor about the President’s browbeating and bullying and in the next slavishly hanging on an offhanded comment from Roosevelt that he

19. *Id.*

20. They thought this for good reason. Secretary of War Henry Stimson viewed proposals for the bombing of Auschwitz, for example, as the “special pleading of an influential American ethnic group that did not necessarily harmonize with the supreme goal of winning the war.” *Id.* at 88.

21. Beschloss, for example, reveals that Roosevelt’s Assistant Secretary of State had “deliberately blocked” efforts to find refuge for Jews in the United States and elsewhere, and had deliberately obstructed the “flow of money, information, and passports.” *Id.* at 53. Cordell Hull, Roosevelt’s hapless Secretary of State, hid his wife’s half-Jewish heritage for purely political reasons: he wanted a Presidential nomination one day. In fact, this political reason was, in Beschloss’s estimation, a factor in the State Department’s failure to do much to rescue Jews. *Id.* Stimson could also be considered anti-Semitic: he had once moved to prevent a donation from going to Columbia University because of the “tremendous Jewish influence” there. *Id.* at 88.

22. *Id.* at 285.

23. *Id.* at 46.

would “run this war together” with him, only to watch like a “jilted lover” as Roosevelt turned to others to help him fight it.²⁴

Like so many in the Roosevelt administration, initially Morgenthau did little to save any Jews. After Roosevelt rejected his proposal to acquire British or French Guiana as a Jewish haven, Morgenthau himself rejected a plea from a rabbi to intervene when Vichy, France began stopping the emigration of Jewish refugees.²⁵ As he became more aware of the crimes, however, Morgenthau seemed to regain both his conscience and his heritage. He confronted the Assistant Secretary of State who was apparently behind the deliberate blocking of aid for refugees.²⁶ He began to disregard the consequences that his pleading would have on his political career. Ultimately, Morgenthau’s prodding and pressure paid off. After over a year and a half, Roosevelt finally created the War Refugee Board, which helped save perhaps 200,000 Jews, and, in March, 1944, he spoke out in “plain language” about the genocide to the American people.²⁷

If this were a story out of Hollywood, Morgenthau’s conscience would also have brought him to the right conclusions for post-war Germany. Principle and judgment would have converged. But history is beyond the fairy-tale simplicities of the movies. Morgenthau’s noble intentions led to courageous and purposeful actions in rescuing Jews from death.²⁸ When it came to the occupation and reconstruction of Germany, however, Morgenthau’s righteous anger and intentions were not enough. Beschloss reaffirms the accepted historical judgment that the plan he set forth and wanted the Allies to implement, known to history as the “Morgenthau Plan,” was naïve, short-sighted, and harsh, all at once.²⁹

According to Morgenthau’s proposal, because the Nazi regime was “essentially the culmination of the unchanging Nazi drive toward aggression,” German society would have needed fundamental reorganization.³⁰ All German heavy industry would have been destroyed. The Ruhr Valley

24. *Id.* at 51.

25. *Id.* at 52.

26. *Id.* at 53. According to Beschloss, Morgenthau confronted Assistant Secretary of State Breckinridge Long, who was reputedly “hostile to foreigners, especially Jews” and had “been deliberately obstructing the flow of money, information and passports that might save Jews from Hitler.” *Id.*

27. *Id.* at 57-9.

28. *Id.* at 51-9.

29. *Id.* at 285.

30. *Id.* at 70-90.

would have been deindustrialized and its plants and factories stripped and sent to the Soviet Union and other victim nations.³¹ Feeding, housing, and clothing Germany would have been the responsibility of the German people themselves.³² Discussing the plan to close the Ruhr, the most productive industrial region in Europe, he said:

Just strip it. I don't care what happens to the population. I would take every mine, every mill and factory and wreck it Steel, coal, everything. Just close it down Make the Ruhr look like some of the silver mines in Nevada.³³

