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The Difference Between Can and Should: *Able v. United States* and the Continuing Debate About Homosexual Conduct in the Military

CAPTAIN JOHN A. CARR*

We have wasted enough precious time, money and talent trying to persecute and pretend. It's time to stop burying our heads in the sand and denying reality for the sake of politics. It's time to deal with this straight on and be done with it. It's time to get on with more important business.
-- Barry M. Goldwater, Former Chairman of the Senate Armed Services Committee[1]

Barry Goldwater may know a lot about flying military jets, but it's clear he knows little about homosexuality or about the threat to our military posed by placing gays in close quarters with heterosexual service members on submarines, on ships and in armored, artillery and infantry units.
-- Gary L. Bauer, President of the Family Research Council[2]

The military's homosexual discharge policy is undoubtedly controversial, and it is fair to say Senator Barry Goldwater never cowered from addressing controversial issues. He was a lieutenant in charge of an all-black unit, founded the Arizona National Guard, chaired the Senate Armed Services Committee,[3] and co-sponsored the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which serves as the foundation for the military's joint doctrine.[4] While one may disagree with his opinion, it may at least be cause for reflection when a man of Senator Goldwater's demonstrated care and

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[1] Barry M. Goldwater, *The Gay Ban: Just Plain Un-American*, WASH. POST, June 10, 1993, at A23.

[2] Gary L. Bauer, *Gays Don't Belong in the Military*, WASH. POST, June 26, 1993, at A23.

[3] Goldwater, *supra* note 1.

[4] BARRY M. GOLDWATER, GOLDWATER 334-40, 353-57 (1988).

concern for this nation's military force characterizes arguments underlying a personnel policy as "just stupid."[5]

The issue of homosexuals in the military came to the forefront of the national debate during the presidential election of 1992. Then-Governor Bill Clinton announced his intention to lift the ban if elected, and a firestorm of controversy ensued.[6] It was even rumored that two members of the Joint Chiefs of Staff were prepared to resign if the ban was lifted.[7] Congress, however, enacted into law the policy that emerged from the debate, and it is codified at 10 U.S.C §654. Due to the various ways in which courts and commentators refer to §654, this article will refer to §654 as "§654," "the Act," and "the Policy." Unlike its predecessor, which was outlined in Department of Defense Directives, the current discharge policy can only be amended by an Act of Congress and will remain in effect regardless of who occupies the position of Commander-in-Chief.

As enacted and absent certain exceptions that will be discussed later, the homosexual discharge policy requires that a military member be discharged if one of three findings is made. The first finding is that the member has engaged in homosexual acts.[8] This finding will be referred to as the act prohibition. The second finding is that the member has made homosexual statements.[9] This finding will be referred to as the statement presumption. Finally, a member will be discharged if it is discovered that he or she has entered into or attempted to enter into a same-sex marriage.[10] This finding will be referred to as the marriage prohibition.

The current policy has prompted a good deal of discussion within the military community. It also has been the subject of much analysis within the legal and academic communities. Numerous articles have been written examining the vulnerability of the Act under the Equal Protection Clause[11] and

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[5] Goldwater, *supra* note 1.

[6] Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369 (July 19, 1993) [hereinafter Remarks Announcing the New Policy].

[7] Barton Gellman, *Clinton Says He'll "Consult" On Allowing Gays in Military; Advisers Warn of Likely Repercussions*, WASH. POST, Nov. 13, 1992, at A1.

[8] 10 U.S.C. § 654(b)(1) (1998).

[9] *Id.* § 654(b)(2).

[10] *Id.* § 654(b)(3).

[11] *See, e.g.*, Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55 (1991); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375 (1995); Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F.L. REV. 919 (1994); Linda Murphy Alexander, Note, *A Constitutional Battle: Will Clinton's "Don't Ask, Don't Tell" Policy Level The Field?*, 2 SAN DIEGO JUST. J. 461 (1994); Alicia Christina

the First Amendment.[12] Additionally, at least four Circuit Courts of Appeals have entertained constitutional challenges to, and ultimately upheld, the policy.[13]

Private and public discussions of the military's discharge policy typically focus on two separate but related questions. The first question is whether the military *can* constitutionally discharge homosexual members or members who engage in or have a propensity to engage in homosexual acts. The second question is whether the military *should* discharge these individuals. Drawing upon the recent case of *Able v. United States,*[14] the purpose of this article is to provide sound answers to both questions.

Part I of this article examines the regulation of homosexual acts, speech, and marriages of military members. The applicable regulations can be

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Almeida, Note, Thomasson v. Perry*: Has the Fourth Circuit Taken "Don't Ask, Don't Tell" Too Literally?*, 75 N.C.L. REV. 967 (1992); Gary Frost, Notes, Steffan v. Aspin: *Gays in the Military Win a Victory - Or Did They?*, 30 TULSA L.J. 171 (1994); Kelly E. Henriksen, Note & Comment, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273 (Winter 1996); Walter John Krygowski, Comment, *Homosexuality and the Military Mission: The Failure of the "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875 (1995); Kenneth S. McLaughlin, Jr., Note, *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179 (1994); Lawrence Kent Mendenhal, Note, *Misters Korematsu and Steffan: The Japanese Internment and the Military's Ban on Gays in the Armed Forces*, 70 N.Y.U.L. REV. 196 (1995); Daniel R. Plane, Comments, *Don't Mess With "Don't Ask, Don't Tell,"* 79 MARQ. L. REV. 377 (1995); *Recent Cases–D.C. Circuit Upholds Military Discharge Based on a Statement of Homosexual Orientation*, 108 HARV. L. REV. 1779 (1995); Glenn D. Todd, Comment, *Don't Ask, Don't Tell, Don't Pursue: Is The Military's New Policy Towards Gays and Lesbians a Step Forward or Status Quo?*, 23 CAP. U.L. REV. 723 (1994); Scott W. Wachs, Note, *Slamming the Closet Door Shut:* Able, Thomasson *and the Reality of "Don't Ask, Don't Tell,"* 41 N.Y.L. SCH. L. REV. 309 (1996); Captain James M. Winner, Comment, *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073 (1998); Frank T. Pimentel, Essay, *The Constitution as Chaperon: President Clinton's Flirtation With Gays in the Military*, 20 J. LEGIS. 57 (1994).

[12] *See, e.g.*, Daniel S. Alter, *Confronting the Queer and Present Danger: How to Use the First Amendment When Dealing With Issues of Sexual Orientation Speech and Military Service*, 22-SUM HUM. RTS. 22 (1995); Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55 (1991); Krygowski, *supra* note 11, at 875; David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393 (1994); Wachs, *supra* note 11, at 309; Williams, *supra* note 11, at 919.

[13] Able v. United States, 880 F.Supp. 968 (E.D.N.Y. 1995), *vacated and remanded*, 88 F.3d 1280 (2nd Cir. 1996), *on remand, injunction granted,* 968 F.Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2nd Cir. 1998); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 498 (1996); Richenburg v. Perry, 97 F.3d 256 (8th Cir. 1996), *reh'g denied en banc*, No. 95-4181, 1997 U.S. App. LEXIS 1040 (8th Cir. 1997), *cert. denied*, 1997 LEXIS 4580 (1997).

[14] 880 F.Supp. 968.

divided into two categories. The first category is comprised of the criminal prohibitions contained in the Uniform Code of Military Justice, which do not facially distinguish between homosexual and heterosexual conduct. The second category is outlined in the current administrative discharge policy. After reviewing its legislative history, §654 will be outlined; to include the accompanying congressional findings, the act prohibition, the statement presumption, and the marriage prohibition. Additionally, the pertinent sections of the Department of Defense Directives that implement §654 are detailed.

Part II explores an analogy to the permissible actions the government may initiate against civilian employees based upon homosexual statements, acts, and marriages. Four principles emerge from this analysis. First, the government is permitted to take certain actions in its capacity as employer that it is not permitted to take as the sovereign. Second, the government is permitted to take into consideration the impact of the employee's conduct on the efficiency and morale of the office. Third, government agencies are not required to wait until the disruptions to the office are fully manifested before being permitted to take corrective action. Finally, courts typically give great weight to the government's estimation of the potential disruption the behavior in question will have on the efficient operation of the office.

Part III of this article details the constitutional challenges brought against the Act in *Able v. United States.*[15] Although three other Courts of Appeals have previously upheld §654 against constitutional attack,[16] the four opinions on the merits in *Able* provide an excellent basis to discuss the policy's legal foundations and implications. In its first opinion, the district court held that the plaintiffs lacked standing to challenge the act prohibition of §654(b)(1), but found that the statement presumption of §654(b)(2) violated the free speech clause of the First Amendment. In its first opinion, the Second Circuit Court of Appeals found that the plaintiffs met the necessary standing requirements to challenge the act prohibition and that the permissibility of the statement presumption was dependent upon the constitutionality of the act prohibition. In its second opinion, the district court held that the act prohibition was based upon irrational prejudices and was unconstitutional under the equal protection component of the Fifth Amendment. The statement presumption, therefore, also violated the free speech clause of the First Amendment. In its second opinion, the Second Circuit ruled that the act prohibition passed constitutional muster under rational basis review and the statements presumption was, therefore, also permissible.

Finally, Part IV seeks to answer two questions. The first question is whether the military *can* constitutionally continue to discharge members based upon the policy outlined in §654. Although the Second Circuit held in *Able*

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[15] *Id.*

[16] Philips, 106 F.3d 1420; Thomasson, 80 F.3d 915; Richenburg, 97 F.3d 256.

that the military could take such action, this section presents suggestions to clarify and strengthen the legal basis for doing so. The examination proceeds in four parts. First, homosexual conduct serves as a basis for discharge not because of any official objection to the underlying conduct, but because of its impact on good order and discipline. Second, the threat to good order and discipline is a result of the "reaction" of military members who object to individuals who engage in homosexual conduct. Third, similar to its ability to take adverse actions against civilian employees who pose a threat to office relationships and morale, the military is permitted to take action against members who pose a threat to the good order and discipline of the units. Finally, even though evidence may be garnered to attack the belief that homosexual conduct is prejudicial to good order and discipline, courts have exhibited a high degree of deference to the estimation of the threat made by commanders, Congress, and the President.[17]

The second question is whether the military *should* continue to discharge military members who engage in or have a propensity to engage in homosexual conduct. The immediate answer is unequivocal. The military should and must take whatever steps are necessary to maintain the readiness of and unit cohesion within military units. It is noted, however, that this goal can be achieved by either removing the individuals who engage in homosexual conduct or prohibiting the members who object to this behavior from acting upon their beliefs. Although it may never be possible to change or alter the objecting members' attitudes, it is suggested that the military take steps to prevent personnel from acting upon their personal feelings or beliefs. Such an antidiscrimination program could be added to the current toleration efforts primarily administered by the base equal opportunity and treatment office (referred to in the Air Force as Social Actions or, more recently, Military Equal Opportunity). The program would display to both the courts and various political forums a good faith effort on the part of the military to reduce the identified threats to good order and discipline posed by homosexual conduct.

I. THE REGULATION OF HOMOSEXUAL ACTS, SPEECH, AND MARRIAGE WITHIN THE MILITARY COMMUNITY

The military regulates homosexual acts, speech, and marriages through the application of two distinct but related processes. The first process is comprised of the criminal prohibitions contained in the Uniform Code of

[17] Understanding that the Act was passed by Congress and is administered by the President, the Department of Defense, and the individual services, the terms "Congress," "the President," and "the military" will be used interchangeably for the purposes of this article.

Military Justice (UCMJ).[18] The UCMJ authorizes criminal punishment for a variety of sexual practices, including sodomy, but does not distinguish *per se* between homosexual and heterosexual behavior. The second process is contained in the administrative discharge policy, which emerged from the debate sparked by the presidential election of 1992 and is codified at 10 U.S.C. §654. The Act consists of fifteen congressional findings concerning homosexuality and the military, and provides that a member shall be separated if any one of three determinations is made. A member is subject to administrative discharge if it is found that he or she engaged in homosexual acts, made a homosexual statement, or entered or attempted to enter into a same-sex marriage. The policy is not directed toward a member's status as a homosexual, but instead seeks to prevent military units from being disrupted by the occurrence of homosexual conduct.

A. Criminal Prohibitions

The UCMJ authorizes criminal penalties for service members who engage in certain sexual practices or conduct. The UCMJ applies to a military member regardless of whether the conduct occurs on or off the installation, on duty or off duty, and in public or in private.[19] Interestingly, however, the UCMJ does not *per se* categorize or distinguish between homosexual and heterosexual conduct. In fact, the terms "homosexual," "gay," and "lesbian" do not appear anywhere in the *Manual for Courts-Martial*. Moreover, in recent litigation the government admitted, "homosexuals are no more likely than heterosexuals to violate the military code of conduct or other rules generally."[20]

In both public and private discussions of sexual conduct, the criminal prohibition of sodomy is perhaps the most controversial. Sodomy is prohibited by Article 125, UCMJ, which provides:

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[18] MANUAL FOR COURTS-MARTIAL, United States, Part IV, ¶¶ 1-113 (1998 ed.) [hereinafter MCM].

[19] MCM, *supra* note 18, Rules for Courts-Martial 202, 203 (outlining limitations on personal jurisdiction and limitations on subject-matter jurisdiction). *See also* Solorio v. United States, 483 U.S. 435, 436 (1987) (holding that jurisdiction in courts-martial depends solely on the accused's status as a person subject to the UCMJ and not on the "service-connection" of the offense). Affirming an officer's conviction under Article 133, UCMJ, the court noted that over a century ago the Supreme Court "upheld the constitutional authority of Congress to prohibit private or unofficial conduct by an officer which 'compromised' the person's standing as an officer 'and brought scandal or reproach upon the service.'" United States v. Hartwig, 39 M.J. 125, 128-29 (C.M.A. 1994) (quoting Smith v. Whitney, 116 U.S. 167, 185 (1886)).

[20] *See* Able v. United States, 968 F.Supp. 850, 855 (E.D.N.Y. 1997) (referring to Defendant's Responses to Plaintiff's Request for Admission, Exhibit PX-13, on pages 5-8); Philips, 106 F.3d at 1434 n.3 (Fletcher, J., dissenting).

> Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.[21]

The explanation accompanying the Article states that unnatural carnal copulation includes both oral and anal sex,[22] and this language has been upheld against vagueness challenges.[23] The United States Court of Appeals for the Armed Forces has also refused to recognize a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults.[24] The Article states that the maximum punishment for consensual sodomy between adults is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[25]

Many people may argue that their opposition to homosexuals stems from the number of homosexuals who engage in sodomy. As previously stated, however, the government's position in recent litigation is that homosexuals are no more likely to engage in any violation of the military code of conduct or other rules generally, to implicitly include the UCMJ's prohibition of sodomy, than are heterosexuals.[26] The available research supports this position. For example, the data indicates that 96 percent to 99

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[21] MCM, *supra* note 18, Part IV, ¶ 51(a).

[22] *Id.* Part IV, ¶ 51 (c).

[23] United States v. Scoby, 5 M.J. 160 (C.M.A. 1978) ("We conclude that the conduct prohibited by Article 125 is sufficiently defined as to be understood by a person of ordinary intelligence in the military community and is, therefore, not unconstitutionally vague.").

[24] United States v. Fagg, 34 M.J. 179 (C.M.A. 1992) (relying upon Bowers v. Hardwick, 478 U.S. 186 (1986), *cert. denied*, 506 U.S. 829 (1992); United States v. Henderson, 34 M.J. 174 (C.M.A. 1992). In *Henderson*, the court found that fellatio was within the scope of Article 125, UCMJ. Consequently, "absent authority from the Supreme Court, we cannot declare that there is a right to privacy in the Constitution that invalidates an Act of Congress outlawing fellatio." Henderson, 34 M.J. at 178. The court noted, however, that Congress "is free to modify its statute if it chooses, and the Executive could limit prosecution." *Id.* The court explained that its duty was to interpret statutes and not debate the merits of the policy, and the court perceived no basis to invalidate the statute under the Constitution. *Id.*

[25] MCM, *supra* note 18, Part IV, ¶ 51(e)(4). If the act is committed by force and without consent, or with a child under the age of 12 years at the time of the offense, the maximum punishment is dishonorable discharge, forfeiture of all pay and allowances, and confinement for life. If the act is committed with a child who, at the time of the offense, has attained the age of 12 but is under the age of 16, the maximum punishment is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years. *Id.* Part IV, ¶ 51(e)(1) - (e)(3).

[26] *See* Able, 968 F.Supp. at 855 (referring to Defendant's Responses to Plaintiff's Request for Admission, exhibit. PX-13, on pages 5-8); Philips, 106 F.3d at 1434 n.3 (Fletcher, J., dissenting).

percent of gay and lesbian individuals have engaged in oral sex.[27] By comparison, it is reported that 90 percent to 93 percent of heterosexual individuals have engaged in oral sex.[28] Additionally, another study indicates that 73 percent of women and 79 percent of men have engaged in passive oral sex, while 68 percent of women and 77 percent of men have engaged in active oral sex.[29] It appears, therefore, that homosexuals and heterosexuals engage in sodomy at relatively equal rates, although the frequency with which homosexuals engage in sodomy may be slightly greater than that of heterosexuals. If the military is representative of society, then the government understandably concedes that homosexual service members are no more likely to engage in sodomy than are heterosexual service members.[30]

In addition to sodomy, the UCMJ prohibits many other forms of sexualized conduct. Article 93, UCMJ, prohibits the oppression or maltreatment of subordinates, including sexual harassment.[31] Article 120, UCMJ, punishes both carnal knowledge of a person under the age of 16 and rape,[32] the latter carrying a maximum punishment of death.[33] Conduct unbecoming an officer and a gentleman is punished under Article 133, UCMJ,[34] and can take the form of either sexual conduct[35] or sexually explicit speech.[36]

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[27] Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 544 n.52 (1992) (citing PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236, 242 (1983)).

[28] Hunter, *supra* note 27, at 544 n.52.

[29] Able, 968 F.Supp. at 864 (citing ROBERT T. MICHAEL ET AL., SEX IN AMERICA 139-41 (1994)). The study's distinction between active and passive oral sex is not relevant to this examination.

[30] Gary Bauer claims that "[f]ew if any of the homosexuals who have been discharged deny engaging in sodomy, a felony under the Uniform Code of Military Justice." Bauer, *supra* note 2, at A23. If the data is correct and sexual orientation cannot be used as a proxy for criminal behavior, his claim should be that few if any *military members* could deny engaging in sodomy.

[31] MCM, *supra* note 18, Part IV, ¶ 17(a). The explanation states that assault, improper punishment, and sexual harassment may constitute the offense. *Id.* Part IV, ¶ 17(c)(2). *See, e.g.*, United States v. Coleman, 48 M.J. 420 (1998) (appellant convicted of two specifications of maltreatment of a subordinate); United States v. Blanchard, 48 M.J. 306 (1998) (appellant convicted of one specification of maltreatment of a subordinate). For examinations of sexual harassment prosecutions in the military, see Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993); Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987).

[32] MCM, *supra* note 18, Part IV, ¶ 45(a).

[33] *Id.* Part IV, ¶ 45(e)(1).

[34] *Id.* Part IV, ¶ 59 (a). Narrowing the broad language of this Article, military courts have required that the underlying conduct must have "double effect and significance." United States v. Howe, 37 C.M.R. 429, 441-42 (C.M.A. 1967). As one commentator explained:

Finally, the general article, Article 134, UCMJ, prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces,"[37] any "conduct of a nature to bring discredit upon the armed forces,"[38] and "crimes and offenses not capital."[39] The specific paragraphs listed under the general article punish, among other things, adultery,[40] indecent assault,[41] bigamy,[42] wrongful cohabitation,[43] fraternization,[44] indecent acts or liberties with a child,[45] indecent exposure,[46] indecent language,[47] and indecent acts with

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> Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such a circumstance as to bring dishonor or disrepute upon the military profession.

WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 711-12 (2d ed. 1920). For an excellent discussion of the historical development and rationale supporting Articles 133 and 134, UCMJ, see Major Keithe E. Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. L. REV. 124 (1970).

[35] *See, e.g.*, United States v. Modesto, 39 M.J. 1055, 1061 (A.C.M.R. 1994) (upholding the conviction of an officer charged with cross-dressing in public which dishonored or disgraced him personally and seriously comprised his standing as an officer), *aff'd*, 43 M.J. 315 (1995).

[36] *See, e.g.*, United States v. Hartwig, 39 M.J. 125 (C.M.A. 1994). In *Hartwig*, the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) upheld the conviction of a captain who responded to the letter of a 14-year-old school girl with a letter that contained strong sexual overtones and a request for the girl to send a nude picture of herself to him. *Id.* at 127. The court found that "the private nature of his letter neither clothes it with First Amendment protection nor excludes it from the ambit of Article 133." *Id.* at 128. *See also* United States v. Moore, 38 M.J. 490 (C.M.A. 1994) (upholding conviction of officer for sexually explicit language described as "not simply amorous banter between two long-time lovers; rather it was demeaning vulgarity interwoven with threats and demands for money and sex").

[37] MCM, *supra* note 18, Part IV, ¶ 60(a). *See generally* James K. Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971).

[38] MCM, *supra* note 18, Part IV, ¶ 60(a).

[39] *Id.*

[40] *Id.* Part IV, ¶ 62. *See generally* Winner, *supra* note 11.

[41] MCM, *supra* note 18, Part IV, ¶ 63.

[42] *Id.* Part IV, ¶ 65.

[43] *Id.* Part IV, ¶ 69.

[44] *Id.* Part IV, ¶ 83.

[45] *Id.* Part IV, ¶ 87. *See, e.g.*, United States v. Orben, 28 M.J. 172, 175 (C.M.A. 1989) (holding that under the circumstances, appellant's display of nonpornographic or obscene pictures to minor constituted taking indecent liberties when accompanied by behavior and language demonstrating intent to arouse his own sexual passions, those of the child, or both).

[46] MCM, *supra* note 18, Part IV, ¶ 88.

[47] *Id.* Part IV, ¶ 89. *See, e.g.*, United States v. Caver, 41 M.J. 556, 561 (N.M.C.C.A. 1994) ("considering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards," accused's use of

another.[48] Without minimizing the importance of any of the listed UCMJ provisions, for the purposes of this article it is simply important to note that they apply with equal force to same-sex and opposite-sex conduct.

B. Administrative Discharge Actions

The military's administrative discharge policy[49] was the subject of intense debate during the presidential election of 1992. While taking questions after a speech at the Kennedy School of Government at Harvard in the fall of 1991, then-Governor Bill Clinton announced his intention to lift the ban on homosexuals in the military if elected.[50] He explained that "the emphasis should always be on people's conduct, not their status."[51] When questioned about his position on the issue, President George Bush reiterated his support for the ban.[52] Gay rights emerged as a major issue in the campaign and

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the term "bitch" was indecent); United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (holding that it is sufficient that the private communications between consenting adults were indecent on their face and were prejudicial to good order and discipline, as clearly established by the testimony of the two victims); United States v. Durham, ACM No. 28224, 1990 CMR LEXIS 1493 (A.F.C.M.R. 1990) (per curiam) (summarily rejecting appellant's argument that his indecent language specifications violate his First Amendment right to free speech).

[48] MCM, *supra* note 18, Part IV, ¶ 90.

[49] From 1982 until 1993, the administrative discharge of homosexual officers was governed by Department of Defense Directive 1332.30, Separation of Regular and Reserve Commissioned Officers, pt. 1, sec. H (1982). The administrative discharge of enlisted members was outlined in Department of Defense Directive 1332.14, Enlisted Administrative Separations, pt. 1, sec. H (1982). Explaining the basis for discharge, Department of Defense Directive 1332.14, pt. 1, sec. H, ¶ 1.a, began by simply stating that "[h]omosexuality is incompatible with military service." It further explained that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." *Id.* Specifically, the presence in the military of individuals who engage in, or have a propensity to engage in, homosexual conduct:

> adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

Id.

[50] Remarks Announcing the New Policy, *supra* note 6, at 1369.

[51] *Id.*

[52] Ann Devroy & Michael Isikoff, *Bush, Perot Face Increasing Pressure on Issue of Homosexuality*, WASH. POST, July 8, 1992, at A11. Reportedly, President Bush was under

President Clinton received strong support from the gay community, garnering 72 percent of the homosexual vote.[53]

While then-House Speaker Tom Foley announced his support for lifting of the ban,[54] concern about whether and when President-elect Clinton would act brought the issue to the forefront again during the post-election transition period.[55] Reportedly, members of the Joint Chiefs of Staff urged President Clinton to appoint a commission to study the issue and cautioned that he would face serious repercussions within the military if the policy was changed.[56] It was even rumored that two members of the Joint Chiefs were prepared to resign over the issue.[57] Announcing his intention to "move forward" on the issue, President Clinton explained that he would consult with a host of experts and interested parties, and:

> come up with an appropriate response that will focus sharply on the fact that we do have people who are homosexuals who served our country with distinction, who were kicked out of the military. . . . The issue ought to be conduct. Has anybody done anything which would disqualify them, whether it's [the] Tailhook scandal or something else.[58]

Nevertheless, as the inauguration approached, Senate Armed Services Committee Chairman Sam Nunn and Senate Minority Leader Robert Dole

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pressure from elements of the conservative Christian Coalition to directly attack homosexuality. *Id. See also* Thomas B. Edsall, *Gay Rights and the Religious Right; Administration Is Under Pressure as Issue Divides Fundamentalists*, WASH. POST, Aug. 10, 1992, at A10.

[53] Michael Isikoff, *Gays Mobilizing for Clinton as Rights Become an Issue*, WASH. POST, Sept. 28, 1992, at A1; Bill McAllister, *Gay Rights Groups Applaud Clinton's Win; Arkansas Governor Said to Get 72 Percent of Homosexual Voters*, WASH. POST, Nov. 5, 1992, at A30.

[54] *For the Record*, WASH. POST, Nov. 13, 1992, at A26. Speaker Foley was quoted in a Cable News Network (CNN) interview with Bob Cain as stating:

> I'm in favor of the president revoking the executive order that bars gay and lesbians from serving in the military, yes, and I think President Clinton will do that. And I think that after it's done, within a matter of a very few months, the whole issue will disappear because gay and lesbian service people have served with distinction and ability and honor in the service when they weren't known, and there isn't any, in my view, reason to continue this rather old and unjustified barrier.

Id.

[55] Al Kamen, *Some Expert Advice for Clinton: Get It Right Before Jan. 20*, WASH. POST, Nov. 5, 1992, at A21; Barton Gellman, *Security Issues Loom on the Horizon; President-Elect Could Be Diverted From Emphasis on Economy*, WASH. POST, Nov. 7, 1992, at A1.

[56] Gellman, *supra* note 7, at A1.

[57] *Id.*

[58] *I Intend to Look Beyond Partisanship . . . . to Help Guide Our Nation*, WASH. POST, Nov. 13, 1992, at A10.

"strongly urged" President Clinton to conduct a thorough study of the issue.[59] This concern was echoed by then-Chairman of the Joint Chiefs of Staff General Colin Powell, who stated his continued belief "that the policy we have been following is a sound one."[60]

Following the inauguration in January 1993, the President announced a two-phase plan.[61] The first phase included an "instruction" from President Clinton to Secretary of Defense Les Aspin to submit a draft executive order by July 15, 1993. The order "would end the present policy of the exclusion from military service solely on the basis of sexual orientation and at the same time establish rigorous standards regarding sexual conduct to be applied to all military personnel."[62] This instruction would stop the military from questioning recruits about their sexual orientation, as well as initiating investigations or discharging members under the former policy.[63] The delay from January 1993 until July 15, 1993, was believed to be an attempt by President Clinton to calm Senate conservatives who were prepared to write the former policy into law, thereby preempting or overriding any executive order.[64] The President was keenly aware of the ramifications that would follow from this type of congressional action.[65] The second phase of the plan would be the signing of the Executive Order lifting the ban.[66] As the President explained, the issue at this point had become very narrow; namely, "whether a person, in the absence of any other disqualifying conduct, can simply say that he or she is a homosexual and stay in the service."[67]

During the spring of 1993, both the House Armed Services Committee and the Senate Armed Services Committee held hearings on the merits of the former policy and the impact that any alteration may have upon military readiness. Testimony was elicited from high-level officials such as Secretary

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[59] Tom Kenworthy, *Nunn, Dole Urge Caution On Military Gay Policy; Study Sought Before Clinton Rescinds Ban*, WASH. POST, Nov. 16, 1992, at A11.

[60] John Lancaster, *Powell Relents on Defense Cut, But Not On Gays*, WASH. POST, Nov. 19, 1992, at A16.

[61] The President's News Conference, 29 WEEKLY COMP. PRES. DOC. 108 (Jan. 29, 1993) [hereinafter The President's News Conference].

[62] *Id.*

[63] *Id. See also* Ann Devroy, *Joint Chiefs Voice Concern to Clinton On Lifting Gay Ban; Vow Reiterated; Senators Warn of Fight*, WASH. POST, Jan. 26, 1993, at A1; Barton Gellman, *Clinton Sets 2-Phase Plan To Allow Gays in Military; Ban to End While Formal Order is Delayed*, WASH. POST, Jan. 22, 1993, at A1.

[64] Devroy, *supra* note 63, at A1; Gellman, *supra* note 63, at A1.

[65] The President's News Conference, *supra* note 61, at 108 ("Now, I would remind you that any President's Executive Order can be overturned by an act of Congress. The President can then veto the act of Congress and try to have his veto sustained if the act stands on its own as a simple issue that could always be vetoed.").

[66] *Id.*

[67] *Id.*

of Defense Aspin, Chairman of the Joint Chiefs of Staff General Powell, and retired General Norman Schwarzkopf.[68] As the July 15th deadline approached, it became clear that Congress intended to codify the emerging policy into law.

On July 19, 1993, President Clinton announced his new policy dealing with the issue of homosexuals in the military.[69] Secretary Aspin was ordered to issue a four-part directive. The first part of the directive would require that "service men and women will be judged based upon conduct, not their sexual orientation."[70] The second part, therefore, would prevent recruits from being asked about their sexual orientation at enlistment. The third part would continue by explaining that a member's statement that:

> he or she is a homosexual would create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption, in other words, to

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[68] Echoing the feelings of many, General H. Norman Schwarzkopf, Ret., United States Army, testified that:

> What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy? What keeps the Marines attacking up the hills under the withering machine gun fire? What keeps the pilots flying through heavy surface-to-air missile fire to deliver the bombs on target? It's a simple fact that they don't want to let down their buddies on the left or the right. . . . It's called unit cohesion, and in my 40 years of Army service in three different wars, I've become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield. Anyone who disputes this fact may have been to war, but certainly never led troops into battle.
>
> Whether we like it or not, in my years of military service I've experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war. For whatever reason, the organization is divided into a majority who oppose, a small minority who approve, and other groups who either don't care or just wish the problem would go away. And I don't find this surprising, given the divisiveness over this issue that I've encountered in our nation in the past year. The attitudes of our servicemen and women simply reflect, in my opinion, the attitudes that I've encountered in the American people.
>
> . . . [I]n every case that I am familiar with, and there are many, when it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down and unit effectiveness suffered. Plain and simple, that has been my experience.

Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on Armed Services, 103d Cong., 2d Sess. (May 11, 1993) (testimony of General H. Norman Schwarzkopf, Ret., United States Army).

[69] Remarks Announcing the New Policy, *supra* note 6, at 1369.

[70] *Id.*

demonstrate that he or she intends to live by the rules of conduct that apply in the military service.[71]

Finally, the directive would mandate that all provisions of the UCMJ were to be even-handedly enforced against both heterosexuals and homosexuals. Maintaining that "the time has come for us to move forward," the President explained that he "strongly believe[d] that our military, like our society, needs the talents of every person who wants to make a contribution and who is ready to live by the rules."[72]

For reasons that will not be explored in this article, Congress enacted the current homosexual discharge policy as §571 of the National Defense Authorization Act for Fiscal Year 1994,[73] codified at 10 U.S.C. §654. The Act begins with a recitation of fifteen congressional findings. These findings are followed by the actual discharge policy.

1. Congressional Findings

10 U.S.C. §654(a) consists of fifteen congressional findings that support the current administrative discharge policy. Findings one through thirteen review the separation of authority over the military, the unique nature of the military community as a separate society, and the pervasive regulation of a member's conduct 24-hours-a-day, anywhere in the world.[74] Findings fourteen and fifteen support the crux of the policy, and state that:

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[71] *Id.*

[72] *Id.*

[73] National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, div. A, tit. V, subtit. G, § 571(a)(1), 107 Stat. 1670 (codified at 10 U.S.C. § 654 (1993)).

[74] Findings one through thirteen provide that:

> (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
> (2) There is no constitutional right to serve in the armed forces.
> (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.
> (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
> (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
> (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

> (14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
>
> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.[75]

> (7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.
> (8) Military life is fundamentally different from civilian life in that –
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> > (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
> > (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
>
> (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.
> (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.
> (11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.
> (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
> (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

10 U.S.C. § 654(a)(1)-(13).
[75] *Id* § 654(a)(14)-(15).

With its focus on conduct and not status, Congress clearly articulated its belief that the presence of individuals who demonstrate a propensity or intent to engage in homosexual acts creates an unacceptable risk to morale, good order and discipline, and unit cohesion. As will be explained in the next section, however, the Act goes on to include within the definition of homosexual a person who has a propensity to engage in or intends to engage in homosexual acts.[76] Conduct and status, therefore, are intertwined to the extent that a person's conduct determines his status and his status indicates his conduct. Put differently, the conduct (homosexual acts) defines the class (homosexuals).

2. The Act Prohibition of §654(b)(1)

Section 654(b)(1) outlines the first of three circumstances that mandate the separation of a military member. As explained by the Act, a member "shall" be discharged if "the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts."[77] A homosexual act is defined as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires" and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in [such behavior]."[78] An exception that permits retention of a member who has engaged in homosexual acts requires that the member prove that:

> (A) such conduct is a departure from the member's usual and customary behavior;
> (B) such conduct, under all the circumstances, is unlikely to recur;
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
> (E) the member does not have a propensity or intent to engage in homosexual acts.[79]

A homosexual is defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.'"[80] A "bisexual" is defined as "a person who engages in, attempts to engage in, has a propensity to

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[76] *Id.* § 654(f)(1).
[77] *Id.* § 654(b)(1).
[78] *Id.* § 654(f)(3)(a)-(b).
[79] *Id.* § 654(b)(1)(a)-(e).
[80] *Id.* § 654(f)(1).

engage in, or intends to engage in homosexual and heterosexual acts."[81] As applied to the last finding, it appears that the member is required to demonstrate that he or she is not included in the statutory definition of a homosexual or bisexual in order to be retained.

3. The Statement Presumption of §654(b)(2)

In addition to the prohibition on homosexual acts, the Act also contains a provision addressing homosexual statements. A member shall be discharged if "the member has stated that he or she is a homosexual or bisexual, or words to that effect,"[82] unless "the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[83] In order to rebut the presumption, it appears that the member must also demonstrate that he or she is not included in the statutory definition of a homosexual or bisexual in order to be retained.

4. The Marriage Prohibition of §654(b)(3)

Finally, the Act also states that a member shall be separated if he or she "has married or attempted to marry a person known to be of the same biological sex."[84] The Act does not specify what types of ceremonies (for example, state-sanctioned marriages, religious celebrations, or informal commitments) are sufficient to trigger its prohibition.

5. Implementing Department of Defense Directives

A few specific provisions of the implementing Department of Defense Directives are especially relevant for this examination. Department of Defense Directive 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction*,[85] prohibits recruits from being "asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect."[86] DODD 1304.26 specifically states, however, that rejection is not required if it is determined that the member engaged in such

[81] *Id.* § 654(f)(2).
[82] *Id.* § 654(b)(2).
[83] *Id.*
[84] *Id.* § 654(b)(3).
[85] Department of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (Dec. 21, 1993).
[86] *Id.* encl.1, E1.2.8.1.

conduct or made such statements in order to avoid military service and rejection is not in the best interest of the service.[87]

DODD 1332.14, *Enlisted Administrative Separations*,[88] also provides further guidance in implementing the policy. The Directive explains that any relevant evidence may be considered in determining whether a finding has properly been rebutted, including: whether the member has engaged in homosexual acts, the member's credibility, testimony from others about the member's past conduct, character, and credibility, and the nature and circumstances of the member's statement.[89] A member's discharge characterization is to be determined under the generally applicable guidelines. If the discharge is based solely on homosexual conduct, however, a characterization of Under Other Than Honorable Conditions may be issued only if otherwise warranted and certain aggravating factors are present.[90] Finally, the Directive notes that the discharge policy does not prohibit trial by court-martial in the appropriate case.[91]

II. THE PERMISSIBLE ACTIONS THAT MAY BE TAKEN AGAINST GOVERNMENT EMPLOYEES BASED UPON STATEMENTS, ACTS, AND MARRIAGES

Before turning to an examination of the recent challenge brought against 10 U.S.C. §654 in *Able v. United States*, it is useful to review the permissible restrictions and personnel actions that the government may take with regard to the statements, acts, and marriage of civilian government employees. Four principles will emerge from the analysis of the applicable

[87] *Id.* encl.1, E1.2.8.4.

[88] Department of Defense Directive 1332.14 [hereinafter DODD 1332.14], Enlisted Administrative Separations (Dec. 21, 1993). *See also* Department of Defense Directive 1332.30, Separation of Regular and Reserve Commissioned Officers (Mar. 14, 1997).

[89] DODD 1332.14, *supra* note 88, encl. 3, atch. 1, E3.A1.1.8.1.2.2.

[90] *Id.* encl. 3, atch. 1, E3.A1.1.8.3. An Under Other Than Honorable Conditions characterization is appropriate if there is a finding that,

> during the current term of service the member attempted, solicited, or committed a homosexual act . . . by using force, coercion, or intimidation, . . . with a person under 16 years of age, . . . with a subordinate in circumstances that violate customary military superior-subordinate relationships, . . . openly in public view, . . . for compensation, . . . aboard a military vessel or aircraft, . . . or in another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

Id. encl. 3, atch. 1, E3.A1.1.8.3.1-7.

[91] *Id.* encl. 3, atch. 1, E3.A1.1.8.4.6.7.

case law. First, civilian government employees do not enjoy the same constitutional protections as civilians who are not employed by the government. Put differently, the government is permitted to take certain employment actions as an employer that it would not be permitted to take as the sovereign. Second, the government may take into account the impact of the employee's action on the efficiency and morale of the office. Courts appear to limit their inquiry to *whether* the office is disrupted by the behavior, not whether the office *should* be disrupted by the employee's actions. Third, the government is not required to wait until the disruptions to office relationships and morale are manifest before taking action against the employee. Finally, the government's estimation of the potential disruption to the efficient operation of the office is afforded great deference by the courts.

A few words of caution are appropriate at this time. Although not all of the cases discussed below directly address homosexual conduct, the legal principles discerned appear to be applicable to the issue. Additionally, it should be noted that in May 1998, President Clinton signed Executive Order 13087, which added sexual orientation to the list of characteristics that may not form the basis for discrimination by the Federal Government.[92] The original list was set forth in a previous order.[93] As President Clinton explained, his action announced, for the first time in an Executive Order, "a uniform policy for the Federal Government to prohibit discrimination based upon sexual orientation in the Federal civilian workforce."[94] The order, however, "states administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission)," which can only be granted by Congress.[95] As the President later reiterated, the order "does not authorize affirmative action, or preferences, or special rights for anyone."[96] Although a determination of the effect of this Executive Order is beyond the scope of this article, the purpose of the analysis that follows is to outline the actions that are constitutionally permissible, even if the government has chosen not to take them.

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[92] Exec. Order No. 13,087, 63 Fed. Reg. 30097 (June 2, 1998).

[93] The original Executive Order was signed by President Richard Nixon. *See* Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

[94] Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government, 34 WEEKLY COMP. PRES. DOC. 994 (May 28, 1998).

[95] *Id.*

[96] Statement on House Action on the Hefley Amendment, 34 WEEKLY COMP. PRES. DOC. 1576 (Aug. 6, 1998). The Hefley Amendment would have overturned Executive Order 13,087, but was defeated in the House of Representatives. *Id.*

A. Actions Based Upon the Speech of Government Employees

While the government is limited by the full set of First Amendment prohibitions when governing its citizens, it enjoys greater latitude in preserving the efficiency of its service from threats posed by the speech of civilian employees,[97] including federal civil servants[98] and independent contractors.[99] In *Pickering v. Board of Education*,[100] the Supreme Court announced a two-part balancing test to determine whether a government employee's speech is protected by the First Amendment, and therefore, cannot be the basis for adverse administrative action. First, the speech must address a matter of public concern. If it does, then a court must determine whether the employee's interest as a citizen "in commenting on matters of public concern" is outweighed by the government's interest as employer "in promoting the efficiency of the public services it performs through its employees."[101] If the employee's rights outweigh the agency's interests, then no administrative action may be taken against the individual.

In *Pickering*, a teacher was dismissed after sending a letter to the local newspaper concerning a proposed tax increase.[102] The Court concluded that the letter addressed a matter of public concern.[103] Weighing in Pickering's favor

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[97] *See, e.g.*, Vojvodich v. Lopez, 48 F.3d 879 (5th Cir. 1995); Horton v. Taylor, 767 F.2d 471 (8th Cir. 1985), *aff'd*, 817 F.2d 476 (8th Cir. 1987); Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983).

