Volume 199 **Spring 2009**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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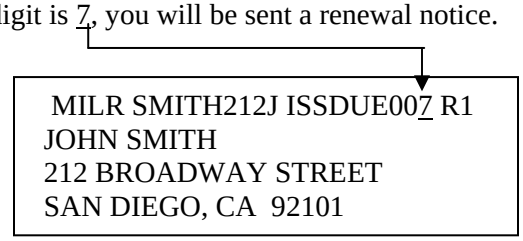

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MILITARY LAW REVIEW

Volume 199 **Spring 2009**

NATIONAL SECURITY VEILED IN SECRECY: AN ANALYSIS OF THE STATE SECRETS PRIVILEGE IN NATIONAL SECURITY AGENCY WIRETAPPING LITIGATION

MAJOR KRISTIAN W. MURRAY*

To cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country.[1]

Five years after our nation was attacked, the terrorist danger remains. We're a nation at war—and America and her allies are fighting this war with relentless determination across the world. Together with our coalition partners, we've removed terrorist sanctuaries, disrupted their finances, killed and captured key

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[1] Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (quoting 3 PATRICK HENRY, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 170 (J. Elliot ed., 1836)).

> *operatives, broken up terrorist cells in America and other nations, and stopped new attacks before they're carried out. We're on the offense against the terrorists on every battlefront—and we'll accept nothing less than complete victory. In the five years since our nation was attacked, we've also learned a great deal about the enemy we face in this war. We've learned about them through videos and audio recordings, and letters and statements they've posted on websites. We've learned about them from captured enemy documents that the terrorists have never meant for us to see. Together, these documents and statements have given us clear insight into the mind of our enemies—their ideology, their ambitions, and their strategy to defeat us.*[2]

I. Introduction

In December 2005, the *New York Times* reported that President Bush issued a classified Executive Order shortly after 11 September 2001, allowing for the telephonic eavesdropping and e-mail interception of American citizens' domestic communications without federal court authorization.[3] The newspaper reported the purpose of the surveillance program was to intercept communications between U.S. citizens and Al Qaeda operatives to thwart and mitigate future terrorist attacks.[4] The next day President Bush confirmed that the Executive operated a "terrorist surveillance program," stating:

> In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency consistent with US law and the Constitution, to intercept the international communication of people with known Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must

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[2] Press Release, White House, President Discusses Global War on Terrorism, Address at the Capital Hilton Hotel, Wash., D.C. (Sept. 5, 2006).
[3] James Risen & Eric Lichtlau, *Bush Lets US Spy on Caller Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
[4] *Id.*

> have information that establishes a clear link to these terrorist networks.[5]

Following the disclosure of this surveillance program, aggrieved private citizen plaintiffs and the American Civil Liberties Union (ACLU) initiated several lawsuits against the alleged transgressing telecommunication carriers and the National Security Agency (NSA).[6] Additionally, disclosure of the program caused considerable congressional debate as to the justification and need for a government surveillance program that may encroach on American citizens' constitutionally protected rights.[7] The Government's response to these actions has been twofold. In the litigation forum, the Government has invoked the state secrets privilege in an attempt to dismiss the suits via summary judgment.[8] In the public policy venue, and indirectly through an Attorney General opinion,[9] the Government has argued that the terrorist surveillance program falls broadly within the President's Article II constitutional powers[10] or statutory authority.[11]

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[5] *See* President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005) [hereinafter President's Radio Address].

[6] Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (denying the Government's motion to dismiss a challenge to the National Security Agency's warrantless wiretapping program on state secrets grounds); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468) (district court denying Government's motion to dismiss regarding NSA terrorist surveillance program); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (granting the Government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying the Government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds).

[7] *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of U.S. Attorney Gen. Alberto Gonzales).

[8] *See, e.g.*, *ACLU*, 438 F. Supp. 2d at 979; *Hepting*, 439 F. Supp. 2d at 758–59.

[9] Letter from Assistant Attorney Gen. William E. Moschella, to Chairman Charles P. Roberts & Vice Chairman John D. Rockefeller of the Senate Select Comm. on Intelligence & Chairman Peter Hoekstra and Ranking Minority Member Jane Harman of the House Permanent Select Comm. on Intelligence (Dec. 22, 2005) (setting forth in general terms the Bush Administration's position regarding legal authority supporting NSA activity).

[10] U.S. CONST. art. II, § 2.

[11] Authorization for Use of Military Force, Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224. Section 2 provides, in relevant part, that

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines

This article will focus on the Government's assertion that the common law doctrine known as the state secrets privilege bars further litigation regarding the NSA's electronic surveillance program. In doing so, this article will examine the competing interests involved. Namely, this article examines the Government's interest in preventing in-court disclosure of information that may compromise the sources and methods of its foreign intelligence gathering. This interest is weighed against the American public's need for transparency and assurances that the Government is not inexcusably encroaching on individual constitutional rights.

The federal government, from President Jefferson's administration to the present date, has utilized the state secrets privilege or a form of the privilege in judicial proceedings.[12] However, since the seminal case of *United States v. Reynolds*[13] in 1953, the Government has more frequently invoked the privilege in high profile litigation.[14] The breadth, scope, and use of the privilege have become extremely relevant in the United States' Global War on Terrorism (GWOT).

The United States is facing an enemy in Al Qaeda that does not belong to a nation-state, does not utilize traditional methods in conducting its operations, and does not distinguish between civilian and military targets.[15] These factors have motivated the Executive Branch to

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> planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

[12] ACLU v. NSA, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

[13] United States v. Reynolds, 345 U.S. 1 (1953). In *Reynolds*, the Supreme Court first explicitly recognized the state secrets privilege and the steps that must be satisfied for the Government to invoke the privilege. *Id.* at 7–8.

[14] *See, e.g.*, Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).

[15] *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 673–74 (2004) ("United States armed forces . . . are distinctly disadvantaged by a grossly asymmetrical legal framework in which morally inferior warriors enjoy all its protections but respect none of its obligations."); *see also* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

> The easier availability of weapons technology, the emergence of rogue states, and the rise of international terrorism have presented more immediate threats to national security than those from attack by

broaden its "inherent" Article II powers in an effort to better prosecute the GWOT. In this environment, the Bush Administration advocated using the state secrets privilege to keep government-sponsored operations secret from public scrutiny in the judicial forum.[16] On the other hand, some American citizens and policy groups argue that the Government is trampling on their rights to privacy and freedom of speech in the name of secrecy.[17] Consequently, the invocation of the state secrets privilege in NSA wiretapping litigation[18] and in cases of alleged Government rendition[19] has caused, and will continue to cause, significant and controversial discourse in academic and public policy forums.[20]

This article analyzes the state secrets privilege in NSA wiretapping litigation in three parts. Part I of this article will focus on the origin and development of the states secrets privilege as the Government's primary argument to bar litigation during judicial cases where national security interests could be at risk.

Part II of this article will address the state secrets privilege in the context of current litigation involving the NSA's warrantless wiretapping of communications of suspected terrorists. In this part, this article will examine the competing public policy needs at stake in the state secrets

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> other nation-states. . . . [T]hese different developments mean that an attack can occur without warning, because its preparation has been covert and it can be launched by terrorists hiding within the civilian population.

Id. at 749–50.

[16] Press Release, White House, Press Briefing from Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.globalsecurity.org/intell/library/news/2005/intell-051219-dni0.htm.

[17] *See, e.g.*, ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

[18] *E.g.*, *Hepting*, 439 F. Supp. 2d 974.

[19] *E.g.*, *El-Masri*, 437 F. Supp. 2d 530.

[20] *See, e.g.*, Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 238 (2007) ("As currently applied, [the state secrets privilege] is a formidable obstacle to civil litigation against the government, an evisceration of the ability of a citizen injured by such executive acts to seek redress, oversee government actions, and hold officials accountable for bad policy or violations of the law."). Academic discussion of the privilege has also focused on its effect on individual rights and judicial power. *See, e.g.*, William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005).

paradigm; namely, whether the state secrets privilege, as currently construed, prevents courts from adjudicating certain grievous constitutional claims in the name of national security.

Part III of this article will argue for continued judicial deference to the Executive in its implementation of secret surveillance programs. This section will advocate that the federal courts are not in the best position, nor were they originally constructed, to adjudicate national security matters effectively. However, this article contends that the blanket assertion of the state secrets privilege by the Executive, without any other form of oversight, can be problematic. A misused state secrets privilege potentially permits the Executive to encroach on constitutional protections in the name of security that may not be in the best long-term interest of the nation. To counter this potential for misuse and to fill this void of lack of oversight, this article argues for further congressional involvement through an Executive briefing and review system run by the intelligence committees in Congress. Alternatively, this article proposes that Congress enact a special national security court reporting directly to the congressional intelligence committees where the Executive would certify its secret surveillance operations. This article contends that both courses of action could be accomplished by enacting relatively minor changes in current intelligence oversight laws.

II. History of the State Secrets Privilege

The state secrets privilege involves an assertion by the Executive Branch that disclosure of certain sensitive government information in a public venue could undermine the national security of the United States.[21] Accordingly, the privilege prevents disclosure of material that could cause "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[22] The privilege is not an ordinary evidentiary rule such as the patient-doctor privilege; rather, its invocation often has constitutional separation of powers implications.[23] The state secrets privilege is a common law evidentiary rule that first

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[21] United States v. Reynolds, 345 U.S. 1, 6 (1953).

[22] Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

[23] ACLU v. NSA, 438 F. Supp. 2d 754, 759 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

surfaced in American jurisprudence in the early 1800s,[24] but has its roots in English common law.[25] The following are some of the primary cases that form the genesis of the privilege.

A. Proceedings Against Bishop Atterbury

Atterbury involved the consideration of an appropriate penalty against Bishop Atterbury on charges of treason and sedition in England in 1723.[26] The English Parliament was the forum for state trials during this time period.[27] To defend himself against the charge of treason, Bishop Atterbury wanted to examine cryptographers who had decoded letters that he had previously sent containing allegedly treasonous information.[28] Bishop Atterbury wanted to question the cryptographers on the methods and means by which they conducted their activities. However, the House of Lords denied Bishop Atterbury's request for relief because they believed such testimony could jeopardize England's security and potentially be advantageous to England's enemies.[29] This ruling by the English Parliament represented the first formal recognition of a national security-type privilege in a quasi–judicial forum under the English common law.

B. *United States v. Burr*

In *United States v. Burr*, John Marshall, sitting as a justice on the circuit court, first heard arguments regarding the release of confidential government information at the treason trial of Aaron Burr.[30] During the trial, Burr's counsel requested that the court subpoena President Jefferson to release a potentially inculpatory document regarding Burr's actions.[31] In response, the Government argued for non-disclosure of the

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[24] U.S. v. Burr, 25 F. Cas. 30 (U.S. Court of Appeals 1807).
[25] Transcript of Trial at 495–96, Proceedings Against Bishop Atterbury, 1723, 9 Geo. 1 (Eng.), *reprinted in* DAVID JARDINE, A COMPLETE COLLECTION OF STATE TRIALS 495–96 (T.B. Howell ed., 2000).
[26] EVELINE CRUICKSHANKS & HOWARD ERSKINE-HILL, THE ATTERBURY PLOT 204–09 (2004).
[27] *Id.*
[28] *Id.* at 208.
[29] *Id.*
[30] U.S. v. Burr, 25 F. Cas. 30, 32 (U.S. Court of Appeals 1807).
[31] *Id.*

matter, claiming that it contained sensitive information.[32] According to Chief Justice Marshall, the President did not have to produce some of the requested information, but the court would be very reluctant to deny production of other documents if they were essential to Burr's defense.[33] Although the court issued the subpoena, it held that if the subpoenaed documents contained any information that the Executive believed to be improper to disclose, and that was not immediately material to Burr's defense, the information would be suppressed.[34] Importantly, Chief Justice Marshall also observed that the Government in this instance was not resisting compliance with the subpoena by arguing that the disclosure of the document would endanger the public safety.[35]

C. *Totten v. United States*

Not surprisingly, based upon the relative lack of American involvement in foreign conflicts or diplomacy during the nineteenth and early twentieth centuries, there were only limited times where the Executive invoked any form of privilege pertaining to military or state secrets.[36] However, one important precedent to come from the period was the case of *Totten v. United States*.[37] *Totten* involved the administrator of an estate of a former Union spy suing the Government on a breach of contract claim to recover money for the spy's covert activities during the Civil War.[38] By a unanimous vote, the Supreme Court dismissed the lawsuit on public policy grounds, holding that this type of trial could potentially disclose information regarded as confidential.[39] The Court stated a contrary result would run the risk of exposing "the details of dealings with individuals and officers . . . to the serious detriment of the public."[40]

Thus, *Totten* was the first time the U.S. Supreme Court explicitly precluded disclosure of Government-held information on security-related grounds. Given the context of the times, it is easy to understand how

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[32] *Id.* at 34.
[33] *Id.* at 37.
[34] *Id.* at 37–38.
[35] *Id.* at 31–33.
[36] ARTHUR M. SCHLESLINGER, JR., THE IMPERIAL PRESIDENCY 329–39 (1973).
[37] Totten v. United States, 92 U.S. 105 (1876).
[38] *Id.* at 106.
[39] *Id.* at 107.
[40] *Id.* at 106–07.

disclosure of this government information could have endangered the lives of former Northern sympathizers and further hampered the reconstruction relationship between the federal government and the former Confederate states. Notably, the Court did not analyze the case under a separation of powers or other constitutional argument rubric. Rather, the Court underscored the detrimental public policy ramifications of permitting lawsuits regarding unacknowledged espionage contracts to proceed.[41] Accordingly, the *Totten* holding strengthened the Executive Branch's argument for barring future litigation in national security cases where any type of covert contractual relationship existed between the Government and another individual or entity.

D. From *Totten* Through World War II

During World War II, the United States found itself in a military struggle against global fascism. During this time, the government increased the amount of classified information based upon its need to produce secret weapon systems, execute greater clandestine military operations, and gather more intelligence on foreign threats.[42]

In this environment, a case arose regarding disclosure of sensitive information in the civil/contractual context.[43] In *United States v. Haugen*, the Government prosecuted defendant Haugen for fraud by billing food services he did not render during the construction of the Manhattan Project.[44] The case required evidence of a contract between the Government and the food service provider.[45] However, the Government refused to provide the contract to the defendant, stating it contained secret information.[46] The district court ruled in favor of the Government, holding that

> [t]he right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable. . . . The determination of what steps are necessary in time of war for the

[41] *Id.* at 105–07.
[42] Schlesinger, *supra* note 36, at 107–19.
[43] United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850, 853 (9th Cir. 1946).
[44] *Id.* at 437–40.
[45] *Id.* at 438.
[46] *Id.* at 437–38.

> protection of national security lies exclusively with the military and is not subject to court review.[47]

Notably, the *Haugen* court narrowed its holding to the military's refusal to disclose information during a time of war for national defense purposes. The court did not explicitly recognize a broad Executive mandate to withhold confidential information through invocation of a state secrets privilege.[48]

E. *United States v. Reynolds*

After World War II, the United States became a global superpower and principal adversary of the former Soviet Union. The government established the NSA and the Central Intelligence Agency (CIA) to gather intelligence on communist nations. In this environment of heightened security concerns, the Supreme Court first formally recognized the state secrets privilege and provided the analytical framework for its modern day implementation in the seminal case of *United States v. Reynolds*.[49]

Reynolds involved a claim against the Government under the Federal Torts Claim Act (FTCA) brought by the widows of three civilians killed in a B-29 military airplane crash.[50] During pre-trial discovery, the plaintiffs requested information from the Air Force's flight accident report as well as statements from crewmen who survived the crash.[51] The Government objected to the release of this report, stating that the requested information contained military secrets that if released could compromise national security.[52] Further, the Government argued that Air Force regulations made the information privileged.[53]

In support of the Government's position, the Secretary of the Air Force filed an affidavit with the court asserting that the accident report was privileged in that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air

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[47] *Id.* at 438 (citing Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912); United States v. Kiyoshi Hirabayashi, 320 U.S. 81, 93 (1943)).
[48] *Id.* at 438–39.
[49] United States v. Reynolds, 345 U.S. 1 (1953).
[50] *Id.* at 2–3.
[51] *Id.*
[52] *Id.* at 3.
[53] *Id.* at 4–5.

Force."[54] An affidavit from the Judge Advocate General of the Air Force reiterated that releasing the requested information "would seriously hamper national security, flying safety and the development of highly technical and secret military equipment."[55]

The district court ordered the Government to provide it with the accident report for an in camera review to ascertain whether the information was privileged.[56] The Government would not turn over the requested accident report. Accordingly, the court entered judgment for the plaintiffs, finding that the FTCA divested the federal government of sovereign immunity.[57] Further, the court held that Air Force regulations creating a privilege to withhold information did not overcome express congressional authorization waiving sovereign immunity in the FTCA.[58] The Government appealed the decision and lost in the Third Circuit.[59] Subsequently, the Supreme Court granted certiorari to decide whether the Government properly invoked the state secrets privilege in its noncompliance with discovery.[60]

The Supreme Court recognized that strict discovery under the FTCA could expose military secrets. Thus, the Court held that in enacting the FTCA, Congress did not waive the common law state secrets privilege.[61] The Court held there was a reasonable possibility that introduction of the accident report would introduce state secrets. Consequently, the Court overruled the lower court and held that the Government properly invoked the state secrets privilege.[62]

In formulating its holding, the Court reasoned that the Federal Rules of Civil Procedure, which govern discovery under the FTCA, recognize that privileged information can be exempt from discovery.[63] Thus, the Court reasoned that Congress did not expressly waive the state secrets

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[54] *Id.* at 4.
[55] *Id*. at 4–5.
[56] Reynolds v. United States, 192 F.2d 987, 990–91 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 998.
[60] *Reynolds*, 345 U.S. at 2.
[61] *Id.* at 7.
[62] *Id.* at 11.
[63] *Id.* at 6–7.

privilege in implementing the FTCA.[64] The Court then turned to analyzing and clarifying the state secrets privilege, laying out the procedural grounds for its invocation:

> The privilege belongs to the Government and must be asserted by it . . . . It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[65]

The Court held that in order to uphold the invocation of the state secrets privilege, a court must find under the facts of the case that there is "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[66] However, the Court cautioned that the judiciary must conduct a balancing test to determine the validity of the privilege, stating, "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[67]

Thus, under *Reynolds*, courts should rule in favor of excluding evidence under the state secrets privilege when the need for such evidence is outweighed by the Government's need to protect national security. In some cases, invoking the privilege will hinder a plaintiff's ability to prevail at trial. In other instances, if the plaintiff cannot prove a prima facie case without the privileged evidence, the case may be dismissed. At any rate, the *Reynolds* case strengthens the principle that courts should be careful in cases where the "very subject matter of the action" presents a danger to national security if exposed in a judicial forum.[68]

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[64] *Id.* at 6–8 (noting that claims under the FTCA would still follow the Federal Rules of Civil Procedure, which recognize privileges during the discovery process).
[65] *Id.* at 7–8.
[66] *Id.* at 10.
[67] *Id.* at 11.
[68] *Id*. n.26 (citing Totten v. United States, 92 U.S. 105 (1876)).

F. *Halkin v. Helms*

The next significant case in the state secrets arena was the 1978 decision in *Halkin v. Helms*.[69] *Halkin* involved a suit brought by former Vietnam protesters and civil rights organizations against the NSA, CIA, and several telecommunications companies asserting constitutional and statutory violations arising out of the Government's alleged warrantless surveillance activities.[70] This litigation has obvious factual parallels to the current government terrorist surveillance program litigation in *Hepting v. AT&T*[71] and *ACLU v. NSA*.[72]

Halkin involved two specific NSA programs: *Operation Minaret* and *Operation Shamrock*. The *Minaret* program targeted overseas electronic communications, while the *Shamrock* program targeted overseas telegraphic communications.[73] Congressional hearings had leaked and disclosed some information regarding the *Shamrock* program, but not the *Minaret* program.[74]

After the plaintiffs brought suit, the Government immediately invoked the state secrets privilege, arguing for a dismissal. The Government asserted that further litigation would illustrate which specific electronic communications the NSA was monitoring.[75] Additionally, the Government asserted that litigation would expose the operating procedures the NSA used to monitor such communications.[76]

For the *Minaret* program, the district court sided with the Government, dismissing the complaint on the grounds that the Government could not confirm nor deny its surveillance activities without exposing state secrets.[77] However, the court ruled there had been sufficient public disclosures regarding the *Shamrock* program to invalidate the state secrets privilege; as such, any further disclosures in a

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[69] Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978).
[70] *Id.* at 3–5.
[71] Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).
[72] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 438 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).
[73] *Halkin*, 598 F.2d at 4.
[74] *Id.* at 4–5.
[75] *Id.*
[76] *Id.* at 3–4.
[77] *Id.* at 5.

judicial forum would not pose a threat to the NSA mission.[78] Both the plaintiffs and the Government appealed the district court's ruling.[79]

The District of Columbia (D.C.) Circuit Court affirmed the district court's dismissal of the suit regarding the *Minaret* program.[80] The D.C. Circuit then reversed the lower court's holding on the *Shamrock* program. Specifically, the circuit court found "[t]here is a 'reasonable danger' that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst." [81]

In denying plaintiff's further discovery, the court opined that any Government answer regarding its foreign surveillance activities could jeopardize national security.[82] The court noted that even seemingly trivial matters can be privileged if they are part of a "mosaic . . . that can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."[83] The court reasoned that even though there had been disclosure of certain portions of the *Shamrock* program, there had not been disclosure of particular targeting methods and target selection.[84] The court stated that disclosure of this information could provide information about NSA surveillance procedures to a sophisticated foreign intelligence analyst.[85] The court then reiterated that the Executive, not the Judiciary, is responsible for foreign intelligence oversight, noting that "courts, of course, are ill-equipped to become

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 9–10.
[81] *Id.* at 10 (citing United States v. Reynolds, 345 U.S. 1, 10 (1953)).
[82] *Id.*
[83] *Id.* at 9.

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

Id.
[84] *Id.* at 10.
[85] *Id.* at 8, 10 (noting disclosure of information could illustrate how the Government conducts surveillance, which communications the Government surveilled, who might be considered a target of interest, and many other adverse inferences).

sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in this area."[86]

Finally, the court held that it did not make a difference that the plaintiffs were alleging the Government's underlying conduct was unlawful, because when the Government invokes the state secrets privilege, and a plaintiff is unable to present a prima facie case without the privileged evidence, it completely bars the underlying litigation.[87] Accordingly, the panel reversed the district court's holding as to *Shamrock*, and remanded for dismissal the portion of the suit pertaining to the NSA.[88]

G. *Halkin v. Helms II*

On remand, the district court dismissed the primary cause of action against the NSA.[89] The plaintiffs' remaining portion of their suit was a claim alleging the CIA submitted "watchlists" to the NSA "on a presumption that the submission of a name resulted in interception of the named person's communications."[90] The CIA produced some of the requested discovery. However, the Agency utilized the state secrets privilege regarding key documents that would have illustrated whether or not plaintiffs had standing. Because of this, the district court dismissed this final portion of the suit on summary judgment, upholding the Government's claim of privilege. The plaintiffs appealed to the D.C. Circuit Court once again.[91]

The D.C. Circuit affirmed the lower court's ruling dismissing the remaining claim against the CIA.[92] The D.C. Circuit held that the plaintiffs did not have standing based upon its previous holding in *Halkin* that the Government could neither confirm nor deny that it monitored the plaintiffs' communications. Thus, because the targeting information was privileged, there was no way to ascertain if plaintiffs' being placed on

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[86] *Id.* at 9.
[87] *Id.* at 7 ("[t]he state secrets privilege is absolute" and overrides any other competing interest, no matter how compelling).
[88] *Id.* at 12.
[89] Halkin v. Helms (*Halkin II*), 690 F.2d 977, 980 (D.C. Cir. 1983).
[90] *Id.* at 981–84.
[91] *Id.* at 988.
[92] *Id.*

CIA watchlists ultimately led to NSA monitoring.[93] The D.C. Circuit Court's holding again demonstrated its interpretation of the state secrets privilege bar as absolute. The plaintiffs could not demonstrate standing, because they could not show injury in fact without the very evidence protected by the privilege.[94]

Finally, the court rejected the plaintiffs' argument that the state secrets privilege should follow some of the procedures under the Freedom of Information Act (FOIA) outlined in *Vaughn v. Rosen*.[95] Under *Vaughn*, when the Executive refuses to disclose information under FOIA, it must submit a detailed explanation of the reasons for its non-disclosure.[96] The plaintiffs requested that the Government justify its withholding of information in state secrets cases utilizing the same FOIA-type "Vaughn index."[97] The D.C. Circuit stated this analogy was flawed. The court stated that the information the Government would not disclose was determined by the head of an Executive agency to have the potential to harm national security; thus, a more detailed explanation of the non-disclosed information would counter the very purpose of the state secrets privilege.[98]

Both *Halkin* and *Halkin II* demonstrate the power of the state secrets privilege. When the Government properly invokes the privilege, the plaintiffs might not be able to discover the very evidence that would give them standing. Without standing, plaintiffs may not proceed to a case on the merits, even if the case involves egregious constitutional violations. In *Halkin* and *Halkin II*, the D.C. Circuit demonstrated complete judicial deference to the Executive in national security matters. The court interpreted the state secrets privilege under *Reynolds* as allowing the Executive to claim secrecy, even without the court making any independent judgment on the appropriateness of invoking the privilege.[99]

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[93] *Id.* at 999. The court held that Government surveillance must be unlawful for a plaintiff to sustain a claim. Thus, for the CIA's submission of the plaintiffs' names to the NSA to constitute a claim, the plaintiffs must show that submission would lead to an unlawful search, not merely the probability of surveillance alone. *Id.*

[94] *Id.* at 998 (noting that the state secrets inquiry "is not a balancing of ultimate interests at stake in the litigation" but rather, "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case").

[95] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

[96] *Halkin II*, 690 F.2d at 995–96.

[97] *Id.*

[98] *Id.* at 996.

[99] *See* Halkin v. Helms, 598 F.2d 1, 7, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d at 998–99.

The D.C. Circuit summarized its position on the matter by stating that "courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets."[100]

H. *Ellsberg v. Mitchell*

In *Ellsberg v. Mitchell*, the D.C. Circuit Court again addressed the state secrets privilege in a lawsuit involving Government electronic surveillance.[101] *Ellsberg* involved former criminal defendants and their attorneys in the "Pentagon Papers" prosecution.[102] These individuals initiated a civil suit, alleging that "one or more of them had been the subject of warrantless electronic surveillance by the federal government" during the earlier criminal investigation.[103] The Government invoked the state secrets privilege pertaining to its alleged foreign electronic surveillance of the plaintiffs. The district court dismissed the plaintiffs' claim, finding that the Government properly asserted the privilege. The plaintiffs appealed to the D.C. Circuit Court.[104]

On appeal, the D.C. Circuit stated that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter."[105] However, the court affirmed the district court's ruling upholding the state secrets privilege. In doing so, it applied the *Halkin* analysis holding that there was a "reasonable danger" a sophisticated foreign intelligence analyst could discover information through the judicial proceeding regarding the Government's electronic surveillance and collection techniques, which could ultimately undermine national security.[106] The court also reiterated the absolute binding nature and judicial deference of the state secrets privilege by stating that,

> When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be

[100] *Halkin*, 598 F.2d at 9 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
[101] Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983).
[102] N.Y. Times v. United States, 403 U.S. 713 (1973). Here the Government sought an injunction to prevent the publication of the contents of a classified study entitled *History of U.S. Decision-Making Process on Viet Nam Policy*. *Id*. at 714.
[103] *Ellsberg*, 709 F.2d at 52.
[104] *Id.* at 54.
[105] *Id.* at 57.
[106] *Id.* at 59.

> advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege, the Supreme Court has made clear that "it is not to be lightly invoked." Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security . . . .[107]

Ellsberg illustrates the evolution of the state secrets privilege. The *Ellsberg* court did not advocate for conducting a balancing test of the competing interests involved under *Reynolds*.[108] Rather, the court stated that no competing private or public interest could ever force the Government to disclose information when the Government properly invokes the state secrets privilege. In this regard, it seems that the *Ellsberg* court found that the Government, at the agency head level, should be the final arbiter of whether to uphold the invocation of the state secrets privilege. Accordingly, under a strict interpretation of *Ellsberg*, the Executive unilaterally controls the release of information in court, not the Judiciary.

In summary, the state secrets privilege is a rule of evidence with its origins in common law, used by the Government to prevent the disclosure of certain national security matters in a judicial forum. Two general principles interpreting the state secrets privilege have developed. The first is that certain cases are not to be adjudicated by the Judiciary. These types of cases involve classified agreements between the Government and other covert or secret entities where the disclosure of the agreement or program could potentially compromise national security.[109] The second principle is that the Government's invocation of state secrets privilege can result in the exclusion of key evidence. The privilege is absolute. If plaintiffs cannot establish standing or a prima facie case without this key evidence, the case may not proceed.[110] The next section of this article will examine recent litigation involving NSA

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[107] *Id.* at 57 (citing United States v. Reynolds, 345 U.S. 1, 7 (1953)).
[108] *Reynolds*, 345 U.S. at 11 ("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.").
[109] Totten v. United States, 92 U.S. 105, 107 (1876).
[110] *Reynolds*, 345 U.S. at 11; Halkin v. Helms, 598 F.2d 1, 7, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 998 (D.C. Cir. 1983).

electronic surveillance where the Government has invoked the state secrets privilege.

III. Sample of Recent Cases Interpreting the State Secrets Privilege

In December 2005, *The New York Times* published an article regarding the NSA's domestic surveillance of American citizens' telephonic and electronic communications.[111] President George W. Bush acknowledged the existence of some form of a surveillance program on 19 December 2005.[112] After the article and the admission by President Bush, several lawsuits were initiated throughout the country.[113] This section will focus on two of these cases at the district court level, *Hepting v. AT&T*[114] and *NSA v. ACLU*,[115] and will analyze *NSA v. ACLU*[116] at the appellate court level. The opinions of these courts illustrate their different interpretations of the state secrets privilege.

A. *Hepting v. AT&T*

In *Hepting v. AT&T*, plaintiffs consisting of civil rights organizations, academics, and individuals allegedly affected by NSA wiretapping activity filed suit in the Northern District of California.[117] The plaintiffs alleged that AT&T collaborated with the NSA to conduct a warrantless surveillance program that monitors the communications of millions of Americans.[118] The plaintiffs' primary complaint centered on

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[111] Risen & Lichtlau, *supra* note 3, at A1.
[112] *See* President's Radio Address, *supra* note 5. The President explained he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that the communication originated or terminated outside the United States, and a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates." *Id.*
[113] *See, e.g.*, Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) .
[114] *Hepting*, 439 F. Supp. 2d 974.
[115] *ACLU*, 438 F. Supp. 2d 754.
[116] ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).
[117] *Hepting*, 439 F. Supp. 2d. at 978.
[118] *Id.*

First and Fourth Amendment violations as well as Foreign Intelligence Surveillance Act (FISA) violations. Namely, plaintiffs contended that AT&T, acting as an agent of the Government, violated their First and Fourth Amendment rights "by illegally intercepting, disclosing, and divulging and/or using [their] communications," and violated FISA by "engaging in illegal electronic surveillance of [their] communications under color of law."[119] The plaintiffs sought certification of a class action, damages, and injunctive relief.[120]

The Government intervened and moved for dismissal, asserting the state secrets privilege.[121] As is procedurally required by the *Reynold*s holding, John Negroponte and Keith Alexander, who were at that time directors of the agencies invoking the privilege (National Intelligence and National Security, respectively), filed affidavits of support.[122] Relying on *Reynolds*, *Halkin*, and *Halkin II*, the Government advocated three reasons for dismissal of the action or an award of summary judgment for AT&T under the state secrets privilege: "(1) the very subject matter of [the] case is a state secret; (2) plaintiffs cannot make a prima facie case for their claim without classified evidence; and (3) the privilege effectively deprives AT&T of information necessary to raise valid defenses."[123] In addition, because the case concerned a classified agreement between AT&T and the Government, the Government also argued that it qualified for dismissal under *Totten v. United States*.[124]

The district court ruled against the Government. The court noted that the press had reported on the NSA terrorist surveillance program and both the President and the Attorney General had, at least in part, confirmed its existence.[125] Further, the court noted that AT&T had been providing some ambiguous statements regarding the program such as, "when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance."[126] Based on the press leaks, Executive confirmation regarding those leaks, and AT&T's public statements, the court held that AT&T was not secretly involved in a terrorist surveillance program. In fact, the court

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[119] *Id.*
[120] *Id.* at 979.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 985.
[124] *Id.*
[125] *Id.* at 992–93.
[126] *Id.* at 992.

stated that AT&T's involvement was fairly well-known.[127] Therefore, the court held there was no secret agreement between the Government and AT&T, and hence the *Totten* precedent was inapplicable.[128]

The court next addressed the underlying state secrets privilege. The court stated,

> [N]o case dismissed because its "very subject matter" was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here. Indeed, most cases in which the "very subject matter" was a state secret involved classified details about either a highly technical invention or a covert espionage relationship.[129]

In rendering this interpretation, the court neither directly addressed nor applied the past precedents of *Halkin*,[130] *Halkin II*,[131] or *Ellsberg*.[132] As discussed in the previous section, in these cases the state secrets privilege denied aggrieved plaintiffs standing in litigation involving NSA surveillance programs.[133] Instead, the *Hepting* court attempted to distinguish these cases by stating that each district court allowed some discovery to proceed before the appellate courts ultimately dismissed the cases on state secrets grounds.[134] Therefore, the court reasoned it was premature to determine that the Government's use of the state secrets privilege would preclude the plaintiffs from the evidence necessary to prove a prima facie case.[135]

However, in making this determination the court failed to address the underlying reason the D.C. Circuit dismissed the plaintiffs' claims in *Halkin*, *Halkin II*, and *Ellsberg*. Namely, the Government's invocation of the state secrets privilege in these cases made it impossible for plaintiffs to illustrate they had standing to be able to prove a prima facie case involving any NSA wiretapping activities. The factual predicate in

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[127] *Id.* at 993.
[128] *Id.*
[129] *Id.*
[130] Halkin v. Helms, 598 F.2d 1, 12 (D.C. Cir. 1978).
[131] *Halkin II*, 690 F.2d 977, 998 (D.C. Cir. 1983).
[132] Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983).
[133] *See supra* Part II.F.–H.
[134] *Hepting*, 439 F. Supp. 2d at 994.
[135] *Id.*

these cases was exactly the same as the factual predicate in *Hepting*, so it seems to have been judicially inefficient for the court to allow the case to proceed based upon past appellate precedent.

Nevertheless, the court did not squarely address this issue, but instead moved on to analyzing whether the state secrets privilege was applicable. The court stated, "[t]he very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."[136] For this reason, the court held the facts of this case were also distinguishable from *El-Masri v. Tenet*, a lawsuit where the Government successfully utilized the state secrets privilege regarding its alleged "extraordinary rendition program."[137]

The *Hepting* court stated that there were only minor leaks of the *El-Masri* program, as compared to *Hepting* case where the leaks were extensive.[138] Further, the court stated that the plaintiff's objective in *El-Masri* was to reveal classified information pertaining to "the means and methods the foreign intelligence services of this and other countries used to carry out the program."[139] In contrast, the court stated it would narrow the focus of litigation under its review to the issue of "whether AT&T intercepted and disclosed communications or communication records to the government."[140] Again the court's logic was somewhat stretched, as further discovery into how AT&T assists the NSA would presumably disclose the specific means and methods of target identification and exploitation of the foreign surveillance program. The disclosure of this type of information is exactly what the state secrets privilege is supposed to prevent. Nevertheless, the court stated that because "significant amounts of information about the Government's monitoring of communication content and AT&T's intelligence relationship with the Government are already non-classified or in the public record," the current litigation did not immediately qualify for dismissal under the state secrets privilege.[141]

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[136] *Id.*
[137] El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).
[138] *Hepting*, 439 F. Supp. 2d at 994–95.
[139] *Id.* at 994 (quoting *El-Masri*, 437 F. Supp. 2d 530).
[140] *Id.*
[141] *Id.*

The court concluded that its present ruling did not confirm the constitutional and statutory violations in the plaintiffs' complaint.[142] The court also noted that legislative or other judicial developments might directly affect its adjudication of the case.[143] However, the court, referencing *Hamdi v. Rumsfeld*,[144] asserted it had the constitutional duty to adjudicate matters brought forth, stating:

> [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired.[145]

The court proceeded to certify its denial of the Government's motion to dismiss for interlocutory appeal to the Ninth Circuit.[146]

B. *American Civil Liberties Union v. National Security Agency*

ACLU v. NSA involved a suit filed in U.S. District Court for the Eastern District of Michigan. The plaintiffs in this case were lawyers,

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[142] *Id.* at 994–95.