That such a plan would have likely condemned millions of innocent Germans (unless one accepted the notion of collective guilt) and non-Germans to a terrible fate, and perhaps led them to accept Soviet totalitarianism, did not matter. Such deprivation was surely better than the death camps they had created: "It seems inhuman," Morgenthau said.³⁴ But, as he also (rightly) pointed out, "We didn't ask for this war. We didn't put millions of people through gas chambers."³⁵ Secretary of War Henry Stimson fundamentally disagreed and opposed the plan for less idealistic reasons. While he argued that closing down the Ruhr would "starve thirty million people" and only fight "brutality with more brutality,"³⁶ he acted primarily out of national interest. He sought a strong Germany as a buffer against the Soviet Union.³⁷ And in the end, it was Stimson's version of postwar occupation that prevailed.

Up until his death in 1967, Morgenthau regarded the scuttling of his plan as a mistake and bet a young historian that Germany would go to war against the United States during his lifetime.³⁸ He was proven wrong, of course, but in retrospect, Morgenthau's plan of social engineering *in extremis* must have had an inexorable historical logic to it in 1945. Germany *had* waged the Franco-Prussian War, World War I, and World War II, each one worse than the one before; Nazism *did* extol German culture and the "Aryan race" as uniquely superior; and the soldiers of the Third Reich *did* fight ferociously, even though hopelessly outmanned and outequipped up

31. *Id.* at 115-17.

32. *Id.* at 101-03.

33. *Id.* at 103.

34. *Id.* at 104.

35. *Id.*

36. *Id.* at 106.

37. *Id.* at 107.

38. *Id.* at 252.

until very nearly the end. And when the war ended, the ghastly secrets of the death camps revealed themselves. Germany was reviled around the world as a criminal state. What further proof was needed that it was irredeemable?

The last third of Beschloss's book deals with a third major figure, Harry Truman, who dealt with the aftermath of German defeat. Beschloss makes it clear that Roosevelt left Truman with little plan or guidance after his death.³⁹ Beschloss also reveals a man far more complex than the folksy, plainspoken Missouri haberdasher turned politician. Truman is not the buck-stops-here man of certitude and conviction, but rather a man deeply insecure about his stature, his abilities, and his following in the footsteps of a statesman who had virtually made an American in his image.⁴⁰ He also held almost childish grudges (he seemed to have near irrationally detested Morgenthau). He was a man not immune to popular prejudices: in private, he referred to New York City as "Kiketown."⁴¹

Yet Truman, in his complexity, emerges as a man greater than the sum of his flaws. Truman was, in many ways, as insightful as Roosevelt. He was a closet intellectual and voracious reader, and he could combine the measured judgment of a great statesman with the gut instinct of a small town politico. He was probably a cruder anti-Semite than Roosevelt, yet as early as 1943, he stated that Hitler's war against the Jews was "not a Jewish problem" but an "American problem."⁴² His scuttling of the Morgenthau Plan was likely driven in part by a crude and mean-spirited disliking of Morgenthau,⁴³ but also genuine insight and historical understanding. Ultimately, Beschloss deems him as a man who was suited for and rose to the challenge. Beschloss does not accept the revisionist view that Truman blundered the world into the Cold War.⁴⁴ Rather, Truman grasped, in a way Roosevelt did not, that the postwar world would not be one of universal harmony, and that a vindictive occupation of Germany was the wrong policy in that new and dangerous world Beschloss writes, "He knew that with the Cold War accelerating, a weak, inert Germany

39. *Id.* at 216-18.

40. *Id.* at 219-220, 229.

41. *Id.* at 229.

42. *Id.* at 255.

43. According to Beschloss, years after Morgenthau left the Cabinet, Truman told friends that Morgenthau was a "nut," and a "blockhead" who didn't know s--- from apple butter." *Id.* at 249.

44. See, e.g., HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES chap. 16 (1980).

might open the way to Soviet force in Europe. . . . [L]etting Germany collapse would have had vastly more grievous consequences than Morgenthau had predicted.”⁴⁵

Truman ultimately got Morgenthau out of his cabinet. Although the document that would implement the German occupation, Joint Chiefs of Staff Directive 1067,⁴⁶ had “Morgenthau”-like language, it ultimately provided sufficient flexibility and enough loopholes to enable Germany to rebuild and reindustrialize. Truman, Stimson, Marshall, and perhaps most importantly, the American military governor, General Lucius Clay, set in motion the great German political and economic recovery.