[98] *See, e.g.*, Johnson v. Department of Justice, 65 M.S.P.R. 46 (1994) (determining racially derogatory comments about co-worker made in the presence of other agency personnel while on duty did not relate to matter of public concern); Means v. Department of Labor, 60 M.S.P.R. 108 (1993) (concluding disruptive, insubordinate, and disrespectful conduct and speech relating to workload and performance standards were not related to matter of public concern); Jackson v. Small Business Administration, 40 M.S.P.R. 137 (1989); Sigman v. Department of the Air Force, 37 M.S.P.R. 352 (1988) (concluding speech that addresses internal agency complaints but not issues of concern to the community do not relate to matters of public concern), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (unpublished disposition); Mings v. Department of Justice, 813 F.2d 384 (5th Cir. 1987); Barnes v. Department of the Army, 22 M.S.P.R. 243 (1984); Curry v. Department of the Navy, 13 M.S.P.R. 327 (1982).

[99] In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court held that the First Amendment protects independent contractors from government termination or prevention of automatic renewal of at-will contracts in retaliation for contractor's speech, and such claims will be evaluated under the balancing test outlined in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[100] 391 U.S. 563 (1968).

[101] *Id.* at 568.

[102] *Id.* at 564. The letter was highly critical of the way school officials had handled past bond issue proposals and the allocation of money between educational and athletic programs. *Id.* at 566.

[103] *Id.* at 571.

was the fact that the speech did not endanger "either discipline by immediate superiors or harmony among coworkers,"[104] and did not impact the actual operation of the school.[105] Additionally, the school failed to show that the speech "in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[106] Therefore, Pickering's speech was protected by the First Amendment and could not be the basis for his dismissal.

Another leading case involving the free speech rights of civilian government employees is *Rankin v. McPherson.*[107] McPherson was employed in a clerical capacity in a county constable office. After hearing of the assassination attempt on President Reagan and in the course of discussing the administration's policies, she remarked to a co-worker "if they go for him again, I hope they get him."[108] The remark was overheard by a fellow co-worker and reported to Constable Rankin. After confirming that she did in fact make the comment, Rankin fired her.[109]

The Supreme Court found that the speech was protected by the First Amendment. First, considering that it was made during a conversation of the President's policies, the speech dealt with a matter of public concern.[110] The Court noted that neither the inappropriate nor controversial nature of the statement was relevant to this determination because debate on public issues should be "uninhibited, robust, and wide-open."[111] Second, the Court concluded that McPherson's free speech interests outweighed Constable Rankin's interests in discharging her. There was no evidence that the speech interfered with the efficiency of the office, impaired employee relationships, or discredited the office since the statement was not conveyed to the public.[112]

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[104] *Id.* at 570.

[105] *Id.* at 571. The Court also noted that teachers are more likely to be informed on the issue of school fund allocation and should be able to speak freely on the issue. *Id.* at 571-72. Although facts in the letter were false, Pickering did not make any claim of special access or knowledge and the information was contained in the public record. *Id.* at 572.

[106] *Id.* at 572-73 (footnote omitted).

[107] 483 U.S. 378 (1987) (5-4 opinion).

[108] *Id.* at 381.

[109] *Id.* at 382.

[110] *Id.* at 386.

[111] *Id.* at 387 (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). The Court also noted that the private nature of the conversation does not prevent the statement from addressing a matter of public concern. *Id.* at 386 n.11.

[112] *Id.* at 388-89. The Court stated that where "an employee serves no confidential, policymaking, or public contact role, the danger of the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91. In his concurring opinion, Justice Powell explained that he thought it was unnecessary to engage in the *Pickering* analysis. His opinion was clear·

The Supreme Court found that a government employee's speech was not protected in *Connick v. Myers*.[113] Employed as an Assistant District Attorney, Myers circulated a questionnaire within the office after learning that she was to be transferred.[114] The District Attorney learned of Myers's survey, considered it an act of insubordination, and fired her.[115] Applying the *Pickering* test, the Court found that only one question in the survey, which the Court characterized as "an employee grievance concerning internal office policy,"[116] addressed a matter of public concern.[117] Furthermore, Myers's interest did not "require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships."[118] Speaking to the importance of the office relationships, the Court noted that:

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the

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> If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, off-hand comment directed at only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on fanciful.

Id. at 393 (Powell, J., concurring). Writing in dissent, Justice Scalia was joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Scalia cautioned that the Court's cited statement "is simply contrary to reason and experience." *Id.* at 400 (Scalia, J., dissenting). He agreed with the proposition that the First Amendment does not require law enforcement agencies to permit one of its employees to "ride with the cops and cheer the robbers." *Id.* at 394 (Scalia, J., dissenting). Furthermore, he pointed out that it "boggles the mind" to think that McPherson had the right to say what she did, "so that she could not only not be fired for it, but could not be formally reprimanded for it, even prevented from saying it endlessly into the future." *Id.* at 399 (Scalia, J., dissenting). Even if the employment decision was intemperate, "we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service." *Id.* (Scalia, J., dissenting).

[113] 461 U.S. 138 (1983) (5-4 opinion).

[114] *Id.* at 141.

[115] *Id.*

[116] *Id.* at 154. The one question asked whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149.

[117] *Id.* at 148-49.

[118] *Id.* at 154.

> workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.[119]

Additionally, the internal working relationships within the office are of such importance that the government is entitled to substantial deference and may act before the disruption actually occurs. As the Court explained,

> [w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[120]

Consequently, when a government employee speaks about a matter of personal interest, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[121]

The *Pickering* test is also used to determine the permissible government restrictions on the speech of federal civil servants.[122] For example, in *Sigman v. Department of the Air Force*, the Merit System Protection Board upheld the Air Force's removal of a GS-05 for unauthorized leave and three specifications of disrespectful, disruptive, and intimidating behavior.[123] The Board found her speech did not address a matter of public concern because a memo she circulated was "personal, highly critical of [her] supervisors, and concern[ed] internal matters that are not related to the public."[124] Additionally, the Board also concluded that the agency's interests in promoting the efficiency of public service that it performs outweighed her free speech interests. The memorandum was distributed to all offices in the division and "had a very disruptive effect."[125] The employee's supervisor also felt "intimidated and frightened by the memo, which contained abusive and insulting language and

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[119] *Id.* at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Kennedy, J., concurring)).
[120] *Id.* at 151-52.
[121] *Id.* at 147.
[122] Reportedly, "Pentagon officials [were] considering a proposal to create a personnel system that would place civilian employees under some military rules." The proposal would not, however, place civilians under the UCMJ. Lisa Daniel, *Civilian Workers May Face Military Rules*, A. F. TIMES, Sep. 15, 1997, at 11.
[123] 37 M.S.P.R. 352 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (unpublished disposition). The employee's actions included writing a four-page memorandum that "expressed her concern over her heavy workload, personal problems, and management's internal personnel policies regarding distribution of work." *Id.* at 354. For additional cases, see *supra* note 98.
[124] *Id.* at 355.
[125] *Id.* at 356.

made references to bodily harm."[126] Accordingly, the speech was not protected by the First Amendment and could serve as the basis for administrative action.

B. Actions Based Upon the Homosexual Acts of Government Employees

Congress has provided that the government may dismiss a federal employee, *inter alia*, for cause if it "will promote the efficiency of the service."[127] Upon the proper showing, such cause may exist when the employee has engaged in homosexual acts. *Norton v. Macy*,[128] decided in 1969, is the leading case that addresses when dismissal for efficiency of the service is permitted based upon homosexual conduct. Norton was a GS-14 employee of the National Aeronautics and Space Administration (NASA).[129] Because he was veterans preference eligible, he could only be dismissed for cause. After a long and somewhat unusual investigation for an alleged off-duty homosexual advance,[130] NASA dismissed Norton based upon "immoral conduct" and "for possessing personality traits which render him 'unsuitable for further Government employment.'"[131]

The Court of Appeals for the District of Columbia found that Norton had been unlawfully discharged.[132] The court did not dispute that NASA considered Norton's behavior to be immoral. Standing alone, however, this determination did not justify Norton's dismissal. As the court explained:

> [T]he Civil Service Commission has neither the expertise nor the requisite anointment to make or enforce absolute moral judgments, and we do not understand that it purports to do so. Its jurisdiction is at least confined to things which are Caesar's, and its avowed standard of "immorality" is no more than "the prevailing mores of our society."[133]

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[126] *Id.*

[127] 5 U.S.C.S. § 7513 (1998); 5 C.F.R. § 731.201(b) (1998).

[128] 417 F.2d 1161 (D.C. Cir. 1969).

[129] *Id.* at 1162.

[130] *Id.* Norton was stopped by the Morals Squad for a traffic violation near Lafayette Square in Washington D.C. After the man he had picked up told the officers that Norton had felt his leg and invited him to Norton's apartment, both Norton and the man were arrested and taken to the Morals Office to be issued traffic violation notices. The police interrogated both men for about two hours. The head of the Morals Squad called the NASA Security Chief who arrived at about 3 A.M. and watched the last of the interrogation incognito. Continuing to deny that he had made a homosexual advance, Norton was taken to a NASA office building and questioned until 6 A.M. During this time, he allegedly admitted to engaging in certain homosexual acts since high school. *Id.* at 1162-63.

[131] *Id.* at 1162.

[132] *Id.*

[133] *Id.* at 1165. The reference to Caesar is similar to that contained in *Matthew* 22:21; "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."

Whatever NASA's ability to categorize the behavior as immoral, it was not "an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees."[134]

Consequently, the court concluded that "a finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service."[135] Whether NASA could properly dismiss Norton, therefore, depended upon the effects on NASA of what he had done or what he was likely to do. The court realized that an employee's homosexual conduct could impact the efficiency of the service in a variety of ways. It may be cause for fear of blackmail or other security risk, as well as evidence of an unstable personality that is unsuited for certain types of work.[136] Additionally, "[i]f an employee makes offensive overtures while on the job, or if his conduct is notorious, the reactions of other employees and of the public with whom he comes in contact in the performance of his official functions may be taken into account."[137]

Norton stands for the proposition that the government must be able to demonstrate some nexus, based on more than mere conjecture, between the employee's conduct and the efficiency of the service in order to justify dismissal for the efficiency of the service. Like the rationale supporting its

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[134] Norton, 417 F.2d at 1165. The court explained that such a notion is "at war with the elementary concepts of liberty, privacy, and diversity." *Id.*

[135] *Id.*

[136] *Id.* at 1166.

[137] *Id.* The court explained, however, that "[w]hether or not such potential consequences would justify removal, they are at least broadly relevant to 'the efficiency of the service.'" *Id.* NASA presented no evidence refuting Norton's ability to perform his job or the unfavorable reactions of coworkers. Instead, it relied on the potential embarrassment on the agency in the eyes of the public. *Id.* Although the court had no doubt that "NASA blushes whenever one of its own is caught in *flagrante delictu*," the agency had failed to provide sufficient evidence of a "specific connection" between Norton's conduct and the efficiency of NASA's operations. *Id.* at 1167. Since Norton's conduct was extremely infrequent and neither openly nor carelessly flaunted in public, the risk of embarrassment was minimal. *Id.* Consequently, the court ruled that Norton had been unlawfully dismissed. The court emphasized that:

> We do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee. Nor do we even conclude that potential embarrassment from an employee's private conduct may in no circumstances affect the efficiency of the service. What we do say is that, if the statute is to have any force, an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying "shame."

Id. at 1168.

ability to take action against an employee based upon his or her speech, however, the government is permitted to consider the reaction of other employees and the public. The relevant inquiry according to the court was not *why* the co-workers were disrupted or upset, only if they *were* or *would be* disrupted or upset. In order words, if Norton's co-workers were so upset by his homosexual advances that it affected the efficiency of the office, it appears that NASA could have lawfully dismissed Norton on this basis.

C. Actions Based Upon the Homosexual Marriages of Government Employees

Although the required nexus between homosexual conduct and the efficiency of the office was not found in *Norton*, a sufficient link was present in the recent homosexual marriage case of *Shahar v. Bowers*.[138] In 1990, Shahar interned with the Georgia's Attorney General Office during her second summer of law school. She was offered a position as a staff attorney with the Attorney General's office effective upon her expected graduation.[139] During that summer, Shahar announced her intention to marry her lesbian partner in a religious ceremony. She sent out invitations to approximately 250 people, including two employees of the office. In November 1990, Shahar filled out her employment application, indicating that she was engaged and listing her partner's name.[140] In June 1991, the Senior Assistant Attorney General learned of Shahar's planned wedding, which was to take place later that month in a public park in South Carolina.

Upon returning from a summer trip, the Attorney General was briefed on the situation.[141] After much discussion with senior attorney's in the office, the Attorney General decided to withdraw Shahar's employment offer. This withdrawal was done in writing in July 1991. Shahar filed suit, alleging that the Attorney General had violated her free exercise and free association rights, as well as her rights to substantive due process and equal protection.[142]

The district court found that Shahar's rights had not been violated, and the Eleventh Circuit Court of Appeals agreed. After stressing that the case involved the government acting as employer and not as sovereign,[143] the

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[138] 114 F.3d 1097 (11th Cir. 1997) (refusing to supplement record with information from two newspaper articles that the Attorney General had admitted to having an adulterous affair), *reh'g denied*, 120 F.3d 211 (11th Cir. 1997).
[139] *Id.* at 1100.
[140] *Id.*
[141] *Id.* at 1101.
[142] *Id.*
[143] *Id.* at 1102 (citing Waters v. Churchill, 511 U.S. 661, 675-76 (1994) (plurality opinion) ("The key to First Amendment analysis of government employment decisions . . . is this: The government's interest in achieving its goals as effectively and efficiently as possible is

Eleventh Circuit adopted the *Pickering* test for free speech to evaluate the permissibility of the withdrawal of the job offer.[144] The court explained that the position of staff attorney was a policy position requiring great trust and confidence on behalf of the employer. In light of the recent controversy surrounding Georgia's sodomy statute,[145] the Attorney General concluded that Shahar's decision to marry another woman and change her name had a "realistic likelihood" of affecting both her credibility and that of the office.[146] It would have also interfered with her ability to handle this type of controversial matter, the office's ability to enforce the sodomy statute, and may have created "other difficulties within the Department which would be likely to harm the public perception of the Department."[147] Additionally, Shahar's failure to appreciate these difficulties caused the Attorney General to lose faith in her judgment.[148] Finally, the court agreed that the Attorney General was rightly concerned about the internal consequences her marriage would have on his staff, including a loss of morale and cohesion.[149] Because these reasonable concerns of the Attorney General outweighed Shahar's competing interests, the court concluded that the withdrawal of the job offer was permissible.

The important and recurring point of the *Shahar* ruling is that, if a sufficient nexus is established between the behavior at issue and the efficiency of the office, then the government as an employer is permitted to take certain factors into consideration that could not otherwise be considered. The most pertinent factor for this examination is that the government may justify an employment decision based upon the reaction of the office; or put differently, upon the impact of the behavior on office morale and cohesion. Again, the court did not indicate its intention to determine whether the office *should* be disrupted by Shahar's marriage, only that the planned marriage *did* or *would* impact the efficient operation of the office. With this principle in mind, the challenge to the military's homosexual discharge policy brought in *Able v. United States* will now be examined.

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elevated from a relatively subordinate interest when it acts as sovereign to a significant one when its acts as employer.").

[144] *Id.* at 1103.

[145] *Id.* at 1104 (citing Bowers v. Hardwick, 478 U.S. 186, 190-92 (1986) (finding criminal prosecution for homosexual sodomy did not violate substantive due process)).

[146] *Id.* at 1105.

[147] *Id.* The court also cited *McMullen v. Carson*, in which that court upheld a "sheriff's clerical employee's First Amendment interest in an off-duty statement that he was employed by the sheriff's office and was also a recruiter for the Ku Klux Klan was outweighed by the sheriff's interest in espirit de corps and the credibility in the community the sheriff policed." *Id.* at 1108 (citing McMullen v. Carson, 754 F.2d 936, 938-40 (11th Cir. 1985)). The court further noted that nothing indicated that the "employee had engaged in a criminal act or that he had joined an organization . . . that had engaged in any criminal act." *Id.* at 1109.

[148] *Id.* at 1105-06.

[149] *Id.* at 1108.

III. THE CASE OF *ABLE V. UNITED STATES*

Although three other Courts of Appeals previously upheld §654 against constitutional attack,[150] the unique history of *Able v. United States*[151] provides an excellent basis to discuss the legal foundations and implications of the Act. The case produced four opinions on the merits, which examined the relationship between the act prohibition and the statement presumption. *Able* began after five military members and one member of the United States Coast Guard[152] were discharged by their respective services after stating that they were homosexuals.[153] The discharges had been processed under the statement presumption of §654(b)(2). The plaintiffs filed suit in the Eastern District of New York seeking an order declaring that §654 and the implementing directives were unconstitutional. Attacking the Act from a variety of positions, the plaintiffs asserted that §654 violated their rights to expressive and intimate association and also the constitutional prohibitions concerning vagueness and overbreadth. In addition, they claimed the act prohibition of §654(b)(1) and the statement presumption of §654(b)(2) violated their right to free speech and equal protection, and that the marriage prohibition of §654(b)(3) violated their equal protection rights.[154] Finally, they asked the court to enjoin the government from enforcing the Act and the implementing directives.[155]

After it preliminarily enjoined the government from enforcing the Act and the directives,[156] the district court granted the government's motion to dismiss the claims based upon intimate association, vagueness, and overbreadth.[157] While this motion was pending, the government appealed the preliminary injunction to the Second Circuit Court of Appeals. The appellate court ruled that the district court had not applied the proper standard and

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[150] Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 498 (1996); Richenburg v. Perry, 97 F.3d 256 (8th Cir. 1996), *reh'g denied en banc*, No. 95-4181, 1997 U.S. App. LEXIS 1040 (8th Cir. 1997), *cert. denied*, 1997 LEXIS 4580 (1997).

[151] 880 F.Supp. 968 (E.D.N.Y. 1995), *vacated and remanded*, 88 F.3d 1280 (2nd Cir. 1996), *on remand, injunction granted*, 968 F.Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2nd Cir. 1998).

[152] At all times, the United States Coast Guard is a military service and a branch of the armed forces. 14 U.S.C. §1 (1976). Furthermore, it is a service in the Department of Transportation, but operates as a service in the Navy upon declaration of war or when the President otherwise directs. 14 U.S.C. §§ 1, 3 (1990).

[153] Able, 880 F.Supp. at 970.

[154] Able v. United States, No. CV 94 0974 (E.D.N.Y. Mar. 6, 1995) (unreported).

[155] *Id.*

[156] Able v. United States, 847 F.Supp. 1038 (E.D.N.Y. 1994).

[157] Able v. United States, 863 F.Supp. 112 (E.D.N.Y. 1994).

remanded the case.[158] It also ordered the district court to consolidate the preliminary injunction hearing with a trial on the merits for the permanent injunction.[159] On March 6, 1995, the district court ruled that the plaintiffs lacked standing to claim that §654 violated their rights to expressive association, that the act prohibition of §654(b)(1) violated their right to free speech and equal protection, and that the marriage prohibition of §654(b)(3) violated their equal protection rights.[160] The district court tried the merits of the remainder of the plaintiff's claim later that month.[161]

A. The First Opinion of the District Court

The sole remaining issue before the district court was the constitutionality of the statement presumption of §654(b)(2). After recounting the history and actual wording of the statement presumption, the court examined the legislative purpose of the subsection. The court concluded that the statement "I am a homosexual" or "I have a homosexual propensity" is not prohibited because the statement is itself harmful. Instead, it is prohibited because it can be inferred that the speaker will engage in harmful conduct, "namely, commit 'homosexual acts' injurious to 'morale, good order and discipline, and unit cohesion.'"[162] Having arrived at this conclusion, the court turned to an analysis of the statement presumption in light of the First Amendment.

The court noted that the statements made by the plaintiffs identified their status as homosexuals and that the First Amendment protects speech that articulates "the premise of individual dignity and choice upon which our political system rests."[163] The court reasoned, therefore, that the speech is protected from content-based restrictions. Aware that courts typically grant the military substantial deference,[164] the court nevertheless explained that this

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[158] Able v. United States. 44 F.3d 128 (2nd Cir. 1995) (per curiam).
[159] *Id.*
[160] *Able*, No. CV 94 0974.
[161] Able, 880 F.Supp. at 970.
[162] *Id.* at 972.
[163] *Id.* at 973 (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).
[164] *Id.* at 973. When confronted with constitutional challenges to military regulations or criminal prosecutions, courts have displayed a substantial amount of deference to the government for two related reasons. The first reason is the responsibility imposed by the Constitution on the legislative and executive branches to administer the military. *See, e.g.*, Solorio v. United States, 483 U.S. 435, 447 (1987) ("Decisions of this Court . . . have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."). The Supreme Court also stated:

> Nor can it be denied that the imposing number of cases from this Court suggest that judicial deference to such congressional exercise of authority is

deference does not equate to an abdication of their responsibility to determine the constitutionality of military decisions.[165] Guided by this duty, the court

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> at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.

Rostker v. Goldberg, 453 U.S. 57, 70 (1981). "The responsibility for determining how best our Armed Forces shall attend to [fighting or being ready to fight wars] rests with Congress, see U.S. CONST., Art. I, § 8, cls. 12-14, and with the President. See U.S. CONST. Art. II, § 2, cl. 1." Rostker, 453 U.S. at 71 (quoting Schlesinger v. Ballard, 419 U.S. 498, 510 (1975)). The second reason is the concept of the military as a "separate community." The separate community rationale is based upon the unique military mission. *See, e.g.*, United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) ("In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. . . . The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."). The rationale also relies on the critical importance of obedience and subordination. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354 (1980) ("To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'") (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)); *see also* Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."). The complimentary development of military custom also plays a role in the development of the separate community rationale. *See, e.g.*, Parker, 417 U.S. at 744 (In order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'") (quoting Martin v. Mott, 12 Wheat. 19, 35, 6 L.Ed. 537 (1827)). *See generally* Captain John A. Carr, *Free Speech in the Military Community: Striking A Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303 (1998); Lieutenant Colonel Michael H. Gilbert, *The Military and the Federal Judiciary: An Unexplored Part of the Civil-Military Relations Triangle*, 8 A.F. ACAD. J. LEG. STUD. 197 (1997/1998); James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984); Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957); Donald N. Zillman and Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 397 (1976) [hereinafter Zillman and Imwinkelried II]; Donald N. Zillman and Edward J. Imwinkelried, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42 (1975); Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423 (1977).

[165] Able, 880 F.Supp. at 973. In *Goldman v. Weinberger*, the Court pointed out that the special demands of "military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Chief Justice Earl Warren wrote that the Supreme Court recognizes the "proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *supra* note 164, at 188. Additionally, the Court of Military Appeals

outlined the standard that would guide its analysis of the permissibility of the statement presumption. In the context of the military community, a content-based speech restriction is constitutional only if it is "no more than [what is] reasonably necessary to protect [a] substantial government interest."[166]

The court explained that the government's primary argument in support of the statement presumption was that it was directed solely at the prohibited acts and created no more than a rebuttable presumption that one would engage in such acts. After noting that the government was no longer arguing that homosexuals were mentally ill or suffering from a physical defect, the court recounted the testimony of numerous high-level military officers attesting to the honorable service of homosexual members.[167] Since closeted homosexuals were allowed to enter and serve in the military, the government had not determined that homosexuals "by their nature" posed "an uncontrollable risk that they would commit acts *inherently dangerous* to morale, good order and discipline, and unit cohesion."[168]

According to the court, the government imposed the speech restriction because it needed to rely upon the orientation statement as evidence of a

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has stated that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

It has been noted that "the judiciary has become more sensitized to violations of individual rights and the perils of unchecked discretion." Zillman and Imwinkelried II, *supra* note 164, at 400. Recently, in fact, a number of judges have taken exception to the military's exercise of discretion, citing either outright abuse or selective enforcement. Regarding the issue of abuse, see *Rigdon v. Perry*, 962 F.Supp. 150, 165 (D.D.C. 1997) ("What we have here is the government's attempt to override the Constitution and the laws of the land.") (granting motion for summary judgment and preliminary injunction based on First Amendment freedom of speech and religion against military's attempt to prevent chaplain from urging congregation to contact Congress on pending legislation). Regarding the issue of selective enforcement, see *Holmes v. California Army National Guard*, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting) ("From General Eisenhower on, up and down the ranks, even to Commander-in-Chief, there are many who would have had to forfeit their positions had the military's code of sexual conduct been strictly and honestly enforced.").

[166] Able, 880 F.Supp. at 973 (quoting Glines, 444 U.S. at 355).

[167] *Id.* at 974 (referring to the Senate Hearing 103-845 testimony of Secretary. of Defense Les Aspin; General H. Norman Schwarzkopf, Ret., United States Army; Major Kathleen Bergeron, United States Marine Corps; Chairman of the Joint Chiefs of Staff General Colin L. Powell, United States Army). For historical examinations of homosexuals in the military see ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990); LAWRENCE R. MURPHY, PERVERTS BY OFFICIAL ORDER: THE CAMPAIGN AGAINST HOMOSEXUALS BY THE UNITED STATES NAVY (1988); RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY—VIETNAM TO THE PERSIAN GULF (1993) (cited in WILLIAM N. ESKRIDGE, JR., & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 366 (1997)).

[168] Able, 880 F.Supp. at 974 (emphasis added).

likelihood to engage in homosexual acts.[169] The court found that it was an "extreme measure" to "presume from a person's status that he or she will commit undesirable acts."[170] After recalling the lessons of Hitler's status-based attacks, the court drew upon Supreme Court precedent. Citing *Robinson v. California*,[171] the court noted that subjecting a narcotics addict to a misdemeanor prosecution based upon the inference that he had possessed or would possess drugs in the future constitutes cruel and unusual punishment.[172] Noting that Robinson's narcotics addiction was self-acquired, the court wondered how much worse it was "to infer the commission of acts from one's homosexual status, which may well be acquired at birth or in early childhood."[173]

It appeared to the court that the government was aware that the judiciary would invalidate a discharge policy based solely on homosexual status or orientation. Counsel to the Department of Defense had said as much during the Senate hearings.[174] The resultant compromise, therefore, was a policy that mandates discharge based upon conduct, where conduct is defined to include homosexual statements. The mere acknowledgement of homosexual status is "transmogrified into an admission of *misconduct*, and *misconduct* that the speaker has the practically insurmountable burden in disproving."[175]

The court was not persuaded there was a meaningful distinction between homosexual "orientation" and homosexual "propensity" as defined by the directives. Homosexual orientation is defined as the quality of having an "abstract sexual preference for members of the same sex."[176] Homosexual propensity is defined "as the quality of having such a preference that presumably is sufficiently concrete to indicate a 'likelihood' that the preference will be acted upon."[177] Describing the treatment of the terms to be Orwellian, the court noted that neither the Act nor the directives explain how to differentiate between the two. According to Senate testimony, "any distinction between the two is 'hypothetical.'"[178] Since homosexual statements are enough to initiate discharge, a member who does no more than express his or her

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[169] *Id.*

[170] *Id.*

[171] 370 U.S. 660 (1962).

[172] Able, 880 F.Supp. at 974.

[173] *Id.* at 975 (citing HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 2 (John C. Gonsiorek & James D. Weinrich eds., 1991)).

[174] *Id.* at 975 (referring to statement of Counsel to the Deparment of Defense Jamie Gorelick from Senate Hearing 103-845).

[175] *Id* (emphasis added).

[176] *Id.*

[177] *Id.*

[178] *Id.* (referring to statement of Counsel to the Department of Defense Jamie Gorelick from Senate Hearing 103-845).

homosexual orientation must somehow show that he or she does not have a propensity to engage in homosexual acts. Neither the Act nor the directives suggest, however, "how one who is born with an innate tendency, an 'orientation' or a 'propensity,' to commit a homosexual act can prove that he or she does not have such orientation or propensity."[179] Forcing the member to rebut this presumption seemed to the court "a rather draconian consequence of merely admitting to an orientation that Congress has determined to be innocuous."[180]

The court was unimpressed with the three "isolated instances" in which Navy members had been able to meet the burden of rebutting the presumption, describing them as aberrations.[181] Instead, the court stated the "plain fact" is that the statement presumption constitutes a content-based speech regulation.[182] Members with a homosexual orientation are subject to discharge "regardless of whether they have engaged in or demonstrated a likelihood of engaging in prohibited acts, and thus reaches speech that does not indicate acts."[183] The court went on to conclude that "under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings."[184]

The court next addressed the government's alternative theory to justify the Act based upon unit cohesion.[185] In short, homosexuals were silenced in order to ease the discomfort of heterosexual members. Because a forthright policy of discharging homosexuals would be constitutionally suspect, the Act created a charade that the concern was really over homosexual acts, not status.[186] The court quickly pointed out, however, that the Act nowhere mentions heterosexuals or the effect that heterosexual reactions to homosexual acts may have on unit cohesion.[187] Despite this congressional omission, the court was prepared to analyze the Act as if such a finding were included.[188]

There was much anecdotal evidence presented during the legislative hearings to support this proposition. The bulk of the anecdotal testimony "described how heterosexuals would be prejudiced against homosexuals because their 'lifestyles' or 'values' differed from the 'traditional' moral or

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[179] *Id.*
[180] *Id.* at 976.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 975.
[185] *Id.*
[186] *Id.* at 977.
[187] *Id.*
[188] *Id.*

religious 'values' of heterosexuals."[189] For example, General Schwarzkopf told the Senate Committee that "[t]he introduction of an open homosexual into a small unit immediately polarizes that unit."[190] General Powell stated that, historically, homosexuals who remained closeted had been successful members but that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale and esprit of the Armed Forces."[191]

In the court's eyes, the animosity that heterosexuals displayed towards homosexuals is "by its terms based upon irrational prejudices."[192] The court found the government's two counterarguments unconvincing. First, the policy could not possibly accommodate the privacy interests of service members.[193] The barracks and latrines are no more private after the Act was passed than before. As for the showers, closeted homosexuals may still peek at the naked bodies of heterosexuals. In the eyes of the court, the policy would only create more tension because there will be a "generalized suspicion of everyone in the showers," hardly conducive to increasing unit cohesion.[194]

The second argument, that the policy is aimed at easing sexual tension, was no more logical. As explained to the Senate Committee, the argument is that homosexuals will act on their tendencies and behave in "improper ways" that will give rise to sexual tension in military units.[195] If this prediction were accurate, the court explained that forcing homosexuals to remain closeted would not ease sexual tensions. Additionally, the court reasoned that any inappropriate behavior could be dealt with under the UCMJ[196]

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[189] *Id.* at 977 (referring to the Senate Hearing 103-845 testimony of Major Kathleen Bergeron, United States Marine Corps; Captain Gordon Holder, United States Navy; Commander James Pledger, United States Navy; General John P. Otjen, United States Army; General H. Norman Schwarzkopf, Ret., United States Army; Chairman of the Joint Chiefs of Staff General Colin L. Powell, United States Army).

[190] *Id.* (referring to testimony of General H. Norman Schwarzkopf, Ret., United States Army, from Senate Hearing 103-845).

[191] *Id.* (referring to testimony of Chairman of the Joint Chiefs of Staff General Colin L. Powell, United States Army, from Senate Hearing 103-845).

[192] *Id.* at 978.

[193] *Id.*

[194] *Id.*

[195] *Id.* (referring to testimony of Fleet Master Chief Ronald Carter, United States Navy, General Gordon Sullivan, United States Army, and Major Kathleen Bergeron, United States Marine Corps, from Senate Hearing 103-845).

[196] *Id. See supra* notes 20-48 and accompanying text. To illustrate this point, Barry Goldwater commented that "the military has wasted a half-billion dollars over the past decade chasing down gays and running them out of the armed services." Goldwater, *supra* note 1, at A23. Gary L. Bauer, the president of the Family Research Council, responded by citing a study of 102 punitive discharges conducted by Retired General William Weise. Of the 102 punitive discharges, 85 percent involved non-consenting victims, 63 percent involved senior military personnel victimizing subordinates, and 49 percent involved gays in the military who molested

The government's arguments, of course, were based upon the assumption that the presence of open homosexuals in the military would be disruptive to the units. Government studies, however, did not support this position. A RAND study commissioned by the Department of Defense concluded that "although some disruptions might result from having acknowledged homosexuals serving in the military, the experience of analogous organizations . . . suggest that any increase is likely to be quite small."[197] The study explained that many foreign countries that had allowed homosexuals to serve openly did not report serious problems.[198] Noting that similar arguments were raised during the racial integration of the military, the RAND study also reported that integration did not destroy unit cohesion and military effectiveness when integration was finally ordered.[199] Furthermore, a 1992 General Accounting Office report examined analogous organizations that have permitted open homosexuals to serve and "have generally not reported adverse impacts."[200]

Even though Congress could have explicitly found the reactions of heterosexual members would be more disruptive than that encountered by foreign nations, the court still doubted that the reaction would be significant. Unit cohesion depends on trust, and the court drew upon common sense to suggest that a policy based on secrecy would only undermine trust.[201] Not only is the policy deceptive, but it also fosters dishonesty.[202] When a closeted homosexual is asked in passing by other members in the unit whether he is a homosexual, "the pressure to lie is obvious."[203] The court explained that it had been presented with no evidence as to whether the effect of secrecy and deception was more disruptive to unit cohesion than a policy based upon openness and honesty. Perhaps more importantly, though, both homosexuals and heterosexuals "would be entitled to think it demeaning and unworthy of a

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children. Bauer, *supra* note 2, at A23. The criminal prohibitions contained in the UCMJ, however, would adequately and justly punish the inappropriate behavior in each of the cited instances.

[197] Able, 880 F.Supp. at 978 (quoting RAND National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* xxiv (1993) (internal quotation marks omitted)).

[198] *Id.* (citing RAND National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 14 (1993)).

[199] *Id.* at 979 (citing RAND National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 189 (1993)).

[200] *Id.* at 978 (citing General Accounting Office, GAO/NSIAD-92-98, DEFENSE FORCE MANAGEMENT, DOD'S POLICY ON HOMOSEXUALITY 39-40 (Report to Congressional Requesters, June 1992)) [hereinafter GAO: DOD POLICY ON HOMOSEXUALITY].

[201] *Id.*

[202] *Id.*

[203] *Id.*

great nation to base a policy on pretense rather than on truth."[204] It might appear less than honorable to invite a homosexual to enter the military only to discharge him because his sexual orientation has been revealed by something he said, and finally to pretend that the discharge is based on something other than orientation.[205]

Returning to the Constitution, the court explained that even if the First Amendment permitted the silencing of homosexuals because of the effect on some heterosexuals, "it would surely require a legislative finding that the consequences of disclosure would be infinitely more serious than anything revealed in the record before Congress."[206] Echoing testimony from the Senate Committee hearings, the court recounted the admission of two high-level military officers that the military would still be able to fulfill its mission.[207] The court concluded its free speech analysis with the observation that "the Supreme Court has held that the First Amendment will not countenance the proscription of the expression of an idea because others find that idea repugnant."[208] Rather than drawing upon government employment cases, the district court relied upon First Amendment principles applicable to government acting in its capacity as sovereign. Citing a string of Supreme Court precedent,[209] the court stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[210] Consequently, the court held that the statement presumption of §654(b)(2) and its implementing directives violate the First Amendment's freedom of speech clause.

Having invalidated the statement presumption under the First Amendment, the court also found that §654(b)(2) violated the Equal Protection clause of the Fourteenth Amendment as made applicable to the federal government by the Fifth Amendment's Due Process clause.[211] Because only members with a heterosexual orientation were permitted to exercise their right to free speech regarding this status, the government was forced to show that the

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[204] *Id.*
[205] *Id.* at 979.
[206] *Id.*
[207] *Id.* (referring to testimony of General John P. Otjen, United States Army, and General Calvin Waller, Ret., United States Army, from Senate Hearing 103-845).
[208] *Id.*
[209] *Id.* (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Healy v. James, 408 U.S. 169, 187-88 (1972); Simon and Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991)). *See infra* notes 355-56 and accompanying text for a comment on the permissibility of the "heckler's veto" in both the civilian and military community.
[210] Able, 880 F.Supp. at 979-80 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989) (striking Texas statute making it a crime to desecrate the American flag) (internal quotation marks omitted)).
[211] *Id.* at 980 (citing Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954)).

policy is tailored to serve a substantial government interest.[212] Even assuming that unit cohesion would be harmed by the presence of open homosexuals, the court found that the discriminatory policy was impermissible. Again relying upon Supreme Court precedent, the court noted that "[p]ublic officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held."[213] Consequently, the statement presumption of §645(b)(2) was also found to violate the Equal Protection clause of the Fifth Amendment.

B. The First Opinion of the Second Circuit

On appeal before the Court of Appeals for the Second Circuit, the government argued that the district court had failed to accord Congress and the military the proper deference regarding eligibility requirements and that §654(b)(2) was constitutional when judged by the proper standard. Furthermore, the government argued that the plaintiff's claim was barred by their failure to exhaust their administrative remedies.[214] Alternatively, the plaintiffs argued that they did have standing to challenge the act prohibition of §654(b)(1) and that the court must address the constitutionality of the act prohibition before it can determine the permissibility of the statement presumption of §654(b)(2). Under this theory, the constitutionality of the statement presumption is contingent on the validity of the act prohibition.

After reviewing the Act and deciding that the plaintiffs were not required to exhaust their administrative remedies,[215] the Court of Appeals determined that the plaintiffs had standing to challenge the constitutionality of the act prohibition of §654(b)(1).[216] The district court, therefore, had erred in ruling upon the permissibility of the statement presumption without first resolving the validity of the act prohibition of §654(b)(2). In the eyes of the Court of Appeals, the two subsections of the Act were inescapably linked. If the act prohibition was invalid, then the statement presumption was invalid as well. If, however, the act prohibition was permissible, then the statement presumption was also valid.[217] Since the district court had failed to consider the constitutionality of the act prohibition, the Court of Appeals vacated the district court's order and remanded the case.

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[212] *Id.* (quoting Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 99 (1972)).
[213] *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting))).
[214] Able v. United States, 88 F.3d 1280, 1284 (2nd Cir. 1996).
[215] Although not directly pertinent to this examination, the court's finding that the plaintiffs were not required to exhaust their administrative remedies because it would be futile can be found at *Able*, 88 F.3d at 1288-90.
[216] *Id.* at 1292.
[217] *Id.*

The Court of Appeals spent the remainder of the opinion explaining exactly why the constitutionality of the statement presumption could not be determined without first addressing the act prohibition. Before turning to the merits of the challenge, however, the court reviewed the "separate society" rationale that permits restrictions on speech in the military that would otherwise run afoul of the First Amendment.[218] As previously explained in this article, the separate society rationale is premised upon the unique military mission, the critical importance of obedience and subordination, and the complimentary development of military custom.[219] Both underlying justifications had been adopted and advanced by the Supreme Court in a series of constitutional challenges arising within the military community.[220]

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[218] *Id.* at 1292-94.

[219] *See supra* note 164.

[220] Able, 88 F.3d at 1294 (citing Brown v. Glines, 444 U.S. 348, 355 (1980); Greer v. Spock, 424 U.S. 828, 837 (1976); Parker v. Levy, 417 U.S. 733, 758 (1974)).

In *Brown v. Glines*, the Supreme Court denied a facial challenge to military regulations that required military personnel and civilians to gain prior command approval before circulating certain material. The Court found that the regulations "protect a substantial Government interest unrelated to the suppression of free speech," namely, the avoidance of a "clear danger to the loyalty, discipline, or morale of the troops on the base under his command." Brown, 444 U.S. at 353-54. The Court also concluded that "the Air Force regulations restrict speech no more than is reasonably necessary." *Id.* at 355. The regulations "prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale." *Id.* The Court reasoned that the prior approval requirement was necessary because if the commander did not have the opportunity to review the material, then he "could not avert possible disruption among his troops." *Id.* at 356.

In *Greer v. Spock*, Army regulations at Fort Dix that prohibited political demonstrations and speeches and required prior approval of literature were challenged both facially and as applied. The base commander denied access to political candidates in order to avoid the appearance of partisan political favoritism and to preserve the training environment of the troops. Greer, 424 U.S. at 833 n.3. Recognizing the military's interests in maintaining both the appearance and reality of political neutrality, the Court explained that keeping official military activities free of entanglement with partisan political campaigns "is wholly consistent with the American tradition of a politically neutral military establishment under civilian control." *Id.* at 839. The Court concluded that restrictions on distribution did not target political speech, but was a general exclusion applicable whenever the commander determined that there was a clear threat to good order, loyalty, and discipline. *Id.* at 840.

In *Parker v. Levy*, the Supreme Court, per then-Justice Rehnquist, denied vagueness and overbreadth challenges to Articles 133 and 134, UCMJ. The Court cited the Court of Claims reasoning that cases involving Article 134 determinations were "not measurable by our innate sense of right or wrong, of honor or dishonor, but must be gauged by an actual knowledge and experience of military life, its usage and duties." Parker, 417 U.S. at 748-49 (citing Swaim v. United States, 28 Ct. Cl. 173, 228 (1893)). It also explained that "[f]or the reasons which differentiate society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Id.* at 756.