> The existence of this alleged program and AT&T's involvement, if any, remain far from clear . . . it is certainly possible that AT&T might be entitled to summary judgment at some point if the court finds that the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' prima facie case or AT&T's defense.

Id.

[143] *Id.*

[144] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

[145] *Hepting*, 439 F. Supp. 2d. at 995 (citation omitted).

[146] *Id.* at 1011 ("[T]he state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion.").

journalists, academics, and civil rights organizations asserting various constitutional and statutory violations against the NSA.[147]

The litigated issues involved substantially the same warrantless surveillance program as *Hepting*. The plaintiffs' complaint asserted that members of their collective group were in contact with individuals overseas whom the Government could reasonably believe have an affiliation with a terrorist group, namely, Al Qaeda.[148] Thus, the plaintiffs alleged they had a well-founded belief that the Government could potentially intercept their electronic communications under the NSA's terrorist surveillance program.[149] Accordingly, the plaintiffs argued that they were unable to communicate openly with their sources, clients, or research assistants. In essence, plaintiffs alleged that the NSA's terrorist surveillance program caused "a chilling effect" on their Fourth Amendment right to privacy because the NSA was not adhering to FISA's minimization or warrant requirements.[150]

The Government filed a motion to dismiss or for summary judgment under the same underlying rationale as *Hepting*. The Government argued for a *Totten* bar ruling from the court that would essentially estop the court from adjudicating the case.[151] In accordance with this theory, the Government argued that the state secrets privilege prohibits further litigation on the constitutionality of the NSA program because the "very

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[147] ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468):

> Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment of the United States Constitution; their privacy rights, as guaranteed by the Fourth Amendment of the United States Constitution; the principle of the Separation of Powers because the TSP has been authorized by the President in excess of his Executive Power under Article II of the United States Constitution, and that it specifically violates the statutory limitations placed upon such interceptions by the Congress in FISA because it is conducted without observation of any of the procedures required by law, either statutory or Constitutional.

Id.

[148] *Id.* at 767–68.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 758–59.

subject matter" of the lawsuit is a state secret involving government relationships with private entities.[152]

Additionally, the Government argued that the state secrets privilege prevented adjudication of the plaintiffs' claims because the plaintiffs could not prove a prima facie case without the use of state secrets. As such, the plaintiffs did not have standing.[153] Further, the Government asserted it would be unable to present defenses to the lawfulness of any NSA surveillance program because of the state secrets privilege.[154] Finally, the Government argued that the court should not adjudicate the constitutionality of the case based only on the information acknowledged by the Executive regarding the terrorist surveillance program, stating, "[t]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate."[155]

In August 2006, the district court issued an opinion holding that it could conduct a judicial review of the plaintiffs' claim.[156] In a literal interpretation of *Totten*, the court stated there was no covert espionage relationship between the Government and plaintiffs.[157] Accordingly, the court found no merit in the Government's assertion that the underlying facts of the case involved secret matters that should not be subject to judicial review under *Totten*.[158]

The court then acknowledged that it had reviewed Government materials ex parte, in camera regarding whether the state secrets privilege should apply in this case.[159] In reviewing the materials, the court held

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[152] *Id.* at 763–64.
[153] *Id.* at 764.
[154] *Id.*
[155] Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 49, ACLU v. NSA, 438 F. Supp. 2d 754, *vacated*, ACLU v. NSA, 438 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).
[156] *ACLU*, 438 F. Supp. 2d at 765–66.
[157] *Id.* at 763–64. Obviously, the Government did not have a covert relationship with the ACLU, but the *Totten* bar could have been applied if the court had found that further exposure of the program itself could compromise national security. *Id.*
[158] *Id.*
[159] *Id.* at 765.

that the state secrets privilege was applicable because "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments."[160]

However, the court found that the plaintiffs did not need state secrets-privileged information to establish standing in the litigation before the court. Rather, the court found that the basis for plaintiffs' claims regarding NSA electronic surveillance was dependent entirely on what the Government had previously publicly admitted.[161] The court found that these admissions, without any further discovery, were sufficient for plaintiffs to prove their prima facie statutory and constitutional violation claims.[162] In this manner, the court was able to distinguish *Halkin* and *Halkin II*, where the Government successfully invoked the state secrets privilege in an electronic surveillance case preventing plaintiffs from receiving additional discovery to illustrate standing.[163] In the case at hand, the district court held there was no need for further discovery because the Government's public disclosures provided the plaintiffs standing and proved the Government committed statutory and constitutional violations.[164]

Yet, the district court, similar to the court in *Hepting*, failed to analyze the purpose of the discovery requests in *Halkin* and *Halkin II*. Namely, the plaintiffs in these cases were attempting to demonstrate that the NSA had specifically targeted them. With the Government witholding this requested information under the auspices of a properly invoked state secrets privilege, the D.C. Circuit Court held that the plaintiffs lacked standing to litigate their suit.[165] The factual scenario presented in *Halkin* and *Halkin II* was very similar to that before the *ACLU* district court.

Nonetheless, after finding the plaintiffs had standing to litigate the claim, the district court analyzed the public admissions of the

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[160] *Id.* at 764 (quoting Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004)).
[161] *Id.* at 765–66.
[162] *Id.*
[163] *Id.* at 764.
[164] *Id.*
[165] *See* Halkin v. Helms, 598 F.2d 1, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).

Government regarding the NSA's warrantless terrorist surveillance program.

> It is undisputed that Defendants have publicly admitted to the following: (1) the TSP [terrorist surveillance program] exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.[166]

The court held that because the Government had confirmed the veracity of a terrorist surveillance program, the state secrets privilege did not apply to this "public" information.[167]

Accordingly, the court held that the plaintiffs were able to establish a prima facie case based solely on the Government's previous public admissions regarding its electronic surveillance of overseas communications.[168] The court then stated that the monitoring of plaintiffs' communications to overseas contacts caused real and concrete harm in "that they are stifled in their ability to vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney Plaintiffs, uphold their oath of providing effective and ethical representation of their clients."[169]

Finally, the court provided a cursory analysis of the constitutional and statutory aspects of the Government terrorist surveillance program. In doing so, it found violations of the First and Fourth Amendment as well as the Separation of Powers doctrine and FISA.[170] Based upon these

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[166] *ACLU*, 438 F. Supp. 2d at 764–65.
[167] *Id.* at 766.
[168] *Id.* at 765.
[169] *Id.*
[170] *Id*. at 775–79. Without conducting a comprehensive analysis of the Government's terrorist surveillance program, the court found that the Government's wiretapping or electronic surveillance did not meet FISA's probable cause standard or warrant requirement. Based upon the Government not complying with FISA warrant requirement, the court found it had violated the Fourth Amendment. Further, with an even more cursory analysis, the court found that the TSP caused a chilling effect on plaintiffs' speech in violation of the First Amendment. Finally, the court found that

violations, the court issued a permanent injunction against NSA's conducting any further surveillance under the auspices of a terrorist surveillance program.[171] The Government immediately appealed the ruling and injunction to the Sixth Circuit Court of Appeals. The Sixth Circuit stayed the permanent injunction pending its ruling on the appeal.[172]

C. Sixth Circuit Appeal of *ACLU v. NSA*

In July 2007, the Sixth Circuit found that none of the plaintiffs had standing to bring claims against the NSA.[173] Additionally, the court held that because of the state secrets privilege, none of the plaintiffs would ever be able to demonstrate that they had standing.[174] Accordingly, the court vacated the district court's holding and remanded the case for dismissal.[175]

The court held that even if NSA had conducted, or was conducting, surveillance without FISA warrants on international telephone and email communication of a party who may have Al Qaeda ties, plaintiffs had no standing to challenge the illegality or constitutionality of the Government's actions.[176] The court stated,

> [P]laintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the [Terrorist Surveillance Program] or without warrants. Instead, they assert a mere belief, which they contend is reasonable and which they label a "well founded belief," that: their overseas contacts are the types of people targeted by the NSA; the plaintiffs are consequently subjected to the NSA's eavesdropping;

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because Congress had expressly enacted a statute to address foreign electronic surveillance and the Executive had unilaterally decided to ignore or violate these provisions in the statute, its actions were also in violation of the Separation of Powers doctrine. *Id.*

[171] *Id.* at 782.

[172] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).

[173] ACLU v. NSA, 493 F.3d 644, 648 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

[174] *Id.* at 653.

[175] *Id.* at 648.

[176] *Id.* at 653.

> the eavesdropping leads the NSA to discover (and possibly disclose) private or privileged information; and the mere possibility of such discovery (or disclosure) has injured them in three particular ways.[177]

The Sixth Circuit then took strong exception to the lower court's rationale that unless it found standing for these plaintiffs, there would be no judicial review of the Executive's actions, and plaintiffs would have no other effective means of redress.[178] The Sixth Circuit stated that the lower court's reasoning was flawed based upon applicable Supreme Court precedent, stating, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[179]

The court then reiterated that the Judiciary was not the correct venue for plaintiffs' claims when the plaintiffs did not, because of the Government's proper invocation of the state secrets privilege, have the requisite standing to pursue litigation. The court stated, "it, not unlike the President, has constitutional limits of its own and, despite any important constitutional questions at stake, cannot exceed its allotted authority to adjudicate matters when it does not have jurisdiction to do so."[180] The court stated the political process or congressional action was the appropriate venue to address plaintiffs' claims. Quoting the Supreme Court in *United States v. Richardson*, the court stated,

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[177] *Id.*

[178] *Id.* at 675–76.

> [I]f [this court] were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control . . . .

Id. (quoting ACLU v. NSA, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468)).

[179] *Id.* at 675 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

[180] *Id.* at 676 ("our standing doctrine is rooted in separation-of-powers concerns" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 125 (1998) (noting Article III standing limitations "confine federal courts to a role consistent with a system of separated powers"))).

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the national government by means of lawsuits in federal courts. The Constitution created a *representative* government with the representatives directly responsible to their constituents . . . ; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress . . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[181]

D. Recent Litigation Summary

The differing opinions interpreting the state secrets privilege illustrate the conflicting pressures on the Judiciary. The district courts in *Hepting* and *ACLU v. NSA* found that plaintiffs have standing in suits initiated before them.[182] These courts demonstrate a more proactive form of judicial oversight in addressing potential constitutional issues, even

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[181] *Id.* (quoting United States v. Richardson, 418 U.S. 166, 179 (1974)).

[182] Hepting v. AT&T, Corp., 439 F. Supp. 2d 974, 994–95 (N.D. Cal. 2006); ACLU v. NSA, 438 F. Supp. 2d 754, 764 (E.D Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

stretching the judicial principle of *stare decisis* to provide plaintiffs with such standing.

On the other hand, the appellate courts in *Halkin*, *Halkin II*, and *ACLU v. NSA* illustrate deference to Executive decision-making in national security cases.[183] In these courts, when the Executive properly invoked the state secrets privilege, they found that plaintiffs did not have standing to litigate if the privilege prevented plaintiffs from proving a prima facie case. However, these courts' deference to Executive invocation of the state secrets privilege risks plaintiffs not having any effective recourse for the Executive's potential unlawful or unconstitutional actions. Obviously, there is some merit to both positions taken by the different courts. The dilemma is striking the appropriate balance between national security and safeguarding constitutional freedoms.

In July 2008, President Bush signed the FISA Amendment Act of 2008.[184] This Act did not address the legality of the Government's assertion of the state secrets privilege in the terrorist surveillance program litigation. Instead, the statute provided immunity for telecommunication companies that took part in the terrorist surveillance program from 11 September 2001 to 17 January 2007.[185] The Act prohibits any civil action against phone companies that provided surveillance assistance to the government so long as the assistance was provided pursuant to a FISA order or was in connection with an intelligence activity authorized by the President designed to prevent a terrorist attack against the United States.[186] In current litigation such as *Hepting*, the Government will likely acknowledge that such authorization was provided to the telephone companies. This should result in the ultimate dismissal of claims against the telecommunication companies that assisted the Government with the terrorist surveillance program. However, because the Supreme Court has opted not to grant certiorari on the issue of whether the state secrets privilege denies plaintiffs standing to adjudicate statutory and constitutional claims against the

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[183] Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983); ACLU v. NSA, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).
[184] FISA Amendments Act of 2008, Pub. L. No. 110-261, § 1018.
[185] *Id.* § 201.
[186] *Id.*

Government,[187] lower courts' interpretation of the state secrets privilege will continue with different courts applying varying degrees of judicial deference or judicial activism. The next section of this article will examine the state secrets privilege in this context.

IV. The State Secrets Privilege: Positives, Negatives, and Proposed Changes

The invocation of the state secrets privilege has profound policy implications. The state secrets privilege, as an evidentiary common law privilege, has evolved over the past two hundred years. It has survived for a reason. It makes sense not to endanger national security by litigating cases involving secret operations. However, history has shown us that the Executive can abuse its authority under the auspices of protecting America. Is there a fair compromise? This section will briefly examine some arguments against maintaining the state secrets privilege as currently constituted. Next, this section will respond to those arguments with advocacy for following *Reynolds*, *Halkin*, and *Halkin II* precedents, concluding that the Judiciary should not adjudicate cases where the Government properly invokes the state secrets privilege. However, this section will also propose an alternative course of action that Congress could implement to lessen the opportunity for the Executive to violate American constitutional rights and to ameliorate the harsh results of the state secrets privilege. This course of action involves Congress increasing its oversight responsibilities directly or implementing a special national security court to review and certify Executive state secrets actions prior to Executive implementation of its programs.

A. Arguments Against Maintaining the State Secrets Privilege

There are arguments in the academic community that the state secrets privilege, as interpreted by *Reynolds*, *Halkin*, and *Halkin II*, is incompatible with American constitutional principles.[188] The underlying

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[187] ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

[188] *See, e.g.*, Anthony Rapa, Comment, *When Secrecy Threatens Security:* Edmonds v. Dep't of Justice *and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233 (2006); Erin M. Stilp, Comment, *The Military and State Secrets Privilege: The Quietly Expanding Power*, 55 CATH U. L. REV. 831 (2006).

theme of these arguments is that the Executive's unilateral control of the state secrets privilege in litigation unfairly increases the Executive's power over the Judiciary. In other words, the Executive's use of the state secrets privilege infringes on a court's ability to have effective oversight over the government's potential constitutional and statutory violations.[189] This section will examine this argument in the context of current wiretapping litigation involving the state secrets privilege. The subsequent section will attempt to counter these arguments and advocate the continued use of the state secrets privilege.

1. Executive Control Infringing Separation of Power Principles

The *Hepting* and *ACLU v. NSA* district court rulings both illustrate the Executive's power to control evidence through the state secrets privilege. In these cases, the Government moved for dismissal because information released in a judicial forum on a terrorist surveillance program could potentially jeopardize national security.[190] In each of the cases, the respective district courts upheld the privilege to any portion of the program not made public. However, the courts denied the privilege to portions of the program the Government had previously acknowledged publicly.[191] Thus, the Government could not successfully assert the state secrets privilege only because of its repeated previous public disclosures regarding the program.

In the future, the Government could limit all litigation by avoiding public comment or acknowledgement of any "secret" program. In this vein, the Executive could control the admissibility of evidence in court, even if there had been a previous leak of the matter to the public and the program is no longer a secret. Academics argue that this is nonsensical because the purpose of the state secrets privilege is to protect government secrets which, if made public, could compromise national security.[192] Obviously, a leaked program is no longer a "secret"

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[189] *See* Perkins, *supra* note 20, at 236.
[190] Hepting v. AT&T, Corp., 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); *ACLU*, 438 F. Supp. 2d at 758.
[191] *Hepting*, 439 F. Supp. 2d at 995; *ACLU*, 438 F. Supp. 2d at 764.
[192] *See* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 760 (1991) ("The secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption or outright violation of law . . . and subsequent events almost always demonstrate that the asserted dangers to national security have been grossly

program, even without the Government's public acknowledgement. Thus, if the facts of the program are already known, the validity of the Government's argument that it must invoke the state secrets privilege to block the release of information in a judicial forum for national security reasons is dubious at best. The counter to this argument is that even if the information the Government is trying to protect from disclosure seems to be insignificant and no longer secret, this information still could be potentially damaging if it led to other information that a "sophisticated intelligence analyst" could piece together to the detriment of national security.[193]

However, the larger issue pertains to separation of power principles. Academics argue that when the Executive unilaterally controls the ability of courts to adjudicate constitutional and statutory violations, the Executive has, and will continue to, assert the state secrets privilege for its own benefit.[194] Accordingly, if the Judiciary gives broad deference to the Government's invocation of the state secrets privilege, the Executive can potentially commit statutory and constitutional violations without any consequence or remedy for an aggrieved plaintiff. Undeniably, the practical result of the state secrets privilege is that broad ranges of Executive action are beyond a court's reach to adjudicate. Precisely for this reason, the state secrets privilege has been the subject of such vociferous academic criticism. In this vein, one commentator asserts that the state secrets privilege is "an unnecessary . . . doctrine that is incoherent, contradictory, and tilted away from the rights of private citizens and fair procedures and supportive of arbitrary executive

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exaggerated.") (quoting Thomas Emerson, *National Security and Civil Liberties*, *in* THE FIRST AMENDMENT AND NATIONAL SECURITY 84–85 (1984)).

[193] *See* Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978). The court noted that even seemingly trivial matters can be privileged if they are part of a "mosaic . . . that can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Id.*

[194] *See* Perkins, *supra* note 20, at 257.

> If the executive is engaged in illegal activity, it violates the principle of separation of powers to allow the executive to control what is admitted into evidence in the trial adjudicating that same activity. By refusing to admit evidence of such activity unless it is officially acknowledged by the very party with an interest in excluding it, the [state secrets] rule gives the executive this undue control, albeit indirectly.

Id.

power."[195] Further, the same commentator states that complete deference by the Judiciary to the Executive invocation of the state secrets privilege is constitutionally suspect.

> The framers adopted separation of powers and checks and balances because they did not trust human nature and feared concentrated power. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in Congress and the courts, placing in jeopardy the individual liberties that depend on institutional checks.[196]

Another commentator argues that Congress has provided the Judiciary specific authority to adjudicate cases when the Executive asserts the state secrets privilege by enacting 28 U.S.C. § 1331,[197] and by enacting specific statutory limitations in the areas of national security such as FISA.[198] Accordingly, this commentator argues that if the Judiciary dismisses cases when the Executive claims the state secrets privilege, the Judiciary is abdicating its congressionally assigned responsibility to restrain Executive power and is equally culpable in not remedying the Government's actions.[199]

2. Lack of Oversight

Academics also take issue with *Halkin* and *Halkin II*, and presumably the Sixth Circuit's holding in *ACLU v. NSA*, that aggrieved plaintiffs without standing to bring suit against the Government have no other recourse, save through Congress or the political process.[200] They feel that when the Executive violates the constitutional rights of unpopular individuals, such as individuals who may be in contact with

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[195] LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 258 (2006).
[196] *Id.* at 262.
[197] 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").
[198] *See* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1954–55 (2007).
[199] *Id.* at 1955.
[200] *See* FISHER, *supra* note 195, at 258 ("Broad deference by the courts to the Executive Branch, allowing an official to determine what documents are privileged, undermines the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced.").

suspected terrorists, these individuals cannot reasonably look to Congress for a remedy because Congress has little political incentive to help these types of constituents.[201] Yet the invocation of the state secrets privilege and rulings such as *ACLU v. NSA* declare that is their only recourse.[202] Further, these academics believe Congress does not have a positive history of proactively helping individuals whose constitutional rights may be abridged.[203] On the other hand, the implication is that the Judiciary has consistently taken stands against a majority to protect constitutional principles.[204]

B. Upholding the State Secrets Privilege

In addressing the aforementioned arguments against the state secrets privilege, this section advocates for continued judicial deference when the Executive invokes the state secrets privilege. The purpose of the state secrets privilege is to protect the disclosure of information that should remain secret in order to ensure an effective implementation of foreign policy and protection of national security. The Executive is the branch with the institutional knowledge to determine what information could potentially damage this nation's national security. Thus, the Executive, not the Judiciary, is in the best position to determine whether to invoke the state secrets privilege to protect sources, methods, and means of intelligence gathering and exploitation to protect this nation.[205]

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[201] *See* Perkins, *supra* note 20, at 257–59.

[202] ACLU v. NSA, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468) (citing United States v. Richardson, 418 U.S. 166, 179 (1974)).

[203] *See* Perkins, *supra* note 20, at 258 ("An elected legislature will often abdicate its responsibility to protect the minority because of its political interest in the majority's approval. This was well understood by the Founders and a fundamental reason behind their creation of a strong and independent judiciary.").

[204] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1953). This case held that separate educational facilities are inherently unequal. As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Id.* at 495.

[205] *See* United States v. Reynolds, 345 U.S. 1, 10 (1953); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).

1. Separation of Powers is Effective

It is true that plaintiffs may be unable to establish standing to prove a prima facie case when the Government properly invokes the state secrets privilege. At first blush, this can appear to be a draconian result, especially if plaintiffs are alleging constitutional misconduct. However, to invoke the privilege, the Agency head must have determined that releasing the information in a public judicial forum could compromise national security.[206] In this type of case, the needs of the nation take precedence over the needs of an individual. In our elected democracy, political leaders who appoint Agency heads are accountable for their actions. If the electorate finds its leaders to be arbitrarily invoking the state secrets privilege, they can vote the political leadership from office, demand that Congress take further oversight action, provide electorate pressure on Congress to enact new legislation, or demand that Congress withdraw funds for suspect Executive programs. Further, if the Executive is egregiously violating the law, Congress could contemplate impeachment proceedings. As the Sixth Circuit stated in *ACLU v. NSA* when it refused to adjudicate constitutional issues in front of the court, "Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [plaintiff's] views in the political forum or at the polls."[207]

Additionally, Congress *has* taken an active role in overseeing Executive actions involving the state secrets privilege. During the same time that the D.C. Circuit Court upheld government state secrets privilege in *Halkin* and *Halkin II*, thereby denying plaintiffs standing to litigate their suits, Congress initiated FISA to provide warrant and minimization requirements for national security surveillance operations.[208] Shortly thereafter, President Reagan enacted Executive Order (EO) 12,333, setting out specific rules on how the Executive was to conduct its intelligence activities with internal oversight and approval mechanisms to ensure utilization of minimal intrusive means when lawfully collecting intelligence information.[209]

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[206] *Reynolds*, 345 U.S. at 7–8.
[207] *ACLU*, 493 F.3d at 676 (quoting United States v. Richardson, 418 U.S. 166, 179 (1974)).
[208] The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1871 (2000).
[209] Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted in* 50 U.S.C. § 401 (2000).

In the present, after the leaked disclosures and subsequent Government confirmation of the NSA terrorist surveillance program, aggrieved plaintiffs initiated suit in federal district courts.[210] The Government's lack of compliance with FISA and the Fourth Amendment was the central complaint of the plaintiffs in these cases.[211] As in *Halkin* and *Halkin II*, the Sixth Circuit in *ACLU v. NSA* dismissed plaintiffs' lawsuit for lack of standing.[212] Yet, the lack of a judicial forum did not prevent Congress or the public from pressuring the Executive to change its surveillance operating procedures to comport with FISA and indirectly comport with the Fourth Amendment.[213] Nor did it prevent Congress from enacting the FISA Amendments Act of 2008 and with it further oversight and minimization procedures.[214] Thus, both *Halkin* and *Halkin II* and the current NSA litigation demonstrate exactly how our separation of powers in government is supposed to operate. The Executive altered its conduct and implemented internal regulations, without judicial intervention, based upon congressional statutory activity, congressional oversight, and electorate pressures. There was no need for judicial activism violating the separation of powers, or for a court to disregard *stare decisis* to find plaintiffs' standing, or for a court to absolve the state secrets common law privilege, as the system of checks and balances functioned correctly.

However, a logical counterargument against this position is that the Executive committed constitutional and statutory surveillance violations in the 1970s and thirty years later committed the same type of violations with its terrorist surveillance program. Thus, this line of reasoning asserts that the Executive repeatedly violated the Constitution and applicable statutes without any discernable consequences. However, this argument fails to recognize that even though *Halkin* and *Halkin II* were

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[210] *See, e.g.*, ACLU v. NSA, 438 F. Supp. 2d 754 (E.D Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).

[211] *ACLU*, 438 F. Supp. 2d at 758; *Hepting*, 439 F. Supp. 2d at 978.

[212] *ACLU*, 493 F.3d at 676.

[213] Letter from Attorney Gen. Alberto Gonzales to Chairman of the Comm. on the Judiciary Patrick Leahy (Jan. 17, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf [hereinafter Gonzales Letter]. According to a letter written by the then-Attorney General, "any electronic surveillance that was occurring as part of the [TSP] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." *Id.*

[214] FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101 (discussed in further detail *infra* Part IV.C).

ultimately dismissed, the Executive changed its conduct without any form of judicial intervention. Instead, Congress fashioned a remedy, specifically FISA minimization procedures, that ensured surveillance applications came under the judicial review of the Foreign Intelligence Surveillance Court (FISC). Contemporaneously, the Executive enacted EO 12,333, thereby ensuring that collection activity on U.S. persons fell within an Agency's purpose under the least intrusive means available. Both FISA and EO 12,333 required that the intelligence community collected information on U.S. persons under very specific circumstances with very specific oversight mechanisms.[215] A court could not have fashioned a better remedy than FISA or EO 12,333 to regulate government surveillance activity. Further, during the last thirty years the Executive has adhered to the statutory limitations and internal regulations regarding surveillance to a much greater degree than during the pre-FISA time period without the need for judicial intervention.[216]

After the Bush Administration relied on its constitutional powers and the authorization for use of military force to initiate the terrorist surveillance program, it targeted "international telephone and email communications in which one of the parties was reasonably suspected of Al Qaeda ties."[217] In this manner, the government did not conduct carte blanche surveillance without any minimization procedures because it was at least trying to operate under the general framework of FISA and EO 12,333. That is to say, the previous statute and the executive order provided a framework for acceptable surveillance activity by the government.[218] Thus, although the terrorist surveillance program focused

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[215] *See* 50 U.S.C. § 1801 (i) (defining what constitutes a U.S. Person for surveillance); *id.* § 1802 (electronic surveillance of certain foreign powers without a court order upon Attorney General certification); Exec. Order No. 12,333 pts. II & III, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted in* 50 U.S.C. § 401 (2000) (detailing specific requirements for collection, what type of techniques to be used, approval authorities, and congressional oversight reporting requirements).

[216] *See* S. REP. NO. 95–604(I), at 7, 1978 U.S.C.C.A.N 3904, 3908. The Senate Judiciary Committee report utilized by the Senate Select Committee to study Government Operations with Respect to Intelligence Activities (Church Committee) conclusively found that every President from Franklin Roosevelt to Richard Nixon had asserted various authorities to conduct warrantless surveillance, at times on extremely dubious targets. *Id.* Compare this period with post–FISA and post-12,333 where the Executive has much more congressional and internal oversight and minimization requirements resulting in more selective and less intrusive targeting of U.S. persons.

[217] *ACLU*, 493 F.3d at 653.

[218] Press Release, White House, President Discusses NSA Surveillance Program, Address at the Diplomatic Reception Room, Wash., D.C. (May 11, 2006). President Bush stated that "[g]overnment's international activities strictly target Al Qaeda . . . [t]he government

on the external terrorist threats that were much more dangerous to national security than those faced in Operations *Minaret* or *Shamrock*, the government purposely minimized its surveillance techniques because of previous statutes and executive orders. Further, when the terrorist surveillance program leaked to the press resulting in several lawsuits, the Executive, faced with further congressional oversight, unilaterally decided to bring the program under FISA review.[219] This illustrates that congressional oversight and congressional action work in reigning in Executive surveillance activities without the need for judicially imposed remedies.

2. National Security Matters Should Be Handled by the Executive

The Judiciary is not better equipped than the Executive or Congress to handle foreign policy or national security matters. The Judiciary is decentralized, has a time-consuming adjudication process, and lacks expertise in the areas of foreign policy and national security.[220] Conversely, the Executive acts with a unified voice in security-related matters, has a relatively quick decision and implementation process, and possesses the requisite knowledge and expertise in national security

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does not listen to domestic phone calls without court approval . . . (the government) is not mining through the personal lives of millions of Americans." *Id.*

[219] *See* Gonzales Letter, *supra* note 213.

[220] John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006).

> Judicial decisions may harm the national interest because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. For example, the President might be engaged in a diplomatic campaign to pressure a Middle Eastern country into terminating its support for terrorism at the time that a judicial decision freed a suspected al Qaeda operative. A judicial decision along these lines could undermine the appearance of unified resolve on the part of the United States, or it might suggest to the Middle Eastern country that the executive branch cannot guarantee that it could follow through on its own counterterrorism policies. A court cannot take account of such naked policy considerations in deciding whether a federal statute has been violated or whether to grant relief, while the political branches can constantly modify policy in reaction to ongoing events.

Id. at 594.

issues. Most importantly, the Executive has a constitutional responsibility to protect the United States.[221]

There are ninety-four district courts, nine circuit courts, and one Supreme Court.[222] Until appellate courts have adjudicated a matter, each of the district courts can have a differing opinion on a legal issue. This system works well for criminal or civil matters litigated in the respective district courts, as the courts are able to adjudicate matters relatively quickly within their jurisdictions without having to report to a higher authority. However, this decentralized system would be ineffective in adjudicating national security cases involving the invocation of the state secrets privilege. Commentators have argued that our nation's forefathers framed the Constitution specifically to ensure that our government speaks with one voice in the context of foreign relations.[223] Indeed, the district court's ruling in *ACLU v. NSA*, enjoining the NSA from conducting further terrorist electronic surveillance, aptly demonstrates the danger of allowing courts to adjudicate foreign policy matters.[224] If the state secrets privilege were eliminated, cases involving legitimate government security programs such as the terrorist surveillance program could be subject to lengthy and arbitrary litigation in multiple district courts. Without the privilege, it would be very difficult for our intelligence community to engage in secret operations. This would have profound national security ramifications as government intelligence could be subject to judicial activism.

However, assume for the sake of argument that the Executive is running a secret program that is blatantly unconstitutional and is in violation of applicable statutes, but is important to national security. Assume also that the program originates from this country with support of private corporations, but also receives technical support from other countries such as Pakistan and India. Further, the program receives

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[221] *See* U.S. CONST. art. II, § 2 ("The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ."); *see also id*. art. II, § 1 (stating the President has a fundamental duty to "preserve, protect, and defend the Constitution.").

[222] Understanding the Federal Courts, http://www.uscourts.gov/UFC99.pdf (last visited Feb. 2, 2009).

[223] *See generally* FRED W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 112 (1986) (exploring the origin of the Constitution in the context of foreign affairs during the period preceding the Constitution's inception).

[224] ACLU v. NSA, 438 F. Supp. 2d 754, 782 (E.D Mich. 2006), *vacated*, ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

unofficial support from operatives in Iran and Saudi Arabia who secretly route information originating from those countries to the American government.

If this program were to be fully exposed in a judicial forum it likely would cause major diplomatic issues, damage national security through the exposure of methods, means, and sources, and jeopardize foreign country operatives. It would also risk the possibility of private industries failing to cooperate with the government in future operations to thwart national security threats. Under these circumstances, it seems reasonable that a court would uphold the Government's assertion of the state secrets privilege.

However, certain federal district courts, such as the district court in *ACLU v. NSA*,[225] may view the unconstitutional nature of these actions as a reason to deny the Government use of the state secrets privilege. This would be very problematic to national security for the aforementioned reasons. Yet, the government would be violating the Constitution and various statutes in running this program, so should there not be some form of redress? Some academics have argued that in this circumstance, the Government should allow the suit to proceed, or settle plaintiff's complaints, rather than simply receiving the benefit of having the complaint dismissed.[226] This procedure would allow the Government, not the plaintiff, to bear the costs of maintaining secrecy. However, this approach would likely cause a dramatic increase in frivolous lawsuits and would not address the primary motive in state secrets privilege litigation: forcing the Government to cease its alleged unconstitutional behavior.[227] Hence, this option seems to be suspect. Instead, this article argues for another form of oversight to ameliorate the situation where the Government invokes the state secrets privilege, causing the plaintiff's constitutional claims go unaddressed.

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[225] *Id.*

[226] *See* FISHER, *supra* note 195, at 212, 245.

[227] *See* Robert Chesney, *Symposium on the New Face of Armed Conflict: Enemy Combatants After* Hamdan v. Rumsfeld*: State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1309–11 (2007).

C. Additional Oversight Proposal

In state secrets privilege cases such as *Halkin*, *Halkin II*, and *ACLU v. NSA*, it appears the Executive only initiated changes to its questionable intelligence activities after exposure in the press and courts. Similarly, in these cases, Congress only increased its oversight responsibilities and enacted new legislation after the Executive committed its alleged statutory or constitutional violations.[228] In this sense, it appears the Executive was operating *ultra vires*, outside of the statutory framework Congress had created, and only changed its behavior when caught. Accordingly, there should be some mechanism in place to prevent this type of Executive conduct from occurring in the first place, thus foreclosing the need for litigation.

As *Halkin*, *Halkin II*, and *Reynolds* held, courts must grant substantial deference to Executive decisions regarding the release of information that might reasonably harm national security.[229] However, absolute deference to Executive decisions in national security, without any form of review, may allow the Executive to commit constitutional or statutory violations in the name of national security. Operations *Minaret* and *Shamrock*, and possibly the terrorist surveillance program, illustrate this point. In an attempt to address some of the issues of the terrorist surveillance program, Congress enacted the FISA Amendments Act of 2008 providing for some additional oversight of the Executive's foreign wiretapping programs.[230] The Act requires the Inspectors General of the Department of Justice, the Office of the National Director of Intelligence, and the National Security Agency to review and report to Congress the intelligence activities involving communications that were authorized at any time between 11 September 2001 and 17 January 2007.[231] There are also provisions in the statute allowing the Inspectors General to review Executive compliance with the targeting and minimization procedures and report this information to select congressional committees.[232]

However, these oversight provisions are by and large addressing retrospective wiretapping issues of the terrorist surveillance program, not

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[228] *See supra* Part IV.B.1.
[229] United States v. Reynolds, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).
[230] FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101.
[231] *Id.* § 101.
[232] *Id.*

prospective issues that are likely to develop in surveillance programs as technology continues to evolve. Accordingly, this article contends that there are more effective oversight procedures available. Namely, there should be a congressional certification of Executive action *prior* to the initiation of an Executive program such as the terrorist surveillance program. This certification process would have the Executive reporting either directly to the congressional intelligence committees or, in the alternative, to a national security court modeled after (or incorporating) the Foreign Intelligence Surveillance Court (FISC) that would certify national security claims.[233] This article asserts that the basic statutory framework is already in place to ensure Executive compliance in conducting intelligence activities. Therefore, only a slight change to existing law would allow Congress to accomplish a certification process ensuring better intelligence oversight of the Executive.

The Intelligence Oversight provision, 50 U.S.C. § 413, states that "[t]he President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity."[234] The law states that the Executive does not need to have congressional intelligence committee approval to carry out anticipated intelligence activities.[235] However, the Executive must provide information to Congress on the intelligence activity and furnish Congress with all requested material on intelligence operations.[236]

Executive agencies regularly meet with congressional intelligence committees regarding current and past operations. As stated, to prevent the Executive Branch from acting outside of its statutory or constitutional authority requires a simple change to this statute. A section could be added to the law that states that the Executive must inform the congressional intelligence committees regarding any current or future operations where the Executive would assert the state secrets privilege if certain details of the program were leaked and litigation commenced. In essence, this would be a system to ensure the Executive kept Congress fully apprised of its intelligence activities while at the same time allowing Congress to exercise further legal oversight over such activities.

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[233] The Foreign Intelligence Surveillance Court (FISC) was established to review requests ("FISA warrants") by U.S. agencies for surveillance of foreign targets. *See* 50 U.S.C. §§ 1801–1805 (2000).
[234] 50 U.S.C. § 413(a)(1) (2000).
[235] *Id.* § 413(a)(2).
[236] *Id.* § 413(b).

The Judiciary may not be the proper branch to inquire into the constitutionality of Executive conduct, but Congress would able to take over that task by enacting this legislation.