What then happened defied the dire predictions of Morgenthau and others who thought Germany could only be changed through harsh measures and over the course of generations. In retrospect, it appears that these Cassandras did not appreciate several key factors. By May, 1945, Germany had not simply been defeated, it had been obliterated as no nation had been in modern history. Its cities lay in ash and cinder, its governmental institutions were shattered, and its people teetered on the edge of mass starvation. It was reviled among the community of nations for its savage injustice, its outright aggression, and its terrible genocide. As the Soviets cut a swath of death and rape in its westward advance, the German people fled, terrified, into the arms of the West.⁴⁷ And Hitler was dead. The German Fascist state rested upon *Führerprinzip*—the embodiment of the state in one man. Hitler *was* National Socialism. Powerfully and skillfully, the failed artist had “aestheticized” politics for the world’s most culturally sophisticated people. With the performer dead, the performance, quite literally, concluded.⁴⁸ Partly out of national interest, partly out of keen

45. BESCHLOSS, *supra* note 1, at 289.

46. *Id.* at 169-70.

47. Beschloss recites the familiar statistic that perhaps two million German women were raped by Soviet soldiers during their westward advance. *Id.* at n.5, 234.

48. George Orwell references the kind of Wagnerian heroism that Hitler’s bombast evoked: “Whereas socialism, and even capitalism in a more grudging way, have said to people, ‘I offer you a good time,’ Hitler has said to them, ‘I offer you struggle, danger, and death,’ and as a result a whole nation flings itself at his feet.” *Quoted in* FREDERICK SPOTTS, *HITLER AND THE POWER OF AESTHETICS* (2003). Spotts brilliantly explores Hitler’s “aesthetic politics” in his book.

insight, Truman in particular grasped these points more readily than Morgenthau did.

Beschloss ultimately concludes that the American statesmen, primarily Roosevelt, Morgenthau, and Truman, were flawed but worthy men. He perhaps overstates his case when, near the end of the book he asserts that “Franklin Roosevelt had more influence than any other non-German on what Hitler’s nation has now become.”⁴⁹ Roosevelt was dead before the occupation even began, and he laid out general and sometimes contradictory guidance. Indeed, General Lucius Clay, the American military governor of Germany from 1945-49, was far more important in postwar German history than Roosevelt, Truman, Morgenthau, Marshall, or any other American statesman of the era.⁵⁰ (Clay is, in this reader’s estimation, a soldier-statesman on a par with Eisenhower, MacArthur, and Marshall.) Nonetheless, Beschloss is right to give credit to Roosevelt, especially for grappling with postwar problems when triumph was still uncertain. He is right to praise Morgenthau’s courage in seeking to rescue Jews, even though he was proven ultimately wrong in seeking a harsh peace for Germany. He is right to pay tribute to Truman’s ability to deal with a changed world after the fall of the German Reich.

One should be wary of finding easy parallels and analogies to the present situation in Iraq. Such comparisons can be helpful, but too often come freighted with forced analogies, factual errors, and sweeping generalizations. Beschloss’s book is ultimately about character, not policy, so perhaps few direct lessons will be found in it. In *The Conquerors*, one sees flawed yet purposeful men. Sometimes they acted out of self-interest, sometimes out of national interest, and sometimes out of a genuine concern to save others from destruction. What ultimately matters in Beschloss’s book is not *what* document was signed or what plan was enacted, but *who* wrote it, who argued for or against it, and who put it into action. The truth of history, *The Conquerors* seems to say, lies not in the stars but in ourselves.

49. BESCHLOSS, *supra* note 1, at 288.

50. Again, to his credit, Beschloss acknowledges that after Potsdam, the “story of Americans in Germany was...Lucius Clay’s.” He devotes a short chapter to Clay’s military governorship for Germany. *Id.* at 271-283.

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0425307