Turning to the constitutionality of the statement presumption, the Court of Appeals did not immediately agree that the presumption constituted a content-based speech restriction. Although the district court had concluded the restriction was aimed at the content of the statement, the Court of Appeals pointed out that even if a speech restriction appears on its face to be content-based, the Supreme Court has held that it may be constitutionally valid if it serves a secondary purpose.[221] In *City of Renton v. Playtime Theaters*,[222] the Supreme Court ruled that a zoning ordinance that restricted the operation of adult theaters was not aimed at the content of the films, but at the secondary effects of the theaters on the surrounding community.[223] The Supreme Court held that the zoning ordinance was constitutional since it was "designed to serve a substantial governmental interest and allow[ed] for reasonable alternative avenues of communication."[224] The Court of Appeals' reference to

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In ruling upon the overbreadth challenge to Article 134, UCMJ, the Court reasoned that the "different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that would be constitutionally impermissible outside it." *Id.* at 758. The Court quoted at length from the "sensibly expounded" reasoning of the Court of Military Appeals in *United States v. Priest*:

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it is both directed at inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Parker, 417 U.S. at 758-59 (quoting United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970))). *See generally* Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (1994).

[221] *Id.* at 1294.

[222] 475 U.S. 41 (1986).

[223] Able, 88 F.3d at 1294-95.

[224] *Id.* at 1295 (quoting City of Renton, 475 U.S. 41, 50 (1986)); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 763 (1994) (concluding injunction against abortion protesters must be content neutral, leave ample alternatives for speech, and burden no more speech than necessary to serve a significant government interest); Ward v. Rack Against Racism, 491 U.S. 781, 791 (1989); Pro-Choice Network v. Schenck, 67 F.3d 377, 386 (2nd Cir. 1995) (en banc) (First Amendment review of restrictions on abortion protestors), *aff'd in part and rev'd in part, remanded*, 519 U.S. 357 (1997); Boos v. Barry, 485 U.S. 312, 320 (1988)). In *Boos v.*

City of Renton recognized the government's attempt to draw an analogy between the principle in *City of Renton* and the argument in *Able* that the central purpose of the statement presumption was to prevent or discover homosexual acts. Of course, the plaintiffs maintained that such an analogy could not be drawn because the purpose of the statement presumption was to silence homosexual members regarding their sexual orientation.[225]

Before determining the primary purpose of the presumption, the Court of Appeals reviewed the standard for both content-neutral and content-based restrictions. Exploring the permissibility of content-neutral restrictions, the court drew upon the case of *Wayte v. United States*.[226] In *Wayte*, the Supreme Court upheld the Department of Justice's policy of selectively prosecuting men who had self-reported that they did not intend to register for the Selective Service.[227] The Supreme Court concluded that the Department of Justice's policy met the four-part test for content-neutral speech restrictions that was first articulated in *United States v. O'Brien*.[228] Applying the *O'Brien* test to the statement presumption, the Court of Appeals noted that if the statement presumption is content-neutral, then the crucial inquiry would be whether the statement presumption furthers a substantial government interest and whether the presumption restricted speech no more than necessary.[229]

Examining content-based speech restrictions in the special context of the military, the Court of Appeals noted that the standard for content-neutral restrictions arguably applied to content-based restrictions as well.[230] If a higher

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Barry, the Supreme Court examined a District of Columbia provision (D.C. Code § 22-1115 (1981)) that prohibited the display of any sign bringing a foreign government into disrepute within five hundred feet of a foreign embassy or building occupied by an embassy official. A similar prohibition applied to assemblies. The Court found that the display provision was content-based because it applied to an entire category of speech, namely "signs or displays critical of foreign governments." Boos, 485 U.S. at 319. It was not viewpoint–based because the determination of which viewpoint is permitted depends upon the policies of foreign governments. *Id.* at 319. Applying strict scrutiny, the Court found that although the display provision may advance the government's interest in protecting the dignity of foreign officials, it was not narrowly tailored to serve that interest. *Id.* at 326-29.

[225] Able, 88 F.3d at 1295.

[226] 470 U.S. 598 (1985)

[227] *Id.* at 610-11).

[228] 391 U.S. 367 (1968). A content-neutral restriction on speech is permissible if: 1) it is within the constitutional power of the government; 2) it furthers an important or substantial government interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedoms is no greater than necessary to further that interest. Able, 88 F.3d at 1295 (citing O'Brien, 391 U.S. at 377).

[229] Able, 88 F.3d at 1295 (citing John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV 1482, 1483 n.10, 1484 (1975)).

[230] *Id.* at 1295-96 (citing Glines, 444 U.S. at 355)

threshold was required for content-based restrictions in the military context, the Court of Appeals determined the statement presumption would have to substantially further an important government interest and restrict no more speech than necessary to further that interest.[231] Although it claimed to have articulated two distinct standards, the Court of Appeals cited nearly identical language for both content-based and content-neutral restrictions.[232] Assuming the government's interest in preventing homosexual acts was permissible and important, a determination left to the district court on remand, the Court of Appeals ultimately determined that the statement presumption was valid regardless of whether it was characterized as content-based or content-neutral.

First, the Court of Appeals found that the statement presumption furthers the government's important interest in preventing homosexual acts in the military.[233] The statement presumption of §654(b)(2) required the discharge of a service member if he or she has a propensity to engage in homosexual acts even if there is no proof that the person actually engages in homosexual acts. The implementing directives defined propensity as "more than an abstract preference or desire to engage in homosexual acts; rather, it indicates a likelihood that a person engages in or will engage in homosexual acts."[234] The Court of Appeals concluded that, "in the context of employment, the government may make a decision based on the likelihood that an individual will engage in prohibited activity, so long as the underlying prohibition is constitutional."[235] Since the correlation between those who state that they are homosexual and those who engage in homosexual acts was clear,[236] the prohibition on homosexual acts permitted the government to prevent homosexual acts by discharging those members likely to commit such acts.[237]

The Court of Appeals also disagreed with the district court's interpretation of the Act's language. The Act did not equate status with

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[231] *Id.* at 1296 (citing Thorne v. United States Department of Defense, 916 F.Supp. 1358, 1370 (E.D.Va. 1996)).

[232] *Id.* The Court of Appeals did state, however, that the standard for a content-based restriction in the civilian setting would be constitutional if it "'is a precisely drawn means of serving a compelling state interest.'" *Id.* at 1296 (quoting Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980)).

[233] *Id.* The Court of Appeals reiterated, however, that it assumed but did not decide "that the interest which supports the act prohibition is sufficient to withstand constitutional scrutiny." *Id.* at 1296 n.8.

[234] *Id.* at 1296 (quoting DoD Directive 1332.14, *supra* note 88, encl. 3, pt. 1, ¶ H.1.b(2)).

[235] *Id.* (citing Steffan v. Perry, 41 F.3d 677, 688 (D.C. Cir. 1994) (en banc)).

[236] *Id.* at 1296-97 (citations and footnote omitted).

[237] *Id* at 1297. *See also* Lee v. United States, 32 Fed. Cl. 530 (Fed. Cl. 1995) (finding that Air Force Reserve officer's honorable discharge was not unlawful because his expression of an inability to launch nuclear weapons based upon moral reservations was not a matter of public concern under the *Pickering* test, and military's compelling need to ensure that all members will carry out orders outweighs any protection to which speech was entitled).

propensity. Although in most cases a member who states that he is a homosexual will be discharged, this result comes to pass only because the evidentiary value of the admission is strongly linked to a likelihood of engaging in homosexual acts.[238] Unlike the district court, the Court of Appeals did not trivialize the opportunity that service members were afforded to rebut the statement presumption. In seven cases out of forty-three attempts, members were retained after making the required showing.[239] Hence, "the admission of homosexual status does not inevitably equate with a finding of propensity to engage in homosexual acts."[240]

Addressing the second prong of the speech standard, the Court of Appeals also found that the statement presumption restricts no more speech than is reasonably necessary.[241] The rebuttable presumption "plays a significant role in the military's effort to eliminate homosexual conduct from the military—an objective that it regards as important."[242] To the Court of Appeals, the policy represented "a balance between a service member's privacy interest and the military interest in prohibiting homosexual acts" by restricting when an investigation can be initiated.[243] As a general matter, a member will be investigated only if he "does something (either by announcing his sexuality or by engaging in conduct which is thereafter reported)" that attracts the attention of the military authorities to him.[244] Since this policy is important to the accomplishment of the military mission and reasonably balances the competing interests, the statement presumption restrains no more speech than is reasonably necessary.[245]

Concluding its analysis, the Court of Appeals again reiterated that its examination was contingent upon the constitutionality of the act prohibition of §654(b)(1). Significantly, it affirmed that "[t]he government does not contend (nor could it) that in the event that §654(b)(1) is held to be unconstitutional; §654(b)(2) may still be upheld. Plainly, a limitation on speech in support of an unconstitutional objective cannot be sustained."[246] Consequently, the Court of

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[238] Able, 88 F.3d at 1298.

[239] *Id.*

[240] *Id.* The court also declined to adopt the argument made by the Family Research Council in its amicus brief that the Act bars all individuals with a known homosexual orientation. Instead, "the Act does not bar those who have a homosexual orientation but are not likely to engage in homosexual acts." The only evidence otherwise was Congress's choice of the word "propensity" in §654(b)(2). The court refused to define propensity to mean "orientation" or "inclination," and instead ascertained that "it means a likelihood to engage in acts." *Id.* at 1298-99.

[241] *Id.* at 1299.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* at 1300.

[246] *Id.*

Appeals vacated the district court's order dismissing the plaintiff's §654(b)(1) claim. It also remanded the case to allow the district court to consider the constitutionality of the act prohibition and then reconsider the permissibility of the statement presumption.

C. The Second Opinion of the District Court

On remand, the district court was assigned the task of determining whether the act prohibition of §654(b)(1) violated the Equal Protection clause of the Fourteenth Amendment, made applicable to the federal government by the Fifth Amendment's Due Process clause.[247] After reviewing the history of the case, the court proceeded to frame the issue in light of the Supreme Court's 1996 decision in *Romer v. Evans*.[248] The district court interpreted the ruling to establish "that government discrimination against homosexuals in and of itself violates the constitutional guarantee of equal protection."[249] The court further read the decision to implicitly hold that "such discrimination, without more, is either inherently irrational or invidious."[250] Since the act prohibition treats sexual acts differently depending upon whether the participants are

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[247] Able v. United States, 968 F.Supp. 850, 852 (E.D.N.Y. 1997) (citing Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954)).
[248] *Id.* at 852 (citing Romer v. Evans, 517 U.S. 620 (1996)). In *Romer*, the Supreme Court ruled that Amendment 2 to the Colorado Constitution violated the Equal Protection clause of the Constitution. Passed in a statewide referendum, Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect" homosexual persons or gays or lesbians. Romer, 517 U.S. at 624. The Court noted that the Amendment put homosexuals "in a solitary class" and "withdraws from homosexuals, but no others, specific legal protections from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. The Amendment failed rational basis review under the Equal Protection clause for two reasons:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Id. at 632. For a post-*Romer* opinion that upheld a similar but more restrictive amendment to a city charter, see *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (holding that city charter amendment was rationally related to the city's interest in "conserving public and private financial resources" that accrue from investigating and adjudicating sexual orientation discrimination complaints).
[249] Able, 968 F.Supp. at 852.
[250] *Id.* (citing Romer, 517 U.S. at 631-32 (1996)).

homosexual or heterosexual, the "issue is whether that different treatment deprives homosexuals of their equal protection rights."[251]

After relating a brief history of the social acceptance of homosexuals and homosexual conduct, the court referenced social opinion polls that illustrate the increasing level of social tolerance of homosexuality in the United States. A Gallup Poll conducted in March 1991 indicated that 69 percent of respondents believed that homosexuals should be admitted to the military. An April 1991 study by Penn and Schoen Associates revealed that 81 percent of Americans believed that homosexuals should not be discharged from military service solely because of their sexual orientation.[252] Additionally, many countries prohibit discrimination against homosexuals and have successfully integrated homosexuals into their armed forces without adversely affecting unit readiness, effectiveness, cohesion, or morale.[253] After further referencing the history of hate crimes and governmental discrimination that homosexuals have endured, the court repeated the admissions made by the government in the case before it. Homosexuals were not excluded because of mental defects, security threats, or fear of infectious diseases.[254] Instead, the court noted that the government had agreed that generally homosexuals could serve honorably and were no more likely than heterosexuals to violate the military code of conduct or other rules.[255]

The court explained that the rules codified in the UCMJ that govern sexual behavior do not distinguish between homosexuals and heterosexuals. After further describing each provision, the court concluded that the UCMJ articles enable the military to deter "all sexual behavior likely to cause harm or embarrassment to someone else."[256] In light of these criminal sanctions, the military did not need to deter sexual misconduct by adding administrative sanctions.[257]

Although the military could prosecute under the UCMJ's comprehensive criminal code, the court highlighted that §654(b)(1) requires a person be discharged for acts that are "inherently innocuous" and not otherwise criminal.[258] Examples of such conduct include kissing and holding hands off base and in private. The court could not imagine why "the mere holding of hands off base and in private is dangerous to the mission of the Armed Forces

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[251] *Id.*
[252] *Id.* at 853 (citing GAO: DoD POLICY ON HOMOSEXUALITY, *supra* note 200, at 39-40).
[253] *Id.* at 853-54 (citing General Accounting Office, GAO/NSIAD-93-215, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES 5 (Report to Senator John W. Warner, June 1993)).
[254] *Id.* at 855.
[255] *Id.*
[256] *Id.* at 857.
[257] *Id.*
[258] *Id.*

if done by a homosexual but not if done by a heterosexual."[259] It was "obvious," therefore, that holding hands was not included in the act prohibition because it is "inherently dangerous," but because it identified the speaker as a homosexual.[260]

The court found the three justifications proffered by the government based upon unit cohesion, privacy interests, and sexual tensions to be illegitimate or irrational. The first justification for the act prohibition was that the presence of a known homosexual would damage unit cohesion by arousing the animosity of heterosexuals who morally disapprove of homosexuals.[261] Although this prejudice was the "only conceivable way" that the presence of homosexuals could impact the level of unit cohesion, it was an illegitimate reason for government-sanctioned discrimination. Quoting the Supreme Court in *Palmore v. Sidoti*,[262] the court explained that:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held.[263]

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[259] *Id.*

[260] *Id.*

[261] *Id.* 858-59.

[262] Palmore v. Sidoti, 466 U.S. 429 (1984). In *Palmore*, the Supreme Court held that a state court's decision to remove a child from the custody of the natural mother because the mother had entered an interracial marriage did not survive strict scrutiny under the Equal Protection clause of the Fourteenth Amendment. After noting that racial classifications are "more likely to reflect racial prejudice than legitimate public concerns," the Court had "little difficulty" in determining that "the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother." *Id.* at 432-33.

[263] Able, 968 F.Supp. at 859 (quoting Palmore, 466 U.S. at 433) (internal citations omitted). The court also cited *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) for the proposition that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." Although declining to extend quasi-suspect classification to mental retardation, the Supreme Court in *Cleburne Living Center* invalidated a city zoning ordinance, as applied to the petitioner in the case, that required the group home to acquire a special use permit annually from the city.

> The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

Cleburne Living Center, 473 U.S. at 450.

The court contended that the applicable case law prohibited the government from giving effect to private biases. The desire to accommodate the personal objections to homosexuality was not sufficient to uphold Amendment 2 to the Colorado Constitution.[264] The desire to protect a child from private racial prejudices was not a legitimate reason to favor same-race couples over interracial couples in a child custody determination.[265] Finally, it was not legitimate for the government to take the negative attitudes of property owners into account in denying a zoning permit for a home for persons with mental disabilities.[266] The court found these principles to be equally applicable in the military context, since the "Constitution does not grant the military special license to act on prejudices or cater to them."[267]

The *Able* court also concluded that the government's rationale was "incongruous."[268] If the presence of homosexuals made heterosexual members uncomfortable, then forcing the former to remain closeted does nothing to relieve the fears of the latter. It was "unlikely in the extreme that any enlisted member fit to serve would believe that closeted homosexuals are not serving," especially after asking a member if he is a homosexual and receiving a "no comment" response.[269] Since under the current policy any member could be a closeted homosexual, the act prohibition, rooted in secrecy, could only result in an atmosphere of general suspicion and mutual distrust hardly conducive to unit cohesion.[270]

The court found the justifications based upon privacy interests and sexual tensions equally lacking. Regardless of how cramped or involuntary the living and working conditions of service members may be, closeted homosexuals were still entitled under the Act to serve.[271] Since "no rational person" would believe that homosexuals were currently not sharing the same bathrooms and bunks, the act prohibition was not rationally related to privacy.[272] Moreover, the government documents indicated that the privacy of heterosexuals was violated not by the acting out of homosexual attractions, but

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[264] Able, 968 F.Supp. at 859 (citing Philips v. Perry, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting) (citing Romer, 517 U.S. at 635)). For a discussion of Amendment 2, see *supra* note 248.
[265] *Id.* (citing Philips, 106 F.3d at 1436 (Fletcher, J., dissenting) (citing Palmore, 466 U.S. at 433)).
[266] *Id.* (citing Philips, 106 F.3d at 1436 (Fletcher, J., dissenting) (citing City of Cleburne, 473 U.S. at 448 (1985)).
[267] *Id.*.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.* at 860.
[272] *Id.*

by the mere presence of an open homosexual in the living quarters.[273] According to the court, the Equal Protection clause simply does not allow the government to discriminate against homosexuals in order to accommodate these prejudices.

It was apparent that the court found the arguments based upon sexual tensions between heterosexuals and homosexuals even less rational. The government's assumption was that members were likely to act in accordance with their sexual drives.[274] Although tensions between males and females were reduced by separate living facilities, it was not possible to further separate heterosexuals from homosexuals. Since the government did not provide reasons why it believed that open homosexuals would be more likely to act upon their sexual attractions than closeted homosexuals, the arguments were illogical.[275]

Returning to a discussion of the applicable case law, the court outlined the requirements of the Equal Protection clause. A court typically "looks at what end the legislation seeks, whether that end is furthered by the classification adopted, and its effect on the persons adversely affected by the Act."[276] If it neither burdens a fundamental right nor targets a suspect class, the legislative classification must only be rationally related to some legitimate end.[277] However, it is illegitimate to punish a harmless act solely because it "serves to announce something that excites the animosity of others."[278] Additionally, the government is prohibited by the Equal Protection clause from "indiscriminately imposing inequalities based upon naked stereotypes."[279] In the case before it, the court was convinced that the act prohibition catered to the irrational prejudices of heterosexuals.[280]

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[273] *Id.*

[274] *Id.*

[275] *Id.* at 860-61. The court also pointed out that military regulations do not address the increased sexual tension that arises out of heterosexual acts that do not constitute sexual misbehavior. *Id.* at 861.

[276] *Id.*

[277] *Id.* (citing Romer, 517 U.S. at 631).

[278] *Id.* (citing Simon & Schuster, Inc. v. New York Crime Board, 502 U.S. 105, 118 (1991); Texas v. Johnson, 491 U.S. 397, 414 (1989); Healy v. James, 408 U.S. 169, 187-88 (1972); Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). The court also quoted *United States Department of Agriculture v. Moreno* for the proposition that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest." Able, 968 F.Supp. at 861 (quoting United States Department of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973)).

[279] Able, 968 F.Supp. at 861 (citing United States v. Virginia, 518 U.S. 515, 531-33 (1996)).

[280] *Id.* at 862. The district court also offered its analysis of the history of discrimination against homosexuals, their political powerlessness, and arguments supporting a finding that they constitute a discrete and insular minority. Although not necessary to dispose of the case

The court reached into the pages of history to conclude its analyses. In the Executive Order desegregating the military, President Harry S. Truman stated "it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in the country's defense."[281] Drawing upon this proposition, the court found that the act prohibition brands open homosexuals, asserting their inferiority by denying the opportunity to serve in the military, which the court considered to be a primary act of citizenship.[282] Importantly, the court went on to conclude that because the government "gives legal effect to prejudice in the military forces and not in civilian government employment does not make the discrimination any more valid."[283] Consequently, the district court held that the unequal conditions imposed upon homosexuals by the act prohibition were invalid under the equal protection component of the Fifth Amendment.[284] Having declared the act prohibition unconstitutional, the court also ruled the statement presumption was also unconstitutional under the First Amendment.[285] Consequently, the court enjoined the government from applying 10 U.S.C. §§654(b)(1) and (b)(2) to the plaintiffs.

D. The Second Opinion of the Second Circuit

The case went back before a three judge panel of the Second Circuit.[286] The court held that the act prohibition, §654(b)(1), did not violate the Equal Protection clause under rational basis review.[287] Having previously held that the constitutionality of the statement presumption, §654(b)(2), was dependent

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before it, the court stated its belief that homosexuals met the criteria that warranted heightened scrutiny under the Equal Protection clause. *Id.* at 862-64.

[281] *Id.* at 864 (quoting Exec. Order No. 9981, 3 C.F.R. Supp. 1947, at 722 (July 29, 1948)).

[282] *Id.* (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

[283] *Id.* (citing United States v. Robel, 389 U.S. 258, 264 (1967)). In *Robel*, the Supreme Court found that § 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 64 Stat. 992, 50 U.S.C. § 784 (a)(1)(D), constituted an unconstitutional abridgement of the right to association under the First Amendment. Robel, 389 U.S. at 261. The section of the Act provided that when a Communist-action organization was under a final order to register, it was then unlawful for any member of the organization to engage in employment in any defense facility. *Id.* The Court noted that it was because the section "sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment." *Id.* at 262.

[284] Able, 968 F.Supp. at 864. The court distinguished the three courts of appeals decisions that had reached a contrary conclusion. *Id.* (distinguishing Philips, 106 F.3d 1420; Thomasson, 80 F.3d 915; Richenburg, 97 F.3d 256).

[285] *Id.*

[286] Able v. United States, 155 F.3d 628 (2nd Cir. 1998).

[287] *Id.* at 636.

upon the constitutionality of the act prohibition, the court accordingly declared that the statement presumption was constitutional as well.[288]

Although the district court had suggested heightened scrutiny was the appropriate standard of review, the Court of Appeals noted that at oral arguments the plaintiffs stated they were only seeking rational basis review of the Act.[289] The scope of rational basis review, however, is very narrow. In *Heller v. Doe*,[290] the Supreme Court ruled that "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'"[291] Legislative classifications are entitled to "a strong presumption of validity" and the government "has no obligation to produce evidence to sustain the rationality of a statutory classification."[292] The assumption, therefore, is that the Act was constitutional and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[293]

The Court of Appeals further explained the plaintiffs faced an even more daunting task in challenging a statute applicable only to the military. Great deference is afforded to legislative judgments affecting the military,[294]

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[288] *Id.*

[289] *Id.* at 632.

[290] 509 U.S. 312 (1993).

[291] *Id.* at 319 (quoting Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 313 (1993))).

[292] Able, 155 F.3d at 632 (citing Heller, 509 U.S. at 320 (quoting Beach Communications, Inc., 508 U.S. at 313 (1993))).

[293] *Id.* (citing Heller, 509 U.S. at 320-21).

[294] *Id.* (citing Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)). In *Goldman v. Weinberger*, the Supreme Court considered a Free Exercise Clause challenge to Air Force Regulation 35-10 which only permitted the wearing of nonvisible religious apparel. Goldman argued "that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to [the uniform regulation] for religious apparel unless the accouterments create a 'clear danger' of undermining discipline and esprit de corps." Goldman, 475 U.S. at 509. The Court held that the Free Exercise Clause did not require the Air Force to make an exception to its uniform and generally applicable dress regulations even if it had the effect of substantially burdening religion. Then-Justice Rehnquist, joined by four other Justices, noted that, even when evaluating whether military needs justify a regulation of religiously motivated conduct, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.* at 507. According to Justice Rehnquist, the "appropriate military officials" decided the desirability of dress regulation, and "they are under no constitutional mandate to abandon their considered professional judgment" and grant an exception. *Id.* at 509. One commentator concluded that the Court's refusal in the case to,

> establish guidelines for government action when that action impinges upon constitutionally protected interests . . . sends a legitimating message to military officials prone to suppress the individuality of service personnel and

especially "where, as here, the challenged restriction was the result of exhaustive inquiry by Congress in hearings, committee and floor debate."[295] The Court of Appeals contended that this deference was "deeply recurrent in Supreme Court case law," justifying a long string of legislative and executive decisions in the military context.[296] Based upon the separate society rationale,[297] military members are not afforded the same constitutional protections as their civilian counterparts, both generally and in the military justice process.[298] Although the Court of Appeals could not abdicate its constitutional role, "courts are ill-suited to second-guess military judgments that bear upon military capability or readiness."[299]

The Court of Appeals addressed both of the plaintiffs' equal protection arguments. First, the plaintiffs argued that the Act is premised on irrational prejudice and fears that can never serve as a legitimate government interest, based upon the holdings in *Romer v. Evans*, *City of Cleburne v. Cleburne Living Center*, and *Palmore v. Sidoti*.[300] Rejecting this argument, the court

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> leaves unanswered the question of when, if ever, the Court is prepared to defend the liberties of Americans who serve their country in the armed forces.

Military Ban on Yarmulkes, 100 HARV. L. REV. 163, 172 (1986). *See also* 10 U.S.C. § 774 (West 1998) (providing that military members may wear items of religious apparel except when the Secretary of the individual service determines that "wearing of the item would interfere with the performance of the member's military duties," or when the Secretary determines by regulation that "the item of apparel is not neat and conservative").

[295] Able, 155 F.3d at 632 (quoting Rostker v. Goldberg, 453 U.S. 57, 72 (1981)).

[296] *Id.* at 633.

[297] *Id.* See *supra* note 164 for a discussion of the separate society rationale.

[298] Able, 155 F.3d at 633. Criminal rights and protections in the military justice process differ from those in the civilian community. The Fifth Amendment's Grand Jury provision contains an exception for "cases arising in the land or naval forces." United States v. Curtis, 44 M.J. 106, 130 (1996). "[A] court-martial has never been subject to the jury-trial demands of Article III of the Constitution." United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993) (citing Ex Parte Quirin, 317 U.S. 1 (1942)). The Court of Military Appeals (now the Court of Appeals for the Armed Forces) has also invoked the separate society rationale to qualify the Fourth Amendment's search and seizure protection. "This Court has observed, 'since the military is, by necessity, a specialized society separate from civilian society, . . . it is foreseeable that reasonable expectations of privacy within the military society will differ from those in the civilian society.'" United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) (quoting United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981)). In the military setting, a commander who issues a search authorization does not have be a judicial officer, the warrant does not have to be in writing or supported by oath or affirmation, and general inspections may be ordered without probable cause and without the specificity required for a typical warrant. *See e.g.*, United States v. Lopez, 35 M.J. 35, 45 (C.M.A. 1992) (Cox, J., concurring).

[299] Able, 155 F.3d at 634.

[300] Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429 (1984). *See also supra* notes 248, 262, 263.

explained that these cases did not arise in the military setting, where "constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions."[301] Additionally, *Romer* and *Cleburne Living Center* involved restrictions based on status and the court had already determined that the act prohibition targeted conduct.[302]

Second, the plaintiffs contended that the government's justification based upon unit cohesion, reduced sexual tensions, and privacy were not rationally related to the prohibition on conduct. The court also found this argument unpersuasive. Given the extensive congressional hearings and deliberation supporting the Act, the court was willing to defer to the Congress' judgment.[303] It could not find that Congress' reliance on the "considered professional judgment" of numerous military experts and personnel was irrational.[304]

After restating a number of the specific findings articulated by Congress, the court concluded that it would not substitute its judgment for that of Congress. This deference was based upon the "strong presumption of validity we give classifications under rational basis review and the special respect accorded to Congress's decisions regarding military matters."[305] Consequently, the court held that the act prohibition of §654(b)(1) did not violate the Equal Protection Clause under rational basis review. Since the act prohibition was constitutional, the statement presumption of §654(b)(2) was also valid.[306]

IV. THE DIFFERENCE BETWEEN CAN AND SHOULD

The public and private debate concerning the current discharge policy typically centers on two distinct but related questions. The first is whether the military *can* constitutionally discharge members who engage in or have a propensity to engage in homosexual conduct without violating the Constitution. Although the Second Circuit ultimately upheld the military's

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[301] Able, 155 F.3d at 634.
[302] *Id.* at 635. *See also* Thomasson v. Perry, 80 F.3d 915, 930 (4th Cir. 1996) ("But in the civil context, the government can fashion general employment policies to prevent unsatisfactory conduct."), *cert. denied*, 519 U.S. 498 (1996); New York City Transit Authority v. Beazer, 440 U.S. 568, 589-92 (1979) (upholding policy barring methadone users from employment); Vance v. Bradley, 440 U.S. 93 (1979) (upholding mandatory retirement age for Foreign Service personnel); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314-17 (1976) (per curiam) (upholding mandatory retirement age for police officers).
[303] Able, 155 F.3d at 635.
[304] *Id.* (citing Goldman, 475 U.S. at 508-10).
[305] *Id.* at 636.
[306] *Id.*

ability to do so, future cases may benefit from a clarification of the applicable legal principles. Accordingly, the discussion in this section will advance in four parts. First, the military no longer argues that homosexual conduct is, in and of itself, wrong. The military objects to the conduct only to the extent that it threatens unit cohesion, reduces privacy, or increases sexual tension. In this sense, the underlying rationale is based upon the threat to good order and discipline posed by the conduct and is similar to the prohibition on fraternization. Second, the threat to good order and discipline is premised upon the reaction of other military members who object to homosexual conduct. This reaction may be couched in terms of "prejudice," "irrational fear," or "justified disgust," but it nevertheless is a "reaction" that has been determined to be disruptive to the efficient operation of the units. Third, assuming that Congress and the commanders are correct in their estimation of the disruptive effect, case law indicates that the military may take corrective and preemptive action to remedy or prevent disruptions to good order and discipline, even if a liberty interest or fundamental right is at issue. Finally, courts have traditionally given the military great deference in its determination of the potential threat posed by a given behavior on the efficient operation of the military.

The second and more controversial question is whether the military *should* continue to discharge members who engage in or are likely to engage in homosexual conduct. It is undisputed that the military may and must take action to insure its ability to fulfill the mission, which by necessity requires that it remedy or prevent disruptions to good order and discipline. As defined by Congress, the threat posed by homosexual conduct, however, involves two sets of actors. The first set is composed of the members who engage in or have a propensity to engage in homosexual conduct. The second set includes military members whose working relationships within the units are disrupted by the presence of the first set of actors. It is possible, if not probable, that it is more efficient to remove the first set than to change the reactions of the second. This article suggests, however, that supplementing the Air Force's current anti-discrimination program with a toleration component for homosexuals may have a number of legal and social benefits. Such a program would not necessarily entail any effort to change members' beliefs, attitudes, or feelings about homosexual conduct. Instead, it would merely discourage discrimination or intolerance based upon sexual orientation.

A. Can the Military Discharge Members Who Engage In or Have a Propensity To Engage In Homosexual Acts?

An examination of whether the military can constitutionally continue to discharge members who engage in or have a propensity to engage in

homosexual conduct will be structured around four questions. The first question is whether homosexual acts or statements are "misconduct." The second question is whether the discharge policy is based upon the "reactions," "prejudices," or "fears" of other military members. The third question is whether the military is permitted to discharge members based upon the reactions, prejudices, or fears of other military members. Finally, the question of how courts evaluate the military's estimation of disruptions to good order, discipline, and morale is addressed.

1. Are Homosexual Acts or Statements Misconduct?

It is important to begin this discussion by examining the source of the military's concern about homosexual acts. Recall that homosexual acts are defined as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in [such behavior]."[307] This definition includes criminal behavior such as sodomy as well as otherwise noncriminal behavior such as handholding and kissing.

Some acts within the UCMJ are prohibited because the occurrence of the act is a wrong in and of itself. For example, the UCMJ imposes criminal punishments upon those members who engage in sodomy. In this regard, it is irrelevant whether 90 percent of the military population engages in sodomy, approve of sodomy, are ignorant of the occurrence of sodomy, or prefer to work with individuals who engage in sodomy.

Other behaviors or relationships are prohibited not because they are wrong in and of themselves, but because they are disruptive to good order and discipline. Examples include unprofessional relationships[308] and, more specifically, fraternization.[309] The military does not express a judgment about the appropriateness of a relationship between Tom Smith and Jane Doe. The military does not appear to express any opinion if they go out to dinner, hold hands, kiss, have pre-martial sex, or get married. This neutrality changes, of course, if the two engage in sodomy or are married to other people. This neutrality also changes if the relationship is between Major Tom Smith and Airman Jane Doe. If they go out to dinner, hold hands, kiss or have premarital sex, then the disparity in rank may create a situation that undermines the

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[307] 10 U.S.C. § 654(f)(3)(a)-(b).

[308] *See* Air Force Instruction 36-2909 [hereinafter AFI 36-2909], Professional and Unprofessional Relationships (May 1, 1996).

[309] MCM, *supra* note 18, Part IV, ¶ 83; AFI 36-2909, *supra* note 308. Portions of AFI 36-2909 are punitive and if violated can be the basis for a charge of failure to obey a lawful general order or regulation under Article 92, UCMJ. MCM, *supra* note 18, Part IV, ¶ 16.

command structure of the Air Force and is prejudicial to good order and discipline. Consequently, the relationship constitutes fraternization and is impermissible and punishable by Article 92 and Article 134, UCMJ

Homosexual acts that do not rise to the level of otherwise criminal behavior are prohibited not because they are wrong in and of themselves, but because they are disruptive to good order and discipline.[310] The military expresses no opinion as to the appropriateness of Tom Smith and John Doe holding hands or kissing. However, if Airman Tom Smith and Airman John Doe engage in this type of conduct, which fits the definition of homosexual acts, then the government has determined that the behavior creates an unacceptable risk to good order and discipline. While it may be argued that this type of homosexual act constitutes the offense of indecent acts with another under Article 134, U.C.M.J,[311] this argument has not been advanced in recent litigation. Instead, the government's argument most recently expressed in *Able* is that homosexual conduct threatens unit cohesion, decreases privacy, and increases sexual tensions within the military force.

It appears, therefore, that the district court erred in its characterization of homosexual acts that do not rise to the level of criminal behavior. The court stated that a homosexual statement under §654(b)(2) is "transmogrified into an admission of *misconduct*."[312] The term misconduct would seem to imply that the individual has engaged in an activity that is in and of itself wrong. But this is not actually the case. The military is not taking a position—favorable, neutral, or unfavorable—on the appropriateness of the underlying behavior, absent the threat to good order and discipline. In this sense, the court is correct that the acts are "inherently innocuous."[313]

This characterization changes once the "inherently innocuous" acts occur in the military context. Recall that the district court concluded that the government has not determined that homosexuals "by their nature" pose "an uncontrollable risk that they would commit acts *inherently dangerous* to morale, good order and discipline, and unit cohesion."[314] The court also could not understand why "the mere holding of hands off base and in private is

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[310] It could be argued that the military is concerned about the occurrence of homosexual acts because it is evidence of a propensity to engage in sodomy, which is prohibited by Article 125, UCMJ. If the data concerning the number of heterosexuals and homosexuals who engage in sodomy is correct, however, and the military is representative of society in this regard, then the military would be concerned about the occurrence of both heterosexual acts and homosexual acts based upon their respective propensities to engage in sodomy. *See supra* notes 26-30 and accompanying text.

[311] MCM, *supra* note 18, Part IV, ¶ 90.

[312] Able v. United States, 880 F.Supp. 968, 975 (E.D.N.Y. 1995) (emphasis added) (history omitted).

[313] Able v. United States, 968 F.Supp. 850, 857 (E.D.N.Y. 1997).

[314] Able, 880 F.Supp. at 974 (emphasis added).

dangerous to the mission of the Armed Forces if done by a homosexual but not if done by a heterosexual."[315] The military, however, has determined that the occurrence of otherwise *innocuous* homosexual acts are *inherently dangerous* to good order and discipline if committed by military members. Congress has determined that homosexual acts pose such a threat to good order and discipline that individuals who engage in or have a propensity to engage in homosexual acts should be discharged in most instances. These otherwise innocuous acts are not inherently dangerous if committed by heterosexual military members because they do not represent the same threat to unit cohesion, decreased privacy, and increased sexual tension.[316]

The Second Circuit, therefore, only identified part of the rationale supporting the statement presumption of §654(b)(2). Recall that the court found that the statement presumption furthered the government's important interest in preventing homosexual acts in the military.[317] The military, however, is not concerned with the occurrence of homosexual acts in a vacuum. Instead, homosexual acts must be prevented because they are harmful to unit cohesion, sexual tension, and privacy that are also threats to good order and discipline. Thus, both the statement presumption and the act prohibition are ultimately aimed at the prevention of disruptions to good order and discipline. While the significance of this distinction will be fully explored below, properly identifying the supporting rationale permits the military to restrict homosexual statements that are disruptive to good order and discipline, regardless of the link between homosexual statements and the occurrence of homosexual acts.

While both the statement presumption and the act prohibition appear to be based upon the potential disruption to good order and discipline, it is necessary to identify the origin of this threat. It appears that the threat posed

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[315] Able, 968 F.Supp. at 857.

[316] President Clinton's comments about the policy also indicate the difficulty of properly characterizing the misconduct at issue. The President initially explained that the "issue ought to be conduct. Has anybody done anything which would disqualify them, whether it's [the] Tailhook scandal or something else." *I Intend to Look Beyond Partisanship . . . . to Help Guide Our Nation*, WASH. POST, Nov. 13, 1992, at A10. Assuming the Tailhook scandal involved alleged sexual assault and not fraternization, this statement seems to indicate that only conduct that was otherwise criminal would be prohibited. The President later explained, however, the issue was "whether a person, in the absence of *any other disqualifying conduct*, can simply say that he or she is a homosexual and stay in the service." The President's News Conference, *supra* note 61, at 108 (emphasis added). In announcing the new policy, the President further stated that members would be given the opportunity to rebut the statement presumption and "demonstrate that he or she intends to live by *the rules of conduct* that apply in the military service." Remarks Announcing the New Policy, *supra* note 6, at 1369 (emphasis added). It appears that the rules of conduct referred to include conduct that is prejudicial to good order and discipline, even if otherwise considered to be "innocuous."

[317] Able, 88 F.3d. at 1296. *See supra* note 233 and accompanying text.

by homosexual acts is a result of the reaction of other military members to the occurrence of the acts. Once the origin is identified, it is then necessary to determine if and how the government may act to dispel the threat. These questions will now be addressed in turn.

2. Is the Discharge Policy Based Upon the "Reactions," "Prejudices," or "Fears" of Military Members?

Based upon the foregoing analysis, the homosexual discharge policy is based upon the reactions of military members who disapprove of homosexual conduct. Perhaps the simplest way to answer this question is to imagine that only homosexuals served in the military. If this were the case, then homosexual conduct that did not rise to the level of criminal behavior would be no more disruptive to the military than heterosexual conduct is now. Men holding hands would be no more disruptive to unit cohesion than men and women holding hands. It is also unlikely that in a homosexual military the open display of homosexual conduct would increase sexual tensions or decrease privacy any more than heterosexual conduct does now. Put differently, if every member of the military, regardless of sexual orientation, was indifferent or supportive of individuals who engaged in homosexual conduct, then the behavior would not be disruptive to unit cohesion, would not decrease privacy, or increase sexual tension.

One may describe the reaction of other military members to homosexual conduct as just that, a reaction. Others may describe it as prejudice or irrational fear. It may be based upon personal, moral, or religious condemnation. Regardless of how it is described, if the reaction is disruptive to good order and discipline, then the military is constitutionally permitted to react by removing from the ranks members who engage in the disruptive behavior.

3. Can the Military Discharge Members Based Upon the "Reactions," "Prejudices," or "Fears" of Military Members?

Despite a number of arguable characterizations, the question that must be addressed is whether the reactions of other military members are a permissible basis upon which to discharge members likely to engage in homosexual conduct. The answer is yes, if in the professional judgment of Congress, the President, or the military, homosexual conduct is disruptive to the military units and the accomplishment of the military mission. The government is permitted to consider the reaction of other employees in the office when determining whether to discharge a civilian government employee. Because of the extreme importance of unit cohesion and discipline to the

effectiveness of the military, the Supreme Court has recognized that certain military personnel decisions and restrictions are permitted by the Constitution even if they would otherwise be impermissible in the civilian setting. For the purposes of this section, it will be assumed that Congress and military commanders are correct in their estimation that homosexual conduct poses a substantial threat to the military mission. This assumption will be revisited in the next section.

To begin this discussion, recall that the district court relied upon *Romer*, *Palmore*, and *Cleburne Living Center* to conclude that the prejudice of heterosexual members represented an illegitimate reason for government-sanctioned discrimination.[318] The district court actually cited *Palmore v. Sidoti* for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[319] The Court of Appeals countered that these cases did not arise in the military setting and that *Romer* and *Cleburne Living Center* involved restrictions based upon status and not conduct.[320] While the Second Circuit's observations are correct, a further examination of the rationale supporting the military's ability to protect and maintain good order and discipline highlights why the administrative discharge policy is permissible.