To accomplish this oversight responsibility, the Agency head would file an affidavit of support advocating why the state secrets privilege would be necessary for the specific program. The Executive would fully articulate to the congressional committees the parameters and legal justifications for the program. The Committee, by majority vote, would then "certify" the agency as complying with applicable constitutional and statutory standards. If the program were to leak, and a lawsuit were to commence, the Executive's invocation of the state secrets privilege would still deny plaintiffs standing. However, plaintiffs, the court, and the American public would know that the matter had received previous oversight by both the Executive and Congress. In this regard, there would be no compromise of national security through litigation, but Congress would exercise an extra check on Executive authority in invoking the state secrets privilege.

At least one commentator has suggested a somewhat similar approach. His suggestion is that the Senate and House intelligence committees serve in an advisory role to a judge whenever the Government invokes the state secrets privilege. The committees would then provide input and a vote on whether the privilege should apply to the case at hand. The judge would consider the vote, but it would not bind his decision.[237] Another commentator has suggested that if a court

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[237] *See* Chesney, *supra* note 227, at 1312.

> This suggestion plainly entails a great many practical and legal hurdles . . . . [U]nder this proposal, the judge would have the statutory option of calling for the views of the intelligence committees after having determined that the privilege has been asserted in conformity with the requisite formalities. The committees' views would not be binding, but would at least provide well-informed advice to the judge without requiring disclosure of information to persons who do not at least arguably have the authority to access it. Of course, one can expect that the committees might divide along partisan lines when faced with such an issue. To avoid that prospect, a recommendation to disallow the privilege should require a supermajority vote.

Id.

concludes that the state secrets privilege is applicable, it should send the matter back to Congress for congressional review and action.[238]

If having the Executive report directly to congressional committees proved too onerous, time-consuming, or politically unappetizing, the alternative would be for Congress to set up a National Security Court modeled after the FISC, or perhaps incorporating the FISC itself.[239] A National Security Court would report directly to the congressional intelligence committees on all of its findings. The members of the court could be specifically selected for their expertise regarding classification procedures, right to privacy issues, and national security issues. The court would be in a secure building and serviced with reporters and clerks who hold the requisite security clearances. Similar to a criminal trial involving classified materials, the court could have the services of intelligence and military subject matter experts appointed to advise it with respect to the risk of disclosure of classified materials.

The court would not adjudicate cases after the Government invoked the state secrets privilege. Rather, it would serve as the certification process for Executive action prior to the initiation of an intelligence operation. If the court agreed to the legality of the Executive's actions coupled with the need to keep the program secret, it would issue an opinion to that effect. Currently, the Government can appeal FISC court determinations regarding government FISA warrants to the Foreign Intelligence Surveillance Court of Review and potentially to the Supreme Court.[240] In this same manner, the Government could also appeal National Security Court state secret certifications if necessary.

The congressional intelligence committees would then have access to the opinion and to the relevant federal court if a lawsuit commenced following a security breach. If the Executive ever conducted a program not certified by the security court, it would be statutorily barred from invoking the state secrets privilege in future litigation. The certification process would serve two purposes. First, it would encourage the Executive to examine thoroughly the legality of its programs prior to their initiation. Second, it would ensure that both the Judiciary through

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[238] *See* Frost, *supra* note 198, at 1958.

[239] *See* 50 U.S.C. §§ 1801–1805 (2000). The FISC's jurisdiction is currently narrowly focused on approving government warrants regarding foreign intelligence information. FISC hearings are non-adversarial proceedings where the government presents applications to conduct surveillance. *Id.*

[240] *Id.* § 1805c.

the National Security Court and Congress through its intelligence committees have some oversight over Executive activity whenever the government is acting in a constitutionally suspect manner. Other commentators have envisioned a similar National Security Court, but its role would be to adjudicate cases after the Government invoked the state secrets privilege, not to serve in a certification process.[241]

In any event, either a certification process or an adjudication process would present some difficult logistical implementation issues. Additionally, some would argue that the process of Congress certifying Executive action or Congress interacting with the Judiciary comes close to the constitutional line separating judging from legislating. However, any further form of oversight that would allow for additional scrutiny of the Executive's actions regarding its invocation of the state secrets privilege would be a welcome development and should be explored thoroughly.

V. Conclusion

The state secrets privilege can be a national security savior or a constitutional demon depending on an individual's personal beliefs. In the past, when the Executive has engaged in arguably unlawful or unconstitutional surveillance conduct, the Executive has invoked the state secrets privilege to prevent further disclosure of the specific methods and means of its surveillance activities in a judicial forum. In some instances, this privilege has prevented plaintiffs from establishing standing for the courts to adjudicate their constitutional and statutory

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[241] *See* Chesney, *supra* note 227, at 1313.

> A related but more appealing alternative would be for Congress to take steps to permit suits implicating state secrets to proceed on an in camera basis in some circumstances . . . . Congress might authorize judges who would otherwise be obliged to dismiss a suit on privilege grounds instead to transfer the action to a classified judicial forum for further proceedings. Such a forum—modeled on, or perhaps even consisting of, the Foreign Intelligence Surveillance Court at a minimum would entail Article III judges hearing matters in camera on a permanently sealed, bench-trial basis.

Id. Other commentators have suggested a similar National Security Court. *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 165, 171–72 (2008).

claims. In a public policy context, this is a correct result, as the state secrets privilege has the objective of ensuring national security. However, there is both the potential, and the reality, of Executive overreaching in its surveillance activities, justifying its actions in the interests of national security, and then claiming the state secrets privilege in court.

To ameliorate this problem, Congress and the Executive have taken active steps to implement regulations to govern surveillance activities and minimize government surveillance of U.S. persons. However, this article argues that the government lacks an adequate system to prevent the Executive from overreaching in its future intelligence activities. As such, an additional oversight mechanism should be enacted to ensure that the Executive is properly invoking this powerful privilege. This extra check on the Executive would entail the Executive reporting its secret surveillance actions to congressional intelligence committees for certification, or reporting to a special National Security Court modeled after the FISC for certification, prior to initiation of the intelligence program. If the Executive did not certify its program, it could not invoke the state secrets privilege in litigation. This would ensure that the Executive kept Congress fully apprised of its conduct, and would reassure the public that the Executive was not acting unilaterally when invoking the state secrets privilege. This development would strike an appropriate balance between the security needs of the nation and the constitutional rights of the individual for the benefit of all.

FROM LAW MEMBER TO MILITARY JUDGE: THE CONTINUING EVOLUTION OF AN INDEPENDENT TRIAL JUDICIARY IN THE TWENTY-FIRST CENTURY

MAJOR FANSU KU*

Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures.[1]

Judicial accountability is yin to the judicial independence yang.[2]

I. Introduction

Judicial independence is a frequent topic of discussion among members of the judiciary and bar associations in recent years.[3] For

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[1] Brennan Center for Justice at New York University School of Law, Questions and Answers about Judicial Independence, http://www.abanet.org/judind/downloads/jidef4-9-02.pdf (last visited Jan. 22, 2009).

[2] Charles Gardner Geyh, *Symposium: Judicial Independence and Judicial Accountability: Searching for the Right Balance*, 56 CASE W. RES. L. REV. 911, 916 (2006).

[3] *See, e.g.*, *id.* (exploring the right balance between judicial accountability and judicial independence); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Elections Versus*

instance, last year Justice Stephen Breyer of the U.S. Supreme Court, on his first visit to Hawaii as a Jurist-in-Residence at the University of Hawaii Law School, addressed members of the Hawaii Bar and Judiciary about the meaning and importance of judicial independence in American society.[4] Justice Breyer spoke of some of his concerns with judicial independence in this country, such as initiatives to punish judges for unpopular decisions and judges being forced to raise money in order to fund their re-election.[5] He is not alone in his assessment. The 2003 Report of the American Bar Association's Commission on the 21st Century Judiciary similarly addressed concerns with judicial independence and set forth numerous recommendations addressing challenges facing the judiciary in the twenty-first century.[6]

What is judicial independence? It has been described as "the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."[7] It has also been described as the means to promote the rule of law, separation of powers, and due process.[8] While the concept appears straightforward, its implementation, as illustrated by the ongoing dialogue in the civilian sector, is anything but straightforward. In the military, the concept of judicial independence is no easier to implement. Like its civilian counterparts, the military justice system wrestles with the contours of judicial power. While the Supreme Court found that "Congress has achieved an acceptable balance between independence

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Merit Selection: Judicial Diversity: Where Independence and Accountability Meet, 67 ALB. L. REV. 775 (2004) (discussing the challenge of balancing the competing interests of judicial independence and judicial accountability); JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, executive summary, at ii (July 2003) [hereinafter ABA REPORT] (reporting on the fairness and impartiality of state judiciaries).

[4] Mark Murakami, *Justice Breyer and Judicial Independence*, HAWAIIOCEANLAW.COM, Feb. 4, 2008, http://www.hawaiioceanlaw.com/hawaiioceanlaw/2008/02/justice-breyer.html.

[5] *Id.*; *see also* Norman L. Greene, *Issues Facing the Judiciary: Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 598 n.2 (2005) ("The paradox is that while we are the envy of the world for our independent judiciary and we are exporting the notion of the rule of law across the world, at home we have not yet decided how to choose judges or exactly what the limits of their role should be." (quoting Thomas Phillips, former Chief Justice of the Texas Supreme Court)).

[6] ABA REPORT, *supra* note 3, at ii; *see also* N.Y. State Bd. of Elections et al. v. Lopez Torres, 128 S. Ct. 791 (2008) (Kennedy, J., concurring) (expressing concerns over the State of New York's requirement that its judicial candidates conduct electoral campaigns).

[7] Geyh, *supra* note 2, at 925 (quoting Tennessee Justice Adolpho Birch).

[8] *Id.* at 915.

and accountability"[9] where the military judiciary is concerned, some contend that an "acceptable balance" is a far cry from "best balance," and that legislative action creating a permanent judiciary is needed to achieve judicial independence.[10]

This article will argue that legislative action creating a permanent judiciary is not needed to achieve judicial independence. Judicial independence in the military, as in the civilian sector, is not an end in itself. Rather, it is a means to advance the goals of military law[11]—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[12] The current judicial structure sufficiently realizes the goals of military law. The military's judicial system, however, is designed to be dynamic.[13] While legislative action creating a permanent judiciary is unnecessary to achieve judicial independence, we must examine ways to build on the system Congress established to maintain judicial independence and the ends it promotes.

Before examining ways of improving the military judiciary to advance judicial independence in the current environment,[14] this article will first explore the historical development of the military judiciary, including the evolving debate over the proper balance between judicial independence and accountability.[15] It will next address the proposition that legislative action creating a permanent judiciary will achieve the "best balance" between judicial independence and accountability. This article next discusses why the proposed legislation is impracticable, and thus unhelpful in achieving its intended purpose. It will then examine

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[9] Weiss v. United States, 510 U.S. 163, 180 (1994).

[10] Fredric Lederer & Barbara S. Hundley, *An Independent Military Judiciary—A Proposal to Amend the UCMJ*, 3 WM. & MARY BILL OF RTS. J. 629, 669 (1994).

[11] "Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders." MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2008) [hereinafter MCM].

[12] *Id.*

[13] *See, e.g.*, Article 146, UCMJ, which requires a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ. UCMJ art. 146 (2008).

[14] Within the limits of this article, the author will examine only those initiatives designed to improve the military trial judiciary.

[15] Within the limits of this article, the author will address only the historical development of the military trial judiciary.

other initiatives that have been put forth to cultivate judicial independence. Finally, this article will propose an initiative short of legislation to promote judicial independence.

II. Evolution of the Military Trial Judiciary

A. Creation of the Law Member

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.[16]

For the first 175 years of its history, military justice largely reflected this view.[17] Because military law at the time aimed to secure the immediate and unquestioned obedience of these "strong men," courts-martial were not independent instruments of justice, but tools to serve the commanders.[18] Commanders were the "fountain of justice" in the military.[19] Thus, from the Revolutionary War through World War I, courts-martial consisted of officer panels appointed by convening authorities that decided all questions, including interlocutory issues.[20] There were no judge figures.[21]

At the end of World War I, Congress amended the Articles of War[22] in response to dissatisfaction from the large number of people brought into contact with the command-dominated justice system for the first

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[16] Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 3 n.4 (2000) (quoting General William T. Sherman).
[17] Brigadier General John S. Cooke, *Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 7 (1998).
[18] Cooke, *supra* note 16, at 3.
[19] Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 10 (1987).
[20] United States v. Norfleet, 53 M.J. 262, 266 (C.A.A.F. 2000) (citations omitted).
[21] WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 7 (1973).
[22] Pub. L. No. 64-242, § 3, 39 Stat. 619, 650–70 (also known as the 1916 Articles of War).

time.[23] Congress now required the convening authority to appoint, in each Army general courts-martial, one of the panel members to serve as a "law member."[24] As one of the panel members, this law member would vote with the rest of the panel, but was assigned certain judge-like duties, such as ruling on the admissibility of evidence and instructing on the applicable law in a given case.[25] Whenever possible, this law member would be a Judge Advocate, although a "specially qualified" officer could be appointed if a Judge Advocate was not available.[26] There was still no requirement that the law member be a licensed attorney.[27] Moreover, a majority of the panel could overrule the law member's decisions.[28] In the absence of a law member, the president of the court-martial panel ruled upon all interlocutory issues.[29] As with the law member, a majority of the panel could also overrule the president's decisions.[30]

World War II generated further change as an even greater number of people were brought into contact with the command-dominated justice system; most disliked what they saw.[31] In 1948, Congress again amended the Articles of War to now require that the law member be a Judge Advocate or a licensed attorney serving as a commissioned officer on active duty and certified by The Judge Advocate General (TJAG) as qualified for such detail.[32] Law members continued to rule on

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[23] GENEROUS, *supra* note 21, at 7–8; *see also* Cooke, *supra* note 16, at 5 (citing as an example of the dissatisfaction that incited change the mass execution of thirteen black soldiers for mutiny one day after their trial ended).
[24] *Norfleet*, 53 M.J. at 266.
[25] GENEROUS, *supra* note 21, at 10.
[26] *Norfleet*, 53 M.J. at 266.
[27] GENEROUS, *supra* note 21, at 10.
[28] *Norfleet*, 53 M.J. at 266.
[29] *Id.*
[30] *Id.* Naval courts-martial, governed by the Articles for the Government of the Navy, continued without a law member. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURTS-MARTIAL PROCEDURE 14-3 (3d ed. 2006).
[31] GENEROUS, *supra* note 21, at 14–16 (1973) (describing widespread complaints about improper command influence over trials such as demands for convictions regardless of actual guilt or innocence); *see also* Cooke, *supra* note 16, at 6–7 (noting that over sixteen million men and women served during World War II—nearly one in eight Americans).
[32] Major Clyde Tate & Lieutenant Colonel Gary Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judges*, ARMY LAW., Oct. 1992, at 24; *see also* Pub. L. No. 80-625, § 201, 62 Stat. 604, 627 (also known as 1948 Articles of War). On 25 June 1948, President Truman signed the Air Force Military Justice Act, which extended the Articles of War to the Air Force, which became a separate service on 26 July 1947. GENEROUS, *supra* note 21, at 31–32 (1973); *see also* Cox, *supra* note 19, at 13; Air Force History Overview, http://www.af.mil/history/overview.asp (last visited Jan. 22, 2009).

interlocutory questions and their rulings in this respect were generally final except in two circumstances: (a) on motions for finding of not guilty; and (b) on questions regarding an accused's sanity.[33] The law members had the additional responsibility of instructing other court-martial panel members regarding the burden of persuasion and standard of proof.[34]

B. Creation of the Uniform Code of Military Justice (UCMJ) and the Law Officer

In 1950, following World War II and the historic number of men and women serving in the armed forces, Congress enacted the UCMJ to provide greater and more uniform protection to servicemembers.[35] "We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice."[36] Justice means a greater acceptance of the civilian judicial system that General Sherman once dismissed as inapposite to the object of military law.[37] A key figure in the civilian judicial system is naturally the judge.

Foreshadowing the advent of the military judge, Congress changed the title of the "law member" to the "law officer" and required the law officer to be an attorney certified by TJAG as qualified for such service at each general court-martial.[38] Under the UCMJ, the law officer, unlike the law member, did not serve as a member of the court-martial.[39] Instead, the law officer assumed duties similar to those of a civilian judge.[40] The law officer ruled on most interlocutory questions and provided instructions to the court-martial panel members on matters of law.[41] The law officer also assumed general responsibility for the

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[33] Tate & Holland, *supra* note 32, at 24 n.18.
[34] *Id.* at 24 n.19; *see also* Pub. L. No. 80-625, § 201, 62 Stat. 604, 627 (also known as 1948 Articles of War).
[35] *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 606 (1949).
[36] Cooke, *supra* note 16, at 9 (quoting Professor Edmund Morgan, chair of the committee that drafted the Uniform Code of Military Justice).
[37] *Id.* at 3 n.4 (citing General William T. Sherman regarding the separate objectives of civil versus military law).
[38] 64 Stat. 117, 124; *see also* United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000).
[39] *Norfleet*, 53 M.J. at 267.
[40] *Id.*
[41] *Id.*; *see also* GENEROUS, *supra* note 21, at 43.

orderly conduct of the court-martial proceedings.[42] "The legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as [a] judge."[43]

C. Creation of the Military Judge

In keeping with its conception of the law officer as a judge and in response to continued wartime criticisms[44] of unlawful command influence and lack of procedural safeguards for servicemembers, Congress enacted the Military Justice Act of 1968.[45] This legislation was designed to

> streamline court-martial procedures in line with procedures in U.S. district courts, to redesignate the law officer of a court-martial as a "military judge" and give him functions and powers more closely aligned to those of Federal district judges, . . . [and] to increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers.[46]

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[42] *Norfleet*, 53 M.J. at 267; *see also* GENEROUS, *supra* note 21, at 43 ("It would be the responsibility of the law officer to insure a fair and orderly trial.").

[43] United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952). The UCMJ also created the United States Court of Military Appeals (COMA) as a civilian check on the operation of military justice. *See* Lederer & Hundley, *supra* note 10, at 637 (stating that the UCMJ and the COMA were compromises between those who wanted commanders to retain unlimited control over military law and those who wanted to place more power in the hands of lawyers and judges). The United States Court of Military Appeals was not officially named until the passage of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *Id.* at 637 n.30. In 1994, Congress renamed the U.S. COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2663 (1994).

[44] "The public increasingly held the Armed Forces in disfavor because of the military's expanding presence in Vietnam. . . . The introduction of an independent military judiciary would curtail some of these criticisms by establishing authority figures to protect the rights of accused servicemembers." Tate & Holland, *supra* note 32, at 26.

[45] Pub. L. No. 90-632, 82 Stat. 1335; *see also* Tate & Holland, *supra* note 32, at 25 ("Congress concluded that the military justice system needed a substantial overhaul to convince the public that the system actually protected the rights of accused service members. One way to accomplish this goal was to align the military justice system more closely with the civilian system.").

[46] *Norfleet*, 53 M.J. at 267.

To this end, TJAG or his designee, instead of the convening authority, now details military judges to preside over general courts-martial.[47] The Judge Advocate General continues to certify the qualification of military judges.[48] In addition, the military judges must be assigned to an organization "directly responsible to the JAG, or his designee" where their primary duty is to serve as military judges.[49] Moreover, "neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance of duty as a military judge."[50]

To further protect the independence of the judiciary, Congress enacted Article 6a and expanded the protection of Article 37, UCMJ.[51] Article 6a requires the President to prescribe procedures governing investigation and disposition of matters concerning the fitness of military judges.[52] The legislative history notes that the procedures, "to the extent consistent with the [UCMJ] . . . should emulate the standards and procedures that govern investigation and disposition of allegations concerning judges in the civilian sector."[53] Article 37 prohibits convening authorities and "any other commanding officer" from censuring or reprimanding court-martial members, military judges, or counsel "with respect to any other exercises of its or his functions in the conduct of the proceedings."[54] Article 37 further prohibits attempts to coerce or unlawfully influence the actions of a court-martial.[55] Thus, with the advent of the military judge, Congress created a military judicial system more independent and more closely resembling the civilian judicial system.

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[47] UCMJ art. 26(c) (2008). In addition, "[s]ubject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial." *Id*. art. 26(a).
[48] *Id.* art. 26(b).
[49] *Id.* art. 26(c).
[50] *Id.*
[51] Congress enacted Article 6a in 1989 and expanded the protections of Article 37 in the Military Justice Act of 1968. *See* 10 U.S.C. §§ 806a, 837 (2006).
[52] UCMJ art. 6a.
[53] H.R. REP. NO. 101-331, at 659 (1989) (Conf. Rep.).
[54] UCMJ art. 37.
[55] *Id.*

D. Debate Over Judicial Tenure for Military Judges and the Appointments Clause

1. Tenure

While Congress has substantially increased the independence of the military judiciary to more closely resemble the civilian judiciary, Congress did not provide military judges with tenure or a fixed term of office in the UCMJ.[56] Moreover, unlike the federal judiciary, the Constitution does not require life tenure for military judges.[57] Some argue, however, that military judges are a special category of military officers, one that requires a change to the structure of the military judiciary itself.[58] The Supreme Court concluded in *Weiss v. United States* that a structural change is not constitutionally required.[59]

Private Eric J. Weiss, a U.S. Marine, pleaded guilty to one specification of stealing a racquetball glove, in violation of Article 121 of the UCMJ, and was sentenced to confinement and partial forfeitures for three months, and a bad-conduct discharge.[60] The Navy-Marine Corps Court of Military Review and the Court of Military Appeals (COMA) both affirmed Private Weiss's conviction.[61] Private Weiss petitioned the Supreme Court of the United States, arguing that military judges' appointments violated the Appointments Clause of the Constitution[62] and

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[56] In the debate over tenure for military judges, the words "tenure" versus "term of office" are often used interchangeably. However, the word "tenure" generally connotes one's right to hold an office for an indefinite period of time while the words "term of office" connote one's right to hold an office for a fixed period of time. United States v. Graf, 35 M.J. 450, 454 n.3 (C.M.A. 1992).

[57] *See* U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[58] *See generally* Lederer & Hundley, *supra* note 10, at 629 (outlining criticisms of the military judiciary and arguing for an amendment to the UCMJ to create a permanent judiciary); GILLIGAN & LEDERER, *supra* note 30, at 14-6 (arguing that military judges occupy a unique military role and therefore deserve special protection).

[59] Weiss v. United States, 510 U.S. 163, 179 (1994).

[60] United States v. Weiss, 36 M.J. 224 (C.M.A. 1992).

[61] *Id.* at 225.

[62] U.S. CONST. art. II, § 2, cl. 2.

that their lack of a fixed term of office violated the Due Process Clause.[63] The Court granted certiorari.[64]

The Supreme Court held that the Due Process Clause of the Constitution does not require that military judges have a fixed term of office, reasoning that a fixed term of office has never been part of the military justice tradition.[65] Given its historical absence, the Supreme Court rejected the claim that fundamental fairness requires a fixed term of office.[66] Moreover, the Supreme Court noted that a fixed term of office is not an end in itself.[67] Rather, it is only one way to advance judicial independence, which in turn ensures judicial impartiality.[68] The Supreme Court cited provisions in the UCMJ that it believes sufficiently insulate military judges from unlawful command influence and promote judicial independence and impartiality so as to satisfy the Due Process Clause.[69] Specifically, the Supreme Court pointed out that

> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. . . . Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.[70]

Lastly, the Supreme Court noted that the COMA,[71] an appellate court composed of civilian judges who serve for fixed terms of fifteen years,

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[63] *Id.* amend. V.
[64] *Weiss*, 510 U.S. at 163. *Hernandez v. United States*, a companion case raising the same issues as *Weiss*, was decided at the same time.
[65] *Id.* at 178–79 (noting that for over 150 years, courts-martial were conducted without the presence of any judge).
[66] *Id.* at 179.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 179–80 (citing Articles 37 and 98 of the UCMJ, which provide for the possible court-martial of servicemembers who influence or attempt to influence a military judge's findings or sentencing decisions).
[70] *Id.* at 180.
[71] Congress later renamed the United States Court of Military Appeals the United States Court of Appeals for the Armed Forces. *See supra* note 43 and accompanying text.

oversees the entire military justice system.[72] In short, the Supreme Court believes the arguments for tenure or a fixed term of office are not so extraordinary as to justify overruling the balance struck by Congress in the UCMJ.[73]

2. Appointments Clause

Besides tenure, critics argue that military judges occupy such a unique military role that a separate appointment is required under the Appointments Clause of the United States Constitution.[74] As with the tenure issue, the Supreme Court concluded otherwise in *Weiss v. United States*.[75]

The Appointments Clause of Article II of the Constitution provides that

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[76]

As commissioned officers of the United States, military judges must receive an appointment pursuant to the Appointments Clause.[77] Weiss argued that the position of the military judge is so unique that the Appointments Clause requires a second appointment before a military

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[72] *Weiss*, 510 U.S. at 181.
[73] *Id.*
[74] *See generally* GILLIGAN & LEDERER, *supra* note 30, at 14-6 (arguing that military judges occupy a unique military role and therefore deserves special protection); Lederer & Hundley, *supra* note 10 at 658, 666–67 (arguing that issues of tenure and appointment go to the "very office and image of the military judge.").
[75] *Weiss*, 510 U.S. at 176.
[76] U.S. CONST. art. II, § 2, cl. 2.
[77] *Weiss*, 510 U.S. at 169–70.

officer can assume military judge duties.[78] While recognizing that Congress has gradually changed the military justice system to more closely parallel the civilian judicial system, including the expanded judicial duties of the military judge, the Supreme Court emphasized that "the military in important respects remains a 'specialized society separate from civilian society.'"[79] In this "specialized society," military judges do not have any judicial authority separate from the court-martial to which they have been detailed.[80] Moreover, until detailed to a specific court-martial, a military judge has "no more authority than any other military officer of the same grade and rank."[81] Article 26(c) of the UCMJ further provides that while serving as a military judge, an officer may perform non-judicial duties with the permission of TJAG.[82] Thus, a military judge remains a military officer, an officer already appointed pursuant to the Appointments Clause.[83] As such, a separate appointment is not necessary before an officer assumes the duties of a military judge.[84]

Concurring, Justice Ginsburg noted that

> [t]he care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges.[85]

Warning that the Supreme Court's praise is "too broad and dangerous," critics argue that structurally, the military judiciary remains susceptible to abuse and that legislative action creating a permanent

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[78] *Id.* at 170.
[79] *Id.* at 174 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).
[80] *Id.* at 175.
[81] *Id.* (quoting United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992)).
[82] UCMJ art. 26(c) (2008).
[83] *Weiss*, 510 U.S. at 175–76.
[84] *Id.* at 176.
[85] *Id.* at 194.

judiciary would ensure the "best balance" between judicial independence and accountability.[86]

III. Legislative Action Creating a Permanent Judiciary—Is It Needed?

In 1994, after the Supreme Court's decision in *Weiss v. United States*, Professor Fredric Lederer and Lieutenant Barbara S. Hundley proposed that Congress amend the UCMJ to create a permanent judiciary to eliminate even the appearance of a lack of judicial independence.[87] While Congress has taken no action toward adopting the proposal, a former chief judge of the United States Court of Appeals for the Armed Forces (CAAF) recently encouraged military justice practitioners to reexamine the proposal and consider its viability in the current wartime environment.[88] While the proposal has positive attributes, it is impracticable, and thus unhelpful in achieving its intended goal of advancing judicial independence. Before examining the proposal's difficulties, this article will analyze the rationale behind the proposal for legislative action.

A. Rationale for Proposed Legislation is Unsupported

Professor Lederer and Lieutenant Hundley's main critique of the current military judiciary structure is that the military's hierarchical scheme, including its personnel practices (i.e., promotions and assignments), extends to military judges.[89] In their opinion, as TJAG maintains technical control over the entire Judge Advocate assignments process, any number of informal actions may result against military judges for "unpopular" decisions that will defy detection or clear causation.[90] For instance, should TJAG and the senior clients he serves decide to "punish" a military judge for a decision they did not like, they need not resort to formal disciplinary actions or bad fitness evaluations.[91]

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[86] Lederer & Hundley, *supra* note 10, at 658, 669.
[87] *Id.* at 673.
[88] H.F. "Sparky" Gierke, *Reflections of the Past: Continuing to Grow, Willing to Change, Always Striving to Serve*, 193 MIL. L. REV. 178, 198 (2007); *see also* H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 257 (2005) (asking whether it is time to take a fresh look at the plan).
[89] Lederer & Hundley, *supra* note 10, at 650–53.
[90] *Id.* at 650.
[91] *Id.* at 653.

They can simply reassign the offending military judge to an undesirable assignment, one not considered "career enhancing."[92] The possibility of unlawful command influence is therefore very real in the minds of these critics.[93]

Moreover, Professor Lederer and Lieutenant Hundley argue that even if military judges are in fact impartial, the military's hierarchical scheme can cause a reasonable person to perceive that unlawful command influence may sometimes occur.[94] In their opinion, this possibility itself justifies legislative action.[95] According to them, a regulatory-mandated fixed term of office for the military judiciary does not sufficiently insulate military judges from possible command influence.[96] "So long as the judge knows that his or her future is in the hands of those who have non-judicial interests, both the perception and the reality of possible tampering will exist."[97] A fixed term of office thus provides little protection, as military judges may still be influenced by their interests in future promotions and assignments, unless they are serving the last assignment of their career.[98] These concerns are unwarranted for several reasons.

First, current personnel practices indicate that military judges are unlikely to be influenced by their interests in future promotions and assignments. To begin with, eligibility requirements preclude most Army Judge Advocates from applying for judgeships until late in their careers.[99] While senior majors may apply for judgeship,[100] those selected

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[92] *Id.*
[93] *Id.* at 657, 673.
[94] *Id.* at 633, 657.
[95] *Id.* at 673.
[96] *Id.* at 666.
[97] GILLIGAN & LEDERER, *supra* note 30, at 14-8; *see also* Lederer & Hundley, *supra* note 10, at 666 ("The degree of protection afforded a judge by fixed tenure is de minimis."); Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 78 (2000) (commenting on the Army's three-year tenure policy, Senior Judge Everett noted that the policy is adequate for now, although "when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed").
[98] Lederer & Hundley, *supra* note 10, at 666.
[99] *See* JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB 1-1, app. VIII, para. 8-1 (2007–2008) [hereinafter JAG PUB 1-1] (listing the selection criteria of active duty military trial judges, including advanced schooling).

to be military judges are usually in the grade of O-5 or O-6. Moreover, even before the Army instituted a three-year fixed term of office for military judges,[101] the standard tour was three to four years.[102] Many went on to serve consecutive tours as military judges until retirement.[103] This policy is true for the Navy as well.[104] "[T]he military is developing a tradition of reappointing people who are doing a good job. By 'good job,' I don't mean just affirming conviction."[105]

Second, no concrete evidence supports a threat to military judges' independence, by TJAG or anyone else. As an example of the threat facing the military judiciary, Professor Lederer and other critics cite an incident related by Rear Admiral Jenkins at a Judge Advocates Association program on 7 August 1993.[106] Rear Admiral Jenkins, former JAG of the Navy, stated that the Secretary of the Navy once ordered him to fire a military judge.[107] Admiral Jenkins stated that he refused the order as unlawful and that he subsequently worked things out with the Secretary of the Navy.[108] According to critics, the mere fact that the request was made suggests that the military justice system is subject to abuse.[109] In their mind, not all senior officers have the ethical integrity of Admiral Jenkins and some may choose a more subtle approach to

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[100] As will be explained in more detail *infra*, the Army started a judicial apprenticeship program where select senior majors are eligible to participate in the one-year program.

[101] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-1g (16 Nov. 2005) [hereinafter AR 27-10]. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[102] Cooke, *supra* note 17, at 18.

[103] Interview with Colonel Stephen R. Henley, Chief Trial Judge of the Army, in Charlottesville, Va. (Nov. 19, 2007) [hereinafter Henley November Interview]; Telephone Interview with Colonel Stephen R. Henley, Chief Trial Judge of the Army, in Arlington, Va. (Jan. 3, 2008) [hereinafter Henley January Interview]. *But see* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-4b ("As a general rule, officers below the grade of colonel will not receive consecutive trial judge assignments.").

[104] E-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Feb. 21, 2008, 15:34 EST) hereinafter Reismeier Feb. E-mail] (on file with author) ("No one wants even the appearance that duty changes might be caused by 'unpopular' rulings.").

[105] Hudson, *supra* note 97, at 78 (Senior Judge Everett remarking that a three-year fixed term is adequate for the present given the tradition of reappointing good people).

[106] GILLIGAN & LEDERER, *supra* note 30, at 14-7; *see also* Lederer & Hundley, *supra* note 10, at 630–31, 653 (stating that such incident demonstrates not just the possibility of command influence, but its actuality).

[107] GILLIGAN & LEDERER, *supra* note 30, at 14-7.

[108] *Id.*

[109] *Id.* at 14-7 to 14-8.

influence military judges.[110] For instance, they argue that in *United States v. Mabe*,[111] the chief judge of the Navy-Marine Corps Trial Judiciary sent a letter to a trial judge expressing concern about the sentences that came out of that trial judge's circuit, and stating that his circuit was fast becoming the "forum of choice for an accused."[112] A majority of the court in *Mabe* concluded that while the chief trial judge's action was improper, no prejudice resulted based on remedial actions taken by the chief trial judge's superiors.[113]

While the actions of the Secretary of the Navy and the Navy chief trial judge were improper, they represent the exception rather than the rule.[114] Although unlawful command influence may sometimes occur, this does not mean that it occurs frequently or that it is viewed as occurring frequently. As noted even by Professor Lederer and the other critics of the military justice system, the available evidence indicates that "many, if not all, of our judges are honorable professionals who act properly."[115] Available evidence further indicates that outside observers see the military justice system as open and fair, capable of protecting individuals and this nation. [116] This does not mean that the military

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[110] *Id.*

[111] United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

[112] GILLIGAN & LEDERER, *supra* note 30, at 14-8 n.31.

[113] *Mabe*, 33 M.J. at 206. Dissenting in part, Judge Cox stated that he viewed the letter as a "frank communication between a Chief Judge and a trial judge concerning the work of the judges in the Transatlantic Circuit of the Navy." *Id.* at 207.

[114] Most of the cases cited as examples of unlawful command influence appear in the early 1990s, some even earlier. *See* Lederer & Hundley, *supra* note 10, at 630–31, 653–58; *see also* GILLIGAN & LEDERER, *supra* note 30, at 14-7 to 14-8. In the majority of the cases cited, like *Mabe*, the COMA found a lack of prejudice and sometimes even a lack of improper command action to begin with. In only one case, United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 337 (C.M.A. 1988), did the COMA grant a protective order, prohibiting the Inspector General from investigating the Navy-Marine Corps Court of Military Review. While a lack of prejudice on appeal does not mean the absence of impropriety, it usually does mean that any impropriety was discovered early enough for corrective action to be taken.

[115] Lederer & Hundley, *supra* note 10, at 630–31, 658; *see also* Cooke, *supra* note 17, at 18 (noting that the Judge Advocates General he has worked with and for all had great respect for the independence of military judges and that none would think of penalizing military judges based on their rulings).

[116] *See, e.g.*, Michael C. Dorf, *Why The Military Commissions Act is No Moderate Compromise*, FINDLAW, Oct. 11, 2006, http://writ.news.findlaw.com/dorf/20061011.html (arguing that courts-martial are a viable option to military commissions); Neal Katyal, *Sins of Commissions: Why Aren't We Using the Courts-Martial System at Guantanamo*, SLATE, Sept. 8, 2004, http://www.slate.com/id/2106406 (arguing that the American military justice system, including the military judges within it, is capable of protecting

justice system is "trouble free" or that the public sees the military justice system as "trouble free."[117] The same, however, can be said of any justice system.[118] The possibility of judge tampering and perceptions of unfairness by some will always be there.

The primary criticism remains: Military judges are commissioned officers and as commissioned officers, they are subject to the personnel policies that apply to all military officers, such as involuntary assignments and performance evaluation.[119] This criticism fails for several reasons. First, the status of military judges as commissioned officers in the armed forces is vital. If the military judges are no longer military, "the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively."[120] Thus, as noted by the CAAF, Congress established the position of the military judge within the context of the military establishment, not as a separate entity.[121] "A military judge shall be a commissioned officer of the armed forces."[122] As accountability is the essence of the military establishment, all military officers' future, in one sense or the other, are in another's

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our nation while preserving our nation's fundamental liberties); William Glaberson, *A Nation Challenged: The Law; Tribunal v. Court-Martial: Matter of Perception*, NYTIMES.COM, Dec. 2, 2001, http://query.nytimes.com/gst/fullpage.html?res=9F07E0DC113DF931A35751C1A9679C8B63&sec=&spon=&pagewanted=all (describing American courts-martial as having a "longstanding reputation for openness and procedural fairness").

[117] Lederer & Hundley, *supra* note 10, at 658 (arguing that one should not take the fact that most, if not all, of our military judges are honorable professionals to mean that our system is trouble-free or free of unnecessary systemic risks).

[118] Dissatisfaction with judicial opinions and subsequent attempts to curb judiciary power are not unique to the military justice system. *See* Geyh, *supra* note 2, at 912–13 (describing attempts by Congress to curb powers of the federal judiciary after the United States Court of Appeals for the Eleventh Circuit affirmed the federal district judge's decision to order the removal of Teresa Schiavo's feeding tube).

[119] *See* GILLIGAN & LEDERER, *supra* note 30, at 14-6 ("The one facet common and critically necessary to all military officers is responsibility to senior authority; the heart of that system is command and the rating system. Judges are part of that system."); Lederer & Hundley, *supra* note 10, at 632 ("The concept of judges as officers responsible to other officers who are, in turn, at least pragmatically responsible to still other officers is a natural consequence of the military paradigm.").

[120] Lederer & Hundley, *supra* note 10, at 673 n.213 (quoting C.F. Blair, *Military Efficiency and Military Justice: Peaceful Co-Existence?*, 42 U.N.B. L.J. 237, 241 (1993)).

[121] United States v. Norfleet, 53 M.J. 262, 268 (C.A.A.F. 2000).

[122] UCMJ art. 26(b) (2008).

hands. Unless one takes away the military status of the military judge, there can be no complete independence from the military establishment.[123] Military status, however, is not necessarily incompatible with independence and impartiality.

As pointed out by the Supreme Court and the CAAF, several provisions within the UCMJ protect judicial independence in the military.[124] Article 26, UCMJ, places military judges under the authority of the Judge Advocates General and precludes a convening authority or his staff from preparing or reviewing any report concerning the fitness of military judges relating to their judicial duties.[125] Article 37, UCMJ, further prohibits attempts to influence the actions of a court-martial and its members.[126] In addition, in the Supreme Court's view, the CAAF in overseeing the military justice system "has demonstrated its vigilance in checking any attempts to exert improper influence over military judges."[127]

Finally, military judges, as commissioned officers, enjoy a form of job security that civilian judges do not.[128] There are those who say that military judges are federal judges but do not enjoy similar job security.[129] "[T]he pay, status, and life tenure of the federal judiciary is such that it can hardly be compared with that of a military officer whose location can

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[123] Moreover, as noted by the CAAF, "The circumstances faced by military judges are not at all dissimilar from those facing judges in those state court systems that provide for relatively brief terms of office, particularly those that provide for popular election of judges or retention through the electoral process." *Norfleet*, 53 M.J. at 268–69; *see also* United States v. Mitchell, 39 M.J. 131, 147 (C.M.A. 1994) (Cox, J., concurring) ("The irony is that the essence of good politics and government requires that civilian jurists be selected (elected/appointed), promoted, and given increased responsibilities and assignments on the basis of perceived merit. In the eyes of some, obviously, the military must be barred from attempting same.").

[124] *See* Weiss v. United States, 510 U.S. 163, 180–81 (1994) (listing provisions within the UCMJ that protect the independence of the military trial judiciary); *see also Norfleet*, 53 M.J. at 267–68 (listing provisions within the UCMJ that separate the military judiciary from the traditional lines of command).

[125] UCMJ art. 26(c) (2008).

[126] *Id.* art. 37; *see also* MCM, *supra* note 11, R.C.M. 104 (prohibitions against unlawful command influence).

[127] *Weiss*, 510 U.S. at 181; *see also Norfleet*, 53 M.J. at 269 (citing cases where the court has examined asserted improper attempts to exert influence over military judges).

[128] E-mail from Brigadier General (Retired) John S. Cooke, to author (June 19, 2008, 07:51 EST) [hereinafter Cooke E-mail] (on file with author).

[129] Lederer & Hundley, *supra* note 10, at 670–71 (considering it as a fact that military judges are federal judges).

be changed in a moment by the decision of superiors."[130] With lifetime job security, it is argued, federal judges are less likely to succumb to inappropriate influences.[131] Military judges who "lose" their job as judges through reassignment, however, continue to receive the same pay and benefits.[132] The pay and status of military judges as commissioned officers do not change with a different assignment.[133] The new job may in fact be equally or more rewarding for the officers, personally and professionally.[134]

In the end, both critics and defenders of the current system agree that "judicial neutrality and independence are essential to the military criminal legal system" just as they are in the civilian system.[135] However, just as in the civilian system, the possibility of wrongdoing, including judge tampering, will always exist. No matter the systemic balance struck, human nature dictates judges will have their integrity tested. Judges, military and civilian alike, do not and cannot live in ivory towers, separated from the population upon which they have to pass judgment.

B. Concerns with Proposed Legislative Action

Amending the UCMJ to provide for a permanent judiciary based on the above criticism is unwarranted. Even assuming the criticism justifies change, the proposed legislative plan has several weaknesses. The major components of the plan for a permanent judiciary include the following:

> 1. The Judge Advocate General of the Department will still appoint all military trial judges. The Secretary concerned may appoint a Judicial Appointment Commission to review and recommend candidates for

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[130] *Id.*
[131] *Id.* at 671.
[132] Cooke E-mail, *supra* note 128.
[133] *Id.*
[134] *Id.*
[135] GILLIGAN & LEDERER, *supra* note 30, at 14-48 ("Just as it is in civilian life, judicial neutrality and independence are essential to the military criminal legal system."); *see also Weiss*, 510 U.S. at 194 (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

appointment. Such a commission may have civilian as well as military members.

2. New military judges, who must be in the grade of O-4 or higher at the time of appointment, will be appointed for a single probationary period;

3. Each Department shall maintain a permanent trial judiciary where each member has served a three-year probationary period;

4. Each trial judge shall remain a judge until retirement, unless removed for good cause;

5. Each trial judge is ineligible for reassignment to a non-judicial position except with the consent of the Secretary of Defense;

6. While serving as a trial judge, the judge shall hold the grade of O-6 and shall retire in that grade;

7. Personnel assigned to the permanent judiciary shall not count against the statutory grade limitation ceilings;

8. The Secretary of Defense may prescribe a judicial fitness/efficiency report and provide that judges be evaluated using such form. No judge may be evaluated by a non-judge, and no evaluation may be made unless the Secretary of Defense has so provided and promulgated a judicial fitness/efficiency report. When so authorized, the Judge Advocate General concerned, and any authorized Judicial Appointment Commission, may consider such reports when appointing permanent trial and appellate judges and the Chief Judge of each Department; and

9. Members of the permanent judiciary shall be entitled to remain in service until the completion of thirty years time in service.[136]

[136] Lederer & Hundley, *supra* note 10, at 675–76.

Professor Lederer and Lieutenant Hundley argue that this plan would leave the military judiciary "military," as the judges will continue to be appointed from experienced military lawyers.[137] While the proposed automatic promotion to O-6 plan bypasses the ordinary promotion system, they argued that it is necessary to make the military judiciary attractive to high quality applicants.[138] The plan also protects interested applicants from loss of competitive advantage by choosing the judiciary instead of more mainstream assignments.[139] At the same time, they argue, this plan ensures that those who choose to join the permanent judiciary must give up any ambition of being promoted beyond O-6 and/or being selected to become TJAG.[140]

While the proposal for a permanent judiciary seems appealing for professional development reasons, several weaknesses exist. First and foremost, the plan goes too far in proposing a solution to a problem that concrete evidence does not support. Unless there is concrete evidence to support a threat to the military judiciary's independence, Congress will likely not amend the UCMJ to create a special promotion system and separate O-6 allocations on mere allegations of "command influence in the air."[141] Second, the plan does not address the type and amount of experience a Judge Advocate may require before becoming part of the permanent judiciary. If Judge Advocates become judges for life (at least for one's military life span) at the grade of O-4, the Judge Advocates may not have had sufficient military, or nonjudicial, experience to allow them to pass judgment on the military population that they serve.

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[137] *Id.* at 677.

[138] *Id.* (stating also that as the judges would be outside the traditional promotion system, it would not be appropriate to count permanent judges for purposes of the grade limitation ceilings that limit how many officers of each grade may exist).

[139] *Id.*

[140] *Id.* ("Otherwise, the very same problem of dependence on command favor is created.").

[141] This phrase is generally used in the context of allegations of unlawful command influence. *See, e.g.*, United States v. Harvey, 64 M.J. 13, 18 (CA.A.F. 2006) (stating that defense must carry the initial burden of showing some facts that constitute unlawful command influence, and that "command influence in the air," or speculation, will not suffice). As noted in Section III.A., *supra*, the argument for an independence threat essentially boils down to the possibility or speculation of improper command attempts to influence the judiciary based on the mere fact that as commissioned officers, military judges may be subject to the non-judicial interests of their superiors. Even in cases where improper command action was found, the courts have consistently held that remedial actions were normally available and that the UCMJ contains provisions that sufficiently protect the judiciary against those actions.

More importantly, this proposal leaves too little flexibility to each of the services to manage its respective military personnel. For instance, it takes two key aspects of personnel management out of each of the services' hands and puts them in the Secretary of Defense's hands—reassignment and fitness evaluation. Under the proposal, the Secretary of Defense's consent is required for every contemplated nonjudicial assignment for a military judge.[142] The Secretary of Defense's consent is also required before a military judge may be evaluated.[143] It is simply impractical and inefficient to require the Secretary of Defense's involvement in the minutiae of day to day personnel management. Servicemembers need to remain mobile. To deprive, in the name of judicial independence, the services' current flexibility to reassign and evaluate its personnel according to its mission requirements is a disservice to the ends judicial independence is supposed to promote—"efficiency and effectiveness in the military establishment."[144]

Lastly, if Congress creates a permanent judiciary where judges are available for nonjudicial duties only with the Secretary of Defense's consent, Judge Advocates arguably now need a second appointment by the President before assuming permanent judiciary duties. A second appointment also means the potential politicization of judicial selection. In *Weiss v. United States*, the Supreme Court held that the military's current method of appointing military judges does not violate the Appointments Clause of the Constitution.[145] Underlying the Supreme Court's decision is the basic premise that military judges remain military officers with judicial duties.[146] Military judgeship does not constitute a separate office,[147] as TJAG assigns officers to the position of military judge for a period of time that he deems necessary or appropriate.[148] Moreover, these officers may be assigned to perform nonjudicial duties.[149] Thus, the Supreme Court noted that "[w]hatever might be the case in civilian society, we think that the role of military judge is 'germane'" to that of military officer."[150]

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[142] Lederer & Hundley, *supra* note 10, at 675.
[143] *Id.* at 676.
[144] MCM, *supra* note 11, pt. I, ¶ 3.
[145] Weiss v. United States, 510 U.S. 163, 165 (1994).
[146] *Id.* at 174–76.
[147] *Id.* at 171.
[148] *Id.* at 176.
[149] *Id.* (citing UCMJ art. 26(c)).
[150] *Id.* at 176.

The legislative proposal for a permanent judiciary, however, in effect creates a separate office. That is in fact the idea behind the plan—to create a judiciary where, by congressional mandate, the personnel policies that normally apply to all military officers no longer apply to judiciary members.[151] Members of this permanent judiciary also cannot be reassigned to perform nonjudicial duties without the consent of the Secretary of Defense.[152] The Supreme Court noted in *Weiss v. United States* that while Congress has changed the military justice system over the years to resemble the civilian justice system, the military remains a "specialized society separate from civilian society."[153] The permanent judiciary's design, however, makes it its own "specialized society," one that operates under its own rules. Thus, the proposal's adoption would make it likely that a second appointment for military judicial candidates, and the politics involved, may become necessary. Giving up the independence the military currently has to appoint Judge Advocates to the bench without a political appointee's consent may merely obtain a false independence. Obtaining such consent may in fact limit independence. [154]

In conclusion, the proposal for a permanent judiciary has appeal. It promotes the professional development of the people that the military relies on to maintain military justice as a core competency.[155] It provides a career path that comes with rank and prestige, one that can certainly do much to attract (and retain) quality people to the judiciary and the Judge Advocate General's Corps. Nonetheless, as designed, it raises concerns that need to be addressed before the goals of the proposal can be realized.

IV. Judicial Independence—Looking Ahead

"[T]he path to judicial independence is judicial reform: the continuous improvement of how we do business— our individual and

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[151] Lederer & Hundley, *supra* note 10, at 674–78.
[152] *Id.* at 675.
[153] *Weiss*, 510 U.S. at 175.
[154] *See, e.g.*, Charlie Savage, *Control Sought on Military Lawyers: Bush Wants Power over Promotions*, BOSTON.COM, Dec. 15, 2007, http://www.boston.com/news/nation/washington/articles/2007/12/15/control_sought_on_military_lawyers/ (describing the uproar that was created when the Bush administration proposed a regulation that requires "coordination" with politically-appointed members of the administration before any member of the Judge Advocate General's Corps can be appointed.)
[155] Military justice as our core competency comes from the fact that it is the only area that requires a Judge Advocate. *See* UCMJ art. 27 (2008).

collective performance as judges."[156] While legislative action creating a permanent judiciary is unnecessary to achieve judicial independence, we should nonetheless examine ways to build on how the military judiciary conducts business so that its independence, and the ends it promotes (justice and discipline) can continue to thrive.[157] This section will evaluate the initiatives recently instituted by two of the services within their respective trial judiciaries,[158] examine a proposal by the Code Committee to expand military judges' contempt powers, and lastly, recommend a non-legislative proposal for consideration.

A. Army's Initiatives

1. Tenure

"We won the constitutional battle over appointment of and tenure for military judges in *Weiss v. United States*. Now it is time to recognize that tenure for judges, as a matter of policy, is appropriate."[159] Ten years ago, Brigadier General (BG) John S. Cooke[160] noted that as a practical matter, Army military judges effectively have tenure anyway as they are assigned to a judicial position for a standard tour of three to four years and would not be reassigned because of their judicial decisions in particular cases.[161] Nonetheless, BG Cooke argued that because of a possible perception that military judges serve at the pleasure of TJAG, a policy should exist that military judges be assigned to a judicial position for a set period (i.e., three years), and not be reassigned during that period without their consent except for good cause.[162] Shortly

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[156] Roger K. Warren, President, *The Importance of Judicial Independence and Accountability*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/WC/Publications/KIS_JudIndSpeechScript.pdf (last visited Jan. 22, 2009).
[157] *See* MCM, *supra* note 11, pt. I, ¶ 3.
[158] The Air Force Judge Advocate General's Corps is in the midst of a major transformational effort. Many of the dynamics and ideas discussed in this section are under consideration as the Air Force Judge Advocate General's Corps reshapes itself for the future. E-mail from Lieutenant Colonel James H. Dapper, U.S. Air Force, Executive to The Judge Advocate General, to author (Mar. 19, 2008, 17:26 EST) (on file with author).
[159] Cooke, *supra* note 17, at 18.
[160] Brigadier General John S. Cooke was the Commander of the U.S. Army Legal Services Agency and the Chief Judge of the U.S. Army Court of Criminal Appeals.
[161] Cooke, *supra* note 17, at 18 ("[O]ur judges effectively have tenure now[;] [w]e just don't get credit for it.").
[162] *Id.*

afterwards, the Army established a fixed term of three years for Judge Advocates certified as military judges by TJAG.[163] Under this policy, Judge Advocates who are certified as military judges by TJAG are assigned to the trial judiciary for a minimum of three years and will not be reassigned except under limited circumstances such as retirement, national emergency, or personal requests.[164] None of the other services currently provide for tenure or a fixed term of office for their judiciary. However, like the Army before it implemented a regulatory fixed term of office, the Navy effectively has a fixed term of office for its judges as well— three years.[165] Barring extraordinary circumstances, the Navy is unlikely to move its judges before the three years are up to avoid even the appearance that the change in duty was due to "unpopular" decisions.[166]

Tenure or some fixed term of office is certainly appropriate as a matter of policy because it may allay some possible perception that military judges serve at the whim of TJAG. As currently implemented, however, the protection it gives is arguably limited. As noted by a former CAAF judge, "Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the [judge] who is hanging on may favor the government in order to be reappointed."[167] More importantly perhaps, the protection a fixed term of office gives may be limited for more practical reasons. As some have pointed out, if we have men and women of good character and integrity as judges, they will not be concerned with the impact their court decisions may have on their careers.[168] "If

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[163] AR 27-10, *supra* note 101, para. 8-1g. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[164] AR 27-10, *supra* note 101, para. 8-1g.

[165] Reismeier Feb. E-mail, *supra* note 104.

[166] *Id.*

[167] Hudson, *supra* note 97, at 78 (Senior Judge Everett noting the limitations of the three-year fixed term of office the Army gives to its military judges). Commentators like Professor Lederer and Lieutenant Hundley echoed this view. *See* Lederer & Hundley, *supra* note 10, at 666 ("The degree of protection afforded a judge by fixed tenure is de minimis."); *see also* GILLIGAN & LEDERER, *supra* note 30, at 14-8 ("So long as the judge knows that his or her future is in the hands of those who have non-judicial interests, both the perception and reality of possible tampering will exist.").

[168] *See* United States v. Mabe, 33 M.J. 200, 208 (C.M.A. 1991) (Cox, J., dissenting) ("The solution [to unlawful influence of military judges] is found in selecting men and women of good character and integrity, persons who want to learn to do a good job, who want to make fair and just decisions, persons with sound judgment."); e-mail from Colonel (Retired) Denise Vowell, former Chief Trial Judge of the Army, to author (Mar.

someone will make the right call when he has tenure, but the wrong call when he doesn't, that says a lot about his integrity."[169]

While tenure or a fixed term of office may be limited in terms of the actual protection it gives against unlawful command influence, it does allow military judges time to learn their job and to do it well. Currently, those below the grade of O-6 in the Army will generally not receive consecutive trial judge assignments.[170] If judges below the grade of O-6 have shown promise during their three-year tour, policy should encourage consecutive trial judge assignments, not the opposite. The position of military judge carries great responsibility, one that takes time to learn and appreciate. To take judges out of their judicial positions and rotate them into non-judicial assignments just when they become comfortable is counterproductive. Judges knowledgeable and competent in their duties and responsibilities are the best protection against possible encroachments on judicial independence. This does not mean that we need to give military judges life tenure. It can simply mean that military judges have an opportunity to reacquire another term of office at the end of each term, assuming competence and personal desire for another tour.[171]

2. Judicial Apprenticeship Program

The Judge Advocate General selects and certifies Judge Advocates to serve as military trial judges.[172] In the Army, judicial candidates will have normally met the following criteria:

> (1) Have at least two years of trial experience as a court-martial trial or defense counsel; one year of court-martial trial experience and at least one year as chief of criminal law, regional defense counsel, or criminal law instructor;

11, 2008, 10:28 EST) [hereinafter Vowell E-mail] (on file with author) (stating that if we pick good people to be judges, they will not be concerned with the career implications of their decisions).

[169] Vowell E-mail, *supra* note 168.

[170] JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-4b.

[171] *See* Vowell E-mail, *supra* note 168 (recommending an explicit provision in AR 27-10 that military judges reacquire tenure each time they are reassigned as military judges and that tenure guarantees that they are not moved earlier than the normal tour length).

[172] UCMJ art. 26(c) (2008) ("The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member.").

> or two years as a Staff Judge Advocate in an active criminal law jurisdiction;
>
> (2) Are serving in the grade of colonel, lieutenant colonel or promotable major;
>
> (3) Have completed CGSC/ILE[173] or the equivalent, or are willing to enroll and complete such a course;
>
> (4) Have demonstrated mature judgment and high moral character;
>
> (5) Have been nominated for selection by the Chief Trial Judge or a designee, in coordination with the Chief, PP&TO;[174] and
>
> (6) Are able to graduate and attain at least a grade of C (77 points) in the Military Judge Course, at the LCS.[175]

While the trial experience requirement is not high, and is in fact rather modest, the trial experience level of many Judge Advocates has gone down over the years, especially with a high operational tempo and the increasing emphasis on other areas of practice.[176] Multiple assignments in trial slots have become the exception rather than the rule.[177] Thus, given the limited trial experience level of Army Judge Advocates, the pool of potential candidates for military judges is equally

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[173] "Intermediate Level Education (ILE) provides a standard educational experience across all career fields and functional areas and replaces the Command and General Staff Course [CGSC]." JAG PUB 1-1, *supra* note 99, app. VII, para. 7-7. "ILE establishes a universal Army operational warfighting culture to prepare field grade officers for service in division, corps, echelons above corps, and joint staffs." *Id.*

[174] The Army's Personnel, Plans, and Training Office (PP&TO) assists TJAG in "fulfilling his responsibilities to recruit individuals to serve as Judge Advocate Officers and to manage the careers of Judge Advocates." *Id.* para. 1-4b.

[175] *Id.* para. 8-1. The LCS refers to The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Va.

[176] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; Telephone Interview with Colonel James L. Pohl, Second Judicial Circuit Judge, in Fort Benning, Ga. (Jan. 8, 2008) [hereinafter Pohl Interview]; Telephone Interview with Colonel (Ret.) Dwight H. Sullivan, U.S. Marine Corps, in Washington, D.C. (Jan. 8, 2008) [hereinafter Sullivan Interview]; Telephone Interview with Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), in Washington, D.C. (Jan. 10, 2008) [hereinafter Reismeier Interview].

[177] Pohl Interview, *supra* note 176.

limited.[178] The Judicial Apprenticeship Program is designed to increase the military justice experience level of Judge Advocates so that there can be a bigger pool of judicial candidates.[179] It is a one-year program[180] where select Army Judge Advocates will first attend the Military Judge's Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.[181] Upon graduating from the course and obtaining at least a grade of C (or 77 points), these Judge Advocates will be certified as qualified to preside over courts-martial, including general courts-martial.[182] These Judge Advocates will then work under the supervision of more senior military judges at various installations.[183] At the end of the year, these Judge Advocates will be reassigned to a non-judicial assignment and may apply at a later time for a regular tour in the trial judiciary, not as an apprentice.[184] As these Judge Advocates return to field assignments after the apprenticeship, it is hoped and expected that they will share their experience on the bench with younger Judge Advocates, train them on how to become better trial advocates, and thus increase the pool of future judicial candidates.[185] Two Judge Advocates were selected to participate in the apprenticeship program beginning summer of 2008 and two more have been selected to participate in the apprenticeship program beginning summer of 2009.[186]

As the program is new, it is too early to evaluate whether the program will meet its intended goals. It undoubtedly has the potential to build and distribute military justice experience to younger Judge

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[178] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[179] *Id.*

[180] It is designed as a one-year program so as to increase the number of Judge Advocates that can participate. Henley January Interview, *supra* note 103.

[181] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[182] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[183] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[184] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[185] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[186] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; e-mail from Colonel Stephen R. Henley, Chief Trial Judge of the Army, to author (Jan. 23, 2009, 11:17 EST) [hereinafter Henley E-mail] (on file with author).

Advocates, preparing them for possible judicial duties at a later time.[187] Building and distributing military justice experience in turn builds knowledge about judicial independence and the ends it promotes—justice and discipline in the armed forces.[188] The reach of the program, however, is limited, as so few Judge Advocates are allowed to participate in the program.[189] Those allowed to participate will subsequently move to a non-judicial assignment at the end of their one-year assignment.[190] As noted above, regarding the policy against consecutive judicial assignments for those below the grade of O-6, the position of military judge carries with it great responsibility, one that takes time to learn.[191] A one-year tour as a military judge is barely sufficient time for a Judge Advocate to learn the intricacies of the job before moving to a nonjudicial assignment. Understandably, it is currently difficult to ask for extra personnel to be assigned to a practice area that may not carry the immediate urgency of other practice areas.[192] Nonetheless, judicial independence and the ends it promotes require personnel knowledgeable about the military justice system.

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[187] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[188] *See* MCM, *supra* note 11, pt. I, ¶ 3 (stating that the purpose of military law is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[189] Two Judge Advocates are currently participating in this program and two more Judge Advocates have been selected to participate in the coming year. Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; Henley E-mail, *supra* note 186.

[190] *Id.*

[191] *See supra* Section IV.A.1 (discussing Army's tenure for its military judges).

[192] *But see* Lieutenant General Scott C. Black, *Changes in Military Justice*, TJAG SENDS vol. 37-16 (Apr. 2008) (modifying existing rating schemes for Brigade Combat Team "Trial Counsel" to provide them with more training and mentoring in military justice in order "to secure the foundation of our practice of military justice and preserve the integrity of our statutory mission").

B. Navy's Initiatives

1. Military Justice Litigation Career Track[193]

As with the Army, the Navy also shares concerns about the decreasing level of military justice experience and its likely impact on the pool of qualified judicial candidates.[194] "Although the number of Navy courts-martial has decreased in recent years, the complexity of the cases has dramatically increased. The [Navy] JAG Corps must identify those judge advocates with the requisite education, training, and aptitude to litigate complex cases and to continue to cultivate their development."[195] To this end, the Navy recently established a military justice litigation career track designed to identify, develop, and retain Judge Advocates who can effectively and efficiently handle complex cases, including high-visibility courts-martial.[196] The military justice litigation career track establishes two qualifications that a Navy Judge Advocate may be designated with: (1) Specialist Military Justice Litigation Qualification; and (2) Expert Military Justice Litigation Qualification.[197] To receive a specialist qualification, one must demonstrate "acceptable quantitative and qualitative experience in military justice litigation."[198] To receive an expert qualification, one must have "significant experience and demonstrated leadership in military justice litigation."[199] Judge Advocates with either qualification

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[193] On 1 October 2008, the Army implemented four additional skill identifiers (ASIs) for military justice: Basic, Senior, Expert, and Master. TJAG Policy Memorandum 08-2, Military Justice Additional Skill Identifiers (21 July 2008) [hereinafter TJAG Policy Memorandum 08-2]. The stated intent of this initiative is to "capture experience for use in the assignments process." *Id*. It is not a specialization or a career track, but part of a larger effort to capture and document experience in the various practice areas Judge Advocates can expect to encounter in their career. Lieutenant General Scott C. Black, *Additional Skill Identifiers in Military Justice*, TJAG SENDS vol. 37-17 (July 2008). In addition, "no particular ASI will be dispositive to any specific position." TJAG Policy Memorandum 08-2, *supra*. As the focus of this article is judicial independence and reforms directed at promoting judicial independence, further discussion of the Army's ASIs for military justice is beyond the confines of this article.

[194] Reismeier Interview, *supra* note 176.

[195] U.S. DEP'T OF NAVY, JAG INSTR. 1150.2, MILITARY JUSTICE LITIGATION CAREER TRACK para. 2a (3 May 2007) [hereinafter NJI 1150.2].

[196] Memorandum, Frequently Asked Questions about the Military Justice Litigation Career Track (2007) [hereinafter Military Justice Litigation Career Track FAQs] (on file with author).

[197] NJI 1150.2, *supra* note 195, para. 2d.

[198] *Id.*

[199] *Id.*

may be considered for special billets, or positions requiring significant litigation experience or supervision of junior officers performing military justice litigation.[200]

Navy Judge Advocates interested in being designated with one of these qualifications submit a detailed application to a semi-annual selection board convened by TJAG.[201] Besides filling special positions, the officers selected for this career path must agree to identify, train, and mentor junior Judge Advocates to be litigators.[202] In addition, the Navy may also send Judge Advocates with these qualifications to recruit at law schools and job fairs to attract potential litigators to the Navy JAG Corps.[203] Finally, "to counter any lingering perceptions or concerns that those who specialize in military justice will be at a competitive disadvantage before promotion boards,"[204] TJAG will determine the anticipated needs for promotion of these Judge Advocates and recommend language for inclusion in Secretary of the Navy selection board precepts.[205] Precept language for O-4 to O-6 promotion boards will include specific language, consistent with application of the best and fully qualified standard, directing the promotion boards to consider the Navy's need for senior officers with demonstrated superior performance in litigation.[206]

2. Judicial Screening Board

In conjunction with its Military Justice Litigation Career Track, the Navy also recently revised its process for selecting military judges to highlight the position's central role in the fair and effective

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[200] *Id.* paras. 2d, 5 (noting that Judge Advocates in either qualification may be assigned to positions outside the litigation career path to "ensure a depth of experience beneficial to both the officer and the Navy").
[201] *Id.* para. 3a(5).
[202] *Id.* para. 6.
[203] *Id.* para. 4a.
[204] Military Justice Litigation Career Track FAQs, *supra* note 196.
[205] Precepts are guidance provided to promotion boards. Sullivan Interview, *supra* note 176.
[206] NJI 1150.2, *supra* note 195, para. 7; *see also* Military Justice Litigation Career Track FAQs, *supra* note 196 ("While particular selection board precept language changes from year to year, one thing remains constant: the need for the best and fully-qualified officers eligible for promotion. During this last year, precept language was developed discussing the Navy's need for senior officers with significant military justice litigation experience.").

administration of military justice.[207] Under the current instruction, Judge Advocates interested in a judicial appointment should have: (1) at least three years of active duty criminal or civil litigation; (2) a leadership tour in litigation; and (3) some broader military justice experience, such as appellate litigation or significant military justice experience as a Staff Judge Advocate.[208] The current procedure also allows all interested Judge Advocates to apply by submitting a detailed application packet to the Judicial Screening Board.[209] The Board will screen all applications and make its recommendations to TJAG.[210] "Combining the career path for litigation with the judicial screening board, we would hope to create a system whereby judges are selected from a cadre of people who have considerable trial experience, and hopefully, independence as a result."[211]

Like the Army's Judicial Apprenticeship Program, the Navy's Military Justice Litigation Career Track and the revamped Judicial Screening Board are still in their beginning stages. Therefore, it is difficult to gauge how successful their implementation will be. As

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[207] U.S. DEP'T OF NAVY, JAG INSTR. 5817.1C, JUDICIAL SCREENING BOARD para. 3 (22 Oct. 2007) [hereinafter NJI 5817.1C]. The panel report that led to the creation of the military justice litigation career track and revised procedures for the Judicial Screening Board noted the following about the need to select good people to the bench:

> Military judges wield a degree of power and influence unlike that of any other officer—power that is largely unimpeded except in the due course of appellate review. Even a new judge has the authority to issue lawful orders to the most senior departmental officers and officials in government. Selection to the bench needs to reflect great respect for that awesome plenary power, and the process must ensure that those entrusted with such power have demonstrated the experience, character, judgment and temperament necessary to wisely and honorably perform judicial duties.

See e-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Oct. 23, 2007, 12:41 EST) [hereinafter Reismeier Oct. E-mail] (on file with author) (quoting report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[208] NJI 5817.1C, *supra* note 207, para. 5a.

[209] *Id.* Previously, the Judicial Screening Board will only screen those officers whose names have been provided to them by a detailer with the Navy or a nominating officer with the Marine Corps. *See* Reismeier Oct. E-mail, *supra* note 207 (quoting report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[210] NJI 5817.1C, *supra* note 207, para. 5d-f ("The Board report is advisory in nature and does not restrict in any manner the statutory authority of the JAG to make judicial appointments, nor does it confer any rights or entitlements to an officer recommended for judicial assignment.").

[211] Reismeier Oct. E-mail, *supra* note 207.

designed though, the two initiatives have tremendous potential to strengthen judicial independence and the ends it promotes. It allows those with demonstrated potential in military justice the opportunity to specialize in military justice while remaining competitive before promotion boards. Cultivating seasoned military justice practitioners in turn populates the military justice system with people who understand how the system operates and what it is designed to do. Judicial independence and the ends it promotes are better served as a result.

Some may contend that since military justice is our core competency, all Judge Advocates should be able to practice it, thus eliminating the need for a formal specialization program. Ideally, that would be the case. However, with the high operational tempo and a corresponding emphasis on other areas of law, the supposition that all Judge Advocates know how to effectively practice military justice may no longer be valid.[212] Specialization and a judicial selection process that emphasizes skills developed from specialization is not the only method through which judicial independence and the ends it promotes can flourish. It is nonetheless one huge step in the right direction.

3. Chief Judge of the Navy

In addition to creating a Military Justice Litigation Career Track and revising the procedures for selecting military judges, the Secretary of the Navy recently approved a new Assistant Judge Advocate General of the Navy (AJAG) position, Chief Judge of the Navy, who will act as the supervisory judge for all trial and appellate judges.[213] The Chief Judge of the Navy's duties will include:

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[212] *See, e.g.*, Pohl Interview, *supra* note 176 (noting that the current emphasis on brigade combat team operations is making it more challenging to train Judge Advocates in military justice); Sullivan Interview (noting that while military lawyers generally do a good job in routine "stand-up, sit-down" type of cases, their inexperience comes across in more complex cases); Reismeier Interview, *supra* note 176 (noting that records of trial and published decisions reflect that cases in general are not well-tried, even if they survive appellate review). Trial experience level is further reflected in the reversal rate of military death penalty cases. *See* Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2 (2006) (stating that the military death sentence has been overturned on appeal 3.5 times more often than it has been affirmed (7 to 2)).

[213] Memorandum from The Judge Advocate General and Deputy Judge Advocate General of the Navy, Announcement of New Assistant Judge Advocate General Position (Feb. 26,

> Overseeing the Navy judicial enterprise of 42 trial and 27 appellate judges, overseeing judicial training, coordinating with state, federal, and other services' chief judges, establishing standards and oversight regarding courthouse security, coordinating of reserve judiciary assets, and other duties required for the administration of the Navy and Marine Corps judicial system.[214]

A board to select AJAG, Chief Judge of the Navy, will convene in either 2009 or 2010.[215]

There will now be three AJAG positions: AJAG, Civil Law; AJAG, Operations and Management; and AJAG, Chief Judge of the Navy. [216] With this new position, all AJAGs will serve a three-year tour, with the third year of service as the statutory AJAG of the Navy.[217] After serving as the statutory AJAG of the Navy for one full year, the person can retire in the grade of O-7.[218]

The Navy created this position to complement its other reform efforts in military justice litigation practice.[219] It began as part of a panel study to realign the judiciary, to include the advancement of judicial independence, real and perceived.[220] The panel recommended the creation of a one-star active duty position to lead the trial judiciary, and a "tombstone" flag position[221] as an alternative.[222] The panel reasoned that an independent judiciary needs to be able attract the best and brightest of the Judge Advocate profession.[223] To attract the best and brightest to the

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2008) [hereinafter Announcement of New Assistant Judge Advocate General Position] (on file with author).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*; *see also* 10 U.S.C. § 5149(b) (2006); e-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Mar. 10, 2008, 17:20 EST) [hereinafter Reismeier Mar. E-mail] (on file with author). This is also referred to as a "tombstone" position, as flag rank is assumed only upon retirement. *Id.*

[219] Announcement of New Assistant Judge Advocate General Position, *supra* note 213.

[220] Reismeier Oct. E-mail, *supra* note 207.

[221] "Tombstone" position is a position where the flag rank is assumed only upon retirement. Reismeier Mar. E-mail, *supra* note 218.

[222] Reismeier Oct. E-mail, *supra* note 207 (containing report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[223] *Id.*

judiciary, it is necessary to create a meaningful career path and thus a reason to join the bench.[224] The panel further reasoned that Judge Advocates need assurance that they can and should remain in military justice for a sufficient period of time with positive career implications.[225]

As with the Navy's other transformation efforts, it is too early to tell how successful this latest effort will be in fostering judicial independence and the importance of military justice as a core competency. Recognizing the importance of fostering judicial independence and military justice as a core competency, however, is a significant step in itself. It is a step toward meeting the ends of military law—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[226] Some may argue that absent hard evidence of problems within the military justice system, one should defend the status quo rather than contemplate change.[227] However, it "presumes too much to suggest that we have arrived at a perfect instrument."[228] Military law should not remain static for fear that one may simply be creating a solution in search of a problem.