The government may seek to act upon the prejudices or reactions of two categories of individuals. First, the society as a whole may be prejudiced or adverse to the behavior at issue. Although the government has not argued that the homosexual discharge policy is based upon the reactions of the society as a whole, it was the fears or prejudices of this group of individuals that were at issue in *Romer*, *Palmore*, and *Cleburne Living Center*. While the government may not act upon these societal prejudices when it is acting in its capacity as sovereign, the government may consider these reactions when it is acting as employer. For instance, recall that NASA was permitted to consider the public reaction to and embarrassment over notorious conduct in *Norton v. Macy*.[321] Furthermore, the Attorney General in *Shahar v. Bowers* was permitted to consider the damage to office credibility that resulted from the same-sex marriage.[322] The courts in these cases did not indicate an intention to inquire into whether the public *should* have reacted to the conduct at issue, but instead sought to determine if it *had* reacted or would in the future.

The military also has a sanction at its disposal that allows it to protect its reputation and public confidence in its abilities. Article 134, UCMJ, permits the military to impose criminal punishments upon conduct that is of a

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[318] *See supra* notes 262-267 and accompanying text.
[319] Able, 968 F.Supp. at 859 (quoting Palmore, 466 U.S. at 433).
[320] Able, 155 F.3d at 635.
[321] *See supra* note 137 and accompanying text.
[322] *See supra* note 146 and accompanying text.

nature to bring discredit upon the armed forces.[323] The explanation accompanying the Article states that the clause "makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[324] Similar to the inquiry for government employment cases, the Article does not make a judgment as to whether the conduct *should* bring the service into disrepute, only if it *does*.

In addition to the fears of society, the government may seek to act upon the prejudices or reactions of its personnel. Based upon the foregoing analysis and the arguments advanced by the government in *Able*, this represents the current basis of the homosexual discharge policy. As Part II of this article indicates, the government as employer is permitted to act upon the reactions of its employees. The government's discretion is even greater for the military. The exercise of this discretion does not indicate that the military is otherwise hostile to the behavior at issue, is neutral towards it, or would like to encourage it. Instead, the government as employer is concerned with the efficiency of its offices and is permitted to stop or remove whatever behavior is disrupting the office, regardless of how it may feel about the underlying conduct.

An appreciation of the military's ability to protect itself from the threats to good order and discipline posed by military personnel can be gained from the Supreme Court's decision in *Brown v. Glines*.[325] An Air Force captain, Glines drafted a petition to high-level government officials complaining of the Air Force's grooming standards.[326] Two Air Force regulations restricted the circulation of petitions.[327] The Court concluded that the regulations were permissible under the First Amendment because they advanced a substantial government interest unrelated to the suppression of free expression and restricted no more speech than was reasonably necessary to protect that interest.

While recounting the special characteristics and attributes of the military as a separate society, the Supreme Court found that the regulations protect a substantial Government interest unrelated to the suppression of free

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[323] MCM, *supra* note 18, Part IV, ¶ 60(a).

[324] *Id.* Part IV, ¶ 60(c)(3).

[325] Brown v. Glines, 444 U.S. 348 (1980). The Court also held that the regulations did not violate 10 U.S.C. § 1034, which it interpreted as protecting the ability of an individual military member to contact members of Congress. *Id.* at 358.

[326] *Id.* at 351 n.3 (quoting Glines v. Wade, 586 F.2d 675, 677 n.1 (9th Cir. 1978)).

[327] Air Force Regulation 35-1(9) prohibited the public solicitation or collection of petitions by a military member in uniform, by a military member in a foreign country, or by any person within an Air Force facility without command permission. Brown, 444 U.S. at 349-50 n.1. Additionally, Air Force Regulation 35-15(3) prohibited military personnel from distributing or posting any unofficial material within an Air Force facility without command permission. *Id.* at 350-51 n.2. While on temporary duty at Anderson AFB, Guam, Glines circulated the petition without obtaining the prior approval of the base commander. When his commander was notified of the incident, Glines was assigned to the standby reserves. *Id.* at 351.

speech.[328] That interest was the avoidance of a "'clear danger to the loyalty, discipline, or morale of the troops on the base under his command.'"[329] In doing so, the Court repeated selective quotes from its precedent to explain the separate community rationale. For example, "[t]o ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'"[330]

After finding that the regulations advanced a substantial government interest, the Court also concluded that the Air Force regulations restrict speech no more than is reasonably necessary.[331] The regulations "prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale."[332] The additional limitations contained in the regulations convinced the Court the commander's censorship authority was sufficiently limited. Finally, the Court reasoned that the prior approval requirement was necessary because if the commander did not have the opportunity to review the material, then he "could not avert possible disruption among his troops."[333]

The protection of political speech is, of course, at the heart of the First Amendment. Although arguably political speech, Glines' petition would undoubtedly be protected from content-based or viewpoint-based regulation in the civilian context.[334] The Court concluded, however, that commanders must

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[328] Brown, 444 U.S. at 354.

[329] *Id.* at 353 (quoting Greer v. Spock, 424 U.S. 828, 840 (1976)).

[330] Brown, 444 U.S. at 354 (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)). Significantly, the Supreme Court also noted that the location or combat status of the base was immaterial. The restrictions necessary for military readiness and discipline "are as justified on a regular base in the United States, as on a training base, or a combat-ready installation in the Pacific." Brown, 444 U.S. at 356 n.14 (citations omitted). Regardless of where the base is located, airmen "may be transferred to combat duty or called to deal with a civil disorder or natural disaster." *Id.*

[331] Brown, 444 U.S. at 355.

[332] *Id.*

[333] *Id.* at 356. In an important footnote, the Supreme Court conceded that commanders could "apply these regulations 'irrationally, invidiously, or arbitrarily,' thus giving rise to legitimate claims under the First Amendment." *Id.* at 357 n.15. Since Glines never requested permission to circulate his petition, the issue was not before the Court.

[334] In the civilian community, content-based restrictions must be necessary to achieve a compelling state interest unless the speech falls into an unprotected category of speech. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Cohen v. California, 403 U.S. 15 (1971). Content-neutral time, place, and manner regulations must be narrowly tailored to advance a significant government interest and not foreclose adequate alternative channels of communication. *See, e.g.*, Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984); Hague v. CIO, 307 U.S. 496 (1937). For example, Congress can pass a statute that makes it illegal to wear a military uniform without authority. It cannot, however, create an exception only for those actors that wear uniforms and portray the armed forces in a positive

be able to protect the ranks from material that would interfere with loyalty, discipline, or morale. Consequently, the Supreme Court upheld the military's ability to regulate speech that commanders believe would threaten good order and discipline.

Although it has never ruled on the precise issue of homosexual discharges, the Supreme Court's rationale in *Glines* indicates that the military may remove members whose behavior is disruptive to good order and discipline. Speech, of course, is typically protected by the First Amendment as a fundamental right. In order for a military speech restriction to be upheld, a court should note that the protection of good order and discipline constitutes a significant government interest, and then determine whether the restriction is narrowly tailored. Recall, for example, that the Eleventh Circuit in *Shahar v. Bowers* adopted the free speech test outlined in *Pickering* to guide its same-sex marriage employment determination. If the same military free speech standard outlined in *Brown v. Glines* applies to homosexual statements, acts, and marriages, then the examination should proceed as follows. The court should note that the protection of good order and discipline constitutes a significant government interest, and then determine whether the restrictions on homosexual statements, acts, and marriages are narrowly tailored. This is true even if the act in question, like speech, would otherwise constitute a fundamental right or liberty interest. For example, even if a person possessed a liberty interest in entering a same-sex marriage, if the marriage was disruptive to good order and discipline, then the military could criminally prohibit it or, alternately, discharge members who entered such an arrangement.

Based upon this reasoning, it would also appear that the military is permitted not only to take action based upon homosexual conduct, but also based solely on homosexual statements. This action would be permitted regardless of any link between homosexual statements and homosexual conduct, so long as Congress or military commanders concluded that homosexual statements were themselves disruptive to good order and discipline. It would appear, therefore, that the Second Circuit was incorrect when it concluded that the statement presumption of §654(b)(2) could not be upheld if the act prohibition of §654(b)(1) was found to be unconstitutional.[335] The court stated that "a limitation on speech in support of an unconstitutional

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manner. In *Schacht v. United States*, the Supreme Court noted that such a statute would seem constitutional on its face because it only has an incidental effect on speech. Schacht v. United States, 398 U.S. 58, 61 (1970). The Court, however, struck the exemption clause from the statute, reasoning that "Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces." *Id.* at 62. Since the exemption was triggered based upon the viewpoint of the actor's speech, it "cannot survive in a country which has the First Amendment." *Id.* at 63.

[335] Able, 88 F.3d at 1300.

objective cannot be sustained."[336] As previously explained, however, the objective of both the statement presumption and the act prohibition is to dispel threats to good order and discipline. Thus, if homosexual statements are themselves disruptive to military units, then the speech could be suppressed regardless of whether the homosexual acts could also be prohibited. Each restriction should rise or fall independently, based on whether each provision seeks to prevent disruptions to good order and discipline.

To illustrate this point, imagine that a presidential election is approaching. Candidate X has a platform that includes the elimination of the military, weekly flag burning in schools, the destruction of all war memorials, the restriction of women and racial minorities from the workplace, and, finally, the implementation of a communist-based societal order. A military member comes into work everyday and states that he is going to vote for Candidate X. He does not try to persuade anyone else to vote for Candidate X, but does explain that he thinks the platform would be good for the country. Although it does not appear that the military has ever tried, it is at least questionable whether the military could prevent a member from voting for Candidate X.[337] Although regulations currently protect a member's ability to express personal opinions on the political candidates, the Court's reasoning in *Glines* would support the military's decision to prevent the member from stating his intention to vote for Candidate X if the statement is disruptive to good order and discipline.[338]

The issue of flag burning serves as another illustrative example of the military's ability to restrict the behavior or conduct of its members. Recall that the district court relied upon *Texas v. Johnson* to support its conclusion that the statement presumption was unconstitutional.[339] Although the Supreme Court invalidated a Texas statute that made it a crime to desecrate an American flag, it is less than clear that a military member has a similar First Amendment right to burn an American flag. The two military cases that have addressed flag

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[336] *Id.*

[337] *See* MCM, *supra* note 18, Part III, Military Rule of Evidence 508 ("A person bas a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally."). Concurring in *Greer v. Spock,* then-Chief Justice Burger addressed the critical importance of the political neutrality of the military and stated that "[i]t is little more than a century ago that some officers of the Armed Forces, then in combat, sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864." Greer v. Spock, 473 U.S. 788, 842 (1985). *See supra* note 220.

[338] The ability to express a personal opinion on political candidates is provided for by Air Force Instruction 51-902, Political Activities by Members of the U.S. Air Force ¶ 4.1 (Jan. 1, 1996).

[339] Able, 880 F.Supp. at 979-80 (quoting Texas v. Johnson, 491 U.S. 397 (1989)). *See supra* note 209.

desecration have not reached the issue. In *United States v. Hadlick*,[340] the then-Army Court of Military Review (ACMR) determined that Hadlick had spit on the flag "for no particular reason" and therefore had no claim to First Amendment protection.[341]

The ACMR rejected a free speech challenge to an Article 92, UCMJ, conviction in *United States v. Wilson*.[342] Wilson was a disenchanted military policeman on flag-detail. After expressing his disgust with the Army and the United States, he blew his nose on the American flag.[343] While the actions constituted expressive conduct, Wilson had a duty as a military policeman on flag detail to safeguard and protect the flag. Applying the *O'Brien* test,[344] the court first found that Article 92 "is a legitimate regulatory measure because the government may regulate the conduct of soldiers."[345] Second, Article 92 "furthers an important and substantial government interest in promoting an effective military force."[346] Third, the purpose of Article 92, "in proscribing failures to perform military duty is, on its face, unrelated to the suppression of free speech."[347] "Finally, the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further the government interest in promoting the disciplined performance of military duties."[348] Although one may disagree with the court's application of the *O'Brien* test,[349] the Army

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[340] United States v. Hadlick, CM 8900080 (A.C.M.R. Nov. 30, 1989) (unpublished opinion) (reversing Article 134, UCMJ, conviction after concluding that: "[W]e have no information that the act was observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting."), *aff'd*, 33 M.J. 163 (C.M.A. 1991).

[341] Hadlick, CM 8900080, at 3.

[342] United States v. Wilson, 33 M.J. 797 (A.C.M.R. 1991). The military judge noted that if the accused in this case were a civilian and purchased his own flag, the conduct would be protected under *Texas v. Johnson*, 491 U.S. 397 (1989). Wilson, 33 M.J. at 798.

[343] Wilson, 33 M.J. at 798.

[344] *Id.* at 799-800 (citing United States v. O'Brien, 391 U.S. 367 (1968). *See supra* note 228.

[345] *Id.* at 800.

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] It could be argued that the *O'Brien* test should be applied to the underlying duty and not the general article. Wilson's duty was to show the proper respect to the flag as a member of the flag-raising detail. Initially, it could be argued that the government's restriction is not incidental to the suppression of speech, and therefore, the *O'Brien* test should not apply. Alternatively, applying the *O'Brien* test, it could be argued that the government's interest in showing the proper respect for the flag is not unrelated to the suppression of free expression. Even applying a more specific definition of the underlying duty, Wilson's challenge would likely fail because his conduct involved government property and he was assigned as a military policeman. However, a different fact scenario might lend itself to this type of argument. *See* Carr, *supra* note 164, at 331-33.

Court of Military Review held that based upon Wilson's specific duty the expressive conduct was unprotected.

The question left unanswered is whether the Constitution permits the military to take either criminal or administrative action against a member who burns his own flag off duty and out of uniform. The military judge in *Wilson* merely stated that "arguably then that expression of a position might be protected, that issue has yet to be decided."[350] The issue has prompted some academic interest.[351] If, unlike Hadlick, a military member burns a flag for expressive purposes during an off-base demonstration, can the military impose a criminal sanction under the UCMJ without offending the First Amendment? One commentator has concluded that "[l]ittle question exists that a flag burner in the ranks will undermine the effectiveness of response to command."[352] Flag burning strikes at "the very heart of good order and discipline" and would subject the flag burner to abuse from the members in his command.[353] A breach of the peace may result, and "any trust" in the flag-burner's "ability and desire to defend his fellow soldiers—let alone his country—in combat would be questionable."[354] Once again, if the expressive conduct disrupts good order and discipline in all instances, then the Supreme Court's reasoning in *Glines* would permit the military to prohibit flag burning through either generally applicable regulations or specific command orders.

In the civilian community, flag burning may not be outlawed merely because of the reaction or "veto" of the "angry crowd." The ability of the government to silence a speaker because of the reaction of an angry crowd is known as the "heckler's veto," and it is prohibited under the First Amendment in the civilian community.[355] This principle is what permits socially and politically unpopular groups to parade with a police escort through city streets and rally at courthouses across the nation. Yet, while the government is not permitted to silence speakers in its capacity as sovereign, it is permitted to do so when it is employing civilians or administering the military. Courts have not applied the prohibition on the heckler's veto to the military because of the government's compelling interest in maintaining good order and discipline. As commentators have noted, although the heckler's veto may not be used to

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[350] Wilson, 33 M.J. at 798.

[351] *See generally* Gregory A. Gross, Note, *Flag Desecration in the Army*, 1990-APR ARMY LAW. 25 (1990); Jonathan F. Potter, *Flag Burning: An Offense Under the Uniform Code of Military Justice?*, 1990-NOV ARMY LAW. 21 (1990).

[352] Potter, *supra* note 351, at 26.

[353] *Id.*

[354] *Id.*

[355] *See*, e.g., Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, anymore than it can be punished or banned, simply because it might offend a hostile mob.") (citing Gooding v. Wilson, 405 U.S. 518 (1972); Terminiello v. Chicago, 337 U.S. 1 (1949)).

silence a speaker in the civilian setting, "constitutional decisions requiring authorities to control the angry crowd rather than the unpopular speaker are not precedents for the military."[356]

4. How Does a Court Evaluate the Military's Estimation of Disruptions to Good Order, Discipline, and Morale?

In the previous section, the assumption was that Congress and military commanders were correct in their estimation that homosexual conduct poses an unacceptable risk to good order and discipline. This assumption has become the subject of some debate as advocates argue that the majority of military members are not disturbed by homosexual conduct.[357] For example, the district court cited a number of studies and surveys that indicate the presence of open homosexuals within the military would not be disruptive to the units.[358] Although gay rights advocates may provide evidence that would support this conclusion, prior holdings of the Supreme Court indicate that such evidence will ultimately be unconvincing.

The case of *Goldman v. Weinberger*[359] highlights the extent of judicial deference to the judgement of military commanders on the question of disruptions to good order and discipline. At issue was Air Force Regulation 35-10, which only permitted the wearing of nonvisible religious apparel.[360] Captain (Rabbi) Goldman felt compelled by his religious beliefs to wear a yarmulke while on duty and in uniform. He argued "that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to [AFR 35-10] for religious apparel unless the accouterments create a 'clear danger' of undermining discipline and esprit de corps."[361] Then-Justice Rehnquist, joined by four other Justices,[362] held that the Free Exercise Clause did not require the Air Force to make an exception to its uniform and generally applicable dress regulations even if it had the effect of substantially burdening religion.

Speaking to the issue of judicial deference, Justice Rehnquist noted that, even when evaluating whether military needs justify a regulation of

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[356] Zillman and Imwinkelried II, *supra* note 164, at 405; Zillman, *supra* note 164, at 442 ("Courts have shown little concern with the civilian principle that the troublemakers and not the peaceful speakers should be controlled.").
[357] *See, e.g.*, Colbert I. King, *Debunking the Case Against Gays in the Military*, WASH. POST, July 7, 1992, at A19.
[358] *See supra* notes 196-99, 252-53 and accompanying text.
[359] Goldman v. Weinberger, 475 U.S. 503 (1986) (5-4 opinion). *See supra* note 294.
[360] *Id.* at 513 (Stevens, J., concurring).
[361] *Id.* at 509.
[362] Justice Rehnquist's opinion was joined by Chief Justice Burger and Justices White, Powell, and Stevens. *Id.* at 503. Justices O'Connor, Marshall, Blackmun, and Brennan dissented.

religiously motivated conduct, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[363] The Air Force had determined that "standardized uniforms encourages the subordination of personal preferences and identities" as well as "a sense of hierarchical unity by eliminating outward individual distinctions except for those of rank."[364] Attacking the Air Force's argument that granting an exception would threaten discipline, Captain Goldman contended that this argument was a bare assertion "with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony."[365] But Justice Rehnquist concluded "whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point."[366] The appropriate military officials decided the desirability of the dress regulation, and "they are under no constitutional mandate to abandon their considered professional judgment" and grant an exception.[367]

Thus, Barry Goldwater may be correct in his belief that "[l]ifting the ban on gays in the military isn't exactly nothing, but it's pretty damned close."[368] In the coming years, advocacy groups will no doubt gather evidence to support this belief and add to the studies cited by the district court in *Able*.[369] It does not appear, however, that evidence supporting his opinion would sway the courts. If, in the professional judgement of Congress and the military, homosexual conduct threatens good order and discipline, then Congress and the military may constitutionally discharge members who engage in or have a propensity to engage in such behavior.

B. Should the Military Discharge Members Who Engage In or Have a Propensity To Engage In Homosexual Acts?

One point can not be overemphasized—the military should and must take whatever measures necessary to prevent and remedy substantial threats to good order, morale, and discipline. If in the judgment of Congress, the President, and the military, *homosexual acts* pose a substantial threat to good

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[363] *Id.*
[364] *Id.* at 508.
[365] *Id.* at 509.
[366] *Id.*
[367] *Id* Although he noted that a modest departure from uniform regulations created "almost no danger of impairment of the Air Force's military mission," Justice Stevens, joined by Justices White and Powell, also concluded that the Court should consider as legitimate and rational the "plausible," yet possibly "exaggerated," interest that the military professionals attached to uniform dress regulations. *Id.* at 511-12 (Stevens, J., concurring).
[368] Goldwater, *supra* note 1.
[369] *See supra* note 252 and accompanying text.

order and discipline, then the threat must be alleviated. If in the judgment of Congress, the President and the military, *homosexual statements* pose a substantial threat to good order and discipline, then the threat must be alleviated. If in the judgment of Congress, the President, and the military, *homosexual marriages* pose a substantial threat to good order and discipline, then the threat must be alleviated. Given the critical importance of military mission to the protection and survival of the country, no other conclusion is defensible.

How the threat should be alleviated, however, is the subject of some discussion. Given the current rationale for the administrative discharge policy, there are at least two groups responsible for the threat to good order and discipline—individuals who engage in homosexual conduct and military members who object to this behavior. To illustrate the dual nature of the threat to good order and discipline, it may be helpful to examine the case of *Ethredge v. Hail.*[370]

In *Ethredge*, the commander of Robins Air Force Base issued an administrative order barring bumper stickers or other signs that "embarrass or disparage the Commander in Chief."[371] Ethredge, a civilian employee who had worked at the base for over twenty-five years, refused to remove a bumper sticker from his truck that read "HELL WITH CLINTON AND RUSSIAN AID" claiming that it was protected speech under the First Amendment.[372] The Eleventh Circuit denied his challenge, finding that Robins Air Force Base was a nonpublic forum, permitting officials to impose speech regulations so long as it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[373]

The court reasoned that the order was not viewpoint-based because it did not prohibit criticism of the President.[374] Finding that the restriction was reasonable, the court noted that a commander may implement a speech restriction without demonstrating actual harm.[375] The commander is merely required to demonstrate a "clear danger to military order and morale."[376] Since the installation commanders submitted affidavits that they believed the sign

[370] Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995).
[371] *Id.* at 1325.
[372] *Id.* at 1325-26.
[373] *Id.* at 1327 (quoting Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 46 (1983)).
[374] *Id.* The court explained that other vehicles on-base had bumper stickers reading "Bill Clinton has what it takes to take what you have" and "Defeat Clinton in '96." *Id.* at 1327 n.2. Additionally, the court found that the order in no way limited the application of the restriction to opponents of the President. Since it merely prohibited bumper stickers that embarrass or disparage the President, it also applied to supporters of the President. *Id.* at 1327.
[375] *Id.* at 1328 (citing Greer v. Spock, 424 U.S. 828, 840 (1976)).
[376] *Id.*

would "undermine military order, discipline, and responsiveness" and anonymous phone callers had threatened to break the window out of Ethredge's truck, this standard was met.[377] As the court concluded, "[w]e must give great deference to the judgment of these officials."[378]

Although one may dispute the court's free speech analysis,[379] the more interesting aspect of the decision is the threat to military order and discipline posed by the message. It appears doubtful that Ethredge was advocating the windows of his truck to be broken. Unlike a soldier in Vietnam advocating for the overthrow of the government or the end of the war,[380] Ethredge's speech was likely to incite lawless action to his detriment. It could be argued, therefore, that the real threat to good order and discipline arose not from Ethredge's message, but from the inability of his co-workers to resist the urge to destroy his property.

The legal implications of this observation are uncertain. Ethredge's sign expresses a political viewpoint that would undoubtedly be protected by the First Amendment in a public forum from content-based and viewpoint-based restrictions. Since free speech rights are at least implicated by the incident, it is possible that a court may be justified in hesitating to give deference to the military unless the commander could point to some action he has taken to identify or dispel the threat posed by the anonymous callers.

The level of action required by the commander may be slight, consisting of no more than the commander's assertion that she does not have the time or resources to identify the callers given the other demands of the military mission. Perhaps the commander would only have to state that she initiated an investigation that was unable to identify the callers. Additionally, it is possible that the court would be satisfied if the commander had stated that she had posted notices around the base explaining that anonymous threats of violence would not be tolerated, but that these efforts were unsuccessful in ending the threat to good order and discipline. Ultimately, of course, the extent of the response required of the commander may vary. In a situation

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[377] *Id.*

[378] *Id.* (citing Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986)).

[379] Despite the court's conclusion to the contrary, the order is undoubtedly both content and viewpoint based. It discriminates based upon content because it applies only to signs that reference the President. It discriminates based upon viewpoint because it applies to comments that are "disparaging or embarrassing" but not to comments that praise the President or merely state vague disapproval. Viewpoint discrimination in this instance is not determined by looking at the underlying political party or even motivation of the speaker.

[380] *See*, e.g., Parker v. Levy, 417 U.S. 733 (1974) (reinstating conviction based upon public statements urging African-American enlisted men not to go to Vietnam if ordered to do so); United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972) (upholding conviction for disloyal statements under the predecessor to Article 134, UCMJ, arising from the publication of 800 to 1,000 pamphlets calling for the violent overthrow of the government).

implicating constitutional rights of one group, however, it is at least conceivable that a court may refuse to defer to a commander who states she has done nothing to alleviate the threat posed by another group's reaction.

Similar to the situation encountered in *Ethredge*, the disruption caused by homosexual conduct is a product of two groups—those members who engage in homosexual conduct and those members who object to such conduct. If the military is no longer taking any independent position on homosexual conduct and all other things being equal, then the military should be ambivalent as to whether homosexual conduct is prohibited or military members are no longer disrupted by the behavior. Of course, all other things may not be equal and one solution may be preferable to the other. It may be easy to identify the members who engage in homosexual conduct but extremely difficult to modify the attitudes, behaviors, or tolerance levels of other military members who object to the conduct. Even if it were possible to modify the attitudes, behaviors, or tolerance levels, it may require a great expenditure of scarce time and resources to implement a program aimed at making these military members more tolerant of homosexual conduct. Even if a toleration program were implemented, it may be impossible or extremely difficult to make the program succeed.

On the other hand, courts and policymakers may be especially sensitive to the issues surrounding homosexual behavior because of the constitutional protections that are typically implicated. There also may be a benefit to a toleration program on the military's efforts at combating other forms of intolerance and discrimination. In this regard, a more tolerant force might be preferable to a less tolerant force. Perhaps most importantly, efforts to minimize the reactions of military members to homosexual conduct might provide the military a weapon to combat political assaults on the policy within political arenas, including Congress. The military could respond to the demands of advocacy groups by showing a good faith effort to minimize the reaction of heterosexual members to homosexual conduct. These efforts may not ultimately achieve the level of toleration necessary to change the current policy or represent the most aggressive effort possible. It may provide, however, at least some evidence of the military's attempt to resolve the threat to good order and discipline as well as the difficulty of changing the opinions and reactions of heterosexual members. The question that remains, therefore, is what type of program could be aimed at alleviating the members' reaction to homosexual conduct.

Many have refuted the effectiveness of some types of anti-discrimination program. General Schwarzkopf explained his belief to the House Armed Services Committee when the current policy was originally being formulated.

> Yet many who advocate lifting the ban on homosexuals in the military blithely say we can overcome all the problems I have raised by ordering already overburdened military leaders at all levels to "institute training for all personnel *on the acceptance of homosexual or bisexual orientation or conduct*," even when the large majority of the leaders and the troops have clearly stated, "they oppose allowing homosexuals in the military" and "believe the gays serving openly in the military would be very disruptive to discipline."[381]

Major Kathleen C. Bergeron, USMC, echoed this sentiment stating, "I do not believe that any amount of sensitivity training or reeducating will change the way Marines *think or feel about homosexual behavior*, because there is nothing more basic to an individual than his or her own sexuality."[382] It would be difficult, if not impossible, to refute the sincere beliefs of General Schwarzkopf and Major Bergeron given their respective experience and command positions within the military.

It is possible, however, that an antidiscrimination program could supplement existing programs without offending the observations of these combat officers. Quite simply, an antidiscrimination program could merely advocate the toleration of individuals who engage in homosexual conduct. Such a program would not seek to convince heterosexual members to accept homosexual orientation or conduct, nor would it seek to change the way members think or feel about homosexual behavior. Instead, it would merely advise members that regardless of their personal feelings on the matter, members should not discriminate against or allow the presence of homosexuals to impact their work performance.

So fashioned, an antidiscrimination program could be added to the current programs which prohibit discrimination based upon "race, color, religion, sex, or national origin."[383] These programs, administered primarily by Military Equal Opportunity, do not require that members accept a certain religion, believe in gender equality, or actively support race initiatives. Instead, the guidelines prohibit members from discriminating against other members based upon these factors, characteristics, or attributes. What a member accepts, thinks, or feels is left to his or her judgment.

Given the recent Executive Order that added sexual orientation to the list of categories that may not form the basis of discrimination by the Federal Government,[384] it seems appropriate for military personnel who supervise or

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[381] *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on Armed Services*, 103d Cong., 2d Sess. (May 11, 1993) (testimony of General H. Norman Schwarzkopf, Ret., United States Army) (emphasis added).
[382] *Id.* (testimony of Major Kathleen Bergeron, United States Marine Corps) (emphasis added).
[383] Air Force Instruction 36-2706, Military Equal Opportunity and Treatment Program ¶ 1.1.2 (Dec. 1, 1996).
[384] *See supra* notes 92-96 and accompanying text.

interact with civilian employees to receive instructions on this issue. It would also appear that instructions would be appropriate for personnel who interact with other groups of individuals that may include homosexuals, such as dependents or the even the general public. If instructions are given that discrimination or intolerance of these groups is to be discouraged, then the question may become why shouldn't personnel be instructed that discrimination against other military members who may be suspected of being homosexual is also to be discouraged. It may be that a toleration program could not be initiated so long as the current policy is in place. Moreover, it is uncertain whether supplementing the current program would ultimately succeed in alleviating some or much of the intolerance displayed toward homosexual conduct and homosexuals. The more important issue, perhaps, is whether it should at least be tried.

V. CONCLUSION

The issue of homosexual conduct in the armed forces continues to spark a good deal of debate and controversy, both within the military community and the public at large. The military regulates homosexual conduct through the application of two distinct but related provisions. The first set of prohibitions is contained in the criminal provisions of the UCMJ that are facially neutral with regard to homosexual and heterosexual conduct. The second set of prohibitions is contained in the current administrative discharge policy, codified at 10 U.S.C §654. Premised upon the need to remove members who engage in or have a propensity to engage in homosexual conduct in order to preserve unit cohesion and good order and discipline, the discharge policy has been subjected to numerous constitutional challenges in the federal courts. The Second Circuit entertained the latest challenge in *Able v. United States*, and ultimately upheld both the act prohibition and the statement presumption of the policy against Equal Protection and First Amendment challenges.

Similar to when it takes personnel actions against civilian government employees, the military is permitted to discharge service members who pose potential disruptions to good order and discipline. The relevant inquiry is *whether* homosexual conduct is detrimental to the accomplishment of the military mission, and not whether it *should* provoke such a reaction within the units. Although advocates may present evidence to refute the necessity for the discharge policy, the courts typically grant the military substantial deference in the exercise of its professional judgment. Consequently, the military *can* discharge a member if he or she engages in or has a propensity to engage in homosexual conduct so long as the potential disruption to military readiness is present.

The more controversial issue is whether the military *should* continue to discharge members who engage in homosexual conduct. Undoubtedly, the military should and must take whatever corrective action necessary to preserve unit cohesion, good order and discipline, and the readiness of the armed forces. Since the policy is based upon the reaction of other military members, the disruption can be alleviated by the removal of the homosexual members. It could also be alleviated if the remainder of the force displayed an apathetic, if not tolerant, demeanor towards homosexual members in the unit. Including sexual orientation in the current antidiscrimination and tolerance program may accomplish this goal. Given the recent Executive Order, a program would appear to be necessary for those members who supervise or interact with civilian employees. It may also display a good faith effort on the part of the military to dispel the disruption through alternative means. While supplementing the current toleration efforts may never be successful, perhaps it should at least be tried.

Bad Checks Make Bad Law and Bad Policy

MAJOR EARL F. MARTIN*

I. INTRODUCTION

On January 7, 1997, MSgt Dianne Eatmon walked into an Air Force courtroom facing the possibility she would be sentenced to 222 years of confinement.[1] Given the severity of this potential sanction, one may think MSgt Eatmon must have either killed someone or at least gone on a violent crime spree. Neither was the case. Instead, what MSgt Eatmon had done was write almost two hundred bad checks to various entities over the course of nearly a year.[2] For that misconduct, MSgt Eatmon faced the threat of being sent to jail for the rest of her natural life.

MSgt Eatmon confronted the possibility of this lengthy term of confinement because of *United States v. Mincey*,[3] a decision the United States Court of Appeals for the Armed Forces (CAAF) handed down two years earlier. In *Mincey*, the CAAF dramatically changed the landscape of bad check prosecutions by reformulating the calculation of the maximum possible term of confinement in these cases. Instead of proceeding with a maximum punishment determined by reference to the amount of the largest single check contained in each specification,[4] the court cleared the way for each bad check

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[1] *See* United States v. Eatmon, 47 M.J. 534 (A.F.C.C.A. 1997), *aff'd*, 49 M.J. 273 (1998).

[2] *See* Eatmon, 47 M.J. at 536. MSgt Eatmon was charged with four violations of Article 123a, Uniform Code of Military Justice (UCMJ), for writing bad checks with the intent to defraud, and two violations of Article 134, UCMJ, for failing to maintain sufficient funds in her account to cover the checks. Additionally, MSgt Eatmon was charged with misusing a government credit card in violation of Article 92, UCMJ, and dishonorably failing to pay a debt to American Express in violation of Article 134, UCMJ. *Id. See also* MANUAL FOR COURTS-MARTIAL, United States, Part IV, ¶¶ 16, 49, 68, 71 (1998 ed.) [hereinafter MCM].

[3] 42 M.J. 376 (1995).

[4] Prior to Mincey, the normal practice in bad check cases was to arrange the disputed checks into separate logical groups (for example, one group included checks written to the commissary, a second group would include checks written to the Army and Air Force Exchange Service, and a third set might consist of checks written to the noncommissioned officers' club). Each individual grouping would then be charged as a separate violation of the charge. Each such violation is called a specification. A specification is "a plain, concise, and definite statement of the essential facts constituting the offense charged." MCM, *supra* note 2, Rule For Courts-Martial 307(c)(3) [hereinafter R.C.M.]. The maximum punishment would

to stand alone when totaling potential confinement time.[5] Thus, those accused in bad check cases now face dramatically increased potential sentences to confinement much greater than they would have faced in the past.[6] It is this dangerously expanded threat of confinement and how it impacts both the fairness of individual proceedings and the overall perception of the military justice system that is the focus of this article.

Part II of this article will explain why the *Mincey* approach to bad check cases makes bad law. Since the accused in a bad check case could not constitutionally be sentenced to the lengthy terms of confinement like that confronted by MSgt Eatmon, to subject them to such a possibility ignores explicit lawful direction to the contrary and threatens them with an unlawful application of the law. Thereafter, Part III of this article will address why the *Mincey* approach to bad check cases makes bad policy. The *Mincey* approach conflicts with the accepted purposes of punishment and causes the military justice system to be perceived as unfair and foolish. Finally, the article concludes with a suggestion for avoiding in the future the injustice that confronted MSgt Eatmon.

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then be calculated based upon the amount of the largest single check charged in each specification. *See* United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987), *aff'd on other grounds*, 26 M.J. 272 (C.M.A. 1988). *See also* United States v. English, 25 M.J. 819, 822 (A.F.C.M.R. 1988) (adopting, in part, the rationale of the Army Court of Military Review in the *Poole* case). As a result, a specification alleging a violation of Article 123a, UCMJ, for writing eight bad checks in excess of $100, but with no single check of a value greater than $100, allowed for a maximum possible sentence of only six months confinement. *See, e.g.,* United States v. Reed, 26 M.J. 891, 894 (A.F.C.M.R. 1988).

[5] The court stated, in no uncertain terms,

> We now . . . hold that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they had been charged separately, regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification as they have here.

Mincey, 42 M.J. at 378.

[6] *See, e.g.,* United States v. Foster, No. ACM 32197, 1997 CCA Lexis 97 (A.F.C.C.A. Mar. 12, 1997) (involving the possibility of 21½ years in confinement versus the six months the accused would have faced under the previous method of handling bad check cases). *See also* United States v. Towery, 47 M.J. 514 (A.F.C.C.A. 1997) (applying the principle to a forgery case to increase the maximum confinement 105 years).

II. BAD CHECKS MAKE BAD LAW

A. *Mincey's* Potential as a Violation of Eighth Amendment Constitutional Proportionality

1. *The Test for Constitutional Proportionality*

The Eighth Amendment to the Constitution of the United States prohibits "cruel and unusual punishment."[7] This proscription has full force and effect in the military justice system.[8] Furthermore, Article 55, Uniform Code of Military Justice (UCMJ), provides a similar limitation on the power of a court-martial to punish. "Punishment by flogging, or by branding, marking, or tattooing on the body, *or any other cruel or unusual punishment*, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter."[9]

In *Solem v. Helm*,[10] the Supreme Court of the United States held that the Eighth Amendment's cruel and unusual punishments clause requires that a "criminal sentence must be proportionate to the crime for which the accused has been convicted."[11] The Court said that "no penalty is per se constitutional," but at the same time it noted that legislatures and sentencing courts are to be accorded substantial deference when a reviewing court considers the sentence imposed.[12] In order to ensure the proper level of deference was granted to these earlier pronouncements, the Court said that appellate decisions regarding proportionality should be guided by objective factors, to include, "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[13]

The *Solem* Court acknowledged the inherent difficulties faced by appellate judges attempting to objectively draw distinctions between similar crimes, but went on to note there are generally accepted criteria for comparing the severity of different crimes on a broad scale.[14] By way of example,

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[7] U.S. CONST. amend. VIII.

[8] *See, e.g.*, United States v. Ingham, 42 M.J. 218, 230 (1995).

[9] Uniform Code of Military Justice [hereinafter UCMJ] art. 55, 10 U.S.C.A. § 855 (1998) (emphasis added).

[10] 463 U.S. 277 (1983).

[11] *Id.* at 290.

[12] *See id.*

[13] *Id.* at 292. This test, in form and substance, came directly from an earlier dissenting opinion written by Justice Powell. *See* Rummel v. Estelle, 445 U.S. 263, 295 (1980) (Powell, J., dissenting).

[14] *See* Solem, 463 U.S. at 292.

criminal laws make it clear nonviolent crimes are less serious than crimes marked by violence or the threat of violence, and the absolute magnitude of a crime may often be relevant; stealing a million dollars is viewed as more serious than stealing a hundred dollars.[15]

In *Solem*, the defendant was sentenced to life in prison without the possibility of parole under a South Dakota recidivist statute.[16] The defendant's triggering conviction was for uttering a "no account" check for $100, and prior to this, he had been convicted over the years of third-degree burglary (three times), obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated.[17] Ordinarily, the maximum punishment for uttering a "no account" check in South Dakota for $100 would have been five years imprisonment and a $5,000 fine.[18] However, due to the defendant's past convictions, South Dakota's recidivist statute provided for him to be punished as if he committed the most serious felony. As a result, the maximum punishment was life in prison and a $25,000 fine.[19]

Calling the defendant's check offense "one of the most passive felonies a person could commit,"[20] the *Solem* Court found that the defendant's sentence of life imprisonment was at odds with all three objective factors used to assess proportionality.[21] First, the nonviolent nature of the defendant's current and past offenses significantly mitigated the gravity of his misconduct, while the excessive severity of the punishment was evident from a comparison with the only punishment more extreme, capital punishment.[22] Second, the Court noted that the defendant's punishment put him in a league with the likes of murderers, arsonists, rapists, and kidnappers, "criminals . . . [that] ordinarily would be thought more deserving of punishment than one uttering a 'no account' check–even when the bad-check writer had already committed six minor felonies."[23] Third, the Court pointed out that only one other state would

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[15] *See id.* at 292-93. *See also* Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973) ("In assessing the nature and gravity of an offense, courts have repeatedly emphasized the element of violence and danger to the person.").

[16] *See* Solem, 463 U.S. at 282-83.

[17] *See id.* at 279-80. A third offense of driving while intoxicated is a felony under South Dakota law. Id. at 280 n.4.

[18] *See id.* at 281.

[19] *See id.*

[20] *Id.* at 296 (citing State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)).

[21] *See id.* at 303.

[22] *Id.* at 296-97.