C. Proposal to Expand Military Judge's Contempt Powers

Article 48, UCMJ, currently provides that a "court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder."[229] Critics like Professor Lederer noted that despite military judges' wide range of responsibilities and powers in a courtroom, they lack the authority to hold personnel outside the courtroom in contempt for defying court orders.[230] As an example,

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[224] *Id.*
[225] *Id.*
[226] MCM, *supra* note 11, pt. I, ¶ 3.
[227] *See, e.g.*, Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 258 (2002) (arguing that we should defend a system that has served as a model for other justice systems rather than contemplate change because other systems have needed change).
[228] Cooke, *supra* note 16, at 19.
[229] UCMJ art. 48 (2008).
[230] GILLIGAN & LEDERER, *supra* note 30, at 14-4, 14-6.

they cited the case of *United States v. Tilghman*,[231] where the accused's commander placed the accused in confinement after findings, but before sentencing, despite the military judge's specific order to the contrary.[232] While the accused ultimately received over eighteen months of confinement credit for spending less than twenty-four hours in confinement,[233] the military judge was without authority to hold the commander who flouted his orders in contempt. This, the critics contend, is problematic and an indicia of the lack of judicial independence as "[a]n independent judiciary arguably would include the power to ensure compliance with the law."[234]

Currently, the Code Committee[235] is considering a proposal to expand military judges' contempt powers under Article 48, UCMJ. Under this proposal, contempt now includes "[w]illful disobedience or refusal to comply by any person subject to this chapter . . . of any ruling, writ, process, order, rule, decree, or command issued by a military judge or the presiding officer of a military commission, military tribunal, or provost court."[236] If adopted, this proposal should eliminate at least one aspect of the critics' concerns about the independence of the military trial judiciary. Under the proposed Article 48, UCMJ, military judges will have the power to ensure compliance with their orders. While this proposal does not address the critics' main concern about military judges being part of the traditional military personnel system, it provides

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[231] United States v. Tilghman, 44 M.J. 493 (C.A.A.F. 1996).
[232] *Id.* at 494.
[233] *Id.* The military judge whose order was defied ordered twenty days of confinement credit against Tilghman's sentence for the illegal pretrial confinement. Two months later, the Chief Circuit Military Judge detailed himself to the case for a post-trial session pursuant to Article 39(a), UCMJ. After finding a "cavalier disregard for due process and the rule of law," the judge ordered an additional eighteen months of confinement credit against Tilghman's sentence. *Id.*
[234] GILLIGAN & LEDERER, *supra* note 30, at 14-6 n.27 (noting that commanders generally resist the idea that non-superior officers, even if they are military judges, should be allowed to interfere with their actions).
[235] Article 146, UCMJ, requires a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ. UCMJ art. 146 (2008).
[236] Proposal 5, Revision and Expansion of Military Judge Contempt Powers, Alternative A, Draft Article 48, UCMJ (on file with author). Under this proposal, however, the military judge does not have the authority to hold a convening authority in contempt for his or her actions on a matter that is committed to that convening authority's discretion by the UCMJ. *Id.*

another step in the direction of improving the way the military judiciary conducts business in the twenty-first century.[237]

D. Proposal for Judicial Career Path

Ten years ago, BG Cooke encouraged recognition of tenure for military judges as appropriate policy even if not constitutionally required.[238] He recommended that the Army start by including a tenure policy for military judges in its regulations;[239] the Army implemented such a policy shortly thereafter.[240] Ten years later, the time has come to consider another of BG Cooke's proposals to further cultivate the reality and perception of judicial independence.

Beyond the current tenure policy, BG Cooke suggests implementation of a more robust career path for military judges.[241] A more robust career path means that Judge Advocates who have demonstrated potential should receive assurance that if they come to and remain on the bench, they will be promoted to the grade of O-6, barring misconduct and/or incompetence.[242] However this career path is implemented, the key is to attract and maintain the best officers on the bench.[243] Attracting and maintaining the very best will, in turn, further advance judicial independence and the ends it promotes.

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[237] As of the submission of this article, the Joint Service Committee has proposed that Congress amend Article 48. The proposal is currently undergoing review by the Executive Branch before submission to Congress. E-mail from Lieutenant Colonel Eric Krauss, Policy Branch Chief, Office of The Judge Advocate General, Criminal Law Division, to author (Feb. 9, 2009, 14:04 EST) (on file with author).

[238] Cooke, *supra* note 17, at 18.

[239] *Id.*

[240] AR 27-10, *supra* note 101, para. 8-1g. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[241] Interview with Brigadier General (Retired) John S. Cooke, in Washington, D.C. (Feb. 15, 2008).

[242] *Id.*

[243] *Id.*; *see also* Cooke, *supra* note 17, at 19 (examining methods of structuring our judiciary to ensure that we continue to attract the best to the bench); Brigadier General John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 6.

Currently, other than the general guidelines set out in the JAGC Personnel and Activity Directory and Personnel Policies,[244] the Army has no formal program or track for the selection of military judges. Judge Advocates are selected to be judges as an outgrowth of the personnel detailing process. The path to a judgeship is random and unpredictable. No systematic effort exists to attract the best and brightest to the bench, or to convince young Judge Advocates that they can and should remain in military justice for a sufficient period of time with positive career implications. While a formal career path or track to attract and retain qualified judicial candidates does not hold the key to an independent judiciary, it provides a good starting point for discussion. Some may contend that any such path or track is risky as it encourages Judge Advocates to think that checking certain assignment blocks assures a judgeship. Such thinking is not new. Judge Advocates often accept certain assignments with the hope that other "plum" assignments will follow. Such hopes are often dashed for the simple reason that these Judge Advocates may not be the best qualified, or the needs of the Army may dictate otherwise. Similarly, a formal career path or track for judicial candidates may provide false hope that a judgeship will follow at the end of the path or track. That hope, nonetheless, is tempered with the reality that judicial candidates, as with all other assignments, are expected to compete with the best of the best, and abide by the needs of the Army.

It is also understandably hard in the current wartime environment to dedicate personnel and efforts to a practice area that may not carry the same short-term urgency of other practice areas. The military justice system works reasonably well and the world certainly does not revolve around military justice. Nonetheless, military justice is our statutory mission and military judges directly influence the fair and effective administration of the military justice system. It is thus crucial to structure the military judiciary in such a way as to attract quality candidates to the bench. Quality judicial candidates, in turn, ensure the reality and perception of judicial independence and the ends it promotes in the military—discipline and justice.

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[244] JAG PUB 1-1, *supra* note 99, app. VIII; *see also supra* Section IV.A.2 (discussing the Army's Judicial Apprenticeship Program).

V. Conclusion

Congress has taken tremendous strides to create in the military a judiciary independent of command control.[245] "Of course, not every suggestion is necessarily a good idea, but judge advocates and others should not shy from critically examining the system. Even if the status quo is the best alternative, it is better defended after penetrating analysis than with knee-jerk reaction."[246] Currently, the judicial structure Congress has set up works reasonably well. It has withstood legal challenges.[247] There are no major malfunctions. The military justice system, however, should not remain static.

Numerous initiatives have been put forth to cultivate judicial independence in the twenty-first century. Professor Lederer and Lieutenant Hundley's proposal to amend the UCMJ to create a permanent judiciary certainly goes far in promoting judicial independence.[248] Its problem, however, is that it goes so far in its reach as to be impracticable. Initiatives the Army and the Navy recently implemented are more promising in their ability to promote judicial independence. In addition, the Judge Advocate General's Corps should consider BG Cooke's suggestion for a more defined career path in order to attract some of the best Judge Advocates to the bench. Together, these initiatives can advance the reality and the perception of judicial independence.

The military justice system is designed to be dynamic.[249] Looking ahead, we should remind ourselves of how far the military justice system has come and that for the best days to be ahead, we need to continually examine how we carry out our statutory mission.

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[245] *But see* Lederer and Hundley, *supra* note 10, at 669–73 (arguing that the military judiciary is not sufficiently independent and that legislative action creating a permanent judiciary is necessary to achieve the "best balance" between judicial independence and accountability).

[246] Cooke, *supra* note 16, at 19.

[247] *See* Weiss v. United States, 510 U.S. 163, 180 (1994) (declaring that "Congress has achieved an acceptable balance between independence and accountability" where the military judiciary is concerned).

[248] *See* Lederer and Hundley, *supra* note 10, at 675–76 (detailing elements of the proposal for a permanent judiciary).

[249] *See, e.g.*, UCMJ art. 146 (2008) (requiring a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ).

> As we engage in such a process, I urge you to always keep in mind our system's constitutional roots, its accountability to the American people, its role in ensuring morale and discipline, and its relationship to the eternal truth—that the young men and women upon whom we depend for success in any endeavor must have faith in the value of doing things the right way.[250]

The judiciary, as stewards of the military justice system, must reinforce that faith.

[250] Cooke, *supra* note 17, at 29.

DUAL STATUS NATIONAL GUARD TECHNICIANS SHOULD BE BARRED FROM BRINGING CIVIL SUITS UNDER TITLE VII

MAJOR WILLIAM E. BROWN[1]

I. Introduction

At no time in our history has America depended more on dual status National Guard technicians (DSTs). The strength of the National Guard is derived from the caliber of these Citizen-Soldiers and Airmen who are employed as DSTs. Significant contributions by DSTs during the 9/11 al-Qaeda attacks on the United States and the 2005 Gulf Coast devastation wrought by Hurricanes Katrina and Rita prove that the National Guard remains an effective provider of well-trained, highly equipped warfighting units to combatant commanders throughout the Army and Air Force. However, judicial review of DSTs' Title VII challenges seriously impedes the military's performance of its vital national security duties.[2] Congress must amend the National Guard Technician Act of 1968[3] (Technician Act) to explicitly exclude Title VII[4] claims by DSTs.[5]

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[2] The author limits the analysis in this paper to National Guard technicians and the Technician Act and does not consider the impact on Reserve technicians. Another approach to this matter could be to amend Title VII in order to capture both groups of servicemembers, but the author leaves that as of yet unexplored option for a different paper.

[3] National Guard Technician Act, Pub. L. No. 90-486, 82 Stat. 755 (1968) (codified at 32 U.S.C. § 709 (2006)).

[4] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16, *as amended* by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[5] Dual status technicians are full-time civilian employees of the National Guard whose salaries are paid in full by the federal government. *See* Major Michael J. Davidson & Major Steve Walters, *Neither Man nor Beast: The National Guard Technician, Modern Day Military Minotaur*, *ARMY LAW., Dec. 1995, at 49.* All DSTs are required to hold

Title VII is silent regarding the application of its protections to DSTs, leaving resolution in the hands of the courts. A split still exists in the federal circuit courts over whether DSTs should be allowed to bring claims against the military under Title VII. Although the Eleventh Circuit Court of Appeals has yet to specifically hold that National Guard military technicians' positions are "'irreducibly military in nature,' the majority of circuit courts of appeals that have examined the issue have so concluded."[6] It is well-established law that members of the armed forces are precluded from suing the United States for alleged constitutional violations.[7] The Ninth Circuit has also ruled that discrimination actions are personnel actions integrally related to the military's structure.[8] The Supreme Court, however, has not yet ruled on whether DSTs may sue the U.S. government under Title VII. The field is now open for Congress to intervene and enact legislation amending the Technician Act to explicitly exclude DSTs from Title VII coverage.

Barring DSTs from bringing suit in federal court will not leave them without a venue to seek redress for unlawful acts of discrimination. In lieu of civil suits, discrimination complaints brought by DSTs would be handled exclusively within the National Guard Military Discrimination Complaint System (NGMDCS).[9] The NGMDCS provides due process protections for DSTs similar to those afforded active duty members of the Army through the Department of Defense (DoD) Equal Opportunity (EO) Program.[10]

Congress should amend the Technician Act to explicitly exclude DSTs from Title VII coverage because their positions are "integrally related" to the unique structure and mission of the armed forces.[11] The

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concurrent National Guard membership as a condition of their civilian employment. *Id.* A DST's civilian duty position skills must relate directly to the skills required of the technician's military position and training. *Id.*

[6] Paulk v. Harvey, 2006 U.S. Dist. LEXIS 70169, at *11 (M.D. Ala. 2006).

[7] *See* Chappell v. Wallace, 462 U.S. 296, 305 (1983).

[8] Mier v. Owens, 57 F.3d 747, 748 (9th Cir. 1995).

[9] U.S. DEP'T OF ARMY & U.S. DEP'T OF AIR FORCE, NAT'L GUARD REG. 600-22/AIR FORCE NAT'L GUARD INSTR. 36-3, NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM para. 1-7(A) (30 Mar. 2001) [hereinafter NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM].

[10] U.S. DEP'T OF ARMY, REG. 600-20, EQUAL OPPORTUNITY PROGRAM (Mar. 18, 2008) [hereinafter AR 600-20].

[11] Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002) While this case stands for the proposition that Title VII protections extend to discrimination actions brought by military personnel in hybrid jobs entailing both civilian and military aspects, except when the

DSTs hold a "hybrid"[12] position that is more akin to a military position than to a civilian job. As such, DSTs should be treated like military personnel and explicitly excluded from Title VII coverage.

Section II of this article provides a brief history of the origins of the National Guard. Section III explains the military nature of the DST position and the vital role DSTs perform in contributing to our national defense. Section IV reviews Supreme Court decisions that bar military personnel from bringing Title VII claims against the military. Section V describes the split among the federal circuit courts regarding the justiciability of Title VII claims filed by DSTs. Section VI proposes that Congress adopt a three-prong approach to resolving the controversy, including requiring DSTs to use the NGMDCS to reconcile discrimination allegations. Section VII demonstrates that the NGMDCS provides adequate due process protections for DSTs who file discrimination complaints and concludes by explaining how amending the Technician Act and directing DSTs to pursue intraservice remedies through the NGMDCS to resolve discrimination complaints would promote judicial efficiency and fundamental fairness within the armed services. Finally, amending the Technician Act would prevent courts from second-guessing personnel decisions made by military commanders.

II. The Role of the National Guard

A. The National Guard as the "Militia"

"The National Guard is the modern Militia reserved to the States by [Article I, Section 8, Clauses 15 and 16] of the Constitution."[13] Since the days of the Minutemen of Lexington and Concord until just prior to World War I, the militias of the various states embodied the concept of a citizen army.[14] The enactment of the National Defense Act in 1916 altered the status of the militias by establishing them as the National

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challenged conduct is integrally related to the military's unique structure, the author asserts that such a distinction is impossible since all such positions are integrally related.

[12] *Id.*

[13] Maryland v. United States, 381 U.S. 41, 46, *vacated and modified on other grounds*, 382 U.S. 159 (1965). *See generally* Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

[14] *Maryland*, 381 U.S. at 46. *See generally* Wiener, *supra* note 13.

Guard.[15] The National Guard occupies a unique position in the United States' federal structure because the daily operation of National Guard units remains under the authority and control of the states.[16] However, since the passage of the National Defense Act, the National Guard has been equipped and funded by the federal government and trained pursuant to federal standards.[17]

In accordance with the National Defense Act, as amended in 1933, the National Guard is also a component of the U.S. Army Reserve, and officers appointed to the National Guard receive corresponding commissions in the Army Reserve Corps.[18] As a vital and essential reserve component of the Armed Forces of the United States, the National Guard is available to serve with regular forces in time of war.[19] In addition to its role under state control, the National Guard may also be called to federal service to assist in controlling civil disorder.[20]

B. National Guard of the United States—Reserve Component of the Armed Forces

The Armed Forces of the United States consists of the Army, Navy, Marine Corps, Air Force, and Coast Guard.[21] Each of the services is supported by a reserve component.[22] The purpose of each reserve component is to provide trained military units as well as qualified individuals to supplement the active duty armed forces "in time of war or national emergency, and at such times as the national security may require."[23]

Since the 1933 amendments to the National Defense Act, all individuals who have joined a state National Guard unit have simultaneously enlisted in the National Guard of the United States (NGUS).[24] Under this "dual enlistment" system, Guardsmen retain their

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[15] National Defense Act of 1916, 39 Stat. 166.
[16] Illinois Nat'l Guard v. Fed. Labor Relations Auth., 854 F.2d 1396, 1398 (D.C. Cir. 1988).
[17] *Maryland*, 381 U.S. at 47.
[18] *Illinois Nat'l Guard*, 854 F.2d at 1398.
[19] *Id.*
[20] *Id.*; *see also* Gilligan v. Morgan, 413 U.S. 1, 7 (1973).
[21] 10 U.S.C.S. § 101(4) (LexisNexis 2008); 32 U.S.C.S. § 101(2) (LexisNexis 2008).
[22] 10 U.S.C.S. § 10,101.
[23] *Id.* § 10,102.
[24] Perpich v. Dep't of Def., 496 U.S. 334, 346 (1990); *see also* 32 U.S.C.S. § 301.

status as members of a state Guard unit, unless and until ordered to active duty in the Army.[25] Members of the NGUS who are ordered to active duty are relieved from duty in the National Guard of their state.[26] Congress may order the NGUS to active duty if it determines that such units are required for national security.[27] Likewise, the President or Congress may order NGUS units to active duty upon the declaration of a national emergency.[28]

C. Federal Authority Over the National Guard

Article I, Section 8, Clause 15 of the Constitution grants Congress power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions . . . ."[29] Additional power over the National Guard is granted to Congress in Clause 16, where Congress has the authority to make appropriations for "organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . ."[30] Congress has the legislative authority to promulgate laws that regulate military life, including whether DSTs should be excluded from Title VII coverage to promote the efficiency of the military. This authority is further supported by the Supreme Court ruling in *Chappell v. Wallace*.

In *Chappell*, the Supreme Court advised that "the Constitution contemplated that the Legislative Branch has plenary control over the rights, duties, and responsibilities in the framework of the Military Establishment."[31] The Supreme Court has further emphasized that Congress has the authority to "regulate military life, taking into account the special patterns that define the military structure."[32]

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[25] *Perpich*, 496 U.S. at 346.
[26] 32 U.S.C.S. § 325; *see also* 10 U.S.C.S. § 10,106.
[27] *10 U.S.C.S. § 10,103.*
[28] *Id. § 12,302.*
[29] U.S. CONST. art. 1, § 8, cl. 15.
[30] *Id.* art. 1, § 8, cl. 16.
[31] 462 U.S. 296, 301 (1983).
[32] *Id.* at 302.

In exercising its explicit authority over the National Guard, Congress has promulgated legislation ordering the organization and composition of the National Guard to be the same as that prescribed for the Army and Air Force.[33] In addition, Congress has established eligibility criteria for original enlistment in the National Guard.[34] Congress requires that those who qualify for service take an oath to support and defend the Constitution of the United States and the constitutions of their own states against all enemies, as well as to obey orders of the President of the United States and of the governor of their state.[35] If a state requests federal assistance to control domestic violence, the President may authorize the use of the militia and armed forces to render assistance to the state.[36] Whenever the President determines that during a period of unlawful obstruction or rebellion against the authority of the federal government it has become impracticable to enforce the laws of the United States, the militia may be authorized for use to enforce federal law.[37]

Further, Congress requires each company, battery, squadron, and detachment of the National Guard to assemble for drill and instruction at least forty-eight times per year and to participate annually in fifteen-day training camps.[38] If a state fails to comply with the prescribed requirements for federal recognition (i.e., adherence to military standards or regulations authorized by Congress), the National Guard of that state will be barred, in whole or in part, from receiving federal aid, benefits, or privileges authorized by law.[39] The National Guard plays a vital role in America's national defense; it must be trained and prepared to respond to both peacetime and wartime missions.

The 9/11 terrorist attacks brought new meaning to the need for well-trained National Guard units. In the immediate wake of the attacks on the World Trade Center, the New York Army and Air National Guard mobilized over 8000 personnel to secure the grounds and to conduct rescue and recovery operations.[40] Following the attacks of 9/11,

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[33] 32 U.S.C.S. § 104(b).
[34] *Id.* § 313.
[35] *Id.* § 312.
[36] 10 U.S.C.S. § 331.
[37] *Id.* § 332.
[38] *Id.* § 502(a).
[39] *Id.* § 108.
[40] The National Guard—About the National Guard, http://ngb.army.mil/About/default.aspx (last visited Nov. 19, 2008).

President George W. Bush authorized the mobilization of National Guard units in Title 32 status (federally funded, but state-controlled) to reinforce security at airports.[41] By mid-December, over 50,000 Guardsmen nationwide were mobilized in support of homeland defense and the war in Afghanistan.[42] In 2005, the largest deployment ever of National Guard troops responded to the devastation caused by Hurricane Katrina and Hurricane Rita in the Gulf Coast.[43] At the peak of deployment levels, over 50,000 Army and Air Guard members responded to these disasters, while nearly 80,000 were simultaneously deployed on active duty in Iraq and elsewhere in the world.[44]

In sum, the mission of the National Guard is to maintain well-trained, well-equipped units available for immediate mobilization for both wartime missions and national emergency operations.[45] To this end, the purpose of the DST program is to ensure that DSTs are trained and logistically supported to meet the demands of homeland security missions and waging war.[46] Dual status technicians' duties may correspond with those of other civilian employees; however, DSTs are also required to serve as Guardsmen and must perform military related duties.[47] The next section will discuss the importance of the DST to the overall mission of the armed forces.

III. The Role of Dual Status National Guard Technicians

Dual status technicians "occupy a unique position in the federal personnel system, maintaining a dual status as civilians and [S]oldiers while serving in a hybrid state/federal organization."[48] The unique status of DSTs is the source of confusion surrounding how they should be treated under Title VII. The status of National Guard employees is unusual and somewhat complicated.[49] The National Guard employs full

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[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] ARMY NATIONAL GUARD, NATIONAL GUARD FACT SHEET (FY2005) (3 May 2006) [hereinafter NG FACT SHEET], *available at* http://www.ngb.army.mil/media/factsheets/ARNG_Factsheet_May_06.pdf.
[46] Simpson v. United States, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).
[47] New Jersey Air Nat'l Guard v. FLRA, 677 F.2d 276, 279 (3d Cir. 1982).
[48] Davidson & Walters, *supra* note 5, at 49.
[49] Illinois Nat'l Guard v. Fed. Labor Relations Auth., 854 F.2d 1396, 1398 (D.C. Cir. 1988).

time National Guard (Title 32 Full-Time National Guard Duty),[50] part-time purely military personnel,[51] and full-time civilian workers, known as DSTs, who provide the day-to-day administrative support, training requirements, equipment maintenance, and logistic needs of the National Guard.[52] While many of their duties correspond directly to those of other civilian employees, DSTs traditionally have been required to serve simultaneously as members of the National Guard, and must perform even their civilian tasks "in a distinctly military context, implicating significant military concerns."[53]

Under the National Defense Act, Congress authorized the employment of National Guard technicians.[54] Since 1916, the role of technicians has grown from caretakers and clerks with limited duties of maintaining National Guard supplies and equipment.[55] Technicians are now responsible for maintenance of National Guard military equipment during their regular military training periods.[56] Further, DSTs are now serving in positions ranging from supervisory aircraft pilots to commanders of National Guard fighter groups.

Prior to the Technician Act, all technicians served as federally funded state employees.[57] Under the Technician Act, technicians were converted to federal civilian employee status, providing them a uniform system of federal salary schedules, retirement plans, fringe benefits, and clarification of their status under the Federal Tort Claims Act.[58] As members of the National Guard, these technicians hold dual status.[59] The DSTs are required to be military members of the state National Guard, and if they lose membership in the National Guard, they must be terminated from employment as technicians.[60] The DSTs serve as

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[50] Full-time National Guard duty means training or other duty, other than inactive duty, performed by a member of the National Guard. NG FACT SHEET, *supra* note 45.
[51] *Illinois Nat'l Guard*, 854 F.2d at 1396.
[52] Simpson v. United States, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).
[53] New Jersey Air Nat'l Guard v. FLRA, 677 F.2d 276, 279 (3d Cir. 1982).
[54] Davidson & Walters, *supra* note 5, at 49.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 51.
[59] *Id.*
[60] Major Michael E. Smith, *Federal Representation of National Guard Members in Civil Litigation*, ARMY LAW., Dec. 1995, at 41.

federal civilian employees, except during normal military periods (one weekend per month and two weeks per year).[61]

The DSTs serve concurrently in three ways: (1) they perform full-time civilian work in their units, as provided in Title 32, U.S. Code; (2) they perform military training in their units, as provided for in Title 32, U.S. Code; and (3) they are available to enter active federal service anytime their units are called.[62] The DSTs' employment is conditioned on current membership in the National Guard.[63] The DSTs must meet military compatibility requirements "because the technician's civilian and military functions are integrated."[64]

In sum, DSTs play a vital role in the mission of the armed forces. Since the enactment of the National Defense Act, the role of DSTs has grown from caretaker to direct contributor to the Global War on Terror and homeland defense missions.[65] The DSTs fill purely military related occupations and are required to maintain membership in the National Guard. Recognizing the importance of filling dual status slots with personnel immediately available for military operations, Congress has

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[61] *Id.*

[62] Simpson v. United States, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

[63] Military "compatibility" is defined as the condition in which the duties and responsibilities of a military technician's full-time civilian position is substantially equivalent to the duties and responsibilities of the technician's military assignment (MTOE/TDA/UMDA). U.S. DEP'T OF ARMY & U.S. DEP'T OF AIR FORCE, TPR 303, MILITARY TECHNICIAN COMPATIBILITY para. 1-1 (24 Aug. 2005). Compatibility ensures that a highly skilled and trained cadre is available when units are deployed. *Id.* Compatibility also ensures that a continuity of operation exists before, during, and after deployment periods, leading to enhanced unit readiness as mandated by the Technician Act of 1968.

[64] *Simpson*, 467 F. Supp. at 1124; *see also* AFGE Local 2953 v. FLRA, 730 F.2d 1534, 1544–46 (D.C. Cir. 1984); 32 U.S.C. § 709 (2006).

[65] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA—A STRATEGY FOR TODAY; A VISION FOR TOMORROW (2004), *available at* http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf.

> The attacks of 11 September 2001 demonstrated that our liberties are vulnerable. The prospect of future attacks, potentially employing weapons of mass destruction, makes it imperative we act now to stop terrorists before they can attack again. . . . This mission requires the full integration of all instruments of national power, the cooperation and participation of friends and allies and the support of the American people.

Id. at iv.

elected to continue the trend of eliminating non-dual status technician positions by requiring that all military technician positions be occupied by DSTs.[66] This increase in the number of positions occupied by DSTs could potentially lead to addition Title VII lawsuits by DSTs against the military. The barring of military personnel from bringing Title VII claims against the armed services[67] is the subject of Section IV.

IV. Barring Title VII Claims Brought By Military Personnel

This section examines Supreme Court holdings that military personnel are barred from bringing claims against the military, their superiors, or other military personnel for wrongs arising incident to military service.[68] For example, under the *Feres* doctrine servicemembers are barred from bringing suits against the military—"the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[69] Courts refrain from reviewing these personnel actions because the "relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the military establishment."[70] The *Feres* doctrine[71] is applicable to the federal government and federal officers as well as to state governments and state officers.[72]

In *Chappell v. Wallace*, five enlisted servicemembers sought recovery from their commanding officer, four lieutenants, and three noncommissioned officers for unjust treatment based on racial discrimination and for conspiracy to deprive them of their statutory

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[66] *Id.*
[67] Fisher v. Peters, 249 F.3d 433, 443 (6th Cir. 2001).
[68] Notice of Proposed Amendment, National Guard Technician Act, 32 U.S.C. § 709 (2000) (on file with author).
[69] Feres v. United States, 340 U.S. 135, 146 (1950).
[70] Mier v. Owens, 57 F.3d 747, 749–50 (9th Cir. 1995) (quoting Chappell v. Wallace, 462 U.S. 296, 300 (1983)).
[71] Under the *Feres* doctrine, members of the armed forces may not bring an action against the Government or armed services personnel for injuries during activity under the control or supervision of a commanding officer. Hodge v. Dalton, 107 F.3d 705, 710 (9th Cir. 1997) (citing McGowan v. Scoggins, 890 F.2d 128, 132 (9th Cir, 1989)); *see Feres*, 340 U.S. 135.
[72] *See* Bowen v. Oistead, 125 F.3d 800, 804–05 (9th Cir. 1997) (noting that "[t]he overwhelming weight of authority indicates that state National Guard officers are protected from suit by fellow Guardsmen by the *Feres* doctrine").

rights.[73] The servicemembers alleged that because of their minority race, the petitioners failed to assign desirable duties, issued threats against them, gave them low ratings on performance evaluations, and imposed penalties of unusual severity.[74] The Court was "[concerned] with the disruption of the 'peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court."[75] The Court held that servicemembers are barred from bringing *Bivens*[76] claims in civilian court alleging unlawful racial discrimination by their superiors.[77]

In *United States v. Stanley*, the Court did not find that the superior-subordinate relationship was crucial and broadened the *Chappell* holding to bar *Bivens* actions against military members who were not within the plaintiff's chain of command.[78] In *Stanley*, the Army secretly administered doses of lysergic acid diethylamide (LSD) to the Soldier as part of a plan to study the effects of the drug on humans.[79] The Soldier claimed that as a result of the LSD exposure, he experienced severe personality disorders that led to his discharge and the dissolution of his marriage.[80] Subsequently, the Soldier filed a lawsuit under the FTCA alleging negligence in the disposition of the experimental program.[81] The district court granted the Government summary judgment on the grounds that the suit was barred by the *Feres* doctrine.[82] Although it concurred with this holding, the court of appeals remanded the case after concluding that the Soldier had a colorable constitutional claim under the *Bivens*[83] doctrine, "whereby a violation of constitutional rights can give rise to a damages action against the offending federal officials even in the absence of a statute authorizing such relief, unless there are 'special

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[73] *Chappell*, 462 U.S. 296.
[74] *Id.* at 298.
[75] *Id.* at 304 (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)).
[76] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* established the general proposition that victims of a constitutional violation perpetrated by a federal actor may sue the offender for damages in federal court despite the absence of explicit statutory authorization for such suits. *Id.*
[77] *Chappell*, 462 U.S. at 304.
[78] United States v. Stanley, 483 U.S. 669, 680 (1987).
[79] *Id.* at 671.
[80] *Id.*
[81] *Id.* at 672.
[82] *Id.*
[83] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

factors counseling hesitation' or an 'explicit congressional declaration' of another, exclusive remedy."[84] The Soldier then amended his complaint to add *Bivens* claims.[85] In reaffirming the reasoning of *Chappell*, the Supreme Court cited the special factors which included counseling hesitation, the unique disciplinary structure of the military establishment, and Congress's activity in the field as a basis for deciding to abstain from inferring *Bivens* actions as extensive as the exception to the FTCA established by *Feres*.[86] The Court held that a *Bivens* remedy is unavailable to servicemembers for injuries that "arise out of or are in the course of activity incident to service."[87]

The Supreme Court holdings in *Chappell* and *Stanley* signify how civilian courts have exercised judicial restraint before entertaining suits that ask courts to interfere with military personnel matters—matters that are at the core of the necessarily unique structure of the military establishment.[88] In ruling to bar military personnel from bringing most suits against the military, the Supreme Court noted the disruptive effect such suits would have on the maintenance of good order and discipline in the military.[89] The Court has warned that "the special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined response by enlisted personnel—would be undermined"[90] if a judicially created remedy exposed officers to personal liability at the hands of their subordinates.[91]

The federal circuits courts of appeal have taken heed of the Supreme Court's rulings in *Feres*, *Chappell*, and *Stanley*. Pursuant to the Supreme Court's rationale in those cases, the federal circuits have held that Congress did not intend to provide military personnel with a judicial remedy under Title VII for claims of unlawful discrimination.[92] Despite

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[84] *Stanley*, 483 U.S. at 672 (citing *Bivens*, 403 U.S. 388).
[85] *Id.*
[86] *Id.* at 684.
[87] *Id.* at 685.
[88] Chappell v. Wallace, 462 U.S. 296, 299 (1983).
[89] United States v. Brown, 348 U.S. 110, 112 (1954).
[90] *Chappell*, 462 U.S. at 304.
[91] *Id.*
[92] *See* Spain v. Ball, 928 F.2d 61, 62 (2d Cir. 1991) (precluding Navy applicant's claims of race and gender discrimination); Roper v. Dep't of Army, 832 F.2d 247, 248 (2d Cir. 1987); Randall v. United States, 95 F.3d 339, 343–44 (4th Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997) (precluding Army officer's claim of racial discrimination); Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) (precluding Army applicant's claim of racial discrimination); Hodge v. Dalton, 107 F.3d

the fact that 42 U.S.C. § 2000e-16(a), Civil Rights Equal Employment Opportunities Act, forbids discrimination in all personnel actions affecting employees or applicants for employment in military departments,[93] the courts have consistently held that Congress did not intend to provide military personnel with a judicial remedy under Title VII.[94] The Equal Employment Opportunity Commission (EEOC) followed suit by excluding uniformed members of the military from Title VII coverage.[95] Some federal courts have extended this prohibition to technicians.[96]

The Supreme Court has held that military personnel are precluded from bringing Title VII claims against the military.[97] The Court has exercised judicial restraint on issues related to military personnel matters and noted the disruptive effect such suits would have on the military.[98] The federal circuits have followed the Supreme Court's rationale and barred military personnel from bringing claims under Title VII for unlawful discrimination. The split among federal circuits regarding the justiciability of Title VII claims brought by DSTs is the subject of the next section.

V. Split Among Federal Circuit Courts Regarding Justiciability of DSTs' Title VII Claims

Even among those circuits that hold DSTs' Title VII suits may be reviewable, a conflict exists regarding how to determine justiciability. Generally, the federal circuits take one of three approaches when

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705, 707–08 (9th Cir. 1997), *cert. denied*, 522 U.S. 815 (1997) (precluding Marine servicemember's claim of racial discrimination); Gonzalez v. Dep't of Army, 718 F.2d 926, 927–29 (9th Cir. 1983) (precluding Army officer's claims of racial discrimination); Stinson v. Hornsby, 821 F.2d 1537, 1539–40 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988) (precluding National Guard member's claim of racial discrimination).

[93] 42 U.S.C.S. § 2000e-16(a) (LexisNexis 2008).

[94] Notice of Proposed Amendment, National Guard Technician Act, 32 U.S.C. § 709 (2000) (on file with author).

[95] 29 C.F.R. § 1614.103(d)(1) (2008) (excluding uniformed members of the military departments from Title VII's purview).

[96] *See* Fisher v. Peters, 249 F.3d 433, 443–44 (6th Cir. 2001) (holding that a National Guard technician's position is irreducibly military in nature; hence, a National Guard Technician's Title VII claim is non-justiciable); Taylor v. Jones, 653 F.2d 1193, 2000 (8th Cir. 1981); *Roper*, 832 F.2d 247.

[97] Chappell v. Wallace, 462 U.S. 296, 304 (1983).

[98] *Id.*

addressing Title VII actions: (1) inseparable nature of the dual status technicians;[99] (2) technicians fall within Title VII's coverage except when the challenged conduct is "integrally related to the military's unique structure";[100] or (3) technician Title VII claims are nonjusticiable because their position is "irreducibly military in nature."[101] These differing opinions have the potential to confuse the issue and open the door for continued judicial infringement upon military personnel decisions, specifically the disposition of Title VII claims within military channels.

A. Inseparable Nature of Dual Status Technicians

In *Wright v. Park*, the First Circuit held that technician positions are encompassed within a military organization and require the performance of duty directly related to the defense of the United States.[102] In *Wright*, the plaintiffs, military technicians in the Air National Guard, brought civil rights actions against military officers in their chain of command.[103] The court noted that "the record reflects that fully one-half of appellant's outfit, the 101st Air Refueling Wing, served in Operation Desert Storm or Desert Shield."[104] The court concluded that "since National Guard technicians' positions are encompassed within a military organization and require the performance of work directly related to national defense, such positions are themselves military in nature."[105] Given the inseparable nature of the technician's civilian and military role, the court found that the plaintiffs' claims were nonjusticiable.[106]

B. Challenged Conduct "Integrally Related to the Military's Unique Structure"

Conversely, the Second Circuit distinguished between the military and civilian aspects of a technician position and instead focused on

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[99] Wright v. Park, 5 F.3d 586, 589 (1st Cir. 1993).
[100] Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995); Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002).
[101] *Fisher*, 249 F.3d at 443.
[102] *Wright*, 5 F.3d at 589.
[103] *Id.* at 586.
[104] *Id*. at 588.
[105] *Id.* at 588–89.
[106] *Id.* at 589.

whether the challenged conduct is related solely to the civilian position or "integrally related to the military's unique structure."[107] In *Luckett v. Bure*, Hugo Luckett served as both a sergeant and civilian technician in the U.S. Army Reserve (USAR).[108] As a condition of employment, civilian military technicians were required to maintain membership in the USAR unit in which they were employed.[109]

In September 1999, Luckett's deputy commander initiated proceedings to separate him for misconduct and failure to make progress on the weight control program.[110] Following a board of inquiry, Luckett was transferred to the Individual Ready Reserve.[111] Consequently, he was discharged from his position as a civilian military technician.[112] The court found that the employee's discrimination claims related primarily to his transfer and to actions taken by his military supervisors.[113] As such, the court held that the claims were not justiciable because they were integrally related to the military's unique structure.[114]

The Fifth Circuit takes a similar view, holding that "claims that originate from [a technician's] military status . . . are not cognizable."[115] In *Brown v. United States*, a technician's discharge from the U.S. Air Force Reserve caused him to lose his civilian position because he was unable to meet the position's requirements, namely, maintaining continuing reserve duty status in the Air Force.[116] Subsequently, the technician brought a Title VII racial discrimination claim against the U.S. Air Force.[117]

In order to determine if Brown's injury arose from activities incident to service, the district court used the three-part test enunciated in *Parker v. Unites States* which considered the following factors: duty status of the servicemembers, where the alleged injury occurred, and what function the servicemember was performing at the time of the alleged

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[107] Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002) (quoting Mier v. Owens, 57 F.3d 747, 749 (9th Cir. 1995)).
[108] *Id.* at 496.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 499.
[114] *Id.*
[115] Brown v. United States, 227 F.3d 295, 299 (2000).
[116] *Id.* at 297.
[117] *Id.*

discrimination.[118] The Fifth Circuit reasoned that "claims arising purely from an ART's [Air Reserve Technician's] civilian position are provided for under Title VII; claims that originate from an ART's military status, however, are not cognizable."[119] The court barred Brown's discrimination claim, finding that the military personnel decision (while having a civilian component, in that his discharge made him ineligible for his civilian position) was taken within the military sphere.[120]

The Seventh Circuit appears to follow the rationale of the Second and Ninth Circuits. In *Bartley v. U.S. Department of the Army*, technicians (in their civilian status) alleged, *inter alia*, harassment and retaliation, and sought relief through the military discrimination complaint system.[121] The Seventh Circuit dismissed the plaintiffs' claim because they failed to use the civilian complaint system and failed to exhaust their administrative remedies.[122] The court reasoned that as it pertains to "Title VII cases, . . . we are required to differentiate the civilian and military positions associated with a dual-status job . . . because Title VII specifically provides for claims against the government for civilian employees in the military departments."[123]

In *Mier v. Owens*, the Ninth Circuit recognized the dual military and civilian status of technicians and held that Title VII does not apply to technicians "when the challenged conduct is integrally related to the military's unique structure."[124] In *Mier*, the appellant, a Hispanic civil service technician employed in the Arizona Army National Guard, filed a complaint under Title VII alleging discriminatory personnel actions (i.e., denial of military promotions and suspension from civilian employment) were taken against him on account of race, color, and national origin.[125] The Ninth Circuit held that "[m]ilitary promotion is . . . a personnel action that is integrally related to the military's structure. . . . Title VII does not allow this court to review decisions regarding the military

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[118] *Id.* (citing Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980)).
[119] *Id.* at 299.
[120] *Id.*
[121] Bartley v. U.S. Dep't of the Army, 221 F. Supp. 2d 934 (C.D. Ill. 2002).
[122] *Id.* at 947.
[123] *Id.* at 954 (quoting *Brown*, 227 F.3d at 299 n.4).
[124] Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995), *cert. denied sub nom*, Mier v. Van Dyke, 517 U.S. 1103 (1996). *But see Brown*, 227 F.3d 295. The Fifth Circuit suggested that technicians are not inherently military, and therefore, Title VII's application may depend on whether plaintiff's allegations arise from his position as a civilian employee of a military department or his position as a uniformed servicemember. *Id.*
[125] *Mier*, 57 F.3d at 751.

promotion of individuals serving as Guard technicians."[126] The Ninth Circuit concluded that the suspension from civilian promotion was "integrally related to the military's structure and nonjusticiable.[127]

C. Irreducibly Military Federal Employees

In *Leistiko v. Stone*, the Sixth Circuit held that the hybrid position occupied by DSTs "are irreducibly military in nature."[128] Colonel Leistiko, a DST serving as a Supervisory Aircraft Pilot in the Ohio National Guard, suffered an apparent grand mal seizure during a helicopter flight resulting in medical disqualification from further aviation service.[129] Leistiko sued alleging, among other things, that the Secretary of the Army violated the Rehabilitation Act.[130] The Sixth Circuit noted that "every court having the occasion to consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature,"[131] and thus the plaintiff's claim was nonjusticiable.

The Sixth Circuit held in *Fisher v. Peters* that a National Guard technician's Title VII claim is nonjusticiable because technician positions are "irreducibly military in nature."[132] In *Fisher*, the plaintiff sought promotions to three different posts while serving as a DST in the Tennessee Air National Guard (TANG) but was denied each time.[133] Following each promotion denial, she filed administrative complaints with the EO office alleging gender discrimination.[134] Finally, the plaintiff filed a civil suit in federal district court, alleging violations of Title VII of the Civil Rights Act of 1964.[135] The court held that technicians' claims are nonjusticiable and their sole channel for relief in

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[126] *Id.*
[127] *Id.*
[128] 134 F.3d 817, 820–21 (6th Cir. 1998).
[129] *Id.* at 819.
[130] *Id.*
[131] *Id.* at 821; *see also* Wright v. Park, 5 F.3d 586 (1st Cir. 1993).
[132] Fisher v. Peters, 249 F.3d 433, 443 (6th Cir. 2001) (quoting *Leistiko*, 134 F.3d at 75).
[133] *Id.* at 434–36.
[134] *Id.* at 436.
[135] *Id.* at 437.

discrimination cases is within the military[136] because technician positions are "irreducibly military in nature."[137]

In sum, federal circuit courts of appeal are split over the justiciability of Title VII claims brought by DSTs. Several circuits give more weight to whether the claim is based on unlawful conduct solely related to the civilian status of the technician in determining the justiciabilty of the claim. Other circuits view DSTs as military personnel. Congressional actions excluding DSTs from Title VII coverage would end the confusion over the justiciability of DSTs' discrimination claims. Courts should not have to wrestle over this uniquely military personnel matter. Deference should be given to the military to make personnel decisions regarding DSTs and the disposition of their discrimination claims. The Supreme Court has yet to rule on the matter. The following proposal would resolve the question of the justiciability of DSTs' complaints of unlawful discrimination.

VI. Proposed Resolution to the Controversy

In order to alleviate the serious problem of discrimination in the military, a balance must be reached between maintaining the courts' traditional approach of denying review of claims concerning the military and protecting the due process rights of aggrieved DSTs. A possible solution is the implementation of a system whereby jurisdiction over a personnel matter that is uniquely military in nature is resolved within military channels. This article contends that a three-pronged approach should be taken to address disposition of DSTs' discrimination complaints.

First, all DSTs must be specifically excluded from Title VII coverage. The DSTs serve in hybrid positions that are more akin to military than to civilian positions. As previously discussed, this military status is in line with congressional intent. Therefore, DSTs should be treated like military personnel for Title VII purposes.

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[136] These complaints would be filed with either the National Guard Military Discrimination Complaint System or the National Guard Civilian Complaint System depending on the status of the technician and the nature of the challenged conduct.

[137] *Fisher*, 249 F.3d at 443 (quoting *Leistiko*, 134 F.3d at 75) (holding that a National Guard technician's sole channel for relief in discrimination cases is within the military).

Second, all unlawful discriminatory acts directed toward a DST must be defined as occurring while in the DST's military capacity.[138] DSTs are employed by the federal/state government to carry out duties directly related to military service.[139] Under the compatibility doctrine, all DSTs must hold positions that are compatible to their military position and training.[140] Simply stated, at all times, no matter their status, technicians are carrying out a military mission. Therefore, any unlawful discriminatory acts against a DST must be deemed as occurring while in their military capacity.

Third, discrimination complaints submitted by DSTs must be processed exclusively through the NGMDCS. This approach will promote fairness and foster positive unit morale. Allowing DSTs to continue to submit complaints to the EEOC and ultimately file suit in federal district court may adversely affect unit cohesion and readiness. For example, a DST, serving in her capacity as a civilian federal employee, may bring a complaint to the EEOC alleging discrimination based on race and sex concerning her performance rating, her termination as a DST, her failure to receive a bonus, and her nonselection for a civilian position. If the EEOC finds in favor of the DST, she may receive up to $300,000 in compensatory damages, reinstatement, assignment to her desired position, and other remedial damages.[141] A uniformed member of the military, or a DST serving in her military capacity in the same or similar job and in the same unit, is precluded by law from filing discrimination complaints with the EEOC. Consequently, the uniformed servicemember or military-status DST is barred from receiving the same monetary and compensatory awards that her civilian-status DST counterparts may receive. Such inequities may create resentment among uniformed servicemembers and DSTs, resulting in an adverse impact on morale, unit cohesion, and military readiness.[142]

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[138] The author recognizes that Title VII does not define discriminatory acts as occurring in any specific capacity. This change could occur either by making a minor amendment to Title VII or through judicial interpretation. In whatever way the change is effected, however, the dual status technician must still be found to be in the scope of employment to preclude prosecutions for serious acts, such as sexual assault.

[139] Simpson v. United States, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

[140] 10 U.S.C.S. § 10216(d) (LexisNexis 2008).

[141] Civil Rights Act of 1991, 42 U.S.C. § 1981a (2006).

[142] That dual status technicians and uniformed servicemembers currently work alongside civilian employees across the DoD is of no movement. It is inevitable that disparate treatment of similarly situated groups may create tensions that could fester and impact morale. Whether this impact could impact readiness is for the reader to decide.

The utilization of NGMDS will promote consistency in disposition of unlawful discrimination cases. By having a single appellate authority (i.e., Chief, National Guard Bureau (NGB)) within the NGMDCS, complainants and respondents will be privy to past rulings. This information could be used to promote early settlement of cases. Strict adherence to the procedural rules of the NGMDCS will minimize judicial interference with the military on matters related to discrimination complaints filed by DSTs. The fundamental due process rights of DSTs will be guarded by strict adherence to the requirements of the NGMDCS. Complaints will be processed, complainants will be allowed to submit appeals, and a final ruling will be issued. All DSTs will have equal access to the same remedies for redress of unlawful discriminatory acts or practices. Therefore, courts will have no need to interfere with matters related to disposition of discrimination complaints filed by DSTs.

In sum, DSTs should be treated like military personnel for Title VII purposes. Any unlawful discriminatory acts against DSTs must be deemed as occurring while in their military capacity. Discrimination complaints submitted by all DSTs must be processed through the NGMDCS. Strict adherence to the procedural rules of the NGMDCS will support the courts' continued deference to the military on matters that impact discipline and efficiency in the armed forces. The next section will provide an explanation of the current discrimination complaint procedures and emphasize the benefits of designating the NGMDCS as the required system for processing discrimination complaints filed by DSTs.

VII. Adequate Due Process Protection Provided under Existing Discrimination Complaint Procedures

The current discrimination complaint procedures provide adequate due process protection to DSTs. If Congress amends the Technician Act to specifically exclude DSTs from Title VII coverage, the current discrimination complaint procedures will fill the gap and provide a venue for disposition of discrimination complaints. The NGMDCS's due process protections available to DSTs compare favorably to those provided to active duty military personnel.

In order to compare the due process protections of the NGMDCS and the DoD EO program, this section divides the elements of their respective protections into parts. For sake of comparison, this article will

use the Army EO Program. Part A explains those policies and procedures established under each system to ensure fair, equitable, and non-discriminatory treatment of all members and employees of the National Guard and active duty servicemembers. Part B provides a description of the personnel responsible for ensuring the integrity of the NGMDCS and the Army EO Program in processing, managing, and adjudicating discrimination complaints. Part C sets forth the intake process for discrimination complaints. Part D explains how informal complaints are investigated and processed. Part E compares how each system investigates formal complaints. Part F discusses how final decisions are issued by the NGB and the general court-martial convening authority (GCMCA) for active duty formal complaints. This section concludes by asserting that the NGMDCS provides adequate due process protections for DSTs comparable to those available to active duty military personnel, thereby negating the need to permit DSTs to file civil suits under Title VII in federal district court.

A. Policy—NGMDC and Army EO Program

The policy of the National Guard is to improve morale and productivity through the fair, equitable, and non-discriminatory treatment of all members, employees, or applicants for membership in the National Guard.[143] This policy is designed to foster unit cohesion and increase the combat effectiveness of the National Guard.[144] The National Guard has established and implemented the NGMDCS as a mechanism to enforce its stated policies and to provide a fair and equitable venue for redress of aggrieved persons in accordance with applicable laws and regulations.[145]

The NGMDCS is governed by National Guard Regulation 600-22/NGR (AF) 30-3 (NGR 600-22).[146] "This regulation establishes policies and procedures for filing, processing, investigating, settling, and adjudicating discrimination complaints in the Army National Guard (ARNG) and Air National Guard (ANG)."[147] It establishes a uniform complaint system for both National Guard legal and administrative

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[143] NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1-7(a).
[144] *Id.*
[145] *Id.* para. 1-7(c).
[146] *Id.*
[147] *Id.* para. 1-1.

reviews, as well as a final administrative decision by a neutral and detached final decision authority.[148]

The Army EO policy applicable to active duty Army personnel is similar to the National Guard policy. The policy of the EO program in the Army is to provide equal opportunity and fair treatment for military personnel regardless of race, color, national origin, or gender,[149] and to provide a working environment free of discriminatory practices and offensive behavior.[150] Under the Army EO Program, Soldiers have the right to file discrimination complaints with the chain of command without fear of intimidation, reprisal, or harassment.[151]

B. Assets

The overall direction of EO program within the National Guard is set by the Chief, NGB, who provides the final level of appeal and issues final decisions in all complaints of discrimination administratively processed within the NGMDCS.[152] The Directors, Army and Air National Guard, NGB, implement EO within their respective components and forward with comments formal discrimination complaints to the Chief, NGB, for final decision.[153] The Chief, EO, NGB, provides overall guidance for the NGMDCS and issues final decisions on behalf of the Chief, NGB.[154]

In addition, the Chief, EO, is tasked with establishing policies and procedures for efficient processing, proper management, and effective adjudication of discrimination complaints.[155] The Judge Advocate, NGB, conducts legal reviews of discrimination complaints and ensures that discrimination files and reports of investigation (ROI) comply with all provisions of the Privacy Act and Freedom of Information Act.[156]

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[148] *Id.* para. 1-7.
[149] AR 600-20, *supra* note 10, app. D-4(a).
[150] *Id.* para. 6-2(a).
[151] *Id.* para. 6-9(a)(1).
[152] NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1-4.
[153] *Id.* para. 1-4(b).
[154] *Id.* para. 1-4(c).
[155] *Id.* para. 1-4(c)(3).
[156] *Id.* para. 1-4(d).

State Adjutants General (AG) implement and manage the NGMDCS at the state level.[157]

Commanders at all levels ensure that EO policies and applicable regulations are adhered to in their organizations.[158] These commanders will conduct inquiries whenever an allegation of discrimination is brought to their attention.[159] If the inquiry substantiates a finding of discrimination, the commander will resolve the matter at the lowest appropriate level.[160]

Under the Army EO Program, significant personnel assets are committed to the investigation and processing of EO complaints. In addition to the unit chain of command, complainants may submit EO complaints through alternative agencies including the Inspector General; chaplain; provost marshal; chief, community housing referral and relocation services office; staff judge advocate (SJA); and medical agency personnel.[161] Initial actions by these agencies on informal complaints are similar to those taken on formal complaints.

C. Intake of Complaints

Dual status technicians serving in their military status who believe they have been unlawfully discriminated against in National Guard technician employment must process such complaints through the NGMDCS.[162] The technician's chain of command will serve as the primary channel for resolving the allegations.[163] The lowest appropriate command will assist the technician by investigating the matter, taking corrective action, and attempting to resolve the complaint to the technician's satisfaction, where possible.[164]

Time constraints have been established to ensure that discrimination complaints are processed expeditiously and to ensure the availability of

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[157] *Id.* para. 1-4(e).
[158] *Id.* para. 1-4(f)(1).
[159] *Id.* para. 1-4(f)(4).
[160] *Id.*
[161] AR 600-20, *supra* note 10, app. D-1(2).
[162] NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1- 4(i)(1).
[163] *Id.* para. 1-7(f).
[164] *Id.*

information and material witnesses needed to effectively resolve the complaints.[165] A discrimination complaint "must be filed within 180 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the discriminatory event or action."[166] This factor is important because if the complainant fails to meet this filing period, the complaint may be dismissed as untimely.

The Army EO complaints processing system investigates allegations of unlawful discriminatory acts or practices on the basis of race, color, religion, gender, and national origin.[167] Under the Army EO complaints processing system, Soldiers have the right to file discrimination complaints to the chain of command without fear of intimidation, threat of reprisal, or apprehension of harassment.[168] Commanders should make every attempt to resolve the problem at the lowest appropriate level within the organization.[169]

D. Informal Complaints

An informal complaint may be expressed orally to a member of the technician's chain of command. The NGMDCS requires commanders to expeditiously process allegations of discrimination in compliance with rigorous administrative procedures. In brief, commanders have thirty calendar days or through the next drill period to complete all required actions on an informal complaint.[170] The sole mechanism available to a technician for appealing the disposition of an informal complaint is to file a formal complaint.[171]

Under the Army EO Program, an informal complaint is considered any complaint that a Soldier elects not to file in writing.[172] These complaints may be resolved directly by the Soldier with the assistance of another unit member, the commander, or other person in the Soldier's

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[165] *Id.* para. 1-6(a).
[166] *Id.* para. 1-8(a).
[167] AR 600-20, *supra* note 10, app. D-1.
[168] *Id.* para. 6-9(a)(1).
[169] *Id.* app. D-1.
[170] *Id.* para. 1-8(b).
[171] *Id.* para. 1-7(f).
[172] *Id.* app. D-1(a)(1).

chain of command.[173] Informal complaints are typically resolved through discussion, problem identification, and clarification of the problem.[174] There is no time suspense for resolution of informal complaints.[175]

E. Formal Complaints

Under the NGMDCS, a formal complaint must be submitted in writing. The lowest level command has sixty calendar days from receipt of a formal complaint to complete all required action on the complainant.[176] If the complainant is not satisfied with the resolution, the complaint will be forwarded to the next level of the chain of command.[177] Each intermediate level command has thirty calendar days (after receipt of the complaint from the subordinate commander) or through the next drill period to complete all required actions on the matter.[178]

The supervisory chain is required to provide adequate and appropriate feedback to the complainant on the status of the complaint.[179] If the matter is unresolved at one level and submitted to the next higher level, the complainant will be given a copy of the inquiry report and may submit an appeal with the next level.[180] If deemed appropriate, the next level will initiate an additional inquiry and attempt to resolve the matter and/or send to the next higher level.[181] If unresolved, the complaint will be forwarded to the AG level for disposition.[182]

The AG implements and manages the NGMDCS at the state level. The AG has ninety calendar days (after receipt of the case file from the subordinate commander) to investigate and take all required action on the case file.[183] The goal of the NGMDCS is to issue a final decision not

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[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* para. 1-8(c).
[177] *Id.* para. 1-8(d).
[178] *Id.* para. 1-8(e).
[179] *Id.* para. 1-9(e).
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* para. 1-8(f).

later than one year after the filing of a complaint.[184] When discrimination complaints cannot be resolved to the satisfaction of the complainant at the AG level, the AG will request a final decision from the NGB.[185] This is important because it provides DSTs with post-decisional due process rights and a final administrative decision on the matter.

Under the Army EO Program, formal EO complaints require more documentation than informal complaints, and are subject to time constraints.[186] The complainant files a written complaint (using a DA Form 7279, EO Complaint Form) and swears to the accuracy of the information contained in the complaint.[187] Soldiers must file a formal complaint within sixty days from the date of the alleged incident with the commander at the lowest echelon of command.[188]

An alternative agency may elect not to investigate a complaint, but to refer the matter to another agency or to the appropriate commander for initiation of an investigation.[189] All formal complaints must be reported to the first GCMCA in the chain of command.[190] Periodically, the commander must submit reports to the GCMCA on the status of the investigation until completion.[191] The commander will either appoint an investigating officer (IO) in accordance with the provisions of Army Regulation 15-6 or personally investigate the complaint.[192] The commander will establish a detailed plan to ensure that the complainant, witnesses, and the subject of the investigation are protected from acts of reprisal.[193]

Upon completion of the investigation, the IO will make factual findings and provide the appointing authority with disposition recommendations that are consistent with the findings.[194] The appointing authority will forward the ROI to the SJA for a legal review.[195] If the

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[184] *Id.* para. 1-8(g).
[185] *Id.* para. 1-4(e)(4).
[186] *Id.* app. D-1(5)(b)(1).
[187] *Id.* app. D-1(5)(b)(2).
[188] *Id.* app. D-1(5)(b)(5), (6).
[189] *Id.* app. D-2.
[190] *Id.* app. D-4(a).
[191] *Id.*
[192] *Id.* app. D-4(b).
[193] *Id.* app. D-4(c).
[194] *Id.* app. D-6(i).
[195] *Id.* app. D-7.

SJA determines that the ROI is legally sufficient, the appointing authority will take action on the investigation.[196]

If the complaint is approved, the commander will take remedial action to restore benefits and privileges lost due to unlawful discrimination or sexual harassment.[197] In addition, the commander will take corrective action to prevent future occurrences of discriminatory practices and to address organizational deficiencies that gave rise to the complaint.[198] These actions may be either administrative or punitive.[199] If the complaint is unresolved to the complainant's satisfaction, the complainant may appeal to the next higher commander. The appellate commander has fourteen calendar days to act on the appeal.[200]

F. Final Decision Authority

Under the NGMDCS, within eight months of the formal filing the complaint will be forwarded to NGB for review and final decision.[201] The NGB will conduct a review of discrimination complaints when: "[1] a complaint is dismissed, in whole or in part; [2] after a formal investigation has been conducted and the AG and the complainant have been unable to resolve the complaint; [3] a resolution of the complaint is reached; and [4] a complainant withdraws his/her complaint."[202] The complaints will be reviewed for adherence to applicable laws and regulations as well as to assess the merits of the case.[203]

The NGB EO will conduct a review of the entire case file and coordinate the matter with the SJA, NGB, and the Army or Air Directorate, NGB.[204] Following this review, the AG will be advised on whether a dismissal is appropriate and whether the complaint case file and procedures are both administratively and legally sufficient.[205] The NGB will issue a final decision on the case file using a preponderance of

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[196] *Id.* The appointing authority may approve all or part of the findings and recommendations, or order further investigation into the matter. *Id.*
[197] *Id.* app. D-7(a).
[198] *Id.*
[199] *Id.* app. D-7(a)(1).
[200] *Id.* app. D-8(c).
[201] *Id.* para. 1-8(f).
[202] *Id.* para. 2-9(a)(1)–(4).
[203] *Id.* para. 2-9(b).
[204] *Id.* para. 2-9(c).
[205] *Id.* para. 2-9(d)(1), (2).

evidence standard.[206] This significant legal standard further emphasizes the level of due process provided to complainants. "All relevant evidence of the record will be scrutinized using principles and case law implemented under Title VII."[207]

Both the AG and complainant will receive copies of the final decision.[208] In addition, the AG or designee will notify any person(s) named in the case file as a responsible party for the discriminatory act(s) of the final decision issued by NGB.[209] If a complaint is administratively closed or a final decision is issued by NGB, the administrative process established under the NGMDCS regulation is exhausted—there are no further appeals.[210] The last step in the process is to implement any binding terms of the resolution or any terms directed in the final NGB decision.[211]

Under the Army EO Program, complaints that are unresolved at the brigade level may be forwarded to the GCMCA.[212] The only exception is where organizations have published a memorandum of understanding delegating Uniform Code of Military Justice authority to local commanders.[213] Decisions at the GCMCA or delegated local command levels are final.[214]

In sum, the NGMDCS offers DSTs due process protections comparable to those provided by the Army's active duty EO program. Under both systems, significant personnel assets are committed to processing discrimination complaints. All complaints are investigated within established timelines. If the complainant is not satisfied with the resolution, the complaint may be forwarded to high levels within the command for investigation. Under both systems, discrimination complaints are investigated and the complainant receives a final decision.

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[206] *Id.* para. 2-10.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* para. 2-11.
[212] *Id.* app. D-9.
[213] *Id.*
[214] *Id.*

Mandating the use of the NGMDCS by DSTs to resolve discrimination complaints will promote fundamental fairness and equal treatment among all military personnel.

VIII. Conclusion

For purposes of Title VII, DSTs should be considered members of the armed forces. Although the federal circuit courts may differ in their holdings regarding whether DSTs can bring Title VII claims, the circuits are consistent in their rationale that DST positions are military in nature and vital to the military's unique structure. As such, DSTs, like military personnel, should be barred from bringing Title VII discrimination suits against the military.

Treating DSTs like members of the armed forces for Title VII purposes will not deprive them of a remedy. The DSTs could seek redress for unlawful discrimination complaints through the NGMDCS. The NGMDCS provides sufficient due process protections for DSTs, including a final decision on the merits of the case by a neutral and detached appellate authority.

By having a single system, the appellate authority will issue decisions on all DST cases. These rulings will create precedents, which may be reviewed and considered by complainants and subjects alike for settlement purposes, creating even more efficiency within the NGMDCS. In addition, a uniformed complaint system for all DSTs provides consistency in disposition of cases and ensures that servicemembers are confident in the system's credibility.

The NGMDCS provides DSTs remedies analogous to those available within the Army EO Program. Complainants receive full adjudication of formal complaints no later than one year after submission through the NGMDCS. In comparison, if the matter goes through the EEO system which allows complainants to file a civil suit in federal district court after exhausting the administrative process, the matter may take well over a year to resolve. In short, justice is neither delayed nor denied[215] when

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[215] Letter from Martin Luther King, Jr., to his fellow clergymen (Apr. 16, 1963), *available at* http://www.stanford.edu/group/King/popular_requests/frequentdocs/birmingham.pdf (stating that "justice too long delayed is justice denied").

DSTs' unlawful discrimination complaints are processed through the NGMDCS.

Limiting DSTs' redress to the NGMDCS will simply make explicit what is already implicit in Title VII and its legislative history. Unless a bright-line rule is established for disposition of unlawful discrimination complaints filed by DSTs, courts will continue to tread on decisions that regulate military life and infringe upon matters that define the military structure. Amending the Technician Act to exclude DSTs from Title VII coverage would resolve the matter once and for all.

THE FOURTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP[1]

MAJOR GENERAL (RET.) WALTER B. HUFFMAN[2]

It is so wonderful for my wife, Anne, and I to be back home, back in the Regimental home. As much as we have enjoyed our post-military career, nothing replaces the camaraderie, the fraternity, the esprit de corps, the friendships that you have in the military, regardless of branch; and, of course, our branch was the Army, but it's true of all branches, and it is something that when you sit around and talk to folks who got out after their first tour in the military or those who, like myself, retired after thirty years in the military, we all talk about the same things and that is how much we miss being in uniform because of those characteristics of the people in uniform that I just mentioned. So it's a great honor, a very warm feeling, and a wonderful opportunity for us to be back here; and it was an honor for me to be informed that I had been asked to give the Clausen Lecture this year, and I will tell you that if you look at the prior Clausen lecturers, and I hope you don't, I will tell you that there have been some really important people who have given this

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[1] This is an edited transcript of a lecture delivered by Major General (Ret.) Walter B. Huffman to members of the staff and faculty, their distinguished guests, and officers attending the 57th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on 19 November 2008. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, United States Army, from 1981 to 1985 and served over thirty years in the United States Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

[2] Major General (Ret.), U.S. Army. B.S., 1967, Texas Tech Univ.; M.Ed., 1968, Texas Tech Univ.; J.D., 1977, Texas Tech Sch. of Law. General Huffman was selected as Dean of the Texas Tech University School of Law in August, 2002. He was formerly a senior assistant for law and policy to the Secretary of Veterans Affairs. General Huffman served over thirty years in the U.S. Army, beginning his career as a Field Artillery officer and subsequently serving twenty-seven years as a Judge Advocate, culminating in his selection to serve as The Judge Advocate General from 1997–2001. General Huffman's military decorations include the Distinguished Service Medal, The Defense Superior Service Medal, The Legion of Merit (2 awards), The Bronze Star (3 awards), The Vietnam Cross of Gallantry with Silver Star, and the Vietnam and Southwest Asia Campaign Medals.

lecture. And, in fact, when I was Judge Advocate General, I was able to bring General Fred Franks and General Dick Cavasos in here to do the Clausen Lecture, and I don't even pretend to be spoken of in the same sentences with those great leaders of our Army, but we'll do the best we can.

And I do want to say, of course, first of all, that I, like General Chipman said, am honored by the fact that not only is General Clausen here with us today, but General Altenburg, my right-hand man, who carried me along for four hard years in the Pentagon; and for whatever success we had there, John Altenburg is the reason we had it, and it's so great to have him here and see him again. Major General Jeff Arnold, who it seems like I've known for an awful long time now, Jeff, so it's great to see you. Gil, congratulations; I didn't know you'd been selected for Brigadier General. It's always good to hear good news when we come back to the Corps, but that's a great thing; and, General Chipman, Colonel Burrell, it's an honor to be here and we thank all of you for this opportunity.

I was trying to get my notes arranged here just a little bit. Whenever I start to arrange my notes now—Adrianne Burrell last night when we were having dinner was kind enough to mention that she had seen me on the *Jim Lehrer NewsHour* a few months back, and I appreciated her mentioning that fact, but what I think about is when I look at my notes, I was on the *Jim Lehrer NewsHour* in the context of four cases that came out of Haditha, that most of you are probably better aware than I in some respects, dealt with allegations that some Marines had intentionally murdered civilians in some homes there in Haditha; and the counterpoint to my concept of the operation, which was the military justice system will do the right thing, was a former Iraqi ambassador who doubted that very much. And there were four trials that were being contemplated at that time, so I was trying to keep my notes straight. I was doing this from Lubbock, and so there was just a TV monitor there that was constantly on and I couldn't tell when it was picking me up. And, as I say, I had these four cases I was looking at and I was trying to stay straight so that I didn't get tripped up on the facts, so I guess the camera caught me with my head down looking at my notes. After this was all over, I have a seven year-old granddaughter down in Jacksonville, Florida, and she called me up and she said, "Gramps, I saw you on TV. Did you see me?" And I said, "Well, no, honey. It doesn't work that way," and she said, "Why did you have your head down?" And I said, "Honey, I'll tell you. I was praying to the good Lord to help me." And

she said, "Why didn't he?" So whenever I get my notes together on something like this, I just can't help but remember my granddaughter, Megan, and hope that this goes a little better than she thought that did.

A lot of people when they talk to me say, "Isn't it a lot different being the dean of a law school than it was being a general in the Army?" And as most of you might expect, the true answer to that question is, yes, it is quite a bit different being the dean of a law school than it was being a general in the Army. As I have said, being the dean of a law school is a little bit more akin to being a cemetery superintendent in that there's still people under me but no one listens to what I say anymore. But it is an exciting time to be at Tech. We have had some pretty thrilling things that have happened in just the past little while. One of them is that just before I came up here we had Justice Scalia there to speak to our students and our school. He was the third Supreme Court justice we have had visit Texas Tech Law and our students really appreciate that opportunity to hear from justices of our Supreme Court, and it was an honor for us to have him there. But that excitement actually paled in comparison to the excitement that everyone felt when Michael Crabtree caught this pass with five seconds left to go in the Texas game and scored from about the five yard line; that's what we call excitement at Texas Tech. And so I wanted to make sure that y'all had an opportunity to vote for either Michael Crabtree or Graham Harrell, our quarterback, for the Heisman Trophy. As you see we have a little campaign going on there that we call "Pass or Catch." You can vote for either one of them for the Heisman Trophy that you want to; either one of them, I think, would do a really good job representing college football. So by now you're all saying, "What exactly is this lecture going to be about?"

And the answer is, actually, that these two are the leaders of that football team, both the formal, that is to say, Graham Harrell, a senior, is a designated captain; and the informal, Michael Crabtree, being the best athlete on the field. People seem to flock around him, seek his advice, look up to him and respect him, and I think that that's the way it is in all organizations. You have your formal leaders. It's really important for formal leaders to understand who the informal leaders are; who those people in the organization whose technical skill is so great that they are admired, respected, their opinions are sought, because if you don't understand as the formal leader of an organization who the informal leaders are, you will be missing a big bet and you may be in a little bit of trouble, as well.

They are the leaders of our team, and we're going to talk about leadership here today. Question: What is leadership? Sometimes it's a little bit hard to define leadership. Most of us think we know leadership when we see it. A lot of writers and scholars have gone to great lengths to tease apart concepts like, what's management? And what's leadership? You know, the old cliché about managers do things right; leaders do the right thing; all those sorts of attempts to articulate the differences between the two. I'm not going to do that today. That's not what I'm about today. We're going to focus on leadership, which includes management in my opinion, and we're going to take a look at, at least what I think is important, and since I have the podium what I think counts today. We're going to take a look at some of the imperatives that I believe exist for today's Army officer, you Judge Advocates, and I'm going to contrast a little bit the past with the present, to the extent that I can, and all of you can tell from looking at my hair that I'm well qualified to talk about the past and I've tried to give some study to the present so I'll try to speak on that as well. We're also going to take a look at the knowledge-based Army of today, where if the Soldiers are not true geeks, nevertheless every Soldier in today's Army, be they officer or enlisted, are awash in the multiple flows of information that come from all the IT [information technology] devices and the electronic tethering devices that are available today; and all of this knowledge that they have gives them a very different outlook on the hierarchy of traditional leadership. Stated differently, if leadership is based on the power that comes from knowledge—you know, the cliché, knowledge is power—but if everyone has the same level of knowledge or perhaps the led have even more knowledge because they are more attuned to the IT environment than the leaders, what happens then? We'll take a look at that.

But I will also tell you that I remain convinced that there are some immutable characteristics of leadership that apply whether we're talking about the Soldiers of even back probably to 1776 or the Soldiers of today, and one of those traits is that you have to take care of people. *You have to take care of people*. It's a tradition in the Army Officer Corps, and perhaps for the officers of other services as well. Officers eat last. You take care of your people in every respect. A perfect example we happen to have here today and the reason that I am so very proud to be selected for this particular lecture is the person after whom this lecture is named, Major General Hugh Clausen. And I just have to tell you one quick personal story. I will tell you several personal stories before we're through, but one that relates to this: taking care of people. There I was,

Field Artillery Captain Huffman back from Vietnam. The Army all of a sudden has this new program, the FLEP [Funded Legal Education] Program, where twenty-five officers are going to be selected to go to law school at government expense. I am going to get out of the Army and go to law school, but I am informed about this program and encouraged to apply by the then-Staff Judge Advocate of III Corps and Fort Hood, where I was stationed after Vietnam, then-Colonel Hugh Clausen. And that was very nice of him and I appreciated that, but then I started looking at the new statutory requirements for this FLEP program, and one of them that impacted me significantly was that you could not have more than six years of active duty. I started out as an enlisted man, went to OCS at Fort Sill, so I was very close to that six-year mark, but I was accepted to Texas Tech's Law School, and as it turned out, law school at Texas Tech started three days before my six years ran out. So I walked over and I talked to Colonel Clausen about that, and here I am, I'm a field artillery officer. He doesn't know me. He certainly doesn't owe me anything, but while I'm standing there, he picked up the phone, called our personnel office, PP&TO for those of you in the Army, and told them, "This fellow's application's coming in, and if you just look at it, it's going to look like he's not eligible, but I'm telling you he is by three days. So be sure he's considered." Taking care of people. He didn't have to do that. He didn't know me. He didn't owe me. He was just a great leader, taking care of people, and obviously I wouldn't be standing here today but for the fact that Hugh Clausen was willing to interrupt his day as the Staff Judge Advocate of III Corps and make a phone call on behalf of a captain. I can't give you any better example of taking care of people. And it is, again, why I'm so honored to be here today, giving this particular lecture. Thank you again, General Clausen, for the great opportunity that you gave me.

It is also critical that leaders be role models: people whose traits, whose characteristics, whose attributes others seek to emulate. If you're not that, you will never garner respect. And we'll talk a little bit more about that later. There are a lot of people to whom I could point. Some of the people I just talked about a little earlier here in the introductions, I could point to them as role models, but the reason I don't have a picture up here for role models is we have the person here that I'd like to point out to you as a role model. And I'd like to ask Betty Clausen to stand up for just a second. Here, ladies and gentlemen, if you want to see a role model, this is what a role model looks like. I do not know anyone who knows Betty Clausen—and this certainly includes my wife—who doesn't regard her and her characteristics as the epitome of what everyone would

like to be like if they could. And you have done so much for our Corps and so much for so many people. As I say, if you want to know a role model, there is one. Thank you very much, Betty Clausen.

A wonderful couple, the Clausens; great leaders; great leaders for our nation and our Corps; and the truth of the matter is if I stopped right now and just let you all hang out with the Clausens for a couple hours instead of listening to me, you would learn a lot more about leadership than anything I'm going to say to you will teach you. But unfortunately, again, that is not your option.