[23] *Id.* at 298-99. *See also* Hart, 483 F.2d at 142 (referring to the appellant's convictions for writing a check on insufficient funds for $50, transporting forged checks in the amount of $140 across state lines, and perjury, the court wondered whether it could "be rationally urged that Hart is as dangerous to society and as deserving of punishment as the murderer, rapist, and kidnapper").

have allowed the defendant to be sentenced to life in prison without the possibility of parole, but like South Dakota, there was no indication that state had ever subjected any similarly situated defendant to that extreme result.[24]

In 1991 the Supreme Court revisited the Eighth Amendment proportionality debate in *Harmelin v. Michigan.*[25] In a splintered decision, the Court held that the petitioner's sentence of mandatory life in prison without the possibility of parole for possession of 672 grams of cocaine did not amount to "cruel and unusual punishment" in violation of the Constitution.[26] In reaching this result, the Court provided three different opinions as to the extent of proportionality review due under the Eighth Amendment. Two Justices concluded no such review was constitutionally required,[27] while four others argued that the Eighth Amendment required the full-blown *Solem* three-part analysis.[28] Falling in between these diametrically opposed positions, three Justices maintained a more centrist view that stare decisis counseled adherence to a narrow proportionality principle under the Eighth Amendment that "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[29]

Notwithstanding the decision of the Court in *Harmelin,* the individual views of the Justices set forth in that case illustrate the importance of proportionality. The centrist concurring opinion from Justice Kennedy counseled that the *Solem* case "is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review."[30] Instead, the first factor from the *Solem* case should be seen as a threshold inquiry. Only when comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality should a court compare sentences imposed on other criminals in the same jurisdiction and sentences imposed for the commission of the same crime in other jurisdictions.[31] Thus, *Harmelin's* centrist opinion would, at a minimum,

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[24] *See* Solem, 463 U.S. at 299-300.
[25] 501 U.S. 957 (1991).
[26] *See id.*
[27] *See id.* at 961-94. Justice Scalia, who wrote the opinion of the court, and Chief Justice Rhenquist, who joined that opinion, shared this view.
[28] *See id.* at 1009-29 (White, J., dissenting). Justice White adopted this position in his dissent. He was joined by Justices Blackmun and Stevens. Justice Marshall agreed with Justice White's position concerning the need for a three-part analysis, but he wrote a separate dissent to discuss the implications of the death penalty.
[29] *Id.* at 1001 (Kennedy, J., concurring in the result). Justice Kennedy espoused this centrist position in his concurring opinion, which was joined by Justices O'Connor and Souter. Although they joined the judgment of the court concerning the result, they disagreed with the lead opinion's reasoning and analysis of the Eighth Amendment.
[30] *Id.* at 1004-05 (Kennedy, J., concurring in the result).
[31] *See id.*

use the last two factors from *Solem* as a means of validating an initial judgment that a sentence is grossly disproportionate to the crime at hand.[32]

The exact fit of the *Solem* and *Harmelin* opinions remains a matter of debate,[33] but it is clear a majority of the Court still adheres to the conclusion that the Eighth Amendment encompasses a proportionality principle. The least that can be said in favor of this principle is that seven Justices in *Harmelin* agreed that, as an initial inquiry, the punishment imposed for a crime may not be grossly disproportionate to the crime committed. To the extent such a determination is made, then both intrajurisdictional and interjurisdictional analysis should be undertaken. It is "this middle ground [that] seems to be the present law of proportionality" in military courts.[34]

2. *The Disproportionality of the* Mincey *Approach*

Taken to its extreme, the *Mincey* approach to bad check cases makes its possible for an accused to be sentenced to an unconstitutional term of confinement. The *Eatmon* case provides a superb real-world example. In that case, MSgt Eatmon faced the possibility of spending 219½ years in jail as a direct result of having uttered 197 bad checks totaling $11,595.84.[35]

From the Supreme Court's holdings in the *Solem* and *Harmelin* cases, the first step in Eighth Amendment proportionality review is to ask whether the sentence is grossly disproportionate to the crime committed.[36] As MSgt

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[32] *See* Harmelin, 501 U.S. at 1005. *See also* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 216 n.76 (1997) (discussing the various positions on proportionality review endorsed by the Court's members in *Harmelin*); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 153-59 (1996) (analyzing Justice Kennedy's *Harmelin* opinion); Adam Scott Tanenbaum, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994 – Appellate Review of Sentences*, 83 GEO. L.J. 1374, 1387-89 (1995) (pointing out the conflicting treatments of proportionality review in *Harmelin*).

[33] *See, e.g.*, United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995).

[34] United States v. Maxwell, 45 M.J. 406, 427 (1996). This same middle ground has found great support in courts across the country. "[M]any courts faced with challenges to the proportionality of a sentence after the decision in *Harmelin* have adopted Justice Kennedy's approach." Grossman, *supra* note 32, at 156.

[35] *See* Assignment of Errors and Brief on Behalf of Appellant at 20, United States v. Eatmon, 47 M.J. 534 (A.F.C.C.A. 1997) (No. ACM 32664) (on file with the author). The military judge instructed the members that the maximum term of confinement in MSgt Eatmon's case was 222 years. *See* Eatmon, 47 M.J. at 538. Two years and six months of this time was the possible punishment for the charge of misuse of the government credit card, and the rest, 219½ years, related to the bad checks. *See* Assignment of Errors and Brief on Behalf of Appellant at 13, *Eatmon*, (No. ACM 32664).

[36] *See supra* notes 31-34 and accompanying text.

Eatmon's check writing activities did not entail any violence or even any hint of violence, her conduct was consistent with the *Solem* Court's characterization of check offenses as "one of the most passive felonies a person could commit."[37] Her actions were certainly nothing like the drug offenses that got Mr. Harmelin sentenced to life in prison, and her misconduct was not part of a long criminal history like the defendant in *Solem* brought to his trial.[38] Furthermore, while $11,595.84 is not an insubstantial amount of money, 219½ years of confinement would not be necessary, in light of the misconduct, to achieve any of the accepted purposes of punishment.[39]

Sentencing MSgt Eatmon to effectively spend the rest of her life in jail would negate any rehabilitative purpose of the sentence, and it would be unnecessary from an incapacitation perspective given the absence of any need to respond to either actual or threatened violence. One could argue that general deterrence would be maximized by a *Mincey*-inspired sentence in the same way that imposing life imprisonment for overtime parking would certainly deter that behavior,[40] but that hardly seems like an argument upon which just punishment should be based.[41] Moreover, the preservation of good order and

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[37] Solem, 463 U.S. at 296.

[38] Some courts have tested for gross disproportionality by comparing the facts of their case with the facts of cases the Supreme Court reviewed when the Court established the parameters of proportionality review. *See, e.g.*, United States v. Prior, 107 F.3d 654, 659 (8th Cir. 1997); Smallwood v. Johnson, 73 F.3d 1343, 1347-48 (5th Cir. 1996) (citing Duhr v. Collins, 20 F.3d 469 (5th Cir. 1994); McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992)); United States v. Easter, 981 F.2d 1549, 1556 (10th Cir. 1992).

[39] Some courts have tested claims of gross disproportionality based upon whether the punishment handed out was justified by a retributive theory of punishment. *See, e.g.*, United States v. Harris, 154 F.3d 1082, 1083 (9th Cir. 1998); Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998). There are five principal reasons for sentencing offenders in the military: protection of society from the wrongdoer, punishment of the wrongdoer, rehabilitation of the wrongdoer, preservation of good order and discipline in the military, and the deterrence of the wrongdoer and of those who know of the crime and the sentence from committing the same or similar offenses. *See* United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989). *See also* United States v. Varacalle, 4 M.J. 181, 182 (C.M.A. 1978) ("There are three reasons for prescribing punishment for those acts declared to be criminal by society. These are the protection of society, the rehabilitation of the offender, and example. The concepts of deterrence and example are not synonymous; instead deterrence comes about because of example."). *Cf.* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5, at 23-27 (1986) (identifying the purposes of the criminal law as prevention (particular deterrence), restraint (incapacitation), rehabilitation, deterrence, education, and retribution).

[40] *See generally* Rummel, 445 U.S. at 274 n.11 (rejecting a proportionality claim in the precursor to *Solem* and *Harmelin*, the Court conceded that "a proportionality principle [might] come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment").

[41] "[G]eneral deterrence is much criticized and cannot justify mechanistic imposition of stiff sentences . . . ." United States v. Lania, 9 M.J. 100, 103 (C.M.A. 1980) (citing United States v. Miller, 589 F.2d 1117, 1139 (1st Cir. 1978)).

discipline in the military would most likely be undermined by such an extreme punishment given its inherent unfairness, to say nothing of the contempt this unfairness would breed among the men and women in military society for a justice system that would go to these ends. Finally, retribution would have to be stretched to absurd lengths to say that "just desserts"[42] demands an offender be sentenced to one year in jail for every $52.83 she stole by writing bad checks.[43] Surely our military justice system places more value on individual liberty than to take one year's worth of freedom for every $52.83 an accused wrongfully takes through purely nonviolent means.[44]

After concluding that 219½ years of confinement would be grossly disproportionate to the crime of writing $11,595.84 worth of bad checks, the aggregate of the *Solem* and *Harmelin* decisions tells us the next step in proportionality review is to look for objective validation of this conclusion.[45] The first place to look for validation lies in a comparison of the sentence at hand with sentences imposed on other criminals in the same jurisdiction.[46] When this is done within the military justice system the case for gross disproportionality becomes even stronger.

Pursuant to Article 56, UCMJ, the President set forth the maximum punishments that may be imposed for various criminal offenses in the military.[47] A sampling of such punishments includes: seven years confinement for maiming[48] or indecent acts or liberties with a child;[49] ten years confinement for assault in which grievous bodily harm is intentionally inflicted with a loaded firearm;[50] fifteen years confinement for robbery committed with a firearm;[51] twenty years confinement for aggravated arson[52] or assault with intent to commit murder or rape;[53] and confinement for life for various forms of murder and for rape and kidnapping.[54]

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[42] *See* UNITED STATES SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, intro. cmt., at 3 (1998) ("Under this principle, punishment should be scaled to the offender's culpability and the resulting harms.").

[43] Another way to look at the issue is to consider that 219½ years confinement for 197 bad checks works out to 1.11 years per check.

[44] For further elaboration on these arguments see *infra* notes 171-79 and accompanying text.

[45] *See supra* notes 31-34 and accompanying text.

[46] *See* Harmelin v. Michigan, 501 U.S. 957, 1004-5 (1991) (Kennedy, J., concurring in the result).

[47] *See* UCMJ art. 56, 10 U.S.C.A. § 856 (1950).

[48] *See* MCM, *supra* note 2, Maximum Punishment Chart, Appendix 12, at A12-4.

[49] *Id.* at A12-5.

[50] *Id.* at A12-4.

[51] *Id.* at A12-4.

[52] *Id.*

[53] *Id.* at A12-3 to A12-6.

[54] *Id.* at A12-4, A12-7.

Assuming that 219½ years in confinement would be at least the equivalent of a life sentence, no persuasive argument can be made that check offenses like those committed by MSgt Eatmon should be treated as more serious than, or even the equivalent of, the violent crimes listed above. And yet, by authorizing bad check offenders to receive 219½ years in jail, the *Mincey* case, contrary to the principles of justice, puts these nonviolent criminals into the same league as murderers, rapists, and kidnappers, and places them above robbers, arsonists, and child molesters. It is a gross understatement to say that violent criminals are, within military society and elsewhere, ordinarily thought to be more deserving of punishment than one who merely utters bad checks.

Another way to conduct an intrajurisdictional analysis is to review the jail terms that bad check writers generally receive at courts-martial. In the *Mincey* case, the accused was sentenced to only twenty-eight months of confinement after having been found guilty of two specifications of uttering bad checks with the intent to defraud, wrongfully uttering a bad check for a past due obligation, and wrongful appropriation.[55] As another example, consider that even after the members in MSgt Eatmon's case were told she was eligible for 222 years in confinement, she was still ultimately sentenced to only six months.[56] The results in *Mincey* and *Eatmon* are consistent with the military practice of punishing bad check offenders with confinement terms measured in months or, at most, a few years[57] versus decades or life. Thus, we see further evidence of the extent to which the maximum punishments allowed by *Mincey* are out of touch with traditional military justice practice.

Following the guidance of *Solem* and *Harmelin*, the second place to look for objective verification of an initial finding of gross disproportionality is through an interjurisdictional analysis of the issue.[58] When done in the context of *Mincey*'s potential treatment of bad check offenders, we find that other

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[55] Mincey, 42 M.J. at 376. The rest of the appellant's sentence included a bad-conduct discharge, forfeiture of $350 pay per month for twenty-eight months, and reduction to the lowest enlisted grade. *Id.*

[56] Eatmon, 47 M.J. at 536. The rest of her sentence included a dishonorable discharge and a three grade reduction in rank to Senior Airman). *Id.*

[57] *See, e.g.*, United States v. Hamilton, 41 M.J. 22 (C.M.A. 1994). In that case,

> [the a]ppellant was tried by a general court-martial composed of officer members at Soesterberg Air Base, The Netherlands, in January and February 1990. Contrary to his pleas, he was found guilty of five specifications of writing bad checks totaling in excess of $9300, in violation of Article 123a, Uniform Code of Military Justice. . . . He was sentenced to a dishonorable discharge, confinement for 24 months, and total forfeitures.

Id. at 23.

[58] *See supra* notes 31-34 and accompanying text.

jurisdictions have judicially recognized the threat of gross disproportionality in similar bad check cases.[59]

In *Faulkner v. State*,[60] the Supreme Court of Alaska found that a defendant's sentence of thirty-six years in prison for eight counts of writing bad checks totaling $1,384.35 was excessive,[61] even though the defendant had a long and extensive history of lawbreaking.[62] In a California case, an appellate

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[59] The following cases are cast as being similar to the potential sentence to confinement in MSgt Eatmon's case since the defendants were facing more than thirty years in prison. In bad check cases involving lesser sentences to confinement, other jurisdictions have rejected claims that the duration of confinement was either excessive or amounted to "cruel and unusual punishment." *See, e.g.*, Wilson v. State, 475 S.W.2d 543, 544 (Ark. 1972) (finding that defendant's sentence of twenty-four years in jail for forging and uttering two checks totaling $77.46 did not constitute cruel and unusual punishment given legitimate goals of the state's habitual criminal statute); Utah v. Nance, 438 P.2d 542, 544 (Utah 1968) (stating that in view of defendant's criminal history, no constitutional basis existed for challenging a sentence of not more than five years in prison for writing a check of $13.32 without sufficient funds). The state of Mississippi has, on a number of occasions, struggled with the issue in the context of shorter terms of confinement. As a result, the state has come down on both sides of the issue. *Compare* Clowers v. State, 522 So. 2d 762 (Miss. 1988) (upholding the trial court's downward deviation from a statute requiring habitual offenders to be sentenced to the maximum term of confinement, because the court said that fifteen years in confinement for uttering a forged $250 check was disproportionate and cruel and unusual punishment), *with* Wallace v. State, 607 So. 2d 1184, 1188 (Miss. 1992) (upholding defendant's cumulative sixteen year sentence for forging and publishing checks in the amounts of a $40, $54, and $62, and for ten other convictions, nine of which were misdemeanors), *and* Barnwell v. State, 567 So. 2d 215, 222 (Miss. 1990) (upholding the defendant's fifteen year mandatory sentence under the state's habitual offenders statute for uttering a forged check for $500).

[60] 445 P.2d 815 (Alaska 1968).

[61] The judge found the sentence was "cruel and unusual" in violation of the Alaska Constitution and the United States Constitution. *Id.* at 819. A separate concurring opinion concluded the sentence was constitutional but excessive. *Id.* at 822 (Rabinowitz, J., concurring). *See also* Black v. State, 569 P.2d 804, 805 (Alaska 1977) (concluding that appellant's sentence of fifteen years confinement for forging two checks totaling about $500 was excessive).

[62] Faulkner, 445 P.2d at 824 (Nesbett, C.J., dissenting):

> During his military service he was court-martialed twice. In civilian life he was arrested in Boise, Idaho in June of 1952 on a charge of passing bad checks. . . . In March of 1955 he was sentenced to serve 15 years in Washington State Prison on a charge of larceny by check. He was released on parole from Washington State Prison within one year. He was arrested in Stillwater, Minnesota in July of 1958 and sentenced to 0-2 years on a charge of concealing and removing mortgaged chattel property. He served one year and four months of this sentence. In 1961 in Denver, Colorado, he was sentenced to serve four years for violation of the National Motor Vehicle Transportation Act. He was released on conditional release in February of 1964 and arrested in Chicago in June of 1964 for violation of the terms of his conditional release. He was returned to the United States Penitentiary at

court reached a similar result when it held that a sentence of four consecutive fourteen year prison terms was cruel and unusual punishment when imposed for the forgery of four checks,[63] even though the appellant also had a prior criminal record.[64] In that case, the court focused on the nonviolent nature of the check offenses and the fact that the punishment being imposed on the appellant was equivalent to what murderers, kidnappers, and rapists could receive in California's courts.[65] Finally, in another case involving a repeat felon, the West Virginia Supreme Court of Appeals held that the imposition of a life sentence for the appellant's third felony of forging a $43 check violated West Virginia's constitutional proportionality principle.[66] Like the California court, the West Virginia court was influenced by the nonviolent nature of the appellant's crimes and the fact that his punishment was unmatched in that jurisdiction "except for the crime[s] of first degree murder, treason, and kidnapping . . . ."[67]

> Leavenworth in November of 1964 to serve the balance of 408 days on his sentence. He was released from Leavenworth in September of 1965. At that time he was again placed on parole by the state of Washington for his 1955 offense. Parole supervision for the state of Washington was accepted by the Illinois State Parole Authority as a courtesy. Appellant absconded parole supervision in Chicago and came to Anchorage, but was again placed on parole by the state of Washington under the parole supervision of the Alaska Youth and Adult Authority as a courtesy to the state of Washington under the provisions of the Inter-State Compact Agreement. While under the parole supervision of the Alaska Youth and Adult Authority, on or about July 9, 1966, appellant passed at least eight checks ranging in value from $45 to $233.45, totaling approximately $1,384. In addition, appellant is reported to have written a number of bad checks in the states of Washington, Idaho, and Oregon while in flight attempting to avoid prosecution for his Alaska offenses. Appellant's parole was finally revoked by the state of Washington, but proceedings have been held in abeyance until it is determined what will be done by the Alaska courts for the offenses which resulted in the sentence now under consideration by this court.

Id.

[63] People v. Keogh, 46 Cal. App. 3d 919, 932 (Cal. Ct. App. 1975).

[64] *Id.* The defendant "had a previous felony conviction and other minor convictions all of which were related directly or indirectly to the use of heroin." *Id.*

[65] *See id.*

[66] Wanstreet v. Bordenkircher, 276 S.E.2d 205, 214 (W. Va. 1981). This court likened its proportionality requirement to the proportionality requirement found in the Eighth Amendment to the United States Constitution. *Id.* at 209.

[67] *Id.* at 212. *See also* State v. Barker, 410 S.E.2d 712, 714 (W. Va. 1991) (per curiam) (overturning the appellant's life sentence imposed under a recidivist statute for the triggering offense of forging and uttering a $40.48 check). *Cf.* Houk v. State, 747 P.2d 1376 (Nev. 1987) (upholding a fifty year sentence to confinement flowing from bad check offenses). The bad check crimes of the defendant in the *Houk* case were so flagrant and long-running that the case is not inconsistent with the results reached by the three cases discussed in this paragraph.

The preceding examples demonstrate that MSgt Eatmon could not, consistent with the Constitution, have been confined for even a few decades, much less 222 years. In fact, even though it rejected MSgt Eatmon's appeal, the Air Force Court of Criminal Appeals said that had MSgt Eatmon actually been sentenced to 222 years it was betraying "no judicial confidences to predict our intervention to meliorate that sentence in satisfaction of our responsibility . . . to approve only an appropriate sentence."[68] The problem with this statement is that it fails to take into account the plain duty that is placed upon the military judge to properly instruct on the law and the fact that the threat of an unconstitutional punishment can, on its own, exert undue and illegal influence on the outcome of a case.[69] The focus of the next three sections of this article will be on the substance of this duty and the danger of this threat.

B. Failing to Properly Instruct on the Maximum Authorized Punishment

Rule for Courts-Martial (R.C.M.) 1005(e)(1) provides that the "[i]nstructions on sentence shall include [a] statement of the maximum authorized punishment which may be adjudged . . . ."[70] The military appellate courts have relied upon this provision to unequivocally hold that the military judge is required to instruct the court members on the maximum authorized punishment.[71] In fact, "[t]he military judge bears the ultimate responsibility for

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[68] Eatmon, 47 M.J. at 538.

[69] *See* United States v. Towery, 47 M.J. 514 (A.F.C.C.A. 1997) (refusing to venture beyond the actual punishment the appellant received to search for infirmities in the case). The court stated, "whether the maximum punishment in the appellant's case is 125 years or 20 years, the appellant only faced (and received) 15 months in jail pursuant to his pretrial agreement. Any further discussion of 'proportionality' would be an exercise in angelic pin-dancing, which we need not pursue." *Id.* at 515. *But cf.* United States v. Hughes, 48 M.J. 700, 732 (A.F.C.C.A. 1998) (Snyder, S.J., concurring) ("Ensuring a fair trial is the bedrock of military due process and the *raison d'etre* of the trial judiciary.").

[70] MCM, *supra* note 2, R.C.M. 1005(e)(1).

[71] *See* United States v. Thomas, 46 M.J. 311, 312 (1997); United States v. Lawson, 34 M.J. 38, 40 (C.M.A. 1992); United States v. Gray, 37 M.J. 751, 757-58 (A.C.M.R. 1993); United States v. Turner, 34 M.J. 1123, 1126 (A.F.C.M.R. 1992). *See also* United States v. Harden, 1 M.J. 258, 259 (C.M.A. 1976) ("Primary responsibility for determining the legal limits of punishment rests upon the trial judge."); English, 25 M.J. 819, 822 (A.F.C.M.R. 1988) ("[W]e conclude that a reassessment of the appellant's sentence is appropriate based upon the military judge's misapprehension as to the maximum confinement which might be adjudged."); United States v. Clifford, 1 M.J. 738, 740 (A.F.C.M.R. 1975) (concluding the military judge's incorrect calculation of the maximum applicable punishment required reassessment of the appellant's adjudged sentence).

instructing the members concerning the correct maximum punishment whether an issue is raised by counsel or not."[72]

In *United States v. Olson*,[73] the military judge instructed the members that the appellant could be sentenced to four years confinement, when in fact, because of a multiplicity issue, the true maximum term of confinement was two years.[74] Calling this a "one hundred percent" overstatement of the possible term of confinement, the Air Force Court of Military Review (A.F.C.M.R.) concluded that the error created a "significant risk that the court members may have imposed a greater sentence than they would have if they were properly instructed."[75] Accordingly, the court reassessed the appellant's sentence by disapproving $5000 in forfeitures.[76]

When a military judge relies upon *Mincey* to calculate the potential term of confinement for an accused in a bad check case and arrives at astronomical totals, the judge does not meet his or her legally mandated obligation to instruct the members on the lawful "maximum authorized punishment which may be adjudged."[77] In *Eatmon* for example, when the military judge instructed the members that they could potentially sentence MSgt Eatmon to over two hundred years in jail, he distorted the amount of confinement that could be lawfully imposed under the Constitution.[78] If a term of two years confinement was found to be an unlawful overstatement in *Olson*, then the difference between 222 years and what would be a constitutional maximum term of confinement in MSgt Eatmon's case would be an overstatement of a phenomenally unlawful magnitude. While the maximum constitutional term of confinement for MSgt Eatmon remains unknown, assuming it would be something less than what murderers, rapists, and

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[72] United States v. Guevara, 26 M.J. 779, 782 (A.F.C.M.R. 1988) (citing United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983)).

[73] 38 M.J. 597 (A.F.C.M.R. 1993).

[74] *Id.* at 600.

[75] *Id.* at 601. The Air Force Court of Criminal Appeals was, at that time, called the Air Force Court of Military Review.

[76] *See id.* The court seemed to indicate it would have disapproved some of the adjudged confinement time but for the fact the time had already been served. In another case, the military judge's instruction that the maximum term of confinement was twenty-nine years rather than the correct amount of twenty years was plain error and necessitated setting the approved sentence aside. United States v. Pabon, 37 M.J. 836, 844 (A.F.C.M.R. 1993); *see also* United States v. Hart, 30 M.J. 1176, 1178-79 (A.F.C.M.R. 1990) ("Because the sentence in this case included a dismissal, six months confinement and a forfeiture of $6,000.00, we cannot rest assured that the stated maximum–which exposed the appellant to ten times the correct maximum punishment as to confinement–did not affect the sentence."), *aff'd*, 32 M.J. 101 (C.M.A. 1991).

[77] MCM, *supra* note 2, R.C.M. 1005(e)(1).

[78] *See supra* Part II.A.2.

kidnappers are subjected to, this overstatement would be in excess of at least 130 years.[79]

C. A Violation of Military Due Process

A military judge who relies upon *Mincey* to calculate the maximum term of confinement in a bad check case runs the risk of overstating the constitutionally acceptable length of that punishment. For this reason alone, the *Mincey* approach to bad check cases should be abandoned.[80] However, this is not the only problem with this approach to these cases. Its direction also exerts undue and illegal influence on many bad check cases by threatening an unconstitutional punishment, which, in turn, intrudes upon fundamental rights guaranteed to a military accused by both military due process and constitutional due process.

1. Military Due Process Generally

There are fundamental rights inherent in trial by court-martial that must be accorded an accused before the case has been fairly adjudicated.[81] The satisfaction of these rights in the military justice system has come to be called "military due process," which "means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights."[82] This concept does not find its power in the Constitution; rather, it draws force from

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[79] If a life sentence, which is available for murder, rape, and kidnapping, can be equated to approximately seventy years confinement, MSgt Eatmon's maximum possible term of confinement still exceeded such a sentence by over 130 years.

[80] For a suggestion on how these cases should be handled see *infra* Part IV.

[81] *See, e.g.*, United States v. Clay, 1 C.M.R. 74, 77 (C.M.A. 1951). In *Clay*, the court-martial closed for deliberation without the members ever being instructed on the elements of the offense, the presumption of innocence, or the burden of proof. All of these instructions were required under the UCMJ. *Id.* at 76.

[82] *Id.* at 77. *Cf.* United States v. Kelly, 41 M.J. 833 (N.M.C.C.A. 1995), *rev'd on other grounds*, 45 M.J. 259 (1996).

> "Military due process" is not a source of military law, nor is it a natural or common law concept. Rather, it was coined by the early Court of Military Appeals to describe a pattern of rights granted by Congress to servicemembers and as a means to determine when the abrogation of those rights warranted a remedy . . . .

Id. at 843.

the standards of fairness laid down by those who oversee the administration of the military justice system.[83]

Military due process doctrine is employed to ensure that an accused receives the benefit of the military justice system's procedural safeguards. However, not every violation of those procedural safeguards implicates military due process concerns.[84] A lack of military due process exists when two conditions are met. First, there must be, by act of Congress or an Executive Order of the President published in the *Manual for Courts-Martial* (*Manual*), a fundamental right granted to a military accused.[85] Second, that right must be denied during the course of a court-martial proceeding.[86]

Consistent with the requirement that military due process be used only to remedy the denial of a fundamental right, the courts have limited grants of relief on these claims to those situations where the basic fairness of a proceeding has been undermined.[87] For example, in *United States v. Toledo*,[88] the United States Court of Military Appeals relied upon Article 46, UCMJ, to hold that military due process required the government to prepare a transcript of a government witness's former testimony in another proceeding, since that testimony would enable the defense to attack that witness on cross-examination based upon prior inconsistent statements.[89] Likewise, in *United States v.*

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[83] Clay, 1 C.M.R. at 77 ("[W]e look to the acts of Congress to determine whether it has declared that there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted."). For an earlier treatment of the doctrine, see Hon. Robert E. Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1960-61).

[84] *See* United States v. McGraner, 13 M.J. 408, 415 (C.M.A. 1982) (citing United States v. Caceres, 440 U.S. 741 (1979)).

[85] United States v. Berrey, 28 M.J. 714, 717 (N.M.C.M.R. 1989); United States v. Jerasi, 20 M.J. 719, 723 (N.M.C.M.R. 1985), *aff'd*, 23 M.J. 162 (C.M.A. 1986); United States v. Suttles, 6 M.J. 921, 925 (A.F.C.M.R. 1979); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE—PRACTICE AND PROCEDURE § 1-1(B) (3d ed. 1992). *Cf.* Kelly, 45 M.J. at 262 (noting that "military due process . . . is not a self-standing principle of law"). There have been occasions where the courts have equated military due process with constitutional due process. *See, e.g.*, United States v. Garries, 22 M.J. 288, 292 (C.M.A. 1986) (referring to the "constitutional and military-due-process duty to preserve evidence"). However, this article employs the more restrictive view of military due process. Whatever loss of coverage this creates for purposes of considering the full impact of the *Mincey* approach on bad check cases will be made up by discussing constitutional due process in its own section. *See infra* Part II.D.

[86] Berrey, 28 M.J. at 717 (citing Jerasi, 20 M.J. at 723).

[87] *See* Hughes, 48 M.J. at 732 (Snyder, S.J., concurring).

[88] 15 M.J. 255 (C.M.A. 1983).

[89] *See id.* at 256-57. Article 46, UCMJ, provides, "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46, 10 U.S.C.A. § 846 (1998). In order to avoid confusion, it should be noted that the United States Court of Military Appeals recently changed its name to the United States Court of Appeals for the Armed Forces.

Mark,[90] the same court said that a staff judge advocate's statutorily mandated posttrial recommendation is an important part of military due process because it is "a critical factor in a convening authority's post-trial sentence action" and because "it is the focal point for the servicemember's efforts to secure clemency."[91]

In addition to errors during findings and those occurring posttrial, the courts have also employed the military due process concept to attack violations of fundamental rights that occur in sentencing proceedings. In *United States v. Suttles*,[92] while fielding inquires from court members following his sentencing instructions, the military judge called attention to the fact that the members could not question the accused following his unsworn statement.[93] After having piqued the members' interest on this issue, the judge did not follow-up by advising the members that no adverse inferences could be drawn from the accused's silence.[94] The Air Force court found this omission on the part of the judge to be a denial of military due process because it impinged upon the accused's right under the *Manual* to make an unsworn statement without being cross-examined.[95] The court said this right was undermined by the military judge's failure to explicitly tell the members they could not draw any adverse inferences from the accused's exercise of his right to make a statement to them in a fashion specifically allowed by the *Manual*.[96]

The result in the *Suttles* case was not dissimilar from, and in fact relied upon, the outcome in *United States v. Callahan*.[97] In that case, the Army Board of Review held that the right of an accused to submit matters in extenuation and mitigation prior to a vote on a sentence is an integral part of military due process.[98] In reaching its conclusion, the board specifically called attention to the impact the accused's right to present such information has upon the reliability of the overall process. The opinion noted that a court-martial could hardly meet its statutory obligation to fix an appropriate sentence unless it was afforded access to the "essential facts regarding [the accused's] background, personal circumstances, etc., which the accused and his counsel deem extenuating in his case."[99] The opinion commented further that an

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[90] 47 M.J. 99 (1997).
[91] *Id.* at 102. A convening authority must "obtain and consider the written recommendation of his staff judge advocate or legal officer" before acting on an adjudged case. UCMJ art. 60(d), 10 U.S.C.A. § 860(d) (1998).
[92] 6 M.J. 921 (A.F.C.M.R. 1979).
[93] *Id.* at 922.
[94] *Id.* at 923.
[95] *Id.* at 925.
[96] *Id.*
[97] 22 C.M.R. 443 (A.B.R. 1956).
[98] *Id.* at 447-48.
[99] *Id.* at 447.

accused is "afforded . . . the right–not solely the permission–to introduce such evidence at his election[,]"[100] and this right is facilitated by relaxation of the rules of evidence for the sentencing portion of the proceedings.[101] The board went on to conclude that Sgt. Callahan's apparent waiver of his right to present evidence in extenuation and mitigation was the product of undue pressure brought to bear in the negotiation of his pretrial agreement and that this "amounted to an unwarranted and illegal deprivation of the accused's right to military due process."[102]

2. *The* Mincey *Approach as a Violation of Military Due Process*

Notwithstanding the possibility that any given case could present due process concerns, the use of the *Mincey* approach in bad check cases clearly gives rise to military due process concerns at two points in the proceedings. First, the possibility of receiving an unconstitutional term of confinement severely impacts the accused's freedom to exercise choice regarding representation, forum selection, and whether to testify in her own defense. Second, this possibility also impacts the fairness and reliability of the accused's sentencing hearing, if the proceedings reach that point.

Pursuant to the Rules for Courts-Martial and the UCMJ, there are four crucial elections the accused is empowered to make when faced with court-martial proceedings. First, it is up to the accused to choose who will represent her.[103] Although the accused will be afforded a military defense counsel at no charge, she can elect to be represented by a civilian counsel at her own expense[104] or an individually detailed military defense counsel if the desired judge advocate is reasonably available.[105] Second, a military accused can elect to have the case heard by court members or choose to have a military judge sitting alone decide her fate.[106] If the accused chooses the military judge sitting alone, it is within the judge's discretion to grant or deny that request,[107] though "[a] timely request . . . should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder."[108]

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[100] *Id.* at 447-48.
[101] *See id.* at 448.
[102] *Id.*
[103] MCM, *supra* note 2, R.C.M. 506(a).
[104] *Id.*
[105] *Id.* R.C.M. 506(b).
[106] *Id.* R.C.M. 903(a). Between the defense counsel and client, this is a choice that ultimately lies in the hands of the client. *See* AIR FORCE RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) [hereinafter RULES OF PROFESSIONAL CONDUCT]; AIR FORCE STANDARDS FOR CRIMINAL JUSTICE Rule 4-5.2(a)(ii) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].
[107] MCM, *supra* note 2, R.C.M. 903(c)(2)(B).
[108] *Id.* R.C.M. 903(c)(2)(B) Discussion.

Third, the accused in a court-martial has the responsibility and freedom to determine her plea.[109] This is a choice within the exclusive control of the accused and must be accepted by the military judge absent some very particular exigencies.[110] Fourth, a military accused has an absolute right to remain silent throughout a court-martial or to waive that right and testify in her own defense.[111] Article 31, UCMJ, strictly prohibits anyone who is subject to the code from forcing a military member to make a statement or answer any question, "the answer to which may tend to incriminate [her]."[112]

By allowing an accused in a bad check case to face the possibility of incredibly lengthy terms of confinement, *Mincey* forces the accused to make each of the four choices under the threat of an unconstitutional punishment. The duress this threat works on the accused's elections arguably amounts to a violation of military due process. Each of these choices are granted to a military accused by either an act of Congress or an Executive Order of the President, and each implicates fundamental rights that have long been recognized in the United States. Although an accused has no constitutional right to a particular appointed counsel,[113] an accused's choice of who will represent her is closely associated with an accused's Sixth Amendment right to counsel.[114] Additionally, an accused's ability to elect a trial by a panel of court members[115] has a strong parallel to the Sixth Amendment right to a jury trial.[116] Finally, the right of a military accused to choose and enter her own plea and the right of that accused to decide whether or not to make any statements in the

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[109] *Id.* 910(a)(1). Between the defense counsel and client, this is an election that ultimately belongs to the client. *See* RULES OF PROFESSIONAL CONDUCT, *supra* note 106, 1.2(a); STANDARDS FOR CRIMINAL JUSTICE, *supra* note 106, 4-5.2(a)(i).

[110] "A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial." MCM, *supra* note 2, R.C.M. 910(a)(1). An accused cannot enter a conditional plea without approval of the military judge and consent of the Government. *See id.* R.C.M. 910(a)(2). "If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused." *Id.* R.C.M. 910(b). Finally, a military judge cannot accept an involuntary or inaccurate plea. *Id.* R.C.M. 910(d), 910(e).

[111] UCMJ art. 31, 10 U.S.C.A. § 831 (1998). Between a defense counsel and a client, this decision ultimately rests with client. *See* RULES OF PROFESSIONAL CONDUCT, *supra* note 106, 1.2(a); STANDARDS FOR CRIMINAL JUSTICE, *supra* note 106, 4-5.2(a)(iii).

[112] UCMJ art. 31(a), 10 U.S.C.A. § 831.

[113] *See* Morris v. Slappy, 461 U.S. 1 (1983) (noting that the Sixth Amendment guarantees only competent representation, not "a meaningful attorney—client relationship"). *See also* Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

[114] *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." *Id.*

[115] *See* UCMJ art. 16, 10 U.S.C.A. § 816 (1998); MCM, *supra* note 2, R.C.M. 903. A military accused does not enjoy a Sixth Amendment right to a jury trial. *See* Ex Parte Quirin, 317 U.S. 1, 39-40 (1942); United States v. Witham, 47 M.J. 297, 301 (1997).

[116] *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury . . . ." *Id.*

course of a court-martial, are both rooted in the Fifth Amendment right to avoid self-incrimination.[117]

The only issue remaining in a military due process analysis of *Mincey's* impact is to ask whether an accused is effectively denied a meaningful opportunity to make these choices in bad check cases. However, we must remember that outright denial of a fundamental right is not necessarily required to find a military due process violation. In *Toledo*, the defense could still cross-examine the prosecution's witness, but the opportunity to conduct a full cross-examination was effectively denied by the prosecution's failure to make transcripts of the witness's earlier testimony available to the defense.[118] Likewise, in *Suttles*, the accused was allowed to make an unsworn statement, but his right to make that statement was undermined by the military judge's failure to ensure the members understood that no adverse inference could be drawn from the accused's actions.[119] It is true that individuals being tried for bad check offenses are not absolutely precluded from choosing who represents them, who will hear their case, how they will plead, and whether or not they will testify. The point, however, is that the duress generated by the threat of an unconstitutional and unconscionable jail term amounts to an effective denial of the right to make these elections. This point is consistent with the holdings in *Toledo* and *Suttles*, and it can be illustrated by considering the circumstances under which these choices would have to be made in the context of the facts presented by the *Eatmon* case.

The first of the four choices made by an accused in a bad check case concerns representation. When MSgt Eatmon first learned she was facing the possibility of going to jail for over two hundred years, any concern she might have had about the skill, caliber, an independence of the military counsel offered to defend her would have been justified. Given that offered counsel wore the uniform of the service prosecuting her, MSgt Eatmon may very well have believed that counsel employed by a service seeking such a draconian sanction for nonviolent thefts is no counsel at all. Accordingly, an accused in a bad check case may feel the only real choice available to her is to hire a civilian attorney untainted by the specter of this unjust punishment scheme–assuming the accused could afford the fees. In this way, that accused's fundamental right to choose between a free military lawyer versus costly civilian representation is compromised in a very significant way; perhaps so much so that this choice is effectively denied to that accused.

The second choice such an accused faces concerns the forum. Even more so than in electing representation, the *Mincey* regime makes this choice

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[117] *See* U.S. CONST. amend. V. "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." *Id.*

[118] *See* United States v. Toledo, 15 M.J. 255, 256-7 (C.M.A. 1983).

[119] *See* United States v. Suttles, 6 M.J. 921, 925 (A.F.C.M.R. 1979).

very problematic for an accused like MSgt Eatmon. An accused facing the frightening prospect of going to jail for the rest of her life would feel compelled to forgo the right to a trial by members for two reasons. First, the threat of such an extreme punishment would make it far more likely the accused would seek a pretrial agreement with the government, and these agreements can, and often do, insist upon the accused waiving her right to have members decide the case.[120] Second, to the extent the protection of a pretrial agreement is unavailable or not sought, an accused would feel compelled to choose a judge alone trial for fear of getting members who see no injustice in putting someone behind bars for decades for passing bad checks. Although most panels would probably find this prospect absurd, *Mincey* makes it possible for an improperly motivated panel to adjudge a nonsensical amount of confinement in a bad check case. This is why *Mincey* is so problematic. Normally, the law and the rules of procedure prevent misguided panels from rendering decisions at odds with the American tradition of justice. But now, in bad check cases, the *Mincey* decision sweeps aside those protections and gives panels complete freedom to adjudge sentences that could turn justice on its head.

As the proceedings unfold, the next choice concerns the plea. Again, for reasons similar to those given concerning forum selection, under *Mincey*, an accused would feel driven to waive her right to put the prosecution to its proof. While a guilty person has the full right to insist upon the prosecution proving her guilt, such a person would nevertheless feel compelled to propose a guilty plea. In such cases, a plea would be necessary to secure the protection of a pretrial agreement or to demonstrate remorse and rehabilitative potential in front of a panel that will have the opportunity to put the accused in jail for hundreds of years.[121] Of greater concern is the innocent military member. In the face of a possible term of confinement like that which applied to MSgt Eatmon, the innocent military member would feel compelled to plead guilty in order to avoid the possibility of a "crushing sentence."[122] Of course, such a result would be unconscionable.

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[120] *See* MCM, *supra* note 2, R.C.M. 705(c)(2)(E). This rule does not prohibit either party from proposing a "promise to waive procedural requirements such as the Article 32 investigation, the right to a trial by court-martial composed of members or the right to request trial by military judge alone . . . ." *Id.*

[121] *Cf., e.g.*, United States v. Walker, 34 M.J. 264 (C.M.A. 1991). "[A] plea of guilty may be improvident if it is predicated upon a substantial misunderstanding on the accused's part of the maximum punishment to which he is subject." *Id.* at 266 (quoting United States v. Windham, 36 C.M.R. 21, 23 (C.M.A.1965)).

[122] *See* United States v. Hunt, 10 M.J. 222, 224 (C.M.A. 1981) (inferring but not finding that such a result would be a very substantial factor in judging the providence of an appellant's guilty plea). One appellate judge noted,

Assuming the accused resisted the pressure to forgo the right to a trial on the charges, the final decision is whether to testify. The impact *Mincey* has upon this choice is twofold. First, *Mincey* raises the stakes to such an extreme level, the accused might very well be intimidated and decline to testify altogether. Given that this pressure is based upon an unlawful application of the law, such an outcome would truly be a denial of the right to make a choice whether or not to testify. Second, if the accused does decide to take the stand burdened by the stress associated with the possibility of going to jail for a lifetime, any testimony could come across in a way that would undermine the accused's credibility. This outcome might not seem to be a denial of the right to avoid self-incrimination, but like the results in *Toledo* and *Suttles*, the net effect of the unlawful pressure generated by *Mincey* is the unjust interference with the accused's ability to speak to the factfinders. This creates a roadblock that effectively denies the accused the option of choosing to waive her right to remain silent and speak to those who have been appointed to decide her fate.