So let's take a quick look at the leadership role Judge Advocates had back in 1977, when I went to the 7th Infantry Division at Fort Ord. Now as Karen Chipman pointed out, when you just say, "Fort Ord," you've already dated yourself. There is no Fort Ord. In fact, there is no 7th Infantry Division, but there was a 7th Infantry Division at Fort Ord, California, when I went to my first JAG assignment in 1977. An interesting patch; I think they called it the Bayonet Division. [*showing slide*] See the bayonets there. Some people called it the Black Widow Division because it has the reverse hour glass insignia of a black widow spider if the red were black and the black were red. All the Soldiers referred to it, of course, as the Crushed Beer Can Division. But that was there in 1977, and you may find this hard to believe as Judge Advocates today, but in 1977 Judge Advocates assigned to this infantry division were not issued TA-50 or weapons. We only wore boots and fatigues one day a month, when we ran with the division. That's right; we ran in boots, on pavement. I have the splintered Achilles' tendon to prove that. But the rest of the time we wore our Class Bs, or Class As when we were in court, and we were in court a lot because this was the post-Vietnam Army, still a draft Army, lots of desertion cases, AWOLs, drugs. We were in court a lot. We worked hard then as now. We had excellent lawyers in the JAG Corps in 1977, but our relationship with the rest of the Army was much like that of physicians and chaplains to a certain extent, which is, if you have a problem, Mr. Commander, in our area of technical expertise, then come to our office and see us. Otherwise, maybe we'll see you at the Officers' Club. Suffice to say, it would have never crossed the mind of a brigade commander in the 7th Infantry Division to take a JAG with him on a field training exercise—never crossed their mind to do that. And I assure you it would have been a mind-boggling concept to a Judge Advocate if they had thought they were going to have to go to the field on a field training exercise. Not to say we didn't have great leaders in the JAG Corps in 1977; we did,

General Clausen among them. And we had people in Vietnam as Judge Advocates who practiced the law in some very difficult and, in fact, some very dangerous circumstances. And those of you who know your JAG history know that in prior conflicts, in World War II, for example, and Korea, we had Judge Advocates who actually had combat commands; true leadership as it were in those days. But generally speaking, the requirements for Judge Advocates to be leaders in the same way other branch officers are required to be leaders only began to materialize, at least in my opinion, when Judge Advocates were integrated into the command and control mission orientation of the Army during Operations Desert Shield and Desert Storm, in 1990 and 1991. [*showing slide*] This is the erstwhile VII Corps leadership. Some of you might recognize Colonel, Judge, Denise Lind over there on the left; then-Captain Denise Lind. I brought this picture, though, primarily because many of you may recognize Cal Lewis, the second person there in line between me and Captain Lind, and then-Major Lewis, my Chief of Criminal Law at the time, who is now a professor and associate dean of mine at Texas Tech University School of Law. He asked me to make sure I brought his picture to show to you when I came.

Those other two, just for those of you who may know them, Colonel Retired Charles Trant, my deputy in VII Corps, as deployed, and Lieutenant Colonel Retired George Thompson, my Chief of International and Operational Law. John Altenburg, since he's here I'd have to point out, was one of the first ones to realize that in that legally intensive environment and with CNN cameras over every commander's shoulder to see whether that commander was doing the right thing, it would be important to integrate Judge Advocates into the combat commands. And I think, perhaps, the first person that John sent with a brigade across the line of departure was Colonel Tara Osborn. But that concept of bringing Judge Advocates into the fold really began then, I think. And, of course, you have to understand, these commanders wanted Judge Advocate advice and they understood how important Judge Advocates could be in that legally intensive environment, that ambiguous environment to a certain extent, but they couldn't afford to give space in a command track to, quote, "only a lawyer." They wanted that lawyer, but they wanted a lawyer who was an officer; who could perform the functions that other officers performed; who could stand radio watch in G-3; who could be an officer of the guard; who could do all the other things expected of staff officers in that brigade. And thus, again, John Altenburg being the originator of this, the new mantra of the JAG Corps became after Desert Storm: "Soldiers first; lawyers always." Not second; lawyers always, as

General Altenburg explained to us. But that was a sea change from what Judge Advocates did in the 7th Infantry Division in 1977. And, of course, as all of you know far better than I, no brigade commander would deploy today without a Judge Advocate. And, in fact, under the BCT system, we have embedded Judge Advocate teams into these brigade combat units and that is the way it will be from now until the end of time, but you need to understand that that is a very different thing from the standard mission of Judge Advocates in 1977.

You all know that, of course, but the point is that the leadership requirements and obligations imposed on Judge Advocates today are much different than they were even on us as we started out in Desert Storm. [*showing slide*] And these are all the SJAs who served in Desert Storm. General Altenburg, easily recognized as Lieutenant Colonel Altenburg of the 1st Armored Division, there on the real far right; Colonel John Burton, just below him. And the reason I point out those two in particular and me over on the far left is you'll notice that we are all in green uniforms. Everybody else has on their desert camouflage. Why? We came from Germany to Desert Storm. Foolishly, and remember the Cold War was still going on then, we thought we were already deployed, to Germany. We didn't know that we could be further deployed to the sands of Saudi Arabia, Kuwait, and Iraq, but we were; and I'm not sure whether this—today I'm still not sure whether this was a public relations ploy, a logistical foul-up, or what it was, but the story that I'm going to start telling about why they left us in our green uniforms in the middle of the desert was that it was to strike fear into the hearts of the enemy because we were those Soldiers who had been chosen to face the Russians in Germany. We were the best that the U.S. Army had and, therefore, they should surrender immediately when they saw these green uniforms. I tend to think this is the story the quartermaster started because they simply couldn't get us desert uniforms, but nonetheless, that was the story and that's why we were wearing green uniforms after our arrival from Germany and throughout the war, for that matter.

Now Judge Advocates are totally integrated into everything that the unit does, and you understand that. A lot more is required of you in your role as officers first, lawyers always than was required in 1977. [*showing slide*] The Army you must lead and the Soldiers who are in it—and this is the best picture I could find of a modern courtroom with military people in it—but what I tried to portray here is that everybody's got a computer. Again, this highly technological environment in which

you operate; very different from the "Middle Ages" in 1977, when if there was one form of communication, it was with the commander and his radio operator, if the radio worked; now we have e-mail, and every other kind of linkage; very different. And leading this essentially knowledge-based Corps of lawyers, and for that matter leading our very technologically astute paralegals, presents a lot of different challenges than the days when a commander could simply issue an edict and expect that edict to be followed. True authoritarian power, while it might still create some superficial adherence to the leader's directive, does not equate to leadership of a group who, generally speaking, if asked at a social event what they do will say, "I'm a lawyer," not "I'm in the Army." And this is not because they are not proud of the Army and not proud of their role in the Army, but their self-identification is with their technical profession. They are lawyers.

And I certainly don't pretend to know all the unique attributes of Soldiers in our high-tech, knowledge-based Army, but I had done some study on it, as I mentioned earlier, and I'm going to share a few things that I learned with you in the hope that they may be of some benefit to you, and I really do hope they are. First, this cohort that's bombarded by information from all sides and by all manner of devices is best able to function at peak efficiency when everything makes sense. When they understand the mission, when they understand the vision and the values of the overall organization and they can articulate their role in that organization, they become both motivated and productive. So, again, the old days, you know, "They call 'em orders'cause they's orders.". I said, "Do it, and the reason that you do it is because I said do it." That worked fine, actually, in 1977, in the infantry. It doesn't work today. Communication is so vitally important for today's leader, and I know those of you in this graduate course are having communication drilled into you incessantly and that's a good thing. These bright and knowledgeable young people that you're going to lead—and I know that y'all are young compared to me, but you're going to lead people who are even younger than you—also have apparently a very, finely, exquisitely tuned hypocrisy detector built into them, so it's vitally important that the leader in doing these communications—in providing this stream of information that's necessary to motivate and make productive these folks—the leader must make it clear that he or she follows the same vision and goals, the same criteria, the same organizational values that are expected of those he or she expects to lead. Stated succinctly, a boss says, "Go." A leader says, "Let's go." An oversimplification, perhaps, but a very important difference. And as you stream this information to

this group, you will better facilitate their individual efforts, and facilitation is very important as a leader for this particular group, because they have lots of knowledge and lots of creativity and they are looking for a leader to facilitate what they do.

In addition to facilitating what they do individually, through communication and facilitation you will also develop trust and respect for your leadership role. Respect—not fear, not friendship, not favors granted—but respect for the leader as a person. And no leader is endowed with respect. Let me say that again. No leader is endowed with respect. You have to earn it, and you have to earn it every day if you wish to be an effective leader. And you do it by taking care of people, and by being a role model.

And raising one more timeless trait—it seems especially important to this cohort we're talking about today—a leader must stay positive all the time. Many things can go wrong in an organization; many things can threaten mission accomplishment, personal accomplishment. It's easy to see clouds hanging over an organization, be they resource-based or personnel-based. You all have been around long enough to understand that there are a lot of things that can threaten mission accomplishment and the well-being of an organization. And in this generation, this cohort we're talking about, that has been shielded, to a large extent, from disappointment and from difficulty—this cohort where the substitute on the soccer team that won no games still gets a trophy—they are not quite so good at handling adversity and difficulty. They need a leader with unbounded enthusiasm for the organization and an eternally positive attitude that says to all, "No matter what happens, no matter what happens, we are not only going to survive, we're going to succeed." And that may be the most important attribute that you can have. And this positive attitude, of course, is especially important when you're deployed because then things can not only go wrong for the organization, they can get downright dangerous for the organization. NCOs seem to understand, inherently understand, this need for positive leadership in an organization for that leadership to be able to—for that organization to be able to succeed, for people to be able to stay at the task. NCOs seem to understand that. All of you, I hope, have seen the movie or read the book, or both, *We Were Soldiers Once . . . and Young*,[3] by Lieutenant General Hal Moore, about his time as a battalion commander in the Ia

[3] HAROLD G. MOORE & JOSEPH GALLOWAY, WE WERE SOLDIERS ONCE . . . AND YOUNG: IA DRANG—THE BATTLE THAT CHANGED THE WAR IN VIETNAM (1992).

Drang Valley of Vietnam in the early days of the war, surrounded by a superior force of North Vietnamese, and his sergeant major, Basil Plumley. Then-Lieutenant Colonel Moore, somewhat downhearted, encircled by a superior enemy, says to Sergeant Major Plumley, "Now I know how Custer must have felt." Sergeant Major Plumley says, "It's a bad analogy. You are a much better man than Custer was." That's not really what he said, but translated from "the NCO" to this audience for polite purposes, that's what he meant. He understood that the whole organization was going to fail if that commander didn't stay positive, and he was going to make that commander positive.

I actually had a very similar experience with an NCO myself in Vietnam. [*showing slide*] This is a much younger version of myself as an artillery battery commander. Our battery was up on the DMZ about 1 click from North Vietnam. Every day we took 122-millimeter rocket fire, and every day we had to fire in support of our infantry that was out there engaging North Vietnamese troops on the border. It was important that our people stay to the guns despite this incoming rocket fire. It's a story I haven't told to anyone other than my wife and maybe my kids, but I think it makes this point here. On this particular day, the rocket attack starts. My first sergeant and I start from the command track to the fire direction center track, and all of a sudden, we hear this 122-millimeter rocket coming in screaming; we can tell it's going to be close. We dive into a crater created by a previous rocket. We hit the ground. The rocket explodes. Something cuts my cheek right there. Was it a rock, a piece of shrapnel? I don't know. I say to the first sergeant, "I think I've been hit. I'm going to get a Purple Heart." First sergeant says, "Sir, the men are scared. As long as you're walking around unhurt, as long as they think you can't be hurt, they'll stay to those guns and they'll be okay, so my suggestion to you is that we put a Band-Aid on that and you tell people that you cut yourself shaving if anybody asks." And so that's what I did. And he was right. The men had to stay to those guns despite those incoming rockets, and they needed a positive leader out there. This story is not about me, you understand; it's about that NCO who understood what was really important to that unit that day, and it was that the Soldiers believed that they had a positive role model going around there and that they were going to not only survive, they were going to succeed.

Well, I can't pretend to cover all aspects of leadership, either today, yesterday, times past, times future. I'm sure there are those of you in the audience, I know there are those of you in the audience, who know more

about leadership and could say more about leadership than I can. One thing in my life, I've never gotten mad at people who know more than I do. It's not their fault, you know. And even the best leaders, it's true, sometimes wonder whether they're being followed or whether they're being chased. But, quite seriously, leadership is critical. It's a challenge; a challenge that varies to a certain extent over time, although we have noted, at least in my opinion, that there are certain immutable characteristics of leaders that stand the test of time; that you take care of people. A leader must be a role model, personally and professionally, personally and professionally, that others seek to emulate. And perhaps most important, a leader must always stay positive, and the more dire and difficult the situation facing the organization is, the more positive that leader must be. It happens at Texas Tech. It will happen in your unit. You must stay positive if your organization is going to function effectively under your leadership. And you'll notice that I've used verbs up there. And that's because if you don't hear anything else I say today, hear this: Leadership is action, not a position. It's action, not a position.

And for the final minutes of this presentation,—what I'd like for you to consider is and what I'd like for us to consider together is, why does it matter? Why does it matter? Why is it that what the JAG Corps does is important enough that the issue of leadership for our troops is worthy of our discussion at all? And an answer to that question I will tell you that from my vantage point as a retired Judge Advocate now eight years removed from active duty that what the JAG Corps does, what you do, has never been more important to our Army or our nation. And in a nutshell, what you do is important because the JAG Corps has demonstrated both at home and abroad that Judge Advocates are our nation's foremost advocates for and guardians of the rule of law that is the very bedrock of our democracy, and of all aspiring democracies in this world, for that matter.

Now "rule of law" is a phrase that's thrown around a lot. A lot of people who use it don't know what it means; they don't understand its true meaning for sure. And it is sometimes kind of hard to articulate. I think it's often easier to articulate, for these purposes, what it's not; what the rule of law is not. And what the rule of law is not, of course, is the rule of man; that's its exact opposite. For most of human history, the history that the founders of our nation knew, the ruler and the law were synonymous. The king could not break the law because the king *was* the law; that was the rule of man. This is Charles I. He had sort of an unfortunate ending, as some of you may know. He was beheaded, so,

you know, sometimes it doesn't even work out when you're the king. But nonetheless, he seems like a fairly nice looking fellow here, but when you think about the rule of man in the context of Hitler, and Stalin, and Saddam Hussein, you get a lot better idea of why the rule of man is not the right answer and why the rule of law is. And as Thomas Paine said in his 1776 pamphlet, *Common Sense*,[4] "In America, the law is king," and "the cause of America is, in a great measure," he said, "the cause of all mankind." The world would seek to emulate what we did with our rule of law, and the reason he felt so strongly that that would be true was that the rule of law, he said, is an inherently moral notion. *It's an inherently moral notion*. Now I know all of you know about natural law and this and that and the other, but in this context I think the fact that it's an inherently moral notion means really that the basic values of due process and equal access and all of those things that make up justice would apply to every person; that every person is equal in the eye of the law and that all people are entitled to the liberties and the protections that the law provides. All people, if you stand for the rule of law, okay. And where persons do not have those rights, where they have no access to a fair legal system in which people can address their grievances, as we found out in Somalia in 1992 when I was at Central Command, people will still address their grievances; they'll address them with a rifle if there is no rule of law. And unfortunately in Somalia that is still true today, although I must say on behalf of our Central Command Judge Advocates, we even had a Somalia-American Bar Association started up before the UN got involved and sort of changed mission to a nation building orientation and everything we had begun was thwarted, but we understood that the only way that Somalia could ever exist as a democracy of any kind was to have the rule of law. And since that time, the JAG Corps has adopted as part of its mission when deployed to these failed or failing nation-states the establishment of the rule of law. [*showing slide*] I could have put a lot of pictures of Judge Advocates deployed to a lot of different places, but I happen to like Marc Warren a lot; don't y'all? So I just thought I'd put him up here because he's certainly worked hard, as have many of you, to establish the rule of law as part of the JAG mission in Iraq.

Now as you also know, this is often an unstated JAG mission because the statute says this is a mission for the State Department, the reestablishment of judiciaries, the reestablishment of court systems and

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[4] THOMAS PAINE, COMMON SENSE (1776), *available at* http://publicliterature.org/books/common_sense/xaa.php (last visited Jan. 20, 2009).

legal systems; State Department responsibility by statute. But as all of you have already figured out, I'm sure, when the bullets are flying and the critical work has to be done, the State Department isn't there, so it falls to Judge Advocates to do their part to try to reestablish the rule of law in these legally intensive combat environments in which we find ourselves today. And you've done a wonderful job, you've done a wonderful job, and I tell everyone who asks me, "How is it going do you think?" I tell them you Judge Advocates are doing a wonderful job by ensuring our own forces follow the rule of law, thus enhancing mission accomplishment in so many different ways in these legally intensive environments. And, in fact, assisting the efforts of these countries to rebuild their legal systems will allow the rule of law to flourish. You've done it a lot of places, in the Balkans, in Bosnia, in Iraq, and in Afghanistan. [*showing slide*] You're looking at that slide saying, "What is that?" It's a mirror. I thought that would be appropriate for this particular graduate course, because I know there are few, if any of you, who haven't been deployed at least once to one of these operational theaters in Iraq and Afghanistan, so that's a picture of you and the work that you've done. These are works in progress, to be sure, and perfect solutions may be unreachable, but the positive difference that you have made is undeniable and our world is better for it, and I hope you're all proud of that, because I'm proud of you for it.

Perhaps equally most important, maybe more important in my mind, is the role of Judge Advocates as the foremost guardians and proponents of the rule of law here at home, here in the United States. All of you are aware of the principled stand our JAG leadership took against the initial proposals of the administration concerning the treatment of detainees in Guantanamo Bay. But what you may not fully understand is how that principled stand that the JAG leadership took in support of our Constitution and the rule of law has affected the view of Judge Advocates in the civilian community, the community in which I now live. I cannot really count the number of people who have come up to me knowing I'm a former JAG to tell me how proud they are that our lawyers in uniform stood up for our Constitution. In speeches by federal judges, bar leaders, and others, they've all commented on this courage, this moral courage, to stand up and be counted; to defend the fundamental precepts of our Constitution and the Geneva Conventions and by extrapolation our Soldiers, and I think in the minds of Americans to defend those core values that make our nation the great nation that it is. In simple terms, Judge Advocates knew, early on, before these administration proposals were ever implemented, that these issues

regarding the treatment of these detainees at Guantanamo Bay were not about how those detainees were going to be treated. It wasn't about them at all. It was about us. It was about us and our values. And people have said, "Well, you know, if the Iraqis or the Afghanis or someone captured our Soldiers, they wouldn't treat them as well as we're treating them; they'd murder us." So what? Is the proposition that we seek moral equivalency with terrorists? I don't think so. I think America is better than that. I think our Judge Advocate leadership understood that America is better than that, and of course, as all of you know for certain, the Supreme Court has validated the position that our JAG leadership took in case after case; in *Hamdan v. Rumsfeld*,[5] in *Rasul v. Bush*,[6] in *Boumediene v. Bush*;[7] that last case following the principle that sometimes bad facts make bad law, in my mind, is a bit of a stretch, but perhaps it can be explained by thinking back to what Thomas Paine said; his concept of the rule of law and its application to every person as an inherently moral notion. If you read that case in that context, that very American context, I think it may make more sense to you, even if you don't agree with the law. Again, as our JAG leadership understood, this was really all about us and our values.

However, another aspect of this whole Guantanamo Bay thing that our civilian brethren in the profession should extol, but do not fully understand, is the professionalism with which both former and current Judge Advocates took the decision of our nation's civilian leadership and executed the mission as best they could. They did what they were required to do under our Constitution's great concept of civilian control of the military; a very critical concept under our Constitution, and none of us would have it any other way. But what a wonderful example of the fact that we are the only Army in the world, so far as I know, that takes an oath to a legal document—to support and defend the Constitution of the United States, not the President, not the flag, not a piece of ground, the Constitution of the United States; that's our oath and it's unique in the world, so far as I know. What a great example, that our leadership stood up for the principles of the Constitution, as they saw it, and argued against the administration's initial proposals; and then when the final decision was made, when they had been heard, they accepted the decision of the civilian leadership and they undertook the mission. What a shining example of professionalism; unmatched in our history, in my

[5] 548 U.S. 557 (2006).
[6] 542 U.S. 466 (2004).
[7] 553 U.S. __, 128 S. Ct. 2229 (2008).

opinion. But who knows what opportunities and challenges the future may bring.

In closing I will tell you, regardless of what the future brings to us, one thing you should always remember is that we in our profession, lawyers, should never fear the future, because as lawyers and judges, we shape the future, as we have done since the founding of our country and the adoption of our Constitution. There's no doubt that the best way to predict the future is to create it. And so long as what we create adheres to the concept of the rule of law and the equally important concept of access to justice for all, then I confidently predict that our future in this great country and our democracy despite its inevitable flaws—and no one pretends that this country is perfect or ever will be—but the future of this country, our great democracy, will be great. And as the recent past has shown, and that I have just discussed with you, the values most central to our great nation, the ones that live here in the hearts of Americans, the values most central to our great nation will flourish as long as we have leaders in our profession who wear the uniform of our armed forces; people who believe in and live the concepts of honor and loyalty; people who are selfless in their service; patriots who represent all those really good things about America.

You know we often say, God bless America. God bless America. I will tell you God does bless America, and the best evidence I can give you today are those of you in this room, those of you in this room. I salute you. I thank you for your service. And I do ask that God bless you and those that you are leading.

MIRROR OF THE ARAB WORLD: LEBANON IN CONFLICT[1]

REVIEWED BY MAJOR RONEN SHOR[2]

"*Those who cannot remember the past are condemned to repeat it.*"[3]

I. Introduction

The president of a little Middle-Eastern country was about to finish his term of office. Embroiled in disagreement on a new candidate, feuding clans drove this wounded country into further chaos. A dysfunctional government turned to its national army to maintain order and intervene in the incidents of violence. The military, plagued with the same rivalries as the nation it served, decided to step aside and refrain from entering the political and cultural squabble. As a last resort, the chief of staff was appointed, as a bipartisan and a compromise nominee, to the highest office.

This episode, which occurred in 1958,[4] was repeated exactly fifty years later in the wrecked country of Lebanon, when General Michel Suleiman was elected by the deputies of the parliament as president "[a]fter 18 months of grinding political conflict."[5]

II. Background

Like Sisyphus, the infamous character of Greek mythology, Lebanon was condemned for its sins to spend eternity rolling a big boulder to the top of its mountains (either real or fabled), only to have it roll down again and again. Is it indeed a cursed fate? Sandra Mackey, a veteran journalist who holds a Master's degree in International Affairs from the University of Virginia, rejects this thought in her new book.

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[1] SANDRA MACKEY, MIRROR OF THE ARAB WORLD: LEBANON IN CONFLICT (2008).

[2] Israel Defense Force. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] 1 GEORGE SANTAYANA, THE LIFE OF REASON (Scribner's 2d ed. 1905).

[4] MACKEY, *supra* note 1, at 62–64.

[5] Robert Worth, *Lebanon Elects President to Ease Divide*, N.Y. TIMES, May 26, 2008, *available at* http://www.nytimes.com/2008/05/26/world/middleeast/26lebanon.html.

Mackey, who spent four years in Saudi Arabia, is "fascinated" [6] with the Arab world and writes with a lot of sympathy to the ordinary citizens among those societies. The author tries to use Lebanon to exemplify the current state, and foreseeable future, of the entire Middle-East region.[7] She does so by analyzing its bloody past, widening the public's understanding, and enriching the reader's insight. Has the author succeeded in her complicated mission? A thoughtful study of her work reveals a complex answer.

III. Analysis

Mackey—in the best part of her book—interweaves sights and voices by juxtaposition of fantastic scenes beside fanatic clans, and by the depiction of serenity adjacent to chaos. Thus she takes the reader on a long journey inside the ancient past of the Arab world. With in-depth insights into history, Mackey contends that the seeds of the grim present were planted long ago: during Islam's historic development, and in the basic structure of Arab society.[8]

Lebanon, also known as the Cedars' Land, has four million citizens and consists of a diverse collection of tribes, sects and religions: Christian, Druze, Greek Orthodox, Sunni, and Shia.[9] Every faction has been self-interested,[10] considered itself as the only legitimate power in reign,[11] and never tried to "[find] a common identity."[12] As a result, the country deteriorated into destructive struggles and total chaos, especially during the civil war, which began in 1975 and lasted fifteen years.[13]

Lebanon—as Mackey's convincing thesis reiterates[14]—failed to achieve its basic role as a sovereign state: to serve the general public and

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[6] MACKEY, *supra* note 1, at 268.
[7] *Id.* at 12.
[8] *Id.* at 15–39, 128.
[9] *Id.* at 29.
[10] *Id.* at 37.
[11] *See* BERNARD LEWIS, THE MULTIPLE IDENTITIES OF THE MIDDLE EAST 139 (1998).
[12] MACKEY, *supra* note 1, at 47.
[13] *Id.* at 100.
[14] The author unfolded this theme in detail in another book that she published two years earlier. *See* SANDRA MACKEY, LEBANON: A HOUSE DIVIDED (2006).

strive for the "common good."[15] Despite gaining its independence in 1946, Lebanon struggles against internal and external entities which threaten to further weaken the fragile country.[16] Indeed, the problems of this country are rooted in its clan-divided heritage and dysfunctional government.[17] Since Lebanon is considered the most open society in the Arab world due to its liberal and independent press, it seems that Thomas Jefferson's preference of the media over the government has never been realized so miserably.[18]

Still, some bothersome thoughts surface while reading about the case of Lebanon. The first relates to the passive position that the Lebanese citizens adopted through the never-ending chaos. One wonders why the disenfranchised, humble, and plain people have not risen up against the stalemate situation. Why have they not tried to control their fate, as many other nations did in Eastern Europe in the late 1980s? Given the relatively liberal characteristics of the Lebanese society,[19] this question becomes more intense. Perhaps the answer lies in the different character of the Arab society, which is rooted more in the confessional and the clan than in the state.[20]

Given the tremendous differences among the diverse beliefs and affiliations,[21] another thought arises: Is the Lebanese country entitled to be a unified one? Does any justification exist to preserve the current structure of this fragile country?[22] Detailed discussion of this complex and sensitive subject exceeds this review.

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[15] MACKEY, *supra* note 1, at 100, 253; *id.* at 226 ("rather than representing the collective will of a nation, survived as a fragile shell within which the sects could conduct combat").

[16] *E.g.*, *id.* at 104, 242.

[17] *See supra* notes 9–13 and accompanying text.

[18] "[A]nd were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." THE BEST LETTERS OF THOMAS JEFFERSON 26 (J.G. Hamilton ed., The Riberside Press Cambridge 1926).

[19] MACKEY, *supra* note 1, at 226; *see* BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 347 (Scribner 2003) (1995).

[20] MACKEY, *supra* note 1, at 44, 57–59, 62, 102; *id.* at 130 ("to most Arabs, it is better to live in tyranny than risk chaos"). The author uses the term "confessional group," synonymous with "communal," or sectarian, group. *See, e.g.*, *id.* at 34–35.

[21] *See generally* ALEXANDER YAKOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS: JEWISH NATION-STATE AND HUMAN RIGHTS (2003) (discussing the formal definitions of self-determination).

[22] *E.g.*, MACKEY, *supra* note 1, at 115.

Nevertheless, Lebanon embodies the protagonist in this narrative to serve the main thesis underlying the book. According to Mackey, Lebanon illustrates the same plights that afflict the entire Arab world. The common characteristics are "tribalism defined by family, clan, and confessional; borders often drawn by others; young, fragile national entities frequently created by colonial powers; the bitter contest between the Israeli state and the Palestinians; traditional societies reluctant to change; rule by elites that ignore the common good; [and] collusion and intrusion of foreign powers . . . ."[23]

Indeed, "[f]rom an airliner approaching the eastern Mediterranean,"[24] the theory that the Arab states share a common distress appears persuasive. Yet the advantage and strength of the book also reveals its deficiency. Mackey mentions the "conditions and challenges in the Arab world that vary in intensity from one country to another."[25] However, the journalistic style[26] and the overall vision of the book weaken this argument. Lebanon is unique in its history, culture, and components. Substantive differences distinguish the Lebanese country from its fellow Arab countries. The existence of a few large minorities, especially of Christians who reside next to (and interlock with) an equal Muslim component, distinguishes considerably the cultural and political experience of Lebanon.[27] This unique diversity underpins the worn-out land's main problem, an argument that is intertwined throughout the book.[28]

Comparison of the political situation of Lebanon with those of other Arab states yields a considerable gap. While Lebanon has been

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[23] *Id.* at 253; *id.* at 14 ("the endemic problems of Lebanon are the same as those of other Arab countries").

[24] *Id.* at 253.

[25] *Id.* at 254.

[26] The journalistic style apparently contributed to some factual and historical mistakes. For example, the election in Israel was held in May 1999, instead of December 1999. *Id.* at 179. *Contra* HOWARD SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 1014 (3d ed. 2007). The president of Syria, Hafez Assad, died in 2000, not 2002, an inconsistency in the book itself. MACKEY, *supra* note 1, at 188, 207.

[27] MACKEY, *supra* note 1, at 13, 29, 131, 225; *see* LEWIS, *supra* note 19, at 347; LEWIS, *supra* note 11, at 100.

[28] MACKEY, *supra* note 1, at 68; *see* Michael Lukas, *Studying Lebanon to Unlock Middle East*, S.F. CHRON., Mar. 22, 2008, at E-2, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/22/DDS8V6KL6.DTL&feed=rss.books (reviewing MACKEY, *supra* note 1); Rory Miller, *Mirror View Fails to Reflect Lebanon's Unique Position*, SUNDAY BUS. POST ONLINE, Apr. 19, 2008, http://archives.tc.ie/businesspost/2008/04/27/story32264.asp (reviewing MACKEY, *supra* note 1).

embedded in endless maelstrom and its "government" is a hollow phrase, other states in the Middle East enjoy stability.[29] In fact, the only Arab country in the region who shares a common fate, Iraq, suffers from the same inherent problems, primarily because of large rival minorities.[30]

Mackey portrays a detailed, terrifying chronology and accuses the countries and clans who were involved in the chaos of parochialism. One of those entities is Israel. Its role in Lebanon's turmoil is analyzed here in two ways: first, its responsibility to the Palestinian plight as a direct aftermath of Israel's foundation,[31] and second, its incursions into Lebanon responding to Palestinians' attacks from Lebanon.[32] In fact, the first role provides a background for the second,[33] but also explains the Arabs' anger toward Israel and the West.[34] Unfortunately, Mackey adopts the Arab version of the historical events that preceded Israel's foundation.[35] The author uses the glossary of Israel's enemies, referring to it several times as the "Zionist"[36] country, referring to Tel Aviv as its capital city,[37] and hurling harsh words toward Israel and the Zionist movement.[38]

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[29] President Mubarak has reigned in Egypt for more than twenty-five years. Egypt State Information Service – Resume, http://www.sis.gov.eg/En/Politics/Presidency/President/Resume/040105010000000001.htm (last visited Jan. 13, 2009). The Hashemite dynasty has controlled Jordan for more than half a century. King Abdullah II Official Website, http://www.kingabdullah.jo/main.php?main_page=0&lang_hmka1=1 (last visited Jan. 13, 2009). Assad's family has been responsible for Syria for more than thirty years. MACKEY, *supra* note 1, at 188, 207.

[30] MACKEY, *supra* note 1, at 98–99.

[31] *Id.* at 72–74.

[32] *Id.* at 187, 190.

[33] *Id.* at 96, 186.

[34] *E.g. id.* at 12, 73–74, 187.

[35] *See* MACKEY, *supra* note 1, at 76–82. *But see* YACOBSON & RUBINSTEIN, *supra* note 21. *See generally* SACHAR, *supra* note 26, at chs. I-XIII.

[36] *E.g.*, MACKEY, *supra* note 1, at 202, 204. Instead of the proper usage, the Arabs used to refer to Israel as the Zionist state, in order to avoid "recognizing" its existence, and to remind others of its ideologist roots. *See* Khaled Meshaal, *We Shall Never Recognize*, LA TIMES, Feb. 1, 2006, *available at* http://articles.latimes.com/2006/feb/01/opinion/oe-meshal1; Jamaat-e-Islami Pakistan, *Qazi Warns Against Recognizing Zionist State of Israel*, http://jamaat.org/news/2005/may/20/1001.html (last visited Jan. 17, 2009).

[37] *E.g.*, MACKEY, *supra* note 1, at 169, 174, 187. The capital of Israel is Jerusalem. *E.g.*, CIA–The World Factbook–Israel, https://www.cia.gov/library/publications/the-world-factbook/geos/is.html (last visited Jan. 13, 2009).

[38] *E.g.*, MACKEY, *supra* note 1, at 74 ("Originally dispossessed by Zionism"); *id.* at 79 ("the Zionist interlopers"); *id.* at 129 ("when the largely Western Zionists wrest Palestine from its Arab inhabitants"); *id.* at 170 ("merciless Israeli siege"); *id. at* 186 ("seeds of Zionism shipped from the West"); *id.* at 201 ("Israel's sledgehammer tactics"); *id.* at 243 ("Israel . . . returned to a policy of brute force employed for decades against the enemies

By ignoring basic facts and by omitting the background for Israel's incursions inside Lebanon, Mackey accuses "[t]he Jewish nation of Israel . . . in the dock of international justice."[39] The book hardly expresses compassion for the hurt, fatalities, and damage to the Israeli society. Mackey scarcely mentions those facts at all. For instance, although she indicates the number of rockets that Hezbollah fired into the northern Galilee in 1996, Mackey forgets to mention Israel's civilian casualties and damages.[40] The author also overlooks more than thirty Israeli civilians murdered by terrorists who originated from Lebanon, an assault that led to Litany Operation in 1978.[41] Nor does she indicate the endless terrorist activities before the 1982 Israeli invasion to Lebanon.[42] Mackey's hostile approach to Israel is tainted with bias and derived from a political point of view.[43] Therefore, it seems difficult to attribute full credibility to the book's background of the Israel-Arab conflict, and consequently sheds a different light on the derived conclusions.

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of the Jewish state"). On the other hand, Palestinians, who perpetrated terrorist activities before the Israeli occupation of 1967, are called "freedom fighter[s]." *Id.* at 88. The reader also cannot understand where is exactly the "Palestine" that is the subject of those activities; either it consists solely of the West Bank and Gaza Strip, or it also includes Israel *Id.* at 87, 89–90.

[39] ALAN DERSHOWITZ, THE CASE FOR ISRAEL 1 (2003).

[40] MACKEY, *supra* note 1, at 178. *Contra* SACHAR, *supra* note 26, at 1011 ("salvos of homemade 'Qassem' rockets wounded thirty-six civilians in Israel's frontier communities").

[41] MACKEY, *supra* note 1, at 169, 174. *Contra* SACHAR, *supra* note 26, at 899; BERNARD REICH, A BRIEF HISTORY OF ISRAEL 123 (Checkmark 2008) (2005).

[42] MACKEY, *supra* note 1, at 169. *Contra* SACHAR, *supra* note 26, at 899 ("[t]he guerrillas in turn lashed back with a devastating rocket barrage against Naharia . . . and its surroundings"); *id.* at 902 ("'Operation Peace for the Galilee' . . . thereby alleviating the danger of guerrilla violence against Israel's northern communities"); REICH, *supra* note 41, at 142.

[43] *See* Interview by Jonathan Mok with Sandra Mackey (June 26, 2008), http://globalcomment.com/2008/the-trouble-in-lebanon-interview-with-sandra-mackey. Mackey said:

> [H]ow much American policy is driven by the needs and desires of Israel. A powerful segment of the Israeli lobby in American politics is right wing Christians who see the state of Israel as God's Biblical promise to the Jews . . . . This theology . . . has nonetheless profoundly influenced American Policy for the entire Arab world since right wing Christians organized themselves into a political machine in the late 1970's.

Id.; *see also* MACKEY, *supra* note 1, at 194, 264.

Regardless of the language and the attitude, the same weakened argument, as analyzed above, also applies here. Mackey asserts that "Israel plays a central role in the tensions between the Arabs and the West."[44] Indeed, the Arab resentment against Israel is a result of Israel's mere existence as a non-Muslim state inside the Arab sphere of influence.[45] However, the strife among the clans in Lebanon stands on its own. The conflicts preceded the establishment of the Jewish state, and are independent—most of the time even irrelevant—to Israel's deeds[46] or even to its occupation of Lebanese territory.[47] Mackey herself reiterates that those internal clashes are the main cause of the menace in this tormented country.[48] Hence, one cannot conclude that Israel should be held responsible for Lebanon's chaos unless one charges Israel's "sin" as being a Jewish state in the Arab region, and consequently a source of the Palestinian plight.