In light of the primary focus of a sentencing hearing, which is to determine whether an accused will be incarcerated or, in some other way, punished,[123] the *Suttles* and *Callahan* holdings stand for the proposition that an accused has a fundamental right to insist that this decision be made fairly and be based upon reliable information. Furthermore, an accused's liberty interest is implicated by the possibility of facing both confinement and the imposition of a punitive discharge.

> While not literally involving "liberty" in the sense of bars on the windows and doors, [a punitive discharge] certainly has certain points of comparison [with confinement]. . . . [F]or instance, . . . a punitive discharge might lawfully be commuted into some length of confinement, so in that regard it is quite closely akin to a liberty interest. Further, . . . such a discharge–which

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> [I]t would be very significant that there is any indication that the accused pleaded guilty even though he believed himself to be innocent, simply to avoid a "crushing" sentence. . . . [S]uch a case would suffer a more serious flaw than the mistake about the sentence, for courts-martial do not take pleas of guilty from persons who say that they believe themselves to be innocent.

United States v. Boroski, No. ACM 30157, 1993 CMR LEXIS 343, at *20 n.18 (A.F.C.M.R. Aug. 17, 1993) (James, J., concurring in part and dissenting in part) (citing Hunt, 10 M.J. 224; MCM, *supra* note 2, R.C.M. 910(e)).

[123] *See* United States v. Brasher, 6 C.M.R. 50 (C.M.A. 1952). "In a special and peculiar sense the sentence of the law for adjudged misconduct—military or civilian—is the product of a trial court. It alone, of all agencies of the law, is authorized to 'adjudge' the law's penalty." *Id.* at 52. *See also* United States v. Greaves, 46 M.J. 133, 139 (1997) (calling sentencing "a vital part of a court-martial proceeding") (citing United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957)).

can result only from the sentence of a court-martial–carries with it "the stigma and hardships of a criminal conviction . . . ."[124]

Through the Rules for Courts-Martial, the President has generally called for just determinations in court-martial proceedings[125] and has specifically mandated that court members be properly instructed on the maximum authorized punishment an accused may receive for her crimes.[126] Protections like these are in place to ensure fair sentencing hearings and cannot, consistent with the holdings of *Suttles* and *Callahan*, be abrogated without a finding that an accused has been denied military due process of law.

Requiring a military judge to instruct court members properly on the maximum authorized punishment is a procedural safeguard that contributes significantly to the protection of the fundamental right not to have our personal liberty taken away arbitrarily.[127] Like the protection the *Suttles* case extends to an accused to speak directly to the members in a sentencing hearing free of the threat of cross-examination,[128] an accused in a bad check case has the fundamental right to present and argue the case free of the threat of having her fate influenced by the specter of an unlawful sentence. Like the protection the *Callahan* case extends to an accused concerning the presentation of evidence in extenuation and mitigation,[129] an accused in a bad check case has the

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[124] United States v. Connell, 42 M.J. 462, 465 (1995) (citations omitted). *See generally* United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989). "The punitive discharge is a stigma. It is a badge of dishonor, and it has a significant historical background and basis. Importantly, it can be adjudged with or without regard to whether an accused has rehabilitative potential." Ohrt, 28 M.J. at 306. One commentator noted that,

> The punitive discharge was never intended to be a rehabilitative punishment. Historically the punitive discharge came into being at a time when retribution and deterrence were the chief, if not the only, reasons for inflicting punishment. The punitive discharge was designed to sever a service member from the military community and to put a mark upon him which would make it difficult for him to reenter the civilian society and economy. The punitive discharge thus had two effects by design: first, it punished by ejection from a familiar society and by imposing social and economic hardships; and, second, it deterred others by its visible, swift, effective and harsh character.

Charles E. Lance, *A Criminal Punitive Discharge–An Effective Punishment?*, 79 MIL. L. REV. 1, 17 (1978).

[125] "These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial." MCM, *supra* note 2, R.C.M. 102(a).

[126] *See id.* R.C.M. 1005(e)(1).

[127] The Fifth Amendment to the Constitution states, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[128] *See* Suttles, 6 M.J. 921.

[129] *See supra* notes 97-102 and accompanying text.

fundamental right to protect the reliability of her proceedings by insisting the members be accurately instructed upon the maximum sentence that could be adjudged. Unfortunately, the *Mincey* approach to bad check cases results in the denial of both of these fundamental rights.

As the *Eatmon* case demonstrates, when court members in a bad check case are instructed that an accused can be sent to jail for an exorbitant number of years, the sentencing process breaks down in two ways. First, assuming the prosecution exercises even a modicum of restraint and does not argue for anything approaching the maximum sentence, the prosecution is granted the unfair advantage of being able to trumpet as eminently reasonable whatever sentence it chooses in light of the maximum allowed by law. In MSgt Eatmon's case the prosecution was able to cast its requested punishment of a dishonorable discharge and three to five years confinement as a seemingly benign result when compared with over two hundred years behind bars.[130] Second, the *Mincey* approach compromises the reliability of the sentencing process in bad check cases by giving court members an artificial and incorrect perception of how the law views the nonviolent acquisition of other people's money by uttering bad checks. This perception, in turn, creates the unacceptable risk the accused will receive a sentence greater than she would have received if the members had been properly instructed. In the military sentencing process, the maximum is always a strong reference point and in the instant case that number was an unconstitutional 222 years. Therefore, since military members vote on a sentence as a total package,[131] it became emotionally, logically, and intuitively much easier for MSgt Eatmon's members to justify not only six months confinement, but also the very harsh result of a dishonorable discharge. This latter sanction certainly appeared to be a reliable characterization of the severity of the conduct given the number of years "the law" would allow MSgt Eatmon to be locked behind bars.

Just as it effectively denies an accused in a bad check case the opportunity to make choices regarding four crucial issues in her case, *Mincey* also denies the accused fundamental rights once a case makes its way into the sentencing stage. In a case like *Eatmon*, the *Mincey* decision ensures that the accused's personal liberty is unjustly put at risk by making it far more likely the accused will be deprived of that liberty, either in terms of physical confinement or through the imposition of a punitive discharge. This result is not only against the law, it also makes for very bad policy. However, before

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[130] See Assignment of Errors and Brief on Behalf of Appellant at 13, *Eatmon* (No. ACM 32664). In his sentencing argument the assistant trial counsel said that the possible term of confinement was "a reflection of how serious these crimes are" and later, in rebuttal, argued the fact that the prosecution hadn't asked for the full term of confinement showed that it was not trying to "hammer" the appellant. *See id.*

[131] *See* MCM, *supra* note 2, R.C.M. 1005(e)(1), 1006(d)(1).

addressing this latter point, let us first consider the application of constitutional due process to the *Mincey* scenario.

D. A Violation of Constitutional Due Process

The due process hierarchy in the military justice system dictates that the more protective source of due process must prevail.[132] This means that between the United States Constitution, the UCMJ, the *Manual*, military regulations, and military case law, an accused must receive the benefit of whichever source offers the most protection.[133] This hierarchy is followed so that "the military justice system will be applied in a consistent and . . . fair fashion"[134] and to avoid the appearance that "military tribunals will interpret the rules in such a way that the offender is disciplined, if necessary, at the cost of justice."[135]

As we have already seen, when a trial judge instructs court members that an accused in a bad check case could be confined for hundreds of years, that judge violates the express requirement of R.C.M. 1005(e)(1) to instruct the members on the correct maximum authorized punishment the accused could receive.[136] Furthermore, that same erroneous instruction raises two military due process concerns. First, the instruction may unlawfully preclude an accused from making crucial elections in the course of the accused's case regarding who will hear the case, who will represent the accused, how she will plead, and whether or not the accused will take the stand.[137] Second, the instruction compromises the fairness and reliability of the accused's sentencing hearing by providing the prosecution with the unfair advantage of being able to cast its requested punishment in terms that appear reasonable and by giving the members an inaccurate perception of how the law views nonviolent check offenses.[138]

Both of the preceding problems provide ample grounds for treating bad check cases in a way other than that required by *Mincey*. However, these are not the only troubling issues that are created by the *Mincey* approach to bad check cases. As we are about to see, telling court members that a writer of bad

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[132] *See* SCHLUETER, *supra* note 85, § 1-1(B) at 8.
[133] *See id.* "These sources [the Constitution, the UCMJ, and so on] are set forth in an hierarchical scheme, the first source, the Constitution being paramount. If a lower source sets forth a more stringent provision to protect individual rights, it will prevail." Colonel Francis A. Gilligan, *The Bill of Rights and Service Members*, THE ARMY LAWYER, Dec. 1987, at 3.
[134] SCHLUETER, *supra* note 85, § 1-1(B) at 9.
[135] *Id.*
[136] *See supra* Part II.B.
[137] *See supra* notes 103-22 and accompanying text.
[138] *See supra* notes 123-31 and accompanying text.

checks can be put behind bars for over two hundred years also offends a basic requirement of fairness, and thus runs afoul of constitutional due process.

1. Constitutional Due Process Generally

Unlike military due process which depends upon an act of Congress or the President for its power, constitutional due process derives its power from the Fifth Amendment to the United States Constitution.[139] Although military members are denied certain constitutional rights possessed by civilians,[140] this is not the case with Fifth Amendment due process. "It has been settled for nearly [two] decades that a citizen in uniform is as 'entitled to the due process of law guaranteed by the Fifth Amendment' as is his civilian counterpart."[141] This means military members are entitled to be treated fairly when the government attempts to court-martial them.[142] This includes, more specifically, fairness both in terms of the procedures used to carry out that prosecution and in terms of the government's conduct as it seeks to put a military member behind bars. The latter concern is called substantive due process, and it is this requirement that is ignored by the *Mincey* approach to bad check cases.

Unlike the alternative procedural due process claim,[143] a substantive due process argument is not concerned with what process is provided;[144] rather,

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[139] *See* U.S. CONST. amend. V.
[140] *See. e.g.*, Parker v. Levy, 417 U.S. 733 (1974).

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it . . . .

Id. at 758.
[141] United States v. Connell, 42 M.J. 462, 464 (citing Middendorf v. Henry, 425 U.S. 25, 43 (1976)). *See also* Cooke v. Orser, 12 M.J. 335, 338 (C.M.A. 1982) ("A service member, like his civilian counterpart, is 'entitled to the due process of law guaranteed by the Fifth Amendment' to the Constitution.").
[142] *See* Weiss v. United States, 510 U.S. 163, 178 (1994) ("It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.'"); United States v. Mitchell, 39 M.J. 131, 136 (1994) ("The Supreme Court has long held that the Due Process Clause basically requires a 'fair trial in a fair tribunal.'").
[143] *See, e.g.*, Connell, 42 M.J. at 464-65; United States v. Spears, 48 M.J. 768, 776 (A.F.C.C.A. 1998).
[144] *See* Reno v. Flores, 507 U.S. 292, 302 (1993). "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of

it focuses on preventing the government from engaging in conduct that "shocks the conscience"[145] or interferes with rights "implicit in the concept of ordered liberty."[146] In order to give these phrases definitive meaning, the courts have devised a two-part test to determine if a substantive due process violation has taken place. The first step involves an assessment of the importance of the interest at stake, while the second concerns an evaluation of the reasons given by the government to justify its conduct.

Analysis of a substantive due process claim must always begin with a careful articulation of the asserted right because these claims can only prevail if the government is infringing upon a fundamental liberty interest.[147] Determining whether such an interest is at stake requires consideration of past and current practices dealing with the right being claimed[148] in an effort to ascertain whether the interest is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[149] While this investigation is

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the fairness of the procedures used to implement them." Zinermon v. Burch, 494 U.S. 113, 125 (1990) (citations omitted).

[145] United States v. Salerno, 481 U.S. 739, 746 (1987) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

[146] Salerno, 481 U.S. at 746 (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). *See also* United States v. Wright, 48 M.J. 896, 899 (A.F.C.C.A. 1998) (quoting Salerno, 481 U.S. 739). "To warrant dismissal of charges, the government's conduct must be so outrageous, fundamentally unfair, and shocking to the universal sense of justice that prosecution is prohibited by the Due Process Clause of the Fifth Amendment." United States v. Lawson, No. ACM 32303, 1998 CCA LEXIS 283, at *5 (A.F.C.C.A. June 10, 1998) (per curiam). "A breach of due process would only occur if the [pre-indictment] delay violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define the 'community's sense of fair play and decency.'" United States v. Devine, 36 M.J. 673, 677 (N.M.C.M.R. 1992) (quoting United States v. Lovasco, 431 U.S. 783 (1977)). "To be so 'outrageous' as to deny due process, government enforcement procedures must be fundamentally unfair or shocking to a universal sense of conscience which generally includes: coercion, violence or brutality to the person." United States v. Patterson, 25 M.J. 650, 651 (A.F.C.M.R. 1987).

[147] *See* Flores, 507 U.S. at 302. *See also* Wright, 48 M.J. at 900. In that case, the court stated,

> It is not the [government] which bears the burden of demonstrating that its rule is "deeply rooted," but rather [the appellant] who must show that the principle of procedure violated by the rule (and allegedly required by due process) is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. (citations omitted).

[148] *See* Weiss, 510 U.S. at 178-79; United States v. Graf, 35 M.J. 450, 462 (C.M.A. 1992); Mitchell, 39 M.J. at 137-41; Wright, 48 M.J. at 900 (citing Montana v. Egelhoff, 518 U.S. 37, 41 (1996)).

[149] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also* Flores, 507 U.S. at 303; Graf, 35 M.J. at 463; Wright, 48 M.J. at 900.

frequently carried out on a case-by-case basis over time, certain interests are intrinsically entitled to substantive due process protection because of the elevated status they hold within society. One of the most revered interests is the right to be free of bodily restraint, which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[150] This liberty interest includes freedom from "incarceration, institutionalization, or other similar restraint of personal liberty . . . even if the conditions of confinement are liberal."[151]

If the government has interfered with a fundamental liberty interest, then the second step of the analysis requires investigation of the reasons given for that interference. In the context of the civilian world, for its action to survive constitutional challenge, the government must show its infringement is narrowly tailored to serve a compelling state interest.[152] By contrast, when assessing the lawfulness of government interference with a military member's fundamental liberty interest, the standard is significantly relaxed.[153] Because the Constitution "contemplates that Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment . . . [j]udicial deference . . . is at its apogee when reviewing congressional decision making in this area."[154] It has been held, therefore, that the appropriate standard to be applied when judging a due process challenge to a facet of the military justice system is to ask whether the factors militating in favor of the asserted liberty interest are so extraordinarily weighty as to overcome the balance struck by Congress or the President.[155]

2. The Mincey *Approach as a Violation of Constitutional Due Process*

The first prong of a substantive due process attack requires a showing the government is infringing upon a fundamental liberty interest. The *Mincey*

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[150] Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

[151] Flores, 507 U.S. at 315 (O'Connor, J., concurring) (citing DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 200 (1989)).

[152] *See* Flores, 507 U.S. at 315 (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Bowers v. Hardwick, 478 U.S. 186, 191 (1986)). *See also* Salerno, 481 U.S. at 749. Justice O'Connor, in her concurring opinion in *Flores* that was joined by Justice Souter, talked of the need for a "sufficiently compelling" government interest when the occasion under consideration was one of the government imprisoning a convicted criminal. *See* Flores, 507 U.S. at 316 (O'Connor, J., concurring).

[153] Weiss, 510 U.S. at 177. "[W]e have recognized . . . that the tests and limitations of due process may differ because of the military context." *Id.* (citations omitted).

[154] *Id.*

[155] *See id.* at 177-78. *See also* Mitchell, 39 M.J. at 137; Graf, 35 M.J. at 462.

approach to bad check cases satisfies this requirement in two different ways. First, it infringes upon a right inherently entitled to due process protection. Second, the historical and current practices of the military justice system amply support the conclusion that to protect personal liberty trial judges are legally bound to instruct accurately the members on the amount of confinement that may be adjudged.

When the military judge in the *Eatmon* case told the members MSgt Eatmon could be sent to jail for over two hundred years, he infringed upon an interest that "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[156] By presenting the members the option to physically restrain MSgt Eatmon for an unconstitutional period of time, the military judge greatly increased the odds she would face jail time well in excess of what she would have received had the members been properly instructed. Additionally, by this same conduct, the military judge greatly increased the odds the members would adjudge a punitive discharge in the case.[157] Even though a punitive discharge does not involve bodily restraint, the courts have long recognized the effect can be equated to confinement,[158] and thus, freedom from the arbitrary imposition of this type of a discharge is "implicit in the concept of ordered liberty"[159] within the military justice system.

Given the military justice system's long tradition and current practice of insisting upon accurate sentencing instructions regarding confinement, even if the freedom from arbitrary bodily restraint did not have its long pedigree, an accused like MSgt Eatmon would still be able to show infringement upon a fundamental liberty interest when threatened by a *Mincey*-mandated sentence. As required by both case law and the Rules For Courts-Martial, the current practice in military courtrooms is for military judges to ensure that all parties to the case are accurately informed of the maximum term of confinement that could be legally imposed. As we have already seen, R.C.M. 1005(e)(1) explicitly requires the military judge to accurately instruct the members on the "maximum authorized punishment that may be adjudged,"[160] and one of the most widely used components of punishment is confinement.[161] Furthermore, this requirement is nothing new. The lineage of R.C.M. 1005(e)(1) can be traced back at least as far as the 1969 version of the *Manual*.[162] For the past

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[156] Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

[157] Of course, that includes a dishonorable discharge, which MSgt Eatmon actually received. A dishonorable discharge is the most severe type of discharge a military member can receive, and it is usually reserved for criminals who commit the most serious offenses.

[158] *See* United States v. Connell, 42 M.J. 462, 466 (1995).

[159] United States v. Solerno, 481 U.S. 739, 746 (1987) (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[160] *See* MCM, *supra* note 2, R.C.M. 1005(e)(1).

[161] *See id.* R.C.M. 1003(b)(8).

[162] *See* MCM, *supra* note 2, Analysis of Rules For Courts-Martial, Appendix 21, at A21-72.

three decades, a mandate from the President has required military judges to properly and accurately instruct on the length of time the accused may be confined against her will.

Military courts have also long made a point of requiring trial judges to calculate correctly the length of time an accused may be sent to prison. As noted earlier in the discussion of the *Olson* case, a failure on the part of a military judge to properly instruct the members on the potential maximum term of confinement is error that will not be ignored on appeal.[163] Additionally, a similar obligation is well recognized in a slightly different context. When a military judge is conducting a *Care*[164] inquiry in order to accept a guilty plea, the judge has the obligation to ensure that the accused is properly advised as to the maximum term of confinement the accused could receive as a result of the plea. For example, in *United States v. Castrillon-Moreno*,[165] the Court of Military Appeals found an accused's guilty pleas to be improvident. The military judge, with the concurrence of both trial and defense counsel, had advised the accused incorrectly that the maximum authorized punishment included ten years of confinement, when in fact the correct amount was only two years.[166] The court said that as a matter of "fundamental due process" the accused was entitled to "substantially correct advice as to the maximum authorized period of confinement . . . ."[167]

Having found a government infringement upon this fundamental liberty interest, the final step in a substantive due process attack on *Mincey* is to assess the strength of the government's justification for its conduct. This is a bit of a

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[163] *See supra* notes 73-76 and accompanying text.

[164] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[165] 7 M.J. 414 (C.M.A. 1979).

[166] *Id.* at 414-15. *See also* United States v. Brewster, 7 M.J. 450 (C.M.A. 1979) (concluding that the military judge's advice to the defendant that he faced the possibility of twenty years in jail instead of the correct amount of ten years, rendered the defendant's pleas of guilty improvident); United States v. Clifford, 1 M.J. 738, 739-40 (C.M.A. 1975) (finding that the defendant was prejudiced by the military judge imposing sentence under the erroneous belief that the defendant was eligible for three more years of confinement than the law would allow, and that the defendant was also prejudiced by the convening authority reviewing the proceedings under this same erroneous belief).

[167] Castrillon-Moreno, 7 M.J. at 415. This court did recognize that a defendant could receive such incorrect advice and still not be entitled to relief if he were "intelligently indifferent to an error by the trial judge as to this aspect of the maximum authorized punishment and . . . still desired to plead guilty." *Id.* "But even a plea entered under such circumstances need not be vacated where the record affirmatively reflects that the accused is aware of the possibility that the actual legal maximum sentence may be less than that perceived at trial and, nonetheless, persists in his plea." Hunt, 10 M.J. at 223. "[T]he Court has not adopted a mathematical formula to resolve an issue of this kind. . . . All the circumstances presented by the record must be considered to determine whether misapprehension of the maximum [possible] sentence affected the providence of guilty pleas." United States v. Walls, 9 M.J. 88, 91 (C.M.A. 1980) (citations omitted).

fanciful exercise because the government has never been called upon to defend the process. We can only speculate as to what justification the government might assert if required to do so. Indeed, even though the government has the benefit of a very deferential standard of review, it is hard to imagine any attempt to defend this conduct.[168] When striking a balance with the right to be free from bodily restraint, what rationale could the government possibly offer in support of a position that exposes bad check writers to a lifetime in jail? Certainly, any desire to achieve an advantage in pretrial negotiations or in sentencing hearings would be rejected as simply using dubious means to accomplish undeserved ends. Furthermore, it is beyond imagination that some military member could ever commit such an egregious case of passing bad checks that she would deserve to spend decades, much less centuries, behind bars. This has not been the case in the past and there is no reason to believe it will be the case in the future. If courts would require the government to articulate a justification for this maximum sentence, the arbitrary approach to bad check cases in the military justice system would be fully exposed. Until that time, judicial inaction in the face of this ongoing due process violation "drastically undermines [the] authority and responsibility [military judges have] to ensure a military accused a fair court-martial . . . ."[169]

III. BAD CHECKS MAKE BAD POLICY

Notwithstanding the foregoing legal critique of the *Mincey* approach to bad check cases,[170] the military justice system's treatment of these cases is flawed from a policy perspective. For a number of reasons, the potential punishment *Mincey* makes possible is inappropriate because it detracts from some of the underlying policies of our military justice system. A *Mincey*-type sentence is entirely inconsistent with bedrock principles of punishment. In fact, a sentence of over two hundred plus years for MSgt Eatmon's crimes furthers no recognized punishment principle. To the contrary, such a sentence actively undermines these principles.

Sending MSgt Eatmon to jail for the rest of her natural life is not necessary to deter other potential bad check writers. In other words, some amount of time in confinement well short of the maximum possible under *Mincey* would be sufficient to achieve the optimal level of deterrence. Any jail

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[168] The reader is reminded that the Air Force Court of Criminal Appeals held in *Eatmon* that the military due process attack on the *Mincey* approach was unwarranted since MSgt Eatmon had not received anything like the threatened two hundred plus years in confinement. United States v. Eatmon, 47 M.J. 534, 538 (A.F.C.C.A. 1997), *aff'd*, 49 M.J. 273 (1998).

[169] United States v. Milburn, 8 M.J. 110, 114 (C.M.A. 1979).

[170] *See supra* Part II.

time beyond that point offers no necessary benefit.[171] Likewise, neither incapacitation nor specific deterrence of the wrongdoer justifies the sentences *Mincey* makes possible, given that bad check offenses do not involve violence or even any threat of violence.[172] True, these offenders may need to be removed from society for some short period of time to break them of their offending pattern or to impress upon them the error of their ways, but a short period of time does not begin to approach *Mincey* maximums.

A *Mincey*-based sentence also misses the mark on other goals of sentencing. A lifetime sentence to confinement for MSgt Eatmon could not have as an underlying goal rehabilitation. That draconian result could not legitimately claim to offer an accused any inspiration or motivation to improve herself. Also, the cause of good order and discipline in the military would be undermined by the message a *Mincey* sentence would send to the military community at large. If MSgt Eatmon's court-martial panel had sentenced her to over two hundred years of confinement, you can bet the old cliché about "military justice" being an oxymoron would have been heard aplenty.[173] Finally, as mentioned earlier, a "just desserts" conception of retribution would be thwarted by the application of *Mincey*[174] under any imaginable circumstances. To put it plainly, a military member could not write enough bad checks for enough money that the system would be justified in locking that member up for the rest of her life in order to achieve just desserts.[175]

Even if one conceives of retribution as an expression of society's outrage at particular criminal acts,[176] this facet of that principle is also

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[171] *See* United States v. Jackson, 835 F.2d 1195, 1199-1200 (7th Cir. 1987) (Posner, J., concurring) (arguing that persons who are thirty-five years old would be unlikely to be further deterred in any significant way by the possibility of spending the rest of their lives in jail for bank robbery versus a maximum punishment of twenty years in jail without the possibility of parole).

[172] *See* MCM, *supra* note 2, Part IV, ¶¶ 49, 68 (Article 123a–Making, drawing, or uttering check, draft, or order without sufficient funds and Article 134–Check, worthless, making and uttering–by dishonorably failing to maintain funds).

[173] *See generally* ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969).

[174] *See supra* notes 42-44 and accompanying text.

[175] Stealing money through purely nonviolent means is qualitatively different from perpetrating violence upon another or threatening another with violence. *See generally* AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-3.3(a)(i) (3rd ed. 1994) [hereinafter ABA STANDARDS] (recognizing a need to treat violent offenses differently from non-violent offenses). No matter how extensive the former misconduct in terms of the number of acts or the amount of money stolen, there has to be a hard ceiling of a reasonable number of years that could be imposed for that misconduct. That ceiling should be around twenty years. *See infra* Part IV. Of course, within limits, reasonable minds can differ on that number.

[176] *See* Spaziano v. Florida, 468 U.S. 447, 461 (1984) (characterizing the principle of retribution as including a community outrage component); United States v. Bramel, 29 M.J.

compromised by a *Mincey*-inspired sentence, and victims of more serious crimes are hurt in the process. Assuming this idea means expressing an appropriate level of outrage given the seriousness of the offense, a lifetime in jail for a bad check writer would amount to nothing more than exacting an extreme form of vengeance.[177] This would hardly be appropriate for a system that strives to achieve justice.[178] Additionally, to the extent we would choose to express our rage against bad check writers by locking them up in prison for life, what might that say to the victims of crimes like rape, kidnapping, and murder, whose perpetrators get the same or even less time in jail? Will we not be demeaning the experience and trauma of these victims when we choose to treat nonviolent bad check writers in the same way we treat rapists, kidnappers, and murderers?[179]

Mincey's approach also makes for bad policy because of its effect on individual accuseds. The duress that the threat of a lifetime in jail creates significantly impacts an accused's ability to make reasoned choices regarding representation, forum, type of plea, and whether or not to testify. Additionally, one does not have to try very hard to imagine the effect a *Mincey*-inspired sentence has on a accused's sense of the fairness of the military justice system. When an accused learns that passing bad checks means facing the possibility of spending the rest of her life in jail, that accused must question whether she should have ever chosen to serve her country. An accused like MSgt Eatmon must perceive he or she is caught in a system that is long on punishment and short on justice.

An additional policy failure lies with the absurd disparities created between various offenders.[180] Since a writer of bad checks who intentionally steals $4,000 accomplishes more societal harm than one who intentionally steals $125,[181] it is just and appropriate to punish the first offender more than the second. However, under a military justice system guided by *Mincey*, this is

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958, 968 (A.C.M.R. 1990) (recognizing that in furtherance of retribution military members can be called upon to express the broader military society's outrage at a defendant's crimes).

[177] In the context of the capital punishment debate it has been argued that societal outrage is either the same as, or not far from, societal vengeance and that vengeance is not an emotion or desire that should be indulged by the state. *See* MARK TUSHNET, THE DEATH PENALTY 4 (1994).

[178] *See* Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) ("An expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion or prejudice.").

[179] While it is true that some of these more serious crimes do carry the possibility of a death penalty, as a practical matter the vast majority of these offenders face life in prison as their worst case scenario. *See*, MCM, *supra* note 2, Part IV, ¶ 43e (capital punishment for murder).

[180] In this regard, the *Mincey* approach challenges one of the basic tenets of the law–to treat like cases alike. *See* Vacco v. Quill, 521 U.S. 793 (1997).

[181] *See generally* ABA STANDARDS, *supra* note 175, 18-3.3(a)(ii) (recognizing that the gravity of an offense can vary depending upon the amount of money or quantity of goods stolen).

not necessarily the case. If these two offenders each wrote a single check to accomplish their crimes, they each face a maximum of five years in confinement.[182] Similarly, a military member who intentionally steals $12,000 by passing a single bad check would also face a maximum term of confinement of only five years.[183] When compared to the two hundred plus years MSgt Eatmon faced after she stole just under $12,000, it becomes apparent the system is out of balance. While it may be that an offender who stole $12,000 with a single check has not caused as much societal harm as someone like MSgt Eatmon who passed almost two hundred bad checks, the qualitative difference between the harm caused by these two offenders does not even come close to justifying their *Mincey*-inspired disparate treatment.

Finally, *Mincey's* approach is infirm from a policy perspective because it makes the military justice system look foolish to those who become aware of its treatment of bad check cases. First, the individuals working within the system, such as judges, trial counsel, and defense counsel, know an accused like MSgt Eatmon is never going to spend the rest of her life in jail. As a result, they view these potential *Mincey*-inspired sentences as an oddity or annoyance that is part of the script, but out of touch with reality. Second, the nonlawyer participants in the system, especially court members, must sit in wonder and disbelief at the very notion that they have the option of sentencing an accused in a bad check case to spend the rest of her existence in confinement. The absurdity of this possibility, when juxtaposed against reality, is illustrated nicely by MSgt Eatmon's sentence of six months in confinement, notwithstanding the instruction to the court members that she could be sentenced to 222 years behind bars.[184] Finally, all others who learn of the possible sentence such an accused faces in the military would likely scratch their heads and ask what kind of justice system provides for such a Draconian sanction. When observers to a court-martial first hear that an accused is facing over two hundred years in confinement, they must immediately think, "I wonder who she killed?" not, "I wonder how many bad checks she wrote?"

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[182] *See* MCM, *supra* note 2, Part IV, ¶ 49e(1)(b) (stating that the maximum confinement for writing a bad check in excess of $100 with an intent to defraud is five years confinement).
[183] *See id.*
[184] In all likelihood, the vast majority of court-martial panels would view the ability to adjudge a sentence of this magnitude in a bad check case as absurd. These panels are not the concern. To the contrary, most panels will probably react the same way the *Eatmon* panel did when it passed sentence. It is the renegade or misguided panel (or the one being manipulated by a malevolent or mistaken judge) that causes distress. *Mincey* makes it possible for such panels to run amok in the courtroom and sentence an undeserving writer of bad checks to a lifetime in jail. It is the potential for this extraordinary injustice that requires action to nullify *Mincey*.

IV. A SOLUTION

Since the *Mincey* approach to bad check cases makes for bad law and bad policy, the only remaining question is what changes need to be made to fix the problem. The first change requires punishment of bad check offenders based primarily upon how much money they stole in the aggregate instead of punishing them based upon the amounts of the individual checks. One proposal envisions an ever increasing maximum term of confinement based upon the aggregate amount of money stolen by passing bad checks, with a hard ceiling of confinement time that would apply beyond a certain amount.[185] For example, the punishment scheme could be arranged as follows based upon aggregate amounts stolen:

Up to and including $100	— 6 months maximum confinement
More than $100 and up to and including $1000	— 2 years maximum confinement
More than $1000 and up to and including $5000	— 5 years maximum confinement
More than $5000 and up to and including $10,000	— 10 years maximum confinement
More than $10,000	— 20 years maximum confinement

If it is necessary to allow the system to respond more severely to those offenders who pass bad checks over a greater period of time, a provision could be included that would place a time limit on the above maximums. For example, it could be required that the aggregate be determined by grouping checks in 180-day increments.[186] If the time between the day the offender wrote her first bad check to the day the offender wrote her last bad check is less than or equal to 180 days, then the above guidelines would limit the prosecution's effort. However, if the offender's misconduct spanned a period of time in excess of 180 days but less than or equal to 360 days, the offender

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[185] The following example is based upon a prosecution for violating Article 123a, UCMJ. MCM, *supra* note 2, Part IV, ¶ 49a (proscribing making, drawing uttering, or delivering a check for the procurement of any article or thing of value with an intent to defraud).

[186] The state of Louisiana employs a system that is similar to the one being proposed in this article. It contains the 180-day device and it breaks out various categories of potential maximum confinement times based upon aggregate amounts stolen instead of the amount of each individual check. *See* LA. REV. STAT. ANN. § 14:71 (West 1998).

would face two separate specifications, each reflecting the maximum terms of confinement.[187]

There are two criticisms of this approach that should be addressed. First, this type of scheme arguably does not account for the increased societal harm occasioned by the offender who passes a number of smaller checks in contrast to the offender who passes a single check in a larger amount. Second, it may be argued that the hard confinement ceiling means there is a point beyond which an offender might be viewed as getting a free pass, in that an offender will face the same term of maximum confinement whether she writes bad checks totaling $10,001 or $1,000,000. The response to both of these criticisms is the same. Since the terms of confinement that will be selected for the various aggregate amounts are maximums, they allow the system, if necessary, to respond to both types of offenders more severely than it responds to less egregious misconduct that still falls under the same maximum punishment ceiling. As evidenced by the historical response of the military justice system to bad check offenders,[188] very few of these offenders receive significant jail time, and it is to be expected that very few of these offenders would come anywhere near the maximums set out above. Therefore, the proposed scheme retains sufficient flexibility to respond appropriately to the more serious bad check offenders, but not with the excesses and dangers of the present *Mincey*-inspired system. The offender who writes $1,000,000 in bad checks would be expected to come much closer to the twenty year maximum confinement term than the offender who passes $10,001 in bad checks, and neither has to face a ridiculous maximum term of confinement to accomplish this appropriate and just result.

Finally, it is possible for reasonable minds to disagree about the length of the various maximum terms of confinement and the amount of time that should serve as the hard ceiling. However, on the latter point, this author is not willing to concede much ground. Stealing money through purely nonviolent means is not, on the grand scale of offenses, worthy of an extreme response. It is qualitatively different from perpetrating violence upon another or threatening another with violence and should not be treated in the same fashion as those types of crime. No matter how many checks were written or how much money was stolen, a bad check case is still, fundamentally, a nonviolent property offense. It demands attention and a punitive response, but that response must be a balanced one that treats the offender according to the harm she has

[187] For example, if an offender passed $1500 in bad checks in the first 180 days and $730 in bad checks in the next forty days, that offender could be charged with two specifications and could face a total of seven years in confinement (five years for the first 180 days and two years for the remainder of the checks).
[188] *See supra* notes 55-57 and accompanying text.

perpetrated upon society. That harm could not, under any circumstances, justify a term of confinement much greater than twenty years.

V. CONCLUSION

When the law would allow a defendant like MSgt Eatmon to face the possibility of spending the rest of her life in jail because she wrote some bad checks, it is obvious that something is amiss. There is no valid reason for confining nonviolent property offenders for anything near what is allowed by our present *Mincey*-inspired system.

On the other hand, there are good reasons, both based in law and policy, to take affirmative efforts to undo *Mincey*'s error. First, a punishment similar to what is being proposed above would avoid the legal pitfalls that plague *Mincey*. It would not raise constitutional proportionality concerns and, thus, would not offend either military or constitutional due process. Second, such a regime would be consistent with the bedrock principles of punishment, would at least attempt to treat like offenders alike, and would not fly in the face of common sense notions of fairness. This latter point is particularly important to a military justice system that is in place to promote justice and maintain good order and discipline in the armed forces. Both of these worthy goals are hard enough to attain without the unnecessary and damaging effects of the *Mincey* approach to bad check cases.

The Sikes Act Improvement Act of 1997: Examining the Changes For The Department of Defense

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I. INTRODUCTION

The Sikes Act Improvement Act of 1997 (SAIA)[1] was passed as Title XXIX of the National Defense Authorization Act for Fiscal Year 1998.[2] These latest amendments to the 1960 Sikes Act[3] levy significant new requirements on the Department of Defense (DoD) and the military departments[4] in the area of natural resources management on military installations. Involved in negotiations over several precursory bills, the DoD and the military services began implementing many of the requirements called for by the SAIA about a year before it passed.[5] More recently, the DoD has issued guidance to the military departments addressing several of the requirements under the 1997 Amendments.[6] This article will examine the 1997 Amendments to the Sikes Act and the implementing guidance, explore the legal issues raised, and discuss their potential impact on the DoD natural resources management programs.[7]

II. BACKGROUND

A. Natural Resources on Military Lands

The Department of Defense, the country's third largest land management department,[8] manages about 25 million acres of federal land.[9]

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[1] This article will use the terms SAIA, 1997 Amendments, and Sikes Act Amendments interchangeably.

[2] Sikes Act Improvement Act of 1997, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

[3] 16 U.S.C.A. § 670a (1985) (amended 1997).

[4] This article will use the terms military departments, military branches, military services, and services interchangeably.

[5] *See infra* notes 82-87 and accompanying text.

[6] Memorandum from the Deputy Undersecretary of Defense (Environmental Security) to the Deputy Assistant Secretaries of the Army, Navy, and Air Force and the Director of the Defense Logistics Agency, Subject: Implementation of Sikes Act Improvement Amendments (September 21, 1998) [hereinafter DoD Guidance].

[7] The scope of this paper does not extend to a discussion of general conformity under the Clean Air Act (*see* 42 U.S.C.A. § 7506(c) (1995 & Supp. 1998)), which may impact activities contained within Integrated Natural Resource Management Plans.

[8] *Department of Defense and Endangered Species Act: Hearing Before the House of*

The primary purpose of DoD lands, which are allocated among approximately 400 major military installations,[10] is to meet operational and training requirements of the military departments.[11] However, the lands also serve as habitat for numerous endangered species[12] and contain important cultural resources.[13] In comparison to other federal landholdings, military land, much

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Representatives Comm. on Resources, 104th Cong. (1996) (statement of Ms. Sherri W. Goodman, Deputy Under Secretary of Defense for Environmental Security, Apr. 17, 1996) [hereinafter Goodman, Apr. 17, 1996]. *Cf.* L. Peter Boice, *Defending Our Nation and Its Biodiversity*, ENDANGERED SPECIES BULL. (Department of the Interior/Fish and Wildlife Service, Washington, D.C.), Jan./Feb. 1997, at 4 [hereinafter Boice] (stating the Department of Defense is the nation's fifth largest federal land management department).

[9] *Natural Resource Management on Military Lands. Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. 147-48 (1994) (statement of Ms. Sherri W. Goodman, Deputy Undersecretary of Defense for Environmental Security, June 29, 1994) [hereinafter Goodman, June 29, 1994]. "The National Guard and Reserve components manage approximately one million acres on over 80 sites in 54 States and Territories." *See* H.R. REP. NO. 104-107(II) (1995). For a discussion of whether the SAIA applies to state-owned National Guard lands, see *infra* notes 100-101 and accompanying text.

[10] Goodman, Apr. 17, 1996, *supra* note 8. *Cf* Boice, *supra* note 8 (asserting the DoD has more than 425 major military installations).

[11] Department of Defense Instruction 4715.3, Environmental Conservation Program ¶ D(1)(d) (May 3, 1996) [hereinafter DoDI 4715.3].

> DoD land is needed to support readiness, testing of new weapon systems, testing of munitions, deployment of weapon systems, and combat training exercises. Specific and unique natural features of the land are crucial to military readiness. To have the ability to deploy and fight successfully anywhere in the world, the armed forces must train in a wide variety of climatic and terrain conditions. Accordingly, training areas are located throughout the United States on grasslands, deserts, coastal areas, forests, and tundra. For example, desert environments are used for maneuvers that involve large, mechanized battalions; coastal zones and beaches provide the setting for missile launches and amphibious landings; forested areas are essential for small arms combat training; and large open areas are needed to accommodate air-to-ground bombing ranges.

Goodman, Apr. 17, 1996, *supra* note 8.

[12] J. Douglas Ripley & Michele Leslie, *Conserving Biodiversity on Military Lands*, FED. FACILITIES ENVTL. J., Summer 1997, at 93, 95 [hereinafter Ripley & Leslie] (estimating over 200 species listed under the Endangered Species Act as well as 350 candidate species inhabit DoD lands). *See, e.g.*, Thomas H. Lillie & J. Douglas Ripley, *Conservation Issues*, 18 NAT. AREAS J. 73, 74 (1998) [hereinafter Lillie & Ripley] (describing some of the more well-known cases of endangered species inhabiting military land, such as the red-cockaded woodpecker at the Army's Fort Bragg, North Carolina, and the Sonoran pronghorn antelope at the Goldwater Air Force Range in Arizona). *See also Fiscal Year 99 Department of the Navy Environmental Budget: Hearing Before the Subcomm. on Readiness of the Senate Comm. on Armed Services*, 105th Cong. (1998) (statement of Mr. Robert B. Pirie, Jr., Assistant Secretary of the Navy for Installations and Environment) (stating federally designated critical habitats exist on four Navy and three Marine Corps installations).

[13] Goodman, June 29, 1994, *supra* note 9.

of which is relatively pristine,[14] has "a disproportionate value in terms of biodiversity."[15] The U.S. Fish and Wildlife Service estimates that 19 million acres of DoD lands are manageable as habitat for fish and wildlife.[16] Additionally, "some of the military's lands are valuable for grazing, agriculture, timber, and mining."[17] Practically every ecosystem found in the United States is represented on DoD lands,[18] illustrating the "wide range of training environments and strategic locations that the military requires to maintain readiness."[19]

The military's approach toward resources management, reflecting changes in public policy, has matured since World War II and expanded to incorporate technical and scientific innovation.[20] In 1993, recognizing the importance of environmental issues, the Secretary of Defense created the Office of Environmental Security "to integrate environmental considerations into defense policies and practices."[21] Among the goals of the office is to "be responsible stewards of the land DoD holds in public trust."[22] In 1994, during testimony considering Sikes Act reauthorization, Ms. Sherri W. Goodman, the Deputy Under Secretary of Defense for Environmental Security, announced that ecosystem management represented the beginning of a "new chapter" of

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[14] *See* DEPARTMENT OF DEFENSE, COMMANDER'S GUIDE TO BIODIVERSITY (1996).

[15] Ripley & Leslie, *supra* note 12, at 95. The authors plotted the number of acres held by federal agencies in relation to the presence of species listed under the Endangered Species Act.

[16] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Mr. Gary B. Edwards, Director, U.S. Fish and Wildlife Service, June 29, 1994) [hereinafter Edwards, June 29, 1994].

[17] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Mr. Dave McCurdy, Chairman, Subcomm. On Military Installations and Facilities, June 29, 1994) [hereinafter McCurdy, June 29, 1994].

[18] *Id.*

[19] Ripley & Leslie, *supra* note 12, at 95.

[20] *Id.* at 96-100. World War II natural resources management efforts were largely directed toward erosion reduction and dust control. Post-World War II efforts focused on renewable resources, such as timber production, agricultural out-leasing, and fishing and hunting programs. The Sikes Act of 1960 and the major environmental statutes of the 1970s–National Environmental Policy Act, Clean Water Act, Clean Air Act and the Endangered Species Act–had a profound impact on resources management on military lands, leading to a more holistic approach. *Id. See also* Goodman, June 29, 1994, *supra* note 9 (giving examples of military adjustments made to comply with environmental laws, such as modifying low-level flying routes, scheduling ground activities to avoid sensitive mating and nesting times, and moving artillery impact areas).

[21] Goodman, June 29, 1994, *supra* note 9.

[22] *Id.* The other major goals are these: "[E]nsure DoD operations comply with environmental laws; clean up and reduce risk from contaminated sites; prevent pollution at the source whenever possible; promote development of dual-use environmental technologies; and protect the safety and health of our military and civilians." *Id.*

military land management.[23] According to the DoD policy published a short time later, the goal of ecosystem management is "to ensure that military lands support present and future training and testing requirements while preserving, improving, and enhancing ecosystem integrity."[24]

B. The Sikes Act (1960 – 1986)

The DoD credits the Sikes Act of 1960 as being "instrumental in helping the Department manage its unique natural resources."[25] The purpose of the 1960 Act was for the Secretary of Defense to "promot[e] effectual planning, development, maintenance, and coordination of wildlife, fish, and game conservation and rehabilitation in military reservations."[26] The legislative history reveals that the 1960 Act had, as its unwitting pilot program, an informal arrangement at Eglin Air Force Base (AFB) dating to before 1949, whereby natural resources personnel collected fees for hunting and fishing permits and used the money for restocking and conservation efforts.[27] This practice came under fire from the Comptroller General because no legislation authorized the base to retain the fees collected.[28] The Sikes Bill of 1949[29] ratified the activity at Eglin AFB, and directed the Secretary of the Air Force to "adopt suitable regulations for fish and game management in accordance with a general plan to be worked out with the Secretary of the Interior."[30] Although the bill did not require the state to be a party to the plan, the federal regulations were to avoid inconsistency, to the extent possible, with applicable Florida laws and regulations.[31]

The Sikes Act of 1960 kept the focus on fish and wildlife conservation but expanded the scope of the 1949 Sikes Bill to include all domestic military reservations.[32] Instead of a general plan, the Act called for a "cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency."[33] Overall, the Act "gave congressional recognition to the significant potential for fish and wildlife management and recreation on [DoD] lands."[34]

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[23] Goodman, June 29, 1994, *supra* note 9.
[24] DoDI 4715.3, *supra* note 11, encl. 6.
[25] Goodman, June 29, 1994, *supra* note 9.
[26] Richard A. Jaynes, Natural Resource Management on Army Installations: DoD Policy Initiatives in a Statutory Chess Game 30-31 (1997) (unpublished LL.M. thesis, George Washington University) (on file with The George Washington University Law School Library) [hereinafter Jaynes].
[27] Jaynes, *supra* note 26, at 28-29.
[28] *Id.* at 29.
[29] Pub. L. No. 81-345, 63 Stat. 671 (1949).
[30] Jaynes, *supra* note 26, at 29.
[31] *Id.*
[32] 16 U.S.C.A. § 670a (1985) (amended 1997).
[33] *Id.*
[34] Edwards, June 29, 1994, *supra* note 16.

The Sikes Act has undergone several amendments since its passage in 1960. The Act was amended for the first time in 1968 to authorize funds and to expand the program to include "the enhancement of wildlife habitat and the development of outdoor recreation facilities."[35] In 1974, amendments mandated that the scope of the plans include fish and wildlife habitat management, range rehabilitation, and the control of off-road vehicle traffic.[36] The Sikes Act was reauthorized in 1978[37] and 1982. The 1982 amendments expanded the scope of the Act to specifically include 'all species of fish, wildlife, and plants considered threatened or endangered.'[38] The next set of amendments, in 1986,[39] were drafted in partial response to a 1984 study assessing natural resources management on Army installations.[40] Essentially, the 1986 amendments imposed multiple-use management principles on the DoD, while recognizing the "paramount importance" of the military mission.[41]

C. The 1997 Amendments

In 1993, the Sikes Act came up for reauthorization.[42] In the first session of the 103rd Congress, Representatives Gerry E. Studds[43] and Don Young[44] introduced House Bill 3300,[45] the Natural Resource Management on

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[35] Jaynes, *supra* note 26, at 36.

[36] H.R. REP. NO. 103-718, at 5-6 (1994). The amendments also established Title II of the Act making it applicable to the Department of Interior and the Department of Agriculture in managing Bureau of Land Management and Forest Service lands, as well as lands under the jurisdiction of the Department of Energy and the National Aeronautics and Space Administration. *See id.* at 6.

[37] Jaynes, *supra* note 26, at 39 (explaining that Congress tried to insert an accountability clause but the bill was vetoed by President Carter; the subsequent compromise bill deleted this clause and lowered the annual authorizations).

[38] *Id.* at 40. *See also* H.R. REP. NO. 103-718, at 6.

[39] Jaynes, *supra* note 26, at 40.

[40] *Id.* at 42 (citing RAND NATIONAL DEFENSE INSTITUTE, MORE THAN 25 MILLION ACRES: DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER 4 (1996)).

[41] Jaynes, *supra* note 26, at 42-43. *See also* H.R. REP. NO. 103-718, at 6. The amendments required the following:

> (1) DoD manage its wildlife and fishery resources with professionals trained in fish and wildlife management, providing sustained multi-purpose use and public access; (2) fish and wildlife plans be reviewed by all parties on a regular basis, not less than once every five years; and (3) any sale or lease of land or forest products be compatible with the fish and wildlife plan.

Id.

[42] 16 U.S.C.A. § 670a (1985) (amended 1997).

[43] Democrat, Massachusetts, Chairman of the Committee on Merchant Marine and Fisheries.

[44] Republican, Alaska, Ranking Minority Member of the Subcommittee on Fisheries Management.

[45] H.R. 3300, 103rd Cong. (1993).

Military Lands Act of 1993, a Bill to Amend the Sikes Act.[46] This marked the beginning of a long and arduous process that ultimately culminated in the passage of the SAIA. The overarching concern put forth by the bill's proponents was that "comprehensive natural resource management is far from a reality on many installations."[47] The bill's sponsors blamed this shortcoming on the lack of an enforcement mechanism within the existing Sikes Act.[48]

In crafting a solution, the bill's drafters were particularly cognizant of the need to ensure the implementation of natural resources management plans "without obstructing the cooperative relationship that should exist [among] DoD natural resource managers, the U.S. Fish and Wildlife Service, and the state fish and wildlife agencies."[49] Generally, the revisions introduced by House Bill 3300 were to (1) increase the scope of the plans from cooperative agreements for fish and wildlife to integrated natural resources management plans (INRMPs), "encompassing all natural resource management activities;"[50] (2) require the preparation and implementation of these plans for all military installations in the United States, unless the Secretary of Defense determined such a plan was inappropriate for a given installation;[51] (3) require a status report to Congress on the implementation of the plans;[52] and (4) institute a system of Notices of Violation (NOVs) for noncompliance with the Act.[53] These proposed changes defined the battleground for DoD negotiators over the course of the next few years until the 1997 public law was passed.

House Bill 3300 originally contained both criminal and civil penalties for noncompliance.[54] These "compliance teeth" were seen as necessary by some proponents to elevate the priority of funding for the management plans mandated by the Act. At a subcommittee hearing, a spokesman for the National Wildlife Federation testified, "[the DOD's] own system is based totally on reaction to noncompliance. If you do not have a notice of violation,

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[46] *Natural Resource Management on Military Lands: Hearings on H.R 3300 and H.R 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. On Armed Services*, 103rd Cong. (1994) (statement of Mr. Gerry E. Studds, Chairman of the Committee on Merchant Marine and Fisheries, June 29, 1994) [hereinafter Studds, June 29, 1994].

[47] *Id.* Specifically, Mr. Studds cited as problems that, "[a]ll too often, plans are not being prepared, are not being implemented, or–where implemented–lack coordination with, or integration into, other military activities." *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. v (1994).

[52] *Id.* at vi (requiring the DoD to enumerate those installations where it determines an INRMP is not appropriate and the corresponding reasons).

[53] *Id.* at vii.

[54] *Sikes Act Amendment Fails, H.R. 3300 Dead for Now,* FISH AND WILDLIFE NEWS (The National Military Fish and Wildlife Association, Newburg, Md.), Sept. 1994, at 2.

you do not have enforcement."[55] The president of the National Military Fish and Wildlife Association (NMFWA),[56] calling the compliance provisions the "heart and soul" of the bill, expressed doubt in the DoD's ability to police its own regulatory programs.[57] The DoD did not support the criminal and civil penalties and eventually negotiated language that "eliminated all oversight of DoD natural resources programs by outside agencies."[58] The new provisions called for internal oversight and mandated compliance reports to Congress.[59]

The Committee on Merchant Marine and Fisheries, to which House Bill 3300 was referred, reported favorably upon it after amending it to remove the NOV provisions.[60] Explaining its conclusion that enforcement mechanisms were not necessary, the committee relied heavily on the DoD's assurances that it would fund recurring projects and services.[61] The committee understood "recurring" activities to include the "production of game for hunting and fishing, the production of food and timber products, long-term implementation of endangered species programs, wildlife recreation programs, and the regular monitoring of wildlife."[62] The committee emphasized its view that these undertakings were "essential to the proper stewardship of military lands."[63]

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[55] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 35 (1993) (testimony of Mr. Gene Stout, Chairman of the Board of Directors, National Wildlife Federation).

[56] The National Military Fish and Wildlife Association (NMFWA) mission is to support professional management of all natural resources on military lands. Its membership consists of over 700 natural resources specialists from each of the four branches of service, the National Guard and Reserve Components, whose job it is to professionally manage all programs that relate to conservation and use of United States Department of Defense lands. *See Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. on Fisheries, Wildlife, and Oceans of the House of Representatives Comm. on Resources*, 104th Cong. (1995) (statement of Mr. Junior D. Kerns, President, NMFWA, Mar. 16, 1995) [hereinafter Kerns, Mar. 16, 1995]. The NMFWA was heavily involved in the legislative process from the draft of H.R. 3300 to the passage of the 1997 Amendments. *See generally* FISH AND WILDLIFE NEWS (The National Military Fish and Wildlife Association, Newburg, Md.), May 1994, Aug. 1994, Sept. 1994, June 1995.

[57] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 34 (1993) (testimony of Mr. Wray, National Military Fish and Wildlife Association, Nov. 3, 1993) [hereinafter Wray, Nov. 3, 1993] (Asserting, "DoD's internal audit initiatives, such as [inspector general] inspections, and the more recent environmental compliance evaluations, have identified deficiencies but lack a serious follow-up.").

[58] *Id. See also* Goodman, June 29, 1994, *supra* note 9 (explaining the DoD's alternative approach to the NOV system would involve internal auditing procedures).

[59] H.R. REP. NO. 103-718, at 3 (1994); *see also Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, *supra* note 54, at 2.

[60] H.R. REP. NO. 103-718, at 1.

[61] *Id.* at 7.

[62] *Id.*

[63] *Id.*

Although House Bill 3300 passed the House of Representatives on September 12, 1994, it did not become law because no action was taken in the Senate before the end of the 103rd Congress.[64]

On March 6, 1995, Congressmen Don Young, Gerry Studds, and Jim Saxton[65] introduced House Bill 1141,[66] the Sikes Act Improvement Amendments of 1995.[67] This bill contained essentially the same language agreed to during the 103rd Congress. At a hearing on the bill shortly after it was introduced, the president of the NMFWA conceded the compliance and enforcement provisions "may not be necessary at this time" based on the "mandatory language in the bill requiring Integrated Natural Resources Management Plans (INRMPs) to be prepared and implemented and [the] Department of Defense commitment to fund preparation and implementation of [INRMPs]."[68] The bill was passed in the House by voice vote on July 11, 1995.[69] The provisions of the bill were incorporated into the House version of the National Defense Authorization Act for fiscal year 1997.[70] However, the provisions again failed to become law because they were subsequently removed by the conference committee.[71]

In 1997, Congressmen Don Young and Jim Saxton co-sponsored House Bill 374,[72] a Bill to Reauthorize and Amend the Sikes Act.[73] This bill contained the same provisions that passed in the House during the 104th Congress, but were not acted upon in the Senate.[74] This bill was passed by the House and the Senate and, after conference committee changes, was successfully attached to the National Defense Authorization Act for fiscal year 1998.[75]

The 1997 Amendments pose several interesting issues and challenges for the military departments and their commanders. These include the extent to which outside agencies and the public may influence the content of the

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[64] H.R. REP. NO. 104-107(II) (1995). *See also Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, *supra* note 54, at 2.
[65] Republican, New Jersey.
[66] H.R. 1141, 104th Cong. (1995).
[67] H.R. REP. NO. 104-107(II). *See also Sikes Act Update*, FISH AND WILDLIFE NEWS (The National Military Fish and Wildlife Association, Newburg, Md.), June 1995, at 2.
[68] Kerns, Mar. 16, 1995, *supra* note 56.
[69] H.R. REP. NO. 104-878 (1997).
[70] *Id.* (referring to H.R. 3230).
[71] *Id.*
[72] H.R. 374, 105th Cong. (1997).
[73] *Wildlife Management on Military Installations: Hearing on H.R. 374 Before the Subcomm. On Fisheries Conservation, Wildlife, and Oceans of the House of Representatives Comm. On Resources*, 105th Cong. (1997) (statement of Jim Saxton, Chairman, Subcommittee on Fisheries Conservation, Wildlife, and Oceans, May 22, 1997) [hereinafter Saxton, May 22, 1997].
[74] *Id.*
[75] Jaynes, *supra* note 26, at 80 (citing 143 CONG. REC. H4381 (daily ed. June 25, 1997) (statement of Rep. Saxton)).

plans, whether the National Environmental Policy Act applies to the plans, and issues concerning funding and implementation. The requirements of the 1997 legislation can be fully understood only in the context of the several bills that went before and the positions negotiated by each interested party. Therefore, to provide a comprehensive overview, these issues will be discussed against the backdrop of their legislative history. To assess the impact of the Amendments on the military services, this paper will analyze the DoD and service guidance implementing the requirements of the SAIA.

III. CHALLENGES OF THE 1997 AMENDMENTS

A. Mandatory Plans

Before the 1997 Amendments, the Sikes Act, by its terms, merely authorized (as opposed to required) the Secretary of Defense to,

> carry out a program of planning for, and the development, maintenance, and coordination of, wildlife, fish, and game conservation and rehabilitation in each military reservation in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency designated by the state in which the reservation is located.[76]

In 1994, there were approximately 250 cooperative fish and wildlife management plans in effect for military installations.[77] Those in favor of amending the statute, however, were dissatisfied with the cooperative plans, both in scope and effect.[78] The DoD earlier agreed that it should undertake more comprehensive environmental planning. At a hearing on House Bill 3300, Ms. Goodman pledged support for ecosystem-based management on all military lands in general, and for "the development and implementation of integrated natural resource management plans for military installations" in particular.[79]

As of March 1995, however, the existing cooperative plans were still a source of dissatisfaction among the supporters of House Bill 1141. The president of the NMFWA expressed his opinion that some of the so-called plans were merely agreements "that provide for cooperation, rather than management of resources."[80] Furthermore, he estimated that less than 25 percent of the cooperative plans "fully meet the requirements of the existing Sikes Act," and that fewer than 10 percent "are properly integrated or address

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[76] 16 U.S.C.A. § 670a (1985) (amended 1997).
[77] Goodman, June 29, 1994, *supra* note 9.
[78] Studds, June 29, 1994, *supra* note 46.
[79] Goodman, June 29, 1994, *supra* note 9.
[80] Kerns, Mar. 16, 1995, *supra* note 56.

sustained military capability of the lands."[81]

Amidst the sometimes heated debate and shortly before the 1997 Amendments passed, the DoD promulgated policy guidance that seemingly predicted what would become law out of the pending legislation. DoD Instruction 4715.3, entitled "Environmental Conservation Program," requires INRMPs be "prepared, maintained, and implemented for all lands and waters under DoD control that have suitable habitat for conserving and managing natural ecosystems."[82] In response to the DoD guidance, the Army updated its existing regulation,[83] and the Air Force promulgated a new instruction.[84] Both services' guidance include exhaustive definitions of what INRMPs must contain and direct how to integrate them with other military plans.[85] The Navy had addressed INRMPs before the DoD Instruction was promulgated and did not update its existing guidance.[86] The Marine Corps also relied on its existing guidance relating to "Multiple Land Use Management Plans," which are similar to INRMPs.[87]

About a year and a half after the DoD promulgated the instruction, the 1997 Amendments made the preparation and implementation of INRMPs mandatory.[88] Generally, the 1997 Amendments require that the Secretary of Defense "carry out a program to provide for the conservation[89] and rehabilitation of natural resources on military installations."[90] More specifically, the SAIA demands that, "[t]he Secretary of each military department shall prepare and implement an integrated natural resources

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[81] *Id.*

[82] DODI 4715.3, *supra* note 11, ¶ D(2)(b).

[83] Army Regulation 200-3, Natural Resources–Land, Forest and Wildlife Management (Feb. 28, 1995) [hereinafter AR 200-3]. This regulation was supplemented by memorandum. Memorandum from the Department of the Army (Assistant Chief of Staff for Installation Management) to All Subordinate Headquarters, Subject: Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys and Integrated Natural Resources Management Plans (Mar. 21, 1997) (on file with author) [hereinafter Army Guidance].

[84] Air Force Instruction 32-7064, Integrated Natural Resources Management (Aug. 1, 1997) [hereinafter AFI 32-7064].

[85] *See id.* Chapter 2 (giving procedures for implementing integrated natural resources management). *See also id.* Attachment 2 (providing a detailed outline of what an INRMP should contain); AR 200-3, *supra* note 83, Chapter 9 (giving the scope of the plans and delineating specific criteria that must be met for the plans to be deemed integrated); Army Guidance, *supra* note 83, ¶ 8(c) (listing what INRMPs must contain).

[86] *See* Operational Navy Instruction 5090.1B, Natural Resources Management, Chapter 22, ¶ 22-4.1(b) (Nov. 1, 1994) [hereinafter OPNAVINST 5090.1B, Chapter 22].

[87] *See* Marine Corps Order 5090.2, Environmental Compliance and Protection Manual, Natural Resources Management Program, Chapter 17 (Sep. 26, 1991).

[88] Sikes Act Improvement Act of 1997, Pub. L. No. 105-85, § 2904(a), 111 Stat. 1629 (1997).

[89] "Conservation" is not defined in the SAIA. *Cf.* DoDI 4715.3, *supra* note 11, encl. 3, ¶ 4 (defining "conservation" as planned management, use and protection of natural cultural resources to provide sustainable use and continued benefit for present and future generations, and the prevention of exploitation, destruction, waste and/or neglect).

[90] Sikes Act Improvement Act § 2904(a).

management plan for each military installation . . . ."[91]

Significantly, the term "INRMP" is not defined within the Amendments. Legislative history indicates INRMPs represent an expanded and comprehensive version of the cooperative plans, reflecting the goal of proponents of the legislation that the DoD manage not only wildlife, but "the whole realm of natural resources."[92] However, a close look at the SAIA reveals a predominant emphasis on wildlife interests.[93] In contrast, the DoD focuses on multiple uses, with no preference of one use over another.[94] The DoD Instruction defines INRMPs as "integrated plans based, on the maximum extent practicable, on ecosystem management that shows the interrelationships of individual components of natural resources management . . . to mission requirements and other land use activities affecting an installation's natural resources."[95] The DoD differentiates INRMPs from cooperative plans in that INRMPs require more coordination and consultation and more comprehensive information.[96] Because of DoD's unbiased approach to natural resources management, wildlife interest groups may challenge INRMPs as not fully conforming with the terms of the SAIA.[97]

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[91] *Id.*

[92] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Gene Stout, Chairman of the Board of Directors, National Wildlife Federation, June 29, 1994) [hereinafter Stout, June 29, 1994].

[93] *See generally,* Jaynes, *supra* note 26, at 71-73.

[94] DoDI 4715.3, *supra* note 11, encl. 7. *See also* Jaynes, *supra* note 26, at 71-73.

[95] DoDI 4715.3, *supra* note 11, encl. 3, ¶ 12. Ecosystem Management is defined in the following manner:

> A goal-driven approach to managing natural and cultural resources that supports present and future mission requirements; preserves ecosystem integrity; is at a scale compatible with natural processes; is cognizant of nature's time frames; recognizes social and economic viability within functioning ecosystems; is adaptable to complex and changing requirements; and is realized through effective partnerships among private, local, State, tribal, and Federal interests. Ecosystem management is a process that considers the environment as a complex system functioning as a whole, not as a collection of parts, and recognizes that people and their social and economic needs are a part of the whole.

Id. encl. 3, ¶ 9. *See also id.* encl. 3, ¶ 20 (Defining natural resources as "all elements of nature and their environments of soil, air, and water . . ." including "nonliving resources such as minerals and soil components [and] living resources such as plants and animals.").

[96] Goodman, June 29, 1994, *supra* note 9. *See also* DoD Guidance, *supra* note 6 (characterizing INRMPs as "comprehensive plans for the management of all installation natural resources (substantially expanded beyond the scope of fish and wildlife cooperative plans)"). *See also* DoDI 4715.3, *supra* note 11, encl. 7 (delineating specific contents of an INRMP).

[97] For a discussion of Administrative Procedure Act, see *infra* notes 112-118 and accompanying text.

Although the SAIA fails to provide a specific meaning for the term INRMP, it does provide definitions that demarcate the applicability of the Amendments. The term "military installation" which replaces "military reservation" throughout the Sikes Act,[98] is defined by the Amendments as:

> (A) any land or interest in land owned by the United States and administered by the Secretary of Defense or the Secretary of a military department, except land under the jurisdiction of the Assistant Secretary of the Army having responsibility for civil works;
> (B) all public lands withdrawn from all forms of appropriation under public land laws and reserved for use by the Secretary of Defense or the Secretary of a military department . . . .[99]

The legislative history reflects the intent of the proponents for the definition to encompass "lands controlled and managed by National Guard and Reserve components."[100] The definition of military installation found in the 1997 Amendments, however, falls short of being that expansive. The DoD position is that the statutory definition, as a matter of law, excludes state-owned National Guard lands, unless the federal government is a lessee or holds some other legal interest in the land.[101]

The scope of the 1997 Amendments is limited in other respects as well. The mandate for creating INRMPs applies only to installations "in the United States,"[102] making the Sikes Act inapplicable to installations on foreign soil, though it does include installations on Guam, Puerto Rico and on other

[98] Sikes Act Improvement Act § 2913.
[99] *Id.* § 2911. Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters United States Air Force Environmental Division, Pentagon, Arlington, Virginia (Jul. 27, 1998) (withdrawn lands account for 17 million acres, which comprises 68 percent of the DoD's 25 million acres).
[100] Kerns, Mar. 16, 1995, *supra* note 56.

> "Military installation" must also include lands controlled and managed by National Guard and Reserve components. Today's integrated battlefields often require Reserve, Guard, and Regular Units to work side by side. The same is true on their training lands. Planning and management on their training lands is no less important than is maintenance of their equipment. . . . Military lands, no matter who manages them, are too precious to ignore.

Id.
[101] Interview with Jim Van Ness, Associate Department of Defense General Counsel for Environment and Installations, Pentagon, Arlington, Virginia (July 17, 1998). *Cf.* Memorandum from the Department of the Army and the Air Force National Guard Bureau, to the Adjutant General of All States, Puerto Rico, Guam, the Virgin Islands, and the District of Columbia, Subject: (All States Log Number P97-0046) Integrated Natural Resource Management Plans, May 7, 1997 (stating INRMPs are to be prepared for state-owned lands provided National Guard Bureau funds are used).
[102] Sikes Act Improvement Act § 2904(a)(1)(B).

territories and possessions of the U.S.[103] Furthermore, some military lands, although located in the U.S., will nonetheless be excused from complying with the provisions of the Act because "military installation" is defined to exclude land that is "subject to an approved recommendation for closure under the Defense Base Closure and Realignment Act of 1990."[104] Overall, the Amendments have the same applicability as the 1996 DoD Instruction governing the development and implementation of INRMPs.[105]

Another provision with the effect of narrowing the scope of the 1997 Amendments allows the Secretary of a military department to determine an INRMP is inappropriate for a given installation where significant natural resources do not exist.[106] Congress, however, retained oversight, requiring the Secretary of Defense to submit a report by November 18, 1998, listing all military installations for which an INRMP was deemed inappropriate and explaining the underlying reasons for each determination.[107] To provide some uniformity to the military departments' conclusions that INRMPs were not necessary based on the absence of significant natural resources, the DoD guidance directed that:

> An installation will normally require an INRMP if it undertakes more than one of the following activities: fish and wildlife management; land management; forest management; natural resource-based outdoor recreation; on-the-ground military missions operations. An INRMP will normally be required if an installation undertakes any of the following: threatened and endangered species management; commercial forestry activities; hunting and fishing management.[108]

The DoD guidance also stated that the acreage of an installation should not by itself determine the need for an INRMP.[109] Rather, the conclusion that an INRMP is not required should reflect the specific nature of an installation or

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[103] *See id.* § 2911 (defining "United States" to include the states, the District of Columbia, and the territories and possessions of the United States).

[104] *Id.*

[105] *See* DoDI 4715.3, *supra* note 11, ¶ B (defining applicability and scope of instruction to include the military departments, United States territories and possessions, public lands withdrawn from all forms of appropriation under public land laws and reserved for use by the Department of Defense; but not the Civil Works function of the Army).

[106] Sikes Act Improvement Act § 2904(a).

[107] *Id.* § 2905.

[108] DoD Guidance, *supra* note 6.

[109] *Id. But see* Army Guidance, *supra* note 83 (directing that INRMPs are not required for installations of five hundred acres or less); AR 200-3, *supra* note 83, ¶ 9-2 (discussing criteria for the preparation of INRMPs); *cf.* Telephone Interview with Dr. Vic Diersing, Chief Conservation, Office of the Assistant Chief of Staff of the Army for Installation Management (June 4, 1998) (explaining that Army guidance is flexible enough to allow commanders to request an exception to prepare INRMPs for situations where an installation of five hundred acres or less encompasses significant natural resources, or not to prepare an INRMP where a larger installation does not encompass significant natural resources).

may be justified by negative findings of a biological survey.[110]

Since the military departments had already imposed upon themselves the requirement for completing and implementing INRMPs by the time the amendments passed, the Act's mandate for INRMPs to be accomplished seems superfluous. However, the Amendments constitute a legal requirement where there was previously only a regulatory one, raising the specter of litigation for perceived noncompliance.[111] Under the Administrative Procedure Act (APA)[112] courts may review agency action at the behest of any person[113] "adversely affected or aggrieved by agency action within the meaning of a relevant statute"[114] and set aside that action[115] if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[116] In other words, if a Department Secretary determined an installation did not have the requisite significant natural resources to trigger the need for an INRMP, an adversely affected party could sue.[117] It is worth noting, however, that courts traditionally give substantial deference to an agency interpretation in this regard if it is reasonable.[118]

B. Mutual Agreement of the Parties to the Plans

The new statutory obligation to complete the plans gives increased meaning to the preexisting provision regarding the relationship among the parties involved in preparing the plans. Like the previous Sikes Act, the SAIA directs the Secretaries of the respective military departments to prepare each plan "in cooperation with the Secretary of the Interior, acting through the Director of the U.S. Fish and Wildlife Service (USFWS), and the head of each appropriate state fish and wildlife agency for the state in which the military

[110] DoD Guidance, *supra* note 6.
[111] Scott M. Farley & Lieutenant Colonel Richard A. Jaynes, *The Sikes Act Improvement Act of 1997*, ARMY LAW., Mar. 1998, at 37, 39 [hereinafter Farley & Jaynes] (explaining that under the Administrative Procedure Act, courts review and may set aside agency action not taken in accordance with law).
[112] 5 U.S.C.A. § 551 (1996).
[113] 5 U.S.C.A. § 551(2) (defining "person" to include an individual, partnership, corporation, association, or public or private organization other than a federal agency).
[114] 5 U.S.C.A. § 702 (1996).
[115] 5 U.S.C.A. § 551(13) (noting that "agency action" includes the failure to act).
[116] 5 U.S.C.A. § 706 (1996).
[117] For a discussion of the standing requirement, see *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (holding that the National Wildlife Federation did not have standing under Section 702 of the Administrative Procedures Act to challenge the land withdrawal review program because the actions objected to were not a final agency action), and its progeny.
[118] An example of an agency interpretation that might be given deference is a determination of what constitutes "significant" natural resources. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (noting that if statute is silent or ambiguous with respect to a specific issue, the agency interpretation will be upheld if it is based on a permissible construction of the statute).

installation concerned is located."[119] Another carry-over requirement is that "the resulting plan for the military installation shall reflect the mutual agreement of the parties concerning conservation, protection, and management of fish and wildlife resources."[120] Before the SAIA, the Secretary of Defense was only "authorized,"[121] not "required,"[122] to prepare and implement plans. This gave an installation commander discretion to decide not to implement the plan or parts of the plan if faced, for example, with a state agency that did not agree to the plan.[123]

One of the DoD's concerns with the SAIA was that the language making INRMPs mandatory and retaining the requirement for mutual agreement among the parties would lead installation commanders to believe state agencies were given "unprecedented authority to 'veto' INRMPs."[124] Because this might make commanders feel pressured to change training schedules and operations "to accommodate natural resources concerns" raised by the state or federal fish and wildlife agencies,[125] even though such actions might adversely impact the mission or training requirements, the DoD feared that the military's autonomy with respect to installation lands would be usurped. As a result, the language in the Amendments concerning the relationship with the federal and state agencies was one of the major stumbling blocks during the negotiations.[126] The DoD's goal was to ensure that retaining the language calling for "mutual agreement" did not diminish an installation commander's authority to decide actions necessary to ensure and preserve military preparedness.[127]

In its subsequent implementing guidance, the DoD reassures installation commanders and their planners that the primary purpose of INRMPs is to "help installation commanders manage natural resources more

[119] Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2904(a)(2), 111 Stat. 1629 (1997).
[120] *Id.*
[121] 16 U.S.C.A. § 670a (1985) (amended 1997).
[122] Sikes Act Improvement Act § 2904(a).
[123] Interview with Jim Van Ness, Associate Department of Defense General Counsel for Environment and Installations, Pentagon, Arlington, Virginia (Mar. 25, 1998).
[124] DoD Guidance, *supra* note 6.
[125] *Id.*
[126] *Id. See also Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. on Fisheries, Wildlife, and Oceans of the House of Representatives Comm. on Resources*, 104th Cong. (1995) (statement of Ms. Sherri W. Goodman, Mar. 16, 1995) [hereinafter Goodman, Mar. 16, 1995] (asserting that consultation is the appropriate role for the United States Fish and Wildlife Service and state agencies, and requesting that the phrase "mutually agreed to by" be replaced with "developed in consultation with"). *See also Wildlife Management on Military Installations: Hearing on H.R.374 Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans of the House of Representatives Comm. on Resources*, 105th Cong. (1997) (statement of Ms. Sherri W. Goodman) (reporting no agreement yet on specific language to ensure all parties have an opportunity to participate in plan development).
[127] DoD Guidance, *supra* note 6.

effectively, so as to ensure the installation lands remain available and in good condition to support the installation's military mission."[128] The DoD's position that the Sikes Act "will enable the military departments to take advantage of the expertise of the [US]FWS and state [agencies]" without jeopardizing "an installation commander's discretion to ensure the preparedness of the Armed Forces," is supported by both the language of the statute and the legislative history.[129] The Amendments point out that nothing within them "enlarges or diminishes the responsibility and authority of any state for the protection and management of fish and resident wildlife."[130] Additionally, the amendments require, "to the extent appropriate and applicable," that the plans provide for "no net loss in the capability of military installation lands to support the military mission of the installation."[131] Legislative history from a prior House bill reveals that this "no net loss" provision was meant to emphasize the primary use of the plans, which was to enable military commanders to make best use of the "military lands to ensure military preparedness."[132] More recently, less than a month before the SAIA passed, the legislators again addressed the DoD's concerns:

> The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the USFWS or the state fish and wildlife agencies in relation to military lands. Moreover, it is expected that INRMPs shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.[133]

In its implementing guidance to the military services, the DoD advises military planners to share the entire INRMP with the other agencies, with the goal of reaching mutual agreement as to the entire plan.[134] However, the DoD points out that mutual agreement is only *required* with respect to those elements of the plan within the scope of the agencies' legal authority "derived from a source other than the Sikes Act, such as the Endangered Species Act."[135] Therefore, if the USFWS or a state fish and wildlife agency does not agree with the part of the INRMP outside the scope of their authority,[136] the installation commander may finalize the plan over their objections and

[128] *Id.*
[129] *Id.*
[130] Sikes Act Improvement Act § 2904(a).
[131] *Id.* § 2904(c).
[132] H.R. CONF. REP. NO. 103-718, at 8 (1994).
[133] H.R. CONF. REP. NO. 105-340, at 870 (1997).
[134] DoD Guidance, *supra* note 6.
[135] *Id.*
[136] *Id.* (expressing the opinion that this situation is not expected to occur often, highlighting the finite role to be played by the federal and state fish and wildlife agencies and reflecting the historically cooperative relationship among the agencies).

"proceed to manage [the] natural resources in accordance with the terms of the plan."[137]

C. The National Environmental Policy Act and the Sikes Act Requirement for Public Comment

In addition to requiring consultation with the USFWS and the appropriate state agency, the 1997 Amendments require the Secretary of each military department to "provide an opportunity for the submission of public comments" on the preparation of INRMPs.[138] This provision is similar to requirements found in the National Environmental Policy Act (NEPA)[139] and can be analyzed in conjunction with the issue of whether NEPA applies to the preparation and implementation of INRMPs. Determining whether NEPA applies in this regard is important for two reasons. First, there is a litigation risk involved if the agency runs afoul of NEPA. Second, NEPA compliance may suffice to meet the isolated requirement for public comment in the Sikes Act Amendments. To determine the applicability of NEPA to INRMP preparation and implementation, one must first understand the statutory and regulatory requirements of NEPA.

1. NEPA Background

NEPA was passed in 1970, and was touted, at least publicly, by President Nixon as "the herald of a new environmental era."[140] NEPA contains lofty goals, calling on the federal government to "use all practicable means . . . to improve and coordinate [f]ederal plans, programs, and resources" to allow the nation to:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

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[137] *Id.*

[138] Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2905(d), 111 Stat. 1629 (1997). *Compare Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 188 (1993) (concerning H.R. 3300 § 4(c)), *with* Sikes Act Improvement Act §2905(d) (public comment provision first appeared in H.R. 3300 and remained intact throughout the several bills preceding the 1997 enactment of the SAIA, except "Secretary of Defense" became "Secretary of each military department").

[139] 42 U.S.C.A. § 4321 (1994). *See* 40 C.F.R. § 1506.6 (1998) (calling for agencies to solicit public comments at various stages of preparing environmental documentation).

[140] GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 333 (3rd ed. 1993) [hereinafter COGGINS]. According to the authors, Nixon thought NEPA was "little more than an innocuous statement of policy." *Id.* For a discussion on how the impact of NEPA was also underestimated by businesses, development interests, and public bureaucracies, see Lynton K. Caldwell, *A Constitutional Law for the Environment. 20 Years with NEPA Indicates the Need*, 31 ENV'T 6, 26-28 (1989) [hereinafter Caldwell].

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[141]

This language is buttressed by a subsequent section which states, "Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . ."[142] This seems to direct agencies[143] to integrate the broad policy goals of NEPA into agency action.

The Supreme Court of the United States, however, has determined that the requirements of NEPA are procedural, not substantive. In *Robertson v. Methow Valley Citizens Council*[144] the Court held that, "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[145] The Court went on to say that whereas "[o]ther statutes may impose substantive environmental obligations on federal agencies . . . NEPA merely prohibits uninformed – rather than unwise – agency action."[146] Although the Court did not ignore what it called the "sweeping policy goals"[147] of NEPA, it nonetheless relegated them to the position of "strong precatory language."[148] The purpose of NEPA, according to the courts, is to help ensure the agency makes a well-informed decision.[149] Its purpose is not to mandate–or even to review whether an agency should have made–one decision over another.

The purpose of NEPA, then, is not to direct an outcome, but to require an agency to carry out a process.[150] As phrased by the Council on

[141] 42 U.S.C.A. § 4331(b) (1994).
[142] 42 U.S.C.A. §4332. (1994).
[143] *See* 40 C.F.R. § 1508.12 (1997) (defining "federal agency" to include all agencies of the federal government, excluding Congress, the Judiciary, and the President, including the performance of staff functions for the President in his Executive Office).
[144] 490 U.S. 332 (1989).
[145] *Id.* at 350.
[146] *Id.* at 351.
[147] *Id.* at 350.
[148] *Id.* at 349.
[149] *See generally* COGGINS, *supra* note 140, at 361 (opining that the Supreme Court "has taken the narrow view of every NEPA question it has chosen to decide"); Caldwell, *supra* note 140, at 26 (deeming the failure to enforce the policy of NEPA as well as the process a "critical error in the interpretation of both NEPA and the Environmental Impact Statement").
[150] *See* COGGINS, *supra* note 140, at 361 ("In spite of the Court's reluctance to allow the tail of

Environmental Quality (CEQ),[151] NEPA "provides a mandate and a framework for federal agencies to consider all reasonably foreseeable environmental effects of their actions."[152] As one author described, "This was a departure from the historic practice of governmental agencies deciding first what they wanted to do and then planning . . . how to do it without regard to the possible, unforeseen consequences."[153] NEPA's "framework" takes the form of 'action-forcing' procedures,[154] requiring all agencies of the federal government to:

> include in every recommendation or report on proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[155]

This statutory language provides the basis upon which implementing guidance has been built. The CEQ, which was established by NEPA[156] and is responsible for "ensuring that federal agencies meet their obligations under Act," [157] provided implementing guidance in the form of regulations.[158] Further implementation is handled at the agency level.[159] Accordingly, the DoD and the military departments have promulgated implementing regulations for NEPA[160] that have been approved by the CEQ.[161] In the event of a conflict

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environmental evaluation to wag the dog of normal government operations, NEPA remains a critical element in public land management."). *But see* Caldwell, *supra* note 140, at 26 (describing how environmental impact statements have been perverted to support agency activities that, if NEPA's intent were honored, would have been rejected; giving as examples the Alaska oil pipeline and the Tennessee-Tombigbee Canal).

[151] The CEQ is the agency responsible for developing NEPA guidelines for other federal agencies. *See infra* notes 156-158 and accompanying text.

[152] COUNCIL ON ENVIRONMENTAL QUALITY, INCORPORATING BIODIVERSITY CONSIDERATIONS INTO ENVIRONMENTAL IMPACT ANALYSIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT vii (1993).

[153] Caldwell, *supra* note 140, at 26.

[154] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[155] 42 U.S.C.A. § 4332(2)(C).

[156] 42 U.S.C.A. § 4342 (1994).

[157] *CEQ Homepage* (visited Apr. 6, 1998) <http://www.whitehouse.gov/CEQ/About.html>; *see also* 40 C.F.R. § 1515.2 (1997) (delineating the Council's primary responsibilities and underlying authority).

[158] 40 C.F.R. § 1500.1 (1983).

[159] *See* 40 C.F.R. § 1507.3 (1997) (requiring agencies to adopt their own procedures in consultation with CEQ).