Mackey further charges that the American involvement and policy in Lebanon has also contributed to the chaos.[49] However, the American military has not been deployed there in almost twenty-five years.[50] Mackey's accusation is further weakened because of "the confrontation between Islam and the West, which dates back to the Crusades according to Islamic radicals."[51] Additionally, France's primary and substantial role in Lebanon was ignored. Although Mackey discusses France's involvement in Lebanon in the early twentieth century, she ignores France's role in the last decades.[52]

Another problem with the book lies in its documentation in general and the lack of precise references in particular. The book has no full and

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[44] MACKEY, *supra* note 1, at 264.
[45] *Id.* at 186–87; *see* YAKOBSON & RUBINSTEIN, *supra* note 21, at 64–79.
[46] MACKEY, *supra* note 1, at 36 (the civil strife of 1841–1861), 53 (the crisis of 1932), 160 (clashes in 1919), 173 (struggle inside the Shia), 181 ("The centuries-old tensions pitting the orthodox against the dissenters of Islam . . . .").
[47] *Id.* at 237, 240, 245.
[48] *Id.* at 154, 181.
[49] Mackey contends that the American policy in Lebanon intends, among other reasons, to "protect the Zionist dream." *Id.* at 11, 43, 186, 189.
[50] *Id.* at 198.
[51] *Id.* at 220.
[52] *E.g.*, Daniel Ben Simon, *Lebanon Policy / France's Lost Honor* , HAARETZ.COM, Dec. 31, 2007, http://www.haaretz.com/hasen/spages/939879.html; Nadia Abou el-Magd, *Kouchner Leaves Lebanon Without Breakthroughs, Says He Will Return*, INT'L HERALD TRIB., July 29, 2007, *available at* http://www.iht.com/articles/ap/2007/07/29/africa/ME-GEN-Lebanon-France.php.

detailed list of sources referred to in the text.[53] Thus, it prevents the ability to check the sources and to get an in-depth understanding of the subject. Furthermore, a glance at the selected bibliography reveals a very selective one indeed,[54] not to mention these are secondary sources. This kind of documentation weakens the author's factual basis[55] and inevitably raises doubts about the author's ability to present an impartial and accurate description of the subjects.

The problematic nature is further exacerbated by comparing Mackey's book to her previous one.[56] Browsing the earlier book reveals that sentences and paragraphs have been repeated in Mackey's new book.[57] Perhaps, one can contend that Mackey's primary premise—Lebanon as "a case study of the Arab world"[58]—changes from one book (or version) to the other. Nevertheless, given the weakness of this mere premise, the outcome becomes bothersome.

IV. Conclusion

In her afterword, Mackey contends that "[i]f East and West are to survive and prosper in a world in which they can no longer remain separated . . . then understanding must come from both sides. This book has been an attempt to begin that process in the West."[59] Indeed, the book is a good introduction to the complexity of Lebanon. Thus, I recommend it for U.S. military members, especially those in the high echelon, so they can understand the hazards that lie in a possible future intervention in Lebanon. However, this recommendation comes with a caveat. Mackey places the mirror in front of Western societies,[60] instead of first and foremost in front of the Lebanese society and the Arab countries. She also blames Israel as one of the main culprits for the

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[53] MACKEY, *supra* note 1, at 4.
[54] There is only one Israeli author in the bibliography list. *Id.* at 269–71 (listing Itamar Rabinovich as the only Israeli author).
[55] E.g., the Zionist movement and the modern history of the Jewish state. *See supra* note 35 and accompanying text.
[56] Also reprinted, and originally published in 1989 under the title *Lebanon: Death of a Nation.* MACKEY, *supra* note 14, at vii.
[57] *Compare id.* at 142–43 *with* MACKEY, *supra* note 1, at 90; MACKEY, *supra* note 14, at 154, 156 *with* MACKEY, *supra* note 1, at 103.
[58] MACKEY, *supra* note 1, at 3.
[59] *Id.* at 255–56.
[60] To be precise, the "thinkers" among Western societies, as Mackey divides the world. *Id.* at 265.

turmoil in Lebanon. Thus, the "nonspecialist reader"[61] will receive an inaccurate picture of the reality. Consequently and unfortunately, Mackey misses an important target and does not enhance the understanding of the issues at hand.

This scratched mirror should serve both sides to mutually enrich themselves, to gain a realistic picture of their weakness and wickedness, and to appraise their merits and demerits. But in crux, this mirror should be used as a warning sign toward the looming future.

[61] *Id.* at 3.

THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS[1]

REVIEWED BY MAJOR KEVIN A. MCCARTHY[2]

He who does battle with monsters needs to watch out lest he in the process becomes a monster himself. And if you stare too long into the abyss, the abyss will stare right back at you.[3]

I. Introduction

On 11 September 2001, four commercial airliners, hijacked by Islamic terrorists, crashed into the World Trade Center in New York, the Pentagon in Washington, D.C., and a field in Pennsylvania, killing 2973 people.[4] Vice President Dick Cheney, who had spent a good portion of his political life preparing for national disasters,[5] sprang into action and took control of the Executive branch.[6] Vice President Cheney took the reins of government and fought for the next seven years to steadily increase the scope of the Executive branch's powers.

The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals is the culmination of Jane Mayer's long-term investigation.[7] It chronicles the actions and decisions by a myriad of high level politicians, lawyers, and bureaucrats in the Bush Administration that pushed the envelope of American morality and Executive power by justifying and authorizing controversial techniques for interrogation, exemptions from the protections of the Geneva Conventions, and surveillance of American citizens. Mayer also tells the story of a small group of lawyers and law enforcement agents who stood up to the administration in an attempt to prevent the use of torture and

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[1] JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

[2] U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] MAYER, *supra* note 1, at 261 (quoting Friedrich Nietzsche).

[4] U.S. Deaths in Iraq, War on Terror Surpass 9/11 Toll, CNN.com, http://edition.cnn.com /2006/WORLD/meast/09/03/death.toll/ (last visited Jan. 20, 2009) (number does not include terrorists).

[5] MAYER, *supra* note 1, at 1–2.

[6] *Id.*

[7] *Id.* at 370. Jane Mayer wrote a series of thirteen articles for *The New Yorker* magazine since 9/11 relating to the Bush Administration's actions during the war on terror. *Id.*

the degradation of civil and human rights.

Mayer's central thesis is that members of the Bush Administration, primarily Vice President Dick Cheney and his legal counsel David Addington,[8] used the political climate after 9/11 to radically advance their long-time agenda of expanding the powers of the Executive branch.[9] Mayer examines the methods by which Vice President Cheney and his colleagues expanded their powers as well as the effects their actions had on suspected terrorists, members of the government that opposed them, and the reputation of America in the international arena.

Mayer presents the reader with a catalogue of shocking behind-the-scenes political machinations culled from her interviews with sources close to the administration. However, the truly gripping and morally engaging aspects of the book are the accounts of the lives affected by the administration's policies of "enhanced interrogation,"[10] indefinite detention, rendition, military commissions, and political assassinations.

II. The Expansion of the Office of the Vice President

Historically, the office of the Vice President has been relatively unimportant.[11] While the office has evolved, there are still notable examples from modern history of the relative unimportance of the office of the Vice President.[12] From the beginning of the Bush Administration it was clear that this would change. President Bush relied heavily upon Vice President Cheney in national security matters from the beginning.[13]

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[8] Addington has been referred to as "the most powerful man you've never heard of." Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REPORT, May 21, 2006, at 32.

[9] MAYER, *supra* note 1, at 7.

[10] *Id.* at 151.

[11] There are only two duties of the Vice President enumerated in the U.S. Constitution. The first is to serve as the President of the Senate, casting a vote only in the case of a tie. U.S. CONST. art. I, § 3. The second is to collect the electoral ballots from the states and open them "in the Presence of the Senate and the House of Representatives." *Id.* art. II, § 1.

[12] *See, e.g.*, This Day in History, 1945, *Truman is Briefed on Manhattan Project*, http://www.history.com/this-day-in-history.do?action=Article&id=505 (last visited Jan. 20, 2009) (Harry S. Truman never informed of the Manhattan Project while serving as Vice President); U.S. Senate: Art and History Home, http://www.senate.gov/artand history/history/common/generic/VP_Dan_Quayle.htm (last visited Jan. 20, 2009) (Vice President Quayle was told by President George H. W. Bush that he should "travel a lot to get some seasoning.").

[13] MAYER, *supra* note 1, at 63.

Over the past seven years, many have come to view Cheney as "the most powerful vice president in U.S. history."[14]

Much of Vice President Cheney's power was derived from his meticulous attention to detail. One witness to many of the presidential daily briefings prior to 9/11 said that "'Cheney was the detail guy. . . . He [was] the one senior guy who had his hands on the steering wheel.'"[15] This same witness described President Bush at the same meetings as "distracted."[16]

As the Chief of Staff for President Ford, Vice President Cheney had a unique vantage point to "witness[] the marginalization of Vice President Nelson Rockefeller."[17] He concluded that the key to power was information, and he was able to manipulate decision-making by limiting the information before the President received it.[18] Vice President Cheney ensured that he was the conduit for all information, and "almost invariably had the final word with the President."[19]

Vice President Cheney also surrounded himself with a contingent of lawyers who shared his beliefs. Chief among them was David Addington. Addington had served as Vice President Cheney's special assistant when he was the Secretary of Defense, and then as the Pentagon's General Counsel during which time he became known by many as "Cheney's gatekeeper."[20] During the transition between the Clinton and Bush Administrations, Addington worked closely with Vice President Cheney in an effort to set up a strong vice presidency.[21]

III. Expansion of Executive Power

Both the Vice President and Addington had long believed that the power of the Executive branch should be expanded and that the

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[14] Robert Kuttner, Op-Ed., *Cheney's Unprecedented Power*, BOSTON GLOBE. Feb. 25, 2004, at A19, *available at* http://www.boston.com/news/glober/editiorial_opinion/oped/articles/2004/02/25/cheneys_unprecedented_power.
[15] MAYER, *supra* note 1, at 27.
[16] *Id.*
[17] *Id.* at 62.
[18] *Id*. at 63.
[19] *Id*. Similarly, David Addington generally had the last word on any paperwork that was to be presented to the President. *Id.*
[20] *Id*. at 61.
[21] *Id*. at 62.

legislative branch's ability to perform checks on the Executive should be curtailed.[22] The terrorist attacks of 9/11 provided the opportunity that they had been awaiting for decades, and they did not hesitate to seize it. Within hours of the attacks, the Vice President and Addington were engaged in strategy sessions to determine how far they could expand the President's power.[23] By the end of the day, they had enlisted two more like-minded attorneys: Timothy Flanigan from the White House Counsel's Office and John Yoo from the Justice Department's Office of Legal Counsel.[24] Yoo had been a law professor specializing in the area of presidential power during war and believed that the President's powers were like "that of British Kings."[25] These men, along with White House Counsel Alberto Gonzalez and Pentagon General Counsel Jim Haynes, began referring to themselves as "The War Council,"[26] and played an astounding role in the expansion of the powers of the President through their legal interpretations.

On 14 September 2001, Senator Trent Lott approached Senate Majority Leader Tom Daschle and, at the behest of the White House Counsel, requested an amendment to the pending congressional authorization of presidential war powers, adding "in the United States" to the proposed area of operations.[27] This amendment would presumably allow the President to prosecute the war on terror inside the United States, effectively denying American citizens their civil rights.[28] Senator Daschle refused the request and the limited authorization was passed.[29] Within a week, the President received a secret opinion from the Justice Department stating that the President had nearly unlimited authority to prosecute the war on terror, unfettered by Congress.[30] This was the first step in a slippery legal slope that would expand the President's powers while stripping individuals of their civil rights and protections from international conventions.

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[22] *See id*. at 7, 51, 55–56, 58–61.
[23] *Id*. at 49.
[24] *Id*. at 50.
[25] *Id*. at 50–51.
[26] *Id*. at 66. Interestingly, no member of the "War Council" had ever served in the military.
[27] *Id*. at 44–45.
[28] *Id*. at 45.
[29] *Id*. The limited authorization passed unanimously in the Senate and by a vote of 420 to 1 in the House. *Id.*
[30] *Id*. at 46–47. The opinion implied that the President had the authority to override the laws specifically imposed by Congress to regulate his powers. *Id.*

On 25 September 2001, the Justice Department Office of Legal Counsel issued another secret memorandum entitled "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them."[31] This opinion, authored by John Yoo, further expanded the powers of the President to take action—including preemptive action—against any terrorist groups regardless of any link to al Qaeda. The memorandum also concluded that Congress had, "no right at all to interfere with the President's response to terrorist threats."[32] The practical effect of this memorandum was significant in that the government is bound by legal interpretations from the Office of Legal Counsel, and anyone who follows the opinion in good faith is virtually immune to prosecution.[33]

The War Council worked in secrecy, regularly refusing to provide copies of their legal analysis to the agencies tasked with carrying out their programs.[34] On several occasions, the War Council excluded those with regulatory authority if they believed that their legal opinions would be challenged.[35] By avoiding legal opposition and controlling the information presented to the President, Vice President Cheney and his War Council steered the country headlong into confronting one of the most contentious moral questions of our time: How far can a President go to keep his people safe?

IV. Interrogations, Torture, and Criminal Justice

> When you capture a suspected Al Qaeda terrorist, what do you do with him? You can't kill him once you have him in custody and he's been captured. That would be a violation of international law. You can't let him go, because he's far too dangerous and potentially far too valuable as a source of intelligence. And . . . you can't,

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[31] *Id*. at 64.

[32] *Id*. at 64–65. One of the authorities cited by Yoo in his memorandum was Yoo himself. *Id.*

[33] *Id*. at 65. Jack Goldsmith, 2003 head of the Office of Legal Counsel, referred to these opinions as "golden shields" and "get-out-of-jail-free cards". *Id.*

[34] *See, e.g., id.* at 68–69 (noting that Addington refused to show the legal justification for a National Security Agency eavesdropping program to the agency that was required to run it).

[35] *See, e.g., id.* at 69–70 (noting that the War Council excluded Richard Shiffrin, the Pentagon lawyer in charge of National Security Agency oversight, because he would likely have found the program to be illegal).

> in many cases, try him in the ordinary civilian court system.[36]

This is the quandary that led the Bush Administration to authorize disturbing and morally reprehensible treatment of suspected terrorists and that eventually led to the establishment of the military commissions. Following 9/11, the administration was more intent on preventing another attack than prosecuting those responsible for the attacks.[37] In their view, constitutional rights and criminal prosecutions were not as important as extracting information that could prevent a second attack.[38] It is with this mindset that the administration decided to abrogate the rights of anyone that they deemed a terror suspect. The speed, and apparent lack of deliberation,[39] with which they came to the decision to implement renditions, enhanced interrogation techniques, and ultimately military commissions,[40] is disturbing.

Mayer cites numerous examples of the administration's apparent preference for the most aggressive approach. Despite repeated anecdotal evidence that traditional, non-coercive interrogations yield useful information,[41] the administration continually insisted that interrogators need to be free to use "enhanced" methods[42] to obtain intelligence even though they have repeatedly produced unreliable results.[43] The reader is left pondering why the administration insists on such harsh tactics when

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[36] *Id*. at 79.

[37] *Id*. at 34 (Attorney General John Ashcroft told the Director of the FBI that "criminal trials were beside the point. All that mattered was stopping the next attack.").

[38] *Id.* at 33.

[39] *Id*. at 34 (discussing the lack of any high-level discussions before discarding the traditional criminal justice system for those suspected of terrorism).

[40] *Id*. at 86. President Bush signed the order establishing military commissions within hours of seeing it for the first time. *Id.*

[41] *See, e.g.*, *id*. at 104–07 (non-coercive interrogation of Ibn al-Shaykh al-Libi resulting in information about an Al Qaeda plot in its final stages); *id.* at 116 (information obtained through a non-coercive approach resulting in the conviction of four Al Qaeda operatives related to the 1998 embassy bombings).

[42] "Enhanced interrogation" is the euphemism used by the Bush administration to describe any number of physically or psychologically coercive methods for procuring information from detainees. This could include anything from sleep deprivation to waterboarding. *See generally id.* at 132–335.

[43] *See, e.g.*, *id.* at 118–19 (FBI threats to Abdallah Higazy that his family would be tortured in Egypt leading to false confession); *id*. at 129–34 (Maher Arar signing several false confessions after being renditioned and subjected to torture for more than a year); *id*. at 134 (Ibn al-Shaykh al-Libi coerced into making a false confession that was used to justify war in Iraq.); *id*. at 277–78 (Khalid Sheikh Mohammed recanting confessions given after being waterboarded).

lesser means remain available. Mayer seems to subscribe to the theory that the administration's panic and hasty reaction to the terrorist threat backed them into a corner from which they could not escape. However, she offers no concrete analysis of why their reaction was to quickly authorize such extreme methods of interrogation and treatment. Nor does she address whether the use of torture would ever be acceptable. Though an extremely small minority is willing to vocalize it, some commentators posit that the torture of a potentially innocent suspect is no worse than the near certainty of killing the innocent in conventional war-time bombings.[44] This issue is left unaddressed.

The Dark Side contains a great amount of graphic detail regarding the treatment of suspected terrorists. Mayer delves deeply into the controversial practices authorized as "enhanced interrogation methods."[45] What is even more disturbing than the descriptions of torture is that several of the individuals who were renditioned and exposed to enhanced interrogation techniques were innocent.[46] Mayer presents the stories of individuals that lived through renditions in their own words. One such personal account is that of Khaled el-Masri, a German national held by the CIA in a secret prison in Afghanistan for 149 days during which time he was stripped, placed in a cold cell with no blanket, and subjected to physical interrogation, enemas, and segregation.[47] Reading these accounts makes it almost impossible to understand how the administration can claim that "enhanced interrogation methods" are not torture.[48]

Mayer makes it clear that not everyone in the Bush Administration was in favor of expanding the President's power at the cost of civil and

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[44] Sam Harris, *In Defense of Torture*, Oct. 17, 2005, http://www.huffingtonpost.com/sam-harris/in-defense-of-torture_b_8993.html (arguing that the harm of torturing one innocent suspect is far less egregious than the inevitable suffering and deaths of multiple innocent women and children caused by the methods of modern warfare, specifically aerial bombing).

[45] *See generally* MAYER, *supra* note 1, at 142–335 (discussing the expanded interrogation techniques approved by the administration).

[46] *See, e.g.*, *id.* at 129–34 (regarding the rendition of Maher Arar, an innocent man imprisoned and interrogated for more than a year based on the forced confessions of individuals tortured in Syria); *id.* at 282–87 (regarding Khaled el-Masri, a German national imprisoned and subjected to harsh interrogation by the CIA, even after high level CIA officials had reason to believe he was mistakenly imprisoned).

[47] *Id.* at 282–87.

[48] *See id.* at 287 (quoting el-Masri: "Whoever says that is not torture should just have it done to them.").

human rights. Several individuals attempted to prevent the administration from violating the basic American principles prohibiting torture.[49] Many of these individuals did so at severe risk to their careers,[50] but they did so because they believed in civil rights and the prohibition of torture.

Mayer further acknowledges that members of the administration were put in a difficult position following 9/11,[51] and does not attempt to depict them as monsters. However, she is clearly critical of their willingness to strip away human rights protection so easily in secret[52] while denying their actions in public.[53] Additionally, she does not paint an altogether pleasant picture of President Bush's leadership. In general, she portrays the President as an individual who follows the lead of those around him.[54] Mayer clearly believes that the real power in the White House was consolidated among Cheney and his War Council.

V. Conclusion

While *The Dark Side* is an extremely well-researched and engaging read, the writing lacks a certain coherence. This is most likely due to the fact that it is essentially an expanded compilation of the investigative reports that the author has written for *The New Yorker* over the past six years.[55] However, the breadth of the subject matter, the shocking descriptions of the hardships endured by often innocent people, and the intriguing insight into the inner workings of the Bush Administration make this book an exceptional resource for those interested in

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[49] *Id.* at 88 (discussing the vocal opposition offered by the service Judge Advocate Generals, including U.S. Army Major General Romig).

[50] *See, e.g., id.* at 95–97 (discussing Jesselyn Radack, an attorney at the Professional Responsibility Advisory Office at the Department of Justice who was driven out of her job after she opposed the custodial interrogation of John Walker Lindh without an attorney present). Ms. Radack further claims that her new firm was told by the DoJ that she was the target of a criminal leak investigation and that she was placed on a "no-fly" list. *Id.*

[51] *Id*. at 9.

[52] *See, e.g., id.* at 151–57, 229–30 (discussing Yoo's justification of the use of enhanced interrogation methods).

[53] *See, e.g., id.* at 151–57 (discussing the Bush Administration's redefinition of torture and denial of torture in public).

[54] *See, e.g., id.* at 324 (discussing an incident where Condoleezza Rice was able to get a private audience and convince the President to back down on the War Council's effort to reverse the Supreme Court's ruling in Hamdan v. Rumsfeld, 548 U.S. 557 (2006)).

[55] *See supra* note 7.

international law and human rights, as well as the inner workings of the Executive branch.

PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ AND FUTURE CONFLICTS[1]

REVIEWED BY MAJOR STEVE BERLIN[2]

In *Private Sector, Public Wars*, Dr. James Jay Carafano provides an in-depth look at the role that private sector contractors play in contemporary military operations and offers insightful recommendations to better integrate contractors into future operations.[3] Although Carafano is a proponent of contractors, he supports his thoughts with historical data and well-thought argument, not with mere rhetoric.[4] His book will aid reasoned discussion on government policy when read in conjunction with other recently published books, most of which criticize the use of contractors.[5] Carafano's book is a must-read for any military professional, concerned citizen, or government official interested in the future of America's military operations.

This review addresses Carafano's thesis that contractors play an integral and helpful role on the battlefield, that contractors could have been employed better in Iraq and Afghanistan, and that the U.S. government can better integrate contractors into future operations.[6] Finally, this review addresses how Judge Advocates can use this book to work with contractors in contingency operations.

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[1] JAMES JAY CARAFANO, PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ AND FUTURE CONFLICTS (2008).

[2] U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] CARAFANO, *supra* note 1.

[4] *Id.*

[5] *See* JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY (2007) (criticizing the use of the private security contractor); *see also* CARTER ANDRESS, CONTRACTOR COMBATANTS (2007) (criticizing Custer Battles's contracts from a first-person perspective as a former Custer Battles employee); T. CHRISTIAN MILLER, BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ (2006) (criticizing the contracting procedures and policies).

[6] CARAFANO, *supra* note 1, at 12.

I. The Value of Contractors on the Battlefield

In developing his thesis, Carafano begins by examining the role that the private sector has played in conflict since the Middle Ages.[7] He feels so strongly about the contractors' role on the battlefield that he bristles when the military says its job "is to fight and win the nation's wars."[8] He argues that it is the nation's job instead, and that the "military is the nation's bridge between its aspirations in war and the reality of war."[9] The government shoulders the responsibility for oversight of war, whether fought by Soldiers or civilians.[10] He posits, "Washington can outsource every requirement for war but the genius for war, for which the nation relies on its armed forces."[11]

One can argue that Carafano's extreme use of contractors would be a breach of international law.[12] His assertion that "[c]ontractors are in combat because they are an integral part of modern military power" is much more widely accepted, however.[13] Recently, the Department of Defense (DoD) published its Quadrennial Defense Review. [14] In its report, the committee stressed that "[t]he Total Force of active and reserve military, civilian, and contractor personnel must continue to develop the best mix of people equipped with the right skills needed by the Combatant Commanders."[15] Recognizing that contractors are an accepted part of DoD's strategy, practitioners should not argue whether the private sector belongs on the battlefield, but rather how to best integrate it.

Governments contract with large scale companies because these companies have the capacity to deliver the requested product.[16]

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[7] *Id.* at 14–39.
[8] *Id.* at 176.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See generally* JENNIFER ELSEA & NINA SERAFINO, CONG. RESEARCH SERV. REPORT, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, RL 32419, at CRS 13-15 (2007) [hereinafter CRS REPORT] (discussing the international law implications of contractors serving as combatants).
[13] CARAFANO, *supra* note 1, at 68.
[14] QUADRENNIAL DEF. REVIEW COMM., QUADRENNIAL DEFENSE REVIEW REPORT 4 (6 Feb. 2006), *available at* http://www.defenselink.mil/qdr/report/Report20060203.pdf.
[15] *Id.*
[16] CARAFANO, *supra* note 1, at 120.

International companies like KBR[17] have the technology, capital, and resources to deliver its product anywhere in the world in a short period of time.[18] As Carafano notes, "[m]any of the goods and services that the Pentagon demands from its contractors are the same things the private sector demands from the private sector—just-in-time delivery of common goods and services, everything from food to fuel."[19] The Congressional Research Service agreed in a 2007, study stating that "[w]ithout private contractors, the U.S. military would not have sufficient capabilities to carry out an operation on the scale of Iraq . . . ."[20] Through its developed capacity, the private sector is a powerful tool that is integral to the U.S. military's power projection.

Carafano also argues that the private sector distinguishes itself from the public sector because it is "bred for efficiency."[21] He attributes the capitalist model as the catalyst for efficiency.[22] The military learned the lesson in Vietnam to tap into the private sector and save the military's resources for combat power.[23]

Fellow scholar Peter Singer refutes this logic in his book *Corporate Warriors*.[24] Singer argues that few private companies can deliver large scale contracts, thus reducing competition.[25] Additionally, Singer argues that monitoring contract performance raises their costs.[26] In turn, adding contractors to the battlefield blurs the chain of command and diffuses responsibility to the contracting agency.[27]

Singer adds a dimension to the efficiency argument. Financial cost alone is not dispositive of efficiency. Instead, one must consider the non-economic costs of factors such as those cited by Singer. Nevertheless, contractors deliver significant support to the U.S. government's operations and are part of the government's operations for

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[17] KBR History, http://www.kbr.com/corporate/kbr_history/index.aspx (KBR, Inc. was formerly known as Kellogg Brown & Root, Inc.).
[18] CARAFANO, *supra* note 1, at 120–21.
[19] *Id.* at 122.
[20] CRS REPORT, *supra* note 12, at 13–15.
[21] CARAFANO, *supra* note 1, at 37.
[22] *Id.*
[23] *Id.* at 43.
[24] PETER SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003).
[25] *Id.* at 152–53.
[26] *Id.*
[27] *Id.*

the foreseeable future.

Contractors bring an additional non-economic benefit to a conflict: economic revival.[28] A large benefit of contractors in combat is that they "promote economic activity in the countries, which helps kindle the postwar revival of private business."[29] At one point, KBR was the largest single employer in Kosovo.[30] As such, its subcontracts boosted new companies, thus enhancing the economy and facilitating stability.[31] This concept has gained significant traction in counterinsurgency operations by using "money as a weapon system."[32]

II. Concerns With Contractors on the Battlefield

Carafano discusses the contempt that many Americans have towards contractors on the battlefield.[33] Much of the information the public receives is through the media.[34] In turn, the media shapes public perception.[35] In the absence of scholarly information on contractors, the public turns to Hollywood.[36] Hollywood is not a good medium to display an unbiased look into contractors in war, however.[37] Carafano criticizes documentary makers like Michael Moore for having "little concern that they might be held accountable for the veracity of their research. Ticket sales, rather than quality of scholarship, stand as the most important measure of a film's long-term influence."[38] Carafano also dismisses press coverage as only delivering small pieces of information without examining all the facts, because of the "episodic nature of the media business."[39] Indeed, he argues, "[i]n today's 24–

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[28] CARAFANO, *supra* note 1, at 46.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* COMMANDER'S COUNTERINSURGENCY GUIDANCE, MULTI-NATIONAL FORCE–IRAQ (21 June 2008), *available at* http://www.mnf-iraq.com/images/CGs_Messages/080621_coin_%20guidance.pdf (encouraging subordinate units to "[e]mploy money as a weapon system" and "[e]nsure contracting activities support the security effort, employing locals wherever possible").
[33] CARAFANO, *supra* note 1, at 136–59.
[34] *Id.*
[35] *Id.* at 143.
[36] *Id.*
[37] *Id.* at 143–47.
[38] *Id.* at 147.
[39] *Id.* at 154.

hour news cycle, . . . even the best investigative reporting does not provide the kind of sustained attention to an issue that is necessary to really inform a public policy debate."[40]

Perhaps the most contentious topic is contractor accountability. Contractors may not adequately fulfill their obligations or they may commit misconduct. Although contractors are not members of the U.S. armed forces, America cannot divest itself of contractor misconduct.[41] Examples include contract interrogators who were involved in the Abu Ghraib abuse scandal and four Blackwater employees who were killed in Fallujah.[42] Likewise, contractors using excessive force, such as forcing civilian cars off the road or shooting at civilians, hampers American efforts to secure a post-war Iraq.[43]

Carafano argues that profit and economic efficiency will encourage contractors to deliver a superior product.[44] He argues that contractors wish to avoid scandals because it interferes with their ability to make profits.[45] Yet, Singer's proposition that there is limited competition for large scale contracts cuts against Carafano's argument.[46] For if there is limited competition, then the government has little recourse against subpar performance.

Congress also discussed poor contractor practices in July 2008 congressional hearings.[47] Senator Byron Dorgan addressed shoddy electrical wiring performed by KBR.[48] He cites an instance where thirteen people, eleven of them Soldiers, were electrocuted in Iraq.[49] Electricians for KBR testified there was "pervasive carelessness and disregard for quality electrical work at [KBR]."[50] Rather than punish KBR, the government ordered the wiring inspected and awarded the

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[40] *Id.*
[41] *Id.* at 163.
[42] *Id.* at 164.
[43] *Id.* at 105 (citing Paul Christopher, a contractor and a veteran, for the proposition that there were aggressive personal security teams whose actions "undermined the mission of bringing security and stability to Iraq" and "undercut the utility of contractors as an adjunct to the military forces").
[44] *Id.* at 166–67.
[45] *Id.*
[46] SINGER, *supra* note 24, at 152–53.
[47] 154 CONG. REC § 7241 (daily ed. July 24, 2008).
[48] *Id.* (statement of Sen. Dorgan).
[49] *Id.*
[50] *Id.*

contract to KBR to inspect its own shoddy work.[51]

Carafano loses credibility when addressing contractor accountability. Unlike his historical analysis, he cites few facts to reinforce his argument. While this attenuates his argument, the remedies discussed in Section IV below still hold true despite the author's scantily supported assertion.

III. The Government's Use of Contractors in Iraq and Afghanistan

In 2002, the Secretary of the Army complained to DoD that a third of the Army's budget went to pay contractors but there was little visibility into the "costs associated with the contract workforce and of the organizations and missions supported by them."[52] Although the number of contracts has increased, the number of contracting officers who manage them has not.[53]

Carafano believes that the problem with contract performance is the government's failure to properly issue and manage the contracts.[54] He argues that the lack of experienced, deployable contracting officers led the government to deploy poorly trained contracting officers who faced a tremendous workload.[55] Carafano's conclusion rings similar to a maxim that a job is not going to be done right unless it is inspected.

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[51] *Id.*

[52] CARAFANO, *supra* note 1, at 82 (quoting an 8 March 2002 memorandum from Secretary of the Army Thomas E. White to the Defense Undersecretary for Acquisition, Technology, and Logistics et al.)

[53] *Id.* at 83; *see also* CRS REPORT, *supra* note 12, at 28 (noting a lack of contracting personnel as part of the problem and noting that the largest problem in deployed situations is the lack of contracting officer representatives to supervise contractor performance abroad).

[54] CARAFANO, *supra* note 1, at 85.

[55] *Id.*

IV. Recommendations to Better Integrate Contractors Into Military Operations

Carafano proposes three ways to better utilize contractors: (1) bring back America's competitive edge, (2) fight better wars, and (3) make government a better customer.[56] To fight better wars, Carafano suggests that America enhances its interagency operations.[57] He posits that the government should create strong doctrine on interagency operations.[58] Arguing that the "government has seldom bothered to exercise anything worthy of being called interagency doctrine,"[59] Carafano offers the government response to Hurricane Katrina as an example of interagency failure.[60]

As a remedy for these failures, he suggests the government create Joint Interagency Groups.[61] These groups would consist of representatives from various governmental organizations and liaisons from nongovernmental organizations.[62] These groups would then deploy Joint Task Forces to the field to ensure the government utilizes a proper doctrinal response to deployed situations.[63] Furthermore, he argues that these task forces would allow the government to place one leader directing the entire mission. He compares the confusion among the split commands in Iraq with a successful single organization involved in post-World War II Germany's reconstruction.[64]

Carafano's argument demands significant study at the highest governmental levels. All too often an organization attempts to fix an inadequate situation by not only continuing its same doctrine but by expanding it, effectively reinforcing failure. Joint Interagency Groups will bring together leaders who will prepare for international missions in

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[56] *Id.* at 183. The first proposal deals with national reform involving trade policies, fiscal and educational reforms, and social policies. These lie outside the scope of this review.
[57] *Id.* at 184.
[58] *Id.* at 185.
[59] *Id.*
[60] *Id.* at 187.
[61] *Id.* at 186–87.
[62] *Id.*; *see also* SINGER, *supra* note 24, at 154 (stating that there is no doctrine to manage contractor resources and effectively integrate them into operations, thus buttressing the need for Joint Interagency Groups).
[63] CARAFANO, *supra* note 1, at 187.
[64] *Id.* at 191.

the same way that they will fight them.[65]

Finally, Carafano suggests that the government become a better customer.[66] He believes that the Pentagon must better determine which contracts to award and then properly oversee its contracts.[67] He argues that the government should adopt a risk-based analysis that considers the noneconomic costs of contract failure.[68] To do so, he recommends that the government employ more operations research professionals.[69] These professionals analyze complex systems and determine ways to use available resources to maximize mission accomplishment.[70]

The DoD should then increase the size and quality of its contracting force.[71] Carafano argues that to build its capacity to function on the ground, the Army "could do no better than read[] its own report."[72] In a study titled *Urgent Reform Required: Army Expeditionary Contracting*, an Army commission "found that only three percent of the Army's contracting personnel were on active duty and that the Army did not have one career Army contracting general officer position."[73]

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[65] *See* Major Tonya Jankunis, *Military Strategists Are from Mars, Rule of Law Theorists Are from Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL L. REV. 16 (2008) (discussing the existing national security apparatus and arguing that the interagency must be reformed if the rule of law is to be established in failed or fragile states). At the strategic level, Major Jankunis argued for the incorporation of the Departments of State and Defense beneath an authoritative Department of National Security. The Director of this department would oversee Geographic Control Center Commands at the high operational level. These commands would have areas of responsibility similar to the current combatant commands. A civilian ambassadorial director would lead each of these commands with a Deputy Military Commander representing the DoD and a Deputy Civilian Commander representing the Department of State. *See generally id.*

[66] CARAFANO, *supra* note 1, at 198.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 200–01.

[70] *Id.* at 200.

[71] *Id.* at 201.

[72] *Id.*

[73] *Id.* (citing COMM. ON ARMY ACQUISITION & PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 2 (2007) [hereinafter URGENT REFORM REQUIRED). The report additionally found that "[t]he Army's acquisition workforce is not adequately staffed, trained, structured, or empowered to meet the Army needs of the 21st Century deployed warfighters." URGENT REFORM REQUIRED, *supra*, at 2; *see also* SINGER, *supra* note 24, at 154 (stating that DoD has a poorly trained contracting corps).

Carafano's two-pronged approach to contracting reform delivers a reasonable method of fixing the problem. As with any major decision, DoD must analyze the decision to contract through solid, unbiased analytical thought. Operations research professionals are well suited for the job. After the decision to contract has been made, an adequately staffed group of professional contracting officers in the same theater as the contractors would be best able to procure and manage DoD's contracts.

V. Utility to Judge Advocates

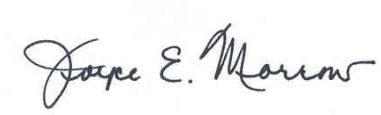
As military professionals, Judge Advocates should read *Private Sector, Public Wars* to better understand contractors, to learn about the private sector's historical role on the battlefield, and to understand that contractors are an integral part of military operations. This knowledge will allow Judge Advocates to better serve their commanders not only as attorneys, but as staff members who can better integrate contractors into their command's mission planning.

In sum, *Private Sector, Public Wars* offers a thought-provoking look into the private sector's place in modern military operations. Carafano gives his readers more than observations; he offers practical solutions. America's leadership should take a hard look at Carafano's recommendations to consider how to best utilize the private sector in this age of persistent conflict.

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.
General, United States Army
Chief of Staff

Official:



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