[160] Environmental Effects in the United States of DoD Actions, 32 C.F.R. 188, encl. 1 (1997); Environmental Effects of Army Actions, 32 C.F.R. 651 (1997); Navy Procedures for

between an agency's regulations and the CEQ regulations, the latter normally take precedence.[162]

The statute and the regulations collectively guide an agency through the NEPA process.[163] The basic procedure of NEPA is that if the action proposed by the agency is a major federal action significantly affecting the quality of the human environment, then an environmental impact statement (EIS) must be prepared.[164] Essentially, the contents of an EIS are those items outlined by the statute, quoted above.[165] In its broadest sense, the EIS "induces an ecological rationality that modifies and may even negate the economic assumptions that have traditionally underlain proposals with environmental impacts."[166]

If the agency has insufficient information to determine whether or not the action is major or significantly affects the quality of the human environment, it must prepare an environmental assessment (EA)[167] to determine whether the environmental impact rises to the level that warrants an EIS.[168] If the EA suggests that the impact is not significant, the agency must prepare a finding of no significant impact (FONSI).[169] Even if an EA reveals a significant impact, an agency may include in its analysis a plan to employ mitigation measures[170] to minimize those effects and then publish a FONSI.[171]

Implementing the National Environmental Policy Act, 32 C.F.R. 775 (1997); Air Force Environmental Impact Analysis Process (EIAP), 32 C.F.R. 989 (1997).

[161] 40 C.F.R. § 1507.3.

[162] 40 C.F.R. § 1507.3 (calling for agency procedures to comply with CEQ regulations unless compliance would be inconsistent with statutory requirements).

[163] Additionally, the CEQ periodically publishes guidance documents which, although not legally binding, address specific topics and are designed to assist agencies' efforts to fully comply with NEPA. *See, e.g.*, COUNCIL ON ENVIRONMENTAL QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997); COUNCIL ON ENVIRONMENTAL QUALITY, INCORPORATING BIODIVERSITY CONSIDERATIONS INTO ENVIRONMENTAL IMPACT ANALYSIS UNDER NEPA (1993).

[164] 42 U.S.C.A. § 4332(2)(c). *See* 40 C.F.R. § 1501.4 (1997).

[165] *Supra* note 155 and accompanying text. *See generally* 40 C.F.R. §§ 1502.1–1502.25 (1997); *Id.* § 1502.10 (requiring agencies to use a standard format which includes a statement of purpose and need for the action, alternatives to the action, and environmental consequences).

[166] Caldwell, *supra* note 140, at 26.

[167] 40 C.F.R. § 1508.9 (explaining an EA is a more concise public document that briefly describes the need for the proposal; the action and its alternatives, along with their environmental impacts; and lists agencies and people consulted).

[168] 40 C.F.R. § 1501.4.

[169] *Id. See also* 40 C.F.R. §1508.13 (defining FONSI).

[170] 40 C.F.R. § 1508.20 (1998). Mitigation includes:

> (a) Avoiding the impact altogether by not taking certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance

As opposed to focusing on a particular action, an agency may identify ahead of time actions "which do not individually or cumulatively have a significant effect on the human environment."[172] Such actions, called categorical exclusions (CATEXs), require neither an environmental assessment nor an environmental impact statement.[173] However, the CEQ regulations require that agencies adopt procedures by which a normally excluded action, that does in fact have a significant environmental effect, will be subject to the procedural requirements of NEPA.[174] Each of the military departments have identified various CATEXs in their regulations implementing NEPA.[175]

The process of preparing and coordinating an EA, and to a greater extent an EIS, can be very complex, costly, and time intensive.[176] Consequently, whether NEPA applies to the preparation and implementation of INRMPs, and, if so, what process under NEPA is appropriate, become important considerations. Indeed, such considerations take on greater significance for the DoD because the agency is faced with statutory deadlines for completing all INRMPs[177] and is operating with a limited budget for preparing and implementing the plans.[178]

2. NEPA and INRMPs

The focus of the procedural mandates of NEPA is on "proposals for major[179] federal actions significantly affecting the quality of the human environment."[180] The overarching question of whether an INRMP triggers

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> operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

Id.

[171] COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19 (1997) [hereinafter NEPA AFTER 25 YEARS] (identifying an increasing trend for agencies to propose mitigation measures during the preparation of EAs).

[172] 40 C.F.R. § 1508.4.

[173] *Id.*

[174] *Id.* (section also allows an agency to prepare environmental assessments even though it is not required to do so).

[175] *See* 32 C.F.R. 651, Appendix A (Army); 32 C.F.R. 775.6(f) (Navy); 32 C.F.R. 989, Attachment 2 (Air Force).

[176] COGGINS, *supra* note 140, at 361.

[177] Sikes Act Improvement Act § 2905(c) (setting deadline of Nov. 17, 2001, for INRMPs to be implemented on each military installation where such plan is required).

[178] For a discussion of funding and budget issues, see *infra* notes 275-312 and accompanying text.

[179] 40 C.F.R. §1508.18 (clarifying that the term major "reinforces but does not have a meaning independent of [the term] significantly").

[180] 42 U.S.C.A. § 4332(2)(C) (1994); 40 C.F.R. 1502.3 (1997). *See also* 40 C.F.R. § 1508.23 (defining "proposals"); 40 C.F.R. § 1508.18 (defining "major federal action"); 40 C.F.R. §

NEPA's procedural requirements must be answered by the agency concerned.[181] A decision by an agency that NEPA does not apply to a proposed federal action is subject to judicial review under the Administrative Procedure Act.[182] Circuit courts are split, however, as to what standard of review is appropriate.[183] Some courts[184] use the arbitrary and capricious standard,[185] and others[186] use the less deferential standard of reasonableness.[187]

Courts have recognized several instances in which an agency determination that NEPA does not apply will be upheld. These include agency action that was completed before the passage of NEPA,[188] situations where 'provisions in other statutes expressly exempt certain activities from requiring preparation of an impact statement,'[189] situations where an agency's enabling statute has a 'clear and fundamental conflict' with NEPA,[190] agency actions that are purely ministerial and non-discretionary,[191] and actions where there is minimal federal involvement.[192] None of these, however, seem to apply to INRMPs. Plans completed before NEPA passed would include cooperative plans accomplished pursuant to the 1960 Act. These are, nevertheless, subject

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1508.27 (defining "significantly"); 40 C.F.R. §§ 1508.3, 1508.8 (defining "affecting"); 40 C.F.R. § 1508.14 (defining "the quality of the human environment").

[181] 42 U.S.C.A. § 4332(2)(C). *See* RESTORE: The North Woods v. U.S. Dept. of Agriculture, 968 F. Supp. 168, 171 (D. Vermont 1997).

[182] 5 U.S.C.A. § 551 (1996). *See supra* notes 112-118 and accompanying text.

[183] *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 666-67 (9th Cir. 1997) (discussing split among circuit courts applying *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989)). The *Northcoast* court distinguishes between a factual or technical matter, in which an agency is accorded a "strong level of deference" and "disputes involving predominantly legal questions," to which the less deferential standard of reasonableness applies. *Id.* at 667.

[184] *See id.* at 667 (describing Eleventh Circuit's adoption of "the arbitrary and capricious standard when reviewing agency action in NEPA cases").

[185] 5 U.S.C.A. § 706(2)(A) (1996) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). *See* Northcoast, 136 F.3d at 666 (explaining that under arbitrary and capricious standard, it will only overturn agency decision only if agency committed a "clear error of judgement").

[186] *See* Northcoast, 136 F.3d at 666-67 (joining the Eighth and Tenth Circuits in limiting *Marsh v. Oregon Natural Resources Council* and finding it to be of no controlling value "when dealing with the threshold question of NEPA applicability in the first instance").

[187] *See id.* at 666 (agency decision to be upheld unless it was unreasonable) (citing Friends of the Earth v. Hintz, 800 F. 2d 822, 836 (9th Cir. 1986)).

[188] The Fund For Animals v. The United States of America, Civ. No. 96-0040 MV/DJS, slip op. at 8 (D. N.M. Oct. 23, 1996).

[189] Melaney Payne, Casenote, *Critically Acclaimed But Not Critically Followed–The Inapplicability of the National Environmental Policy Act to Federal Agency Actions*: Douglas County v. Babbitt, 7 VILL. ENVTL. L.J. 339, n.5 (1996) [hereinafter Payne] (quoting Howard Geneslaw, Article, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 J. Land Use & Envtl. L. 127, 136-138 (1994)).

[190] Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, 791 (1976).

[191] RESTORE: The North Woods, 968 F. Supp. at 175.

[192] *Id.*

to periodic review and alteration.[193] Any such review taking place after 1970 could not escape NEPA analysis merely because the plan originated before the passage of NEPA.[194]

Concerning INRMPs and environmental planning generally, natural resources legislation applicable to the DoD and the military departments does not conflict substantively with the requirements of NEPA.[195] Furthermore, the actions taken to prepare and implement INRMPs do not seem "ministerial and non-discretionary."[196] To the contrary, INRMPs consider alternatives and establish priorities among ecosystem management objectives.[197] Similarly, the proposition that an INRMP constitutes action characterized by minimal federal involvement is not compelling.[198] The CEQ regulations include as an example of federal action, "adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based."[199] Like the plans described by CEQ, INRMPs contain "information needed to

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[193] *See* 16 U.S.C.A. § 670a(b)(2) (1985) (amended 1997) (Sikes Act of 1960 called for plans to be "reviewed as to operation and effect by the parties thereto on a regular basis, but not less often than every five years"); DoDI 4715.3, *supra* note 11, ¶ F(1)(f) (DoD guidance on INRMPs that predated the 1997 Amendments called for the plans to be reviewed annually, updated as warranted by mission or environmental changes, and revised and approved at least every five years); Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2904(c)(2), 111 Stat. 1629 (1997) (SAIA retained language from previous Act calling for review at least every five years).

[194] The Fund For Animals, Civ. No. 96-0040 MV/DJS, slip op. at 9 (discussing project begun or planned prior to NEPA is subject to NEPA as to the portions remaining undone, and instructing as long as agency decisions remain to be made or are open to revision, NEPA applies). *See* 40 C.F.R. § 1506.12 (1998) ("These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date.").

[195] Numerous statutes and Executive Orders (EOs) compel the military to pay particular attention to the environment. *See, e.g.*, Marine Mammal Protection, 16 U.S.C.A. § 1361 (1985 & Supp. 1998); Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C.A. § 1431 (1985 & Supp. 1998); Coastal Zone Management Act, 16 U.S.C.A. § 1451 (1985 & Supp. 1998); Endangered Species Act of 1973, 16 U.S.C.A. § 1531 (1985 & Supp. 1998); Coastal Barrier Resources Act, 16 U.S.C.A. § 3501 (1985 & Supp. 1998); Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (1971) (Protection and Enhancement of the Cultural Environment); Exec. Order No. 11.644, 37 Fed. Reg. 2,877 (1972) (Use of Off-Road Vehicles on the Public Lands); Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (1977) (Floodplain Management); Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (1977) (Off-Road Vehicles on Public Lands); Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (1977) (Protection of Wetlands); Exec. Order No. 12,898, 3 C.F.R. 859 (1995) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations); Exec. Order No. 12,962, 3 C.F.R. 383 (1996) (Recreational Fisheries).

[196] RESTORE: The North Woods, 968 F. Supp. at 172.

[197] DODI 4715.3, *supra* note 11, encl. 6(b)(5).

[198] *See* DODI 4715.3, *supra* note 11, ¶ D(1)(m) (describing the management and conservation of natural resources under DoD control, "including planning, implementation, and enforcement functions," as "inherently governmental functions").

[199] 40 C.F.R. § 1508.18(b)(2).

make appropriate decisions about natural resources management" on federal lands.[200] Clearly, the adoption of an INRMP is "federal action" under NEPA.

An examination of the SAIA and its legislative history reveals no indication that Congress intended to exempt the military from the requirements of NEPA in preparing and implementing INRMPs. The Sikes Act Amendments, which constitute the statutory requirement for completing INRMPs, seem at least cognizant, if not inviting, of the NEPA process. The 1997 Amendments give the military almost four years to complete all required plans,[201] which is arguably enough time to conduct the NEPA process, and require that the public be given an opportunity to comment on the plans, which is reminiscent of NEPA's public comment provisions.[202] The only other "exclusion" from the requirements of NEPA is for activities covered by agency CATEXs.[203] A review of the military departments' NEPA regulations, however, indicates that the activities listed are not typical of what might be undertaken pursuant to a natural resources management plan.[204]

If the military departments are not excused from complying with NEPA in preparing and implementing INRMPs, they must determine what process under NEPA is appropriate. The focus becomes whether the agency action "significantly affects" the quality of the human environment. "Human environment" is defined comprehensively to include "the natural and physical environment and the relationship of people with that environment."[205] This CEQ regulatory guidance is mirrored by the DoD's language in describing ecosystem management, the basis for INRMPs.[206] Clearly, the ecosystem management activities undertaken by military departments to fulfill the Sikes Act requirements of preparing and implementing INRMPs will affect the human environment.

The more difficult determination concerns the term "significantly," which is dispositive as to whether an EIS is required or if an EA and FONSI are sufficient. "Significantly" is defined by CEQ in terms of "context" and "intensity."[207] Depending on the setting of the proposed action, context can include the impact on society as a whole, the affected region, or the locality

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[200] DODI 4715.3, *supra* note 11, ¶ D(2)(b).

[201] Sikes Act Improvement Act § 2905(c) (giving the Secretaries of the military departments until Nov. 17, 2001, to prepare and begin implementing INRMPs on each applicable installation).

[202] Sikes Act Improvement Act § 2905(d). For a discussion of the public comment requirement under the SAIA, see *infra* notes 233-263 and accompanying text.

[203] *See supra* notes 172-173 and accompanying text.

[204] *See* 32 C.F.R. 651 Appendix A (Army); 32 C.F.R. 775.6(f) (Navy); 32 C.F.R. § 989 Attachment 2 (Air Force).

[205] 40 C.F.R. § 1508.14.

[206] DoDI 4715.3, *supra* note 11, encl. 3, ¶ 9 (Defining ecosystem management as "a process that considers the environment as a complex system functioning as a whole, not as a collection of parts, and recognizes that people and their social and economic needs are a part of the whole.").

[207] 40 C.F.R. § 1508.27.

involved.[208] Since an INRMP is site-specific to a given installation, its significance would most likely be evaluated based on its long- and short-term effects only in the location to which it applies.[209]

Intensity refers to the "severity of impact"[210] and includes considerations of both beneficial and adverse impacts,[211] unique geographical characteristics,[212] "the degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration,"[213] and "the degree to which the action may adversely affect an endangered or threatened species or its habitat" as determined under the Endangered Species Act.[214] Depending on the natural resources management activities called for by a given INRMP, it may have a significant effect based on intensity. Many installations, for example, have unique characteristics in terms of ecosystems represented or cultural resources present.[215] Additionally, some installations are home to endangered or threatened species and contain critical habitat.[216] Furthermore, INRMPs can be said to "establish a precedent for future actions" in that they are 5-year plans.

Given the requirements of NEPA, the definitions found in CEQ's implementing regulations, and the potential impact of INRMPs, it seems clear that many INRMPs will trigger the NEPA process. Although the 1996 DoD Instruction that mandated preparation of INRMPs was silent as to whether or how NEPA applied, other DoD regulations, which implement NEPA, are on point.[217] The DoD's general position is that "when a proposal is not one that normally requires an [EIS] and does not qualify for categorical exclusion, the DoD Component shall prepare an [EA]."[218] The DoD offers a non-exhaustive list of considerations as to whether an activity is one that normally requires an EIS. These include whether the action has the potential to cause significant degradation of environmental quality, present a threat or hazard to the public, or result in a significant impact on protected natural or historic resources.[219] Unless the potential impact of an INRMP is known from the start, it would be reasonable to first use an EA to document a proposed INRMP. An EA

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[208] 40 C.F.R. § 1508.27(a).
[209] *Id.*
[210] 40 C.F.R. § 1508.27(b).
[211] 40 C.F.R. § 1508.27(b)(1) (a significant effect may exist even if, overall, the effect will most likely be beneficial).
[212] 40 C.F.R. § 1508.27(b)(3) (including "proximity to historic or cultural resources . . . wetlands, wild and scenic rivers, or ecologically critical areas").
[213] 40 C.F.R. § 1508.27(b)(6).
[214] 40 C.F.R. § 1508.27(b)(9).
[215] *See supra* notes 12-17 and accompanying text.
[216] *See supra* note 12 and accompanying text.
[217] 32 C.F.R. 188, encl. 1 (1998).
[218] *Id.*
[219] *Id.*

includes a discussion of the need for the proposed agency action, alternatives to the action, and the environmental impacts of the proposed action and the alternatives.[220] It is then followed by either an EIS or a FONSI.[221]

Before the passage of the 1997 Sikes Act Amendments, the military departments promulgated guidance on INRMPs, which, to some extent, also addressed NEPA compliance.[222] For the Air Force and the Army, the pre-existing guidance is still in effect, although the Air Force has drafted policy guidance incorporating the new requirements of the SAIA.[223] Since the passage of the Amendments, the Navy has finalized its policy guidance concerning the review of INRMPs under NEPA.[224]

The current Army guidance details how the implementation of INRMPs will comply with NEPA. As early as 1988, the Army published general NEPA guidance that the development of natural resources management plans normally requires the preparation of at least an EA.[225] Later, in guidance specific to INRMPs, the Army required that INRMPs receive "appropriate environmental review according to NEPA . . . prior to implementation of the plan's objectives."[226] At that time, the Army announced that the appropriate level of environmental documentation would be determined on an "installation by installation basis," considering impacts on "endangered species, wildlife, riparian zones, floodplains, wetlands, archeological and historic sites, off-road vehicle use, sedimentation erosion, timber harvesting, and non-point source pollution."[227] The Army published additional guidance several months before the 1997 Amendments passed, reiterating that its plans will comply with NEPA. "INRMPs shall comply with NEPA process requirements specified in AR 200-2."[228] According to the Army's supplemental guidance, "[t]he NEPA process is a decision-making tool that ensures coordinated planning and identifies and discloses environmental impacts to both the decision-maker and the public. Implementation of the INRMP shall serve as the proposed action

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[220] 40 C.F.R. § 1508.9.

[221] *Id.*

[222] *See supra* notes 83-87 and accompanying text.

[223] Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters U.S. Air Force Environmental Division, Pentagon, Arlington, Virginia (Jan. 15, 1999) (discussing the Memorandum from Headquarters Air Force, Environmental Division to Major Commands, Draft Policy Memo for Implementation of Sikes Act Improvement Amendments, Attachment 1: Annotated Sikes Act with Air Force Interpretation (June 22, 1998) (on file with author) [hereinafter Air Force Draft Guidance]).

[224] Memorandum for the Vice Chief of Naval Operations and the Assistant Commandant of the Marine Corps, Subject: Department of the Navy Environmental Policy Memorandum 98-06; Review of Integrated Natural Resources Management Plans Under the National Environmental Policy Act (Aug. 12, 1998) (on file with author) [hereinafter Navy Policy].

[225] Army Regulation 200-2, Environmental Effects of Army Actions ¶ 5-3(k) (Dec. 23, 1988) [hereinafter AR 200-2].

[226] AR 200-3, *supra* note 83, ¶ 2-2(a).

[227] *Id.*

[228] AR 200-2, *supra* note 225, ¶ 5-3(k).

and NEPA documentation should be scoped to address appropriate alternatives and issues."[229] Similar to the Army guidance, Navy policy is that "[d]ocumentation under NEPA is required before approval of all new or newly revised INRMPs."[230] The Navy recognizes an EA may suffice unless projects in the INRMP will have a significant environmental impact, triggering the need for an EIS.[231] In contrast to the Army and Navy, the Air Force has little in the way of specific NEPA guidance as to preparing and implementing INRMPs. The Air Force Instruction simply states, "The implementation of an INRMP may constitute a potentially significant federal action . . . [and] may require consideration of potential environmental effects" under the NEPA process.[232]

3. NEPA, INRMPs and the Sikes Act

While not mentioning NEPA, the 1997 Amendments specifically require an opportunity for the submission of public comments on (1) INRMPs undertaken pursuant to the 1997 Amendments, and (2) INRMPs that result from negotiations with the USFWS and the appropriate state agencies to convert a cooperative plan, existing before the Sikes Act Amendments, into an INRMP.[233] The significance of the public comment provision is that it removes the military departments' discretion to determine when public participation is appropriate. Unlike NEPA, it applies regardless of the environmental effect of an INRMP. Furthermore, this pervasive requirement is a potential basis for litigation. Under the APA, courts may set aside agency action "taken without adherence to all of the procedures required by law."[234] This opens the courthouse door to a plaintiff alleging an INRMP was completed without allowing adequate opportunity for public comment. It is unclear what the remedy would be, but the courts could impose an injunction against implementing the plan until the requisite public comment was accomplished.[235]

Given the potential impact of the provision, it received surprisingly little attention during the negotiation over the language of the various bills. Although the public comment provision was present as early as 1993, in the

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[229] Army Guidance, *supra* note 83, ¶ 8(d).
[230] Navy Policy, *supra* note 224.
[231] *Id.*
[232] AFI 32-7064, *supra* note 84, ¶ 2.4. *See also* Air Force Draft Guidance, *supra* note 223 (calling for each plan to be "evaluated in terms of the Air Force Environmental Impact Analysis Process as required by the scope of the plan").
[233] Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2905, 111 Stat. 1629 (1997).
[234] Farley & Jaynes, *supra* note 111, at 39.
[235] *See* State of Utah v. Babbitt, 137 F.3d 1193, 1212 (10th Cir. 1998) (discussing that if defendants amended a land use plan without the public participation required under the Federal Land Policy and Management Act of 1976, plaintiffs could challenge the plan at that time, would be entitled to relief, and the appropriate remedy would be to enjoin the use of the plan).

first bill proposed to reauthorize the Sikes Act,[236] the legislative history is largely devoid of an explanation of the purpose of language. Seemingly, however, it was embraced early on by the DoD. In a 1994 hearing on House Bill 3300, Ms. Goodman testified that the DoD "generally supports a number of amendments that would complement development and implementation of integrated plans, including public participation in the preparation of each."[237] She echoed this sentiment in her statement concerning House Bill 1141 in 1995,[238] and nothing indicates the DoD changed its position before the SAIA was passed in 1997.

Cognizant of the public comment requirement, but reluctant to dictate procedural details, the DoD leaves to the discretion of the military departments the determination of how to meet the new public comment requirement.[239] Specifically, DoD guidance provides:

> The NEPA process could be used to meet the public review requirements of the SAIA, as well as to document the decision-making process for INRMP preparation and implementation in a detailed, thorough administrative record. Alternative provisions to solicit and evaluate public comments (e.g., notices in the local media, public meetings) should be developed if the NEPA process is not used. These provisions should be clearly and explicitly stated, and should ensure that all potentially interested parties have an opportunity to comment on the INRMP.[240]

Each of the military departments has at least drafted guidance to incorporate the SAIA requirements and DoD guidance into their policy and procedures.[241] The Air Force draft guidance echoes the DoD guidance by stating that either the NEPA process or alternative provisions to solicit and evaluate public comments may be used to meet the public review requirements of the SAIA.[242] Although it doesn't constitute formal guidance, in a recent article the Army noted the SAIA public comment requirement and articulated the rationale that an EA followed by a FONSI is normally the appropriate course of action because, usually, "INRMPs are derived to maintain and to sustain natural

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[236] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 188 (1993) (concerning H.R. 3300 § 4(c)).

[237] Goodman, June 29, 1994, *supra* note 9.

[238] Goodman, Mar. 16, 1995, *supra* note 126.

[239] DoD Guidance, *supra* note 6.

[240] *Id. Cf.* Memorandum from Department of the Army, Office of the Assistant Secretary for Installations, Logistics, and Environment, to Deputy Under Secretary of Defense, Environmental Security (May 29, 1998) (on file with author) (in response to DoD guidance, the memorandum suggested the language be strengthened to recommend that "[t]he NEPA process *should* be used to document the decision making process" for INRMPs (emphasis added)).

[241] Note that the most recent Army guidance available predates the SAIA. *See* Army Guidance, *supra* note 83.

[242] Air Force Draft Guidance, *supra* note 223.

resources."[243] The authors pointed out, however, that if "implementation of the INRMP will significantly impact the environment, the installation must produce an EIS."[244]

Navy guidance, finalized after the 1997 Amendments, is more directive than that of the Army and Air Force. The Navy, more clearly than the other departments, has shifted its focus to the preparation of INRMPs in relation to the requirements under NEPA. The policy states:

> Documentation under NEPA is required before approval of all new or newly revised INRMPs. Under normal circumstances, an [EA], concluding in a [FONSI], will suffice. However, if the goals, objectives, methodologies (processes to achieve objectives) or specified projects identified in a draft INRMP will have a significant environmental impact, an [EIS] is required. An INRMP and an EA or EIS may be prepared and processed as one document . . . [or] separately.[245]

The last quoted sentence provides authorization for the Marine Corps to implement, as it requested, a practice of developing the INRMP as the NEPA document.[246]

It appears from the existing and draft guidance that the military will use the NEPA process to prepare and implement INRMPs. The follow-up question is whether the NEPA process, involving either an EIS or EA/FONSI, will satisfy the separate Sikes Act public comment requirement. Since the public comment requirement refers to the development of plans, NEPA will only suffice if it is applied during the preparation of INRMPs, as opposed to during the plans' implementation.

Assuming NEPA is utilized in developing a plan, the next step is to examine the public participation fostered by NEPA. Public involvement under NEPA is extensive.[247] Generally, CEQ regulations require agencies to "provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons . . . who may be interested or affected."[248] For actions that have effects "primarily of local concern," which arguably include an INRMP on a given military installation, the CEQ allows public notice to be made through local newspapers or the media, direct mailings, newsletters, posting of notices on and off site in the area, and other similar means.[249]

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[243] Farley & Jaynes, *supra* note 111, at 39 n.38.
[244] *Id.*
[245] Navy Policy, *supra* note 224.
[246] Telephone Interview with Jennifer L. Scarborough, Natural Resource Specialist, Headquarters, United States Marine Corps, Virginia (June 29, 1998)
[247] *See* 40 C.F.R. § 1506.6 (1997) (concerning public involvement); 40 C.F.R. § 1506.10 (concerning timing of agency action); 40 C.F.R. § 1507.3 (1997) (concerning agency procedures).
[248] 40 C.F.R. § 1506.6.
[249] *Id.*

Under NEPA, the public comment procedures may be different depending on whether an agency completes an EIS or an EA. Whereas the procedures for involving the public during the EIS process are well-defined and comprehensive,[250] NEPA largely allows agencies to determine the extent to which they involve the public during the production of an EA and FONSI.[251] CEQ regulations do, however, require agencies to inform the affected public of a FONSI.[252] The CEQ regulations also specify circumstances under which the agency "shall make the FONSI available for public review . . . for thirty days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin."[253] These include situations where the proposed action is similar to one normally requiring an EIS, and where the nature of the proposed action is "without precedent."[254] It is unclear whether INRMPs will invoke this review period. This determination will have to be made by the military departments on an installation-by-installation basis.

The military procedures for public involvement on EAs vary by service. The Army regulations call for public involvement in the preparation of EAs "whenever appropriate."[255] The factors the Army considers when determining the extent of public involvement are the, "(1) [m]agnitude of the proposed project/action, (2) [e]xtent of anticipated public interest, (3) [u]rgency of the proposal, and (4) [a]ny relevant questions of national security classification."[256] Additionally, Army regulations require that any documents incorporated into the EA or FONSI by reference be available for public review.[257] Air Force NEPA regulations also call for public involvement on EAs and FONSIs.[258] The extent of public involvement varies depending on the magnitude of the proposed action and its potential for controversy.[259] The Air Force added to the CEQ's list of situations requiring the EA and draft FONSI be made available for public review, to include proposed actions that would be located in a floodplain or wetland and actions mitigated to insignificance in the

[250] *See generally* 40 C.F.R. § 1503 (1997) (concerning commenting).
[251] NEPA AFTER 25 YEARS, *supra* note 171, at 20 (indicating there is a great deal of confusion about what public involvement is required, appropriate, or allowed in the preparation of EAs, because the NEPA regulations and guidance are primarily oriented to the preparation of environmental impact statements; and noting some agencies fail to successfully incorporate public participation into their EA/FONSI procedures). *See also id.* at 19 (identifying the preparation of an EA as the most common source of litigation under NEPA because members of the public perceive they are being kept from participating in the process).
[252] 40 C.F.R. § 1501.4(e) (1997).
[253] *Id.*
[254] *Id.*
[255] 32 C.F.R. § 651.35(c) (1997).
[256] 32 C.F.R. § 651.25.
[257] 32 C.F.R. § 651.26.
[258] 32 C.F.R. § 989.15(e) (1997).
[259] *Id.*

FONSI.[260] Either or both of these could subject a given INRMP to the 30-day review requirement. The Navy regulations contain similar language to the other services concerning the factors to consider to determine the extent of public participation.[261] In its supplemental guidance to the CEQ regulations on public participation for EAs, the Navy encourages its commands to "develop a plan to ensure appropriate communication with affected and interested parties."[262]

It appears, based on CEQ and agency guidance, future INRMPs developed using the NEPA process, whether it concerns an EIS or an EA/FONSI, will meet the obligatory public comment requirement under the Sikes Act. If, however, the preparation of an INRMP does not trigger either an EA or an EIS under NEPA, the military departments must nonetheless allow for public comment to comply with the Sikes Act.[263] To be prepared for such a situation, the military departments will need to develop some implementing guidance providing for new stand-alone public comment procedures.

4. Previously Existing Plans and the Public Comment Requirement

Plans already in effect at military installations when the SAIA passed raise unique issues. These plans include cooperative plans developed under the previous Sikes Act and, more recently, INRMPs created pursuant to DoD guidance and in anticipation of the 1997 statutory requirements. The SAIA states that for an installation with a cooperative plan in effect as of the day before the enactment of the SAIA,[264] the Secretary of the military department concerned shall "complete negotiations with the Secretary of the Interior and the heads of the appropriate state agencies regarding changes to the plan that are necessary for the plan to constitute an [INRMP]."[265] The Amendments require an opportunity for the submission of public comments on the "changes to cooperative plans" that are proposed so that the plans constitute INRMPs.[266]

INRMPs completed before the passage of the 1997 Amendments are not directly addressed by the SAIA. Legislators, however, were aware of these INRMPs and according to the legislative history, did not intend for existing INRMPs that meet the requirements of the 1997 Amendments to be reaccomplished.

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[260] *Id.*

[261] 32 C.F.R. § 775.11 (1997) (listing as factors: the magnitude of the environmental considerations associated with the proposed action; the extent of anticipated public interest; and any relevant questions of national security and classification).

[262] *Id.*

[263] DoD Guidance, *supra* note 6.

[264] Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2905(c)(2), 111 Stat. 1629 (1997).

[265] *Id.* § 2905(c).

[266] *Id.* § 2905(d).

> The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment.[267]

Unfortunately, it is not clear what "the criteria established under this provision" include. One important issue is whether the new public comment requirement of the SAIA is one of these "criteria." Although each military service has guidance that calls for NEPA compliance, many INRMPs completed before the 1997 Amendments were not accompanied by an EA or EIS.[268] Consequently, many existing INRMPs did not provide for public comment. If the public comment requirement is considered to be one of the requisite criteria, then these INRMPs cannot be grandfathered, and must be reaccomplished to meet this requirement of the SAIA. DoD has not, however, taken this approach.

After the 1997 Amendments passed, the DoD addressed the question of when and how to revise existing cooperative plans and INRMPs.[269] DoD guidance on previously existing INRMPs states:

> Those INRMPs that were complete on or before November 18, 1997; that were prepared in cooperation with appropriate FWS and State fish and wildlife officials; and that meet the substantive requirements of the SAIA, need not be reaccomplished simply because they were not subject to public review, but may remain in effect until review is required in accordance with the SAIA.[270]

The DoD guidance directs its component agencies to "review all cooperative plans in effect on November 17, 1997, and identify any changes required to modify them to meet the criteria for INRMPs under the SAIA." The guidance points out that while "many existing cooperative plans may meet the more stringent requirements for INRMPS established by the SAIA . . . some existing plans may not." Relying on the conference language that refers

[267] H.R. CONF. REP. NO. 105-340, at 870 (1997).
[268] Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters United States Air Force Environmental Division, Crystal City, Virginia (Apr. 13, 1998) (discussing Air Force INRMPs); Telephone Interview with Dr. Vic Diersing, Chief Conservation, Office of the Assistant Chief of Staff of the Army for Installation Management (June 4, 1998) (discussing Army INRMPs); Telephone Interview with Mr. Lew Shotton, Office of the Assistant Secretary of the Navy for Installations and Environment (July 8, 1998).
[269] DoD Guidance, *supra* note 6.
[270] *Id.*

to INRMPs, the DoD directs its components to "adhere to the Congressional intent to 'grandfather' existing cooperative plans that embody the substantive requirements of the SAIA for their remaining anticipated period of applicability (not to exceed five years)."[271] DoD guidance also highlights the overarching deadline set by the SAIA that requires the Secretary of each military department to prepare and begin implementing INRMPs for those installations where an INRMP is appropriate by November 18, 2001.[272]

D. Implementation Issues

Another issue receiving significant attention throughout the negotiations concerning the SAIA was how to ensure the INRMPs, once finalized, would be implemented.[273] This issue includes funding for the plans themselves as well as the activities and projects called for by the plans. Integrally related to implementation are the new reporting requirements imposed by Congress to oversee how ardently the DoD and the military departments comply with the terms of the 1997 Amendments.[274] As agency planners endeavor to create and implement plans that comply with the requirements of the Amendments, agency attorneys must prepare to defend against legal challenges to the plans.

1. Mandatory Implementation of the Plans

Historically, Congress has been disappointed with the DoD's efforts to attain the goals of the Sikes Act.[275] Although the language of the statute prior to the 1997 Amendments did not mandate action by the Secretary of Defense, Congress has continuously scrutinized the extent to which the Secretary has fulfilled the terms of the Sikes Act.[276] The DoD's consistent failure to request funds under the Sikes Act has long been a source of dissatisfaction in Congress, as recorded in the legislative history of the 1978, 1982, and 1986 amendments.[277] In his 1995 statement promoting House Bill 1141, Representative Saxton pointed out that while authorization of appropriations under the Sikes Act expired on September 30, 1993, "Congress has not appropriated any money for the Sikes Act in over a decade."[278]

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[271] *Id.*
[272] *Id.*
[273] *See infra* notes 275-312 and accompanying text.
[274] *See* Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, §§ 2905, 2907, 111 Stat. 1629 (1997) (review for preparation of INRMPs; annual reviews and reports).
[275] *See generally*, Jaynes, *supra* note 26, at 39-45.
[276] *Id.* at 39-44.
[277] *Id.* at 38-45.
[278] *Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. on Fisheries, Wildlife, and Oceans of the House of Representatives Comm. on Resources*, 104th Cong. (1995).

The DoD's failure to fund conservation programs became central to the debate over the language of the Amendments in 1994. Congressman Studds introduced House Bill 3300 by noting, among other things, that "many military installations have considered the requirements of the Sikes Act optional and have not requested funding."[279] Congressman Studds' criticism that conservation programs were under-funded at a time when the overall DoD environmental budget was increasing[280] was echoed by the Chairman of the Board of Directors of the National Wildlife Federation.[281] Calling the bill a "terrific investment for the American people,"[282] the chairman championed the bill for making mandatory the requirement that military installations implement natural resources management plans.[283] The idea of budgeting for proactive conservation measures in the present, instead of paying degrees of magnitude more for clean-up and restoration in the future, was a recurring theme in the lengthy process to amend the Sikes Act.[284]

Focusing on funding, the president of the NMFWA testified in a 1995 hearing that the fiscal year 1995 DoD environmental budget allocated ninety percent to restoration and compliance and ten percent to prevention and conservation.[285] More specifically, he pointed out that the DoD spent about 2.2 percent of its environmental budget at that time for conservation programs.[286] About one percent of this amount consisted of appropriations under the Legacy Resource Management Program (Legacy),[287] created by Congress in 1991.[288] The funds provided under the Legacy program have been used throughout the DoD for conservation and restoration projects.[289] However, this source of funds is not a panacea for those who want more money spent on conservation efforts. Although the Legacy program provided a much-needed infusion for "historically low stewardship funding," it was not meant to serve as a long-term funding source.[290]

When asked during a 1994 hearing considering House Bill 3300 what the barriers were to full implementation of existing cooperative plans, Ms. Goodman cited a lack of adequate fiscal resources to meet conservation needs,

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[279] Studds, June 29, 1994, *supra* note 46.
[280] *Id.*
[281] Stout, June 29, 1994, *supra* note 92.
[282] *Id.*
[283] *Id.* Mr. Stout decried the current system as one that allocates money based on noncompliance rather than a commitment toward preventing noncompliance. He specifically cited the Army's successful Integrated Training Area Management (ITAM) program as one being cut back because it is largely proactive and not compliance driven. *Id.*
[284] *See* Kerns, Mar. 16, 1995, *supra* note 56.
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] Lillie & Ripley, *supra* note 12, at 75.
[289] *Id.*
[290] *Id.*

and a lack of sufficient numbers of trained resources management personnel.[291] She went on to describe the competition that exists for funds to fulfill not only other environmental needs but also other mission priorities.[292] Ms. Goodman touted a policy statement she issued asking military departments to give consideration to natural and cultural resources compliance requirements equal to that given other environmental requirements.[293] She stated that every military department has a separate budget item for conservation, allowing for the "identification, monitoring and funding of natural and cultural resources requirements."[294] Ms. Goodman indicated that the DoD was creating a funding "prioritization system" to identify "urgent natural resource needs" and would fund them accordingly.[295] Under this system, she reported, the preparation and implementation of INRMPs would be "among the highest priorities for funding."[296]

Within the DoD, the priority of funding requirements is the key component to determining what items are and are not ultimately funded. During the hearings on the Sikes Act Amendments, a much berated culprit for DoD's funding priorities and the resulting lack of money for conservation activities was Office of Management and Budget (OMB) Circular A-106.[297] Under the circular's terms, "priority for funding goes to installations that are (or soon will be) in physical noncompliance with the law, have received a Notice of Violation from a federal or state agency, or have signed a compliance agreement or consent order."[298]

The DoD's environmental budgeting priorities, based on OMB Circular A-106, are found in its 1996 instruction.[299] The DoD divides activities requiring funding into four prioritized classifications.[300]

> Class 0: Recurring Natural and Cultural Resources Conservation Management Requirements.
> Includes activities needed to cover the recurring administrative, personnel, and other costs associated with managing DoD's conservation program that are necessary to meet applicable compliance requirements (Federal and State laws, regulations, Presidential Executive Orders, and DoD policies) or

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[291] Goodman, June 29, 1994, *supra* note 96, at 145 (responding to a question posed by Mr. McCurdy).
[292] *Id.* at 146.
[293] *Id.*
[294] *Id.*
[295] Goodman, June 29, 1994, *supra* note 9.
[296] *Id.*
[297] Office of Management and Budget, Circular A-106, Reporting Requirements in Connection With the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities (Dec. 31, 1974) (this guidance has been rescinded, but discussions with OMB officials did not yield the exact date of this action). *See* Stout, 29 June 1994, *supra* note 92; Kerns, Mar. 16, 1995, *supra* note 56.
[298] H.R. REP. NO. 103-718, at 6 (1994).
[299] DoDI 4715.3, *supra* note 11, encl. 4.
[300] *Id.*

which are in direct support of the military mission.

> Class I: Current Compliance.
> Includes projects and activities needed because an installation is currently out of compliance (has received an enforcement action from a duly authorized Federal or State agency, or local authority); has signed a compliance agreement or has received a consent order; has not met requirements based on applicable Federal or State laws, regulations, standards, Presidential Executive orders, or DoD policies. . . . Class I also includes projects and activities needed that are not currently out of compliance (deadlines and requirements have been established by applicable laws, regulations, standards, DoD policies, or Presidential Executive orders, but deadlines have not passed or requirements are not in force) but shall [sic] be if projects or activities are not implemented in the current program year.
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> Class II: Maintenance Requirements.
> Includes those projects and activities needed that are not currently out of compliance (deadlines or requirements have been established by applicable laws, regulations, standards, Presidential Executive orders, or DoD policies but deadlines have not passed or requirements are not in force) but shall [sic] be out of compliance if projects or activities are not implemented in time to meet an established deadline beyond the current program year.
>
> Class III: Enhancement Actions. Beyond Compliance.
> Includes those projects and activities that enhance conservation resources or the integrity of the installation mission, or are needed to address overall environmental goals and objectives, but are not specifically required under regulation or Executive order and are not of an immediate nature.[301]

The instruction directs that all natural and cultural resources compliance requirements be categorized based on these classes.[302] The instruction further mandates that, "[a]ll projects in Classes 0, I, and II shall be funded consistent with timely execution to meet future deadlines."[303] Expounding on each of the classes, the instruction lists "planning" under Class I, giving INRMPs as an example.[304]

It is clear from the DoD Instruction that the INRMPs themselves are "must fund" items. However, at least some of the projects or activities contained within an INRMP may fall into Class III and be difficult to fund, such as:

> (1) Community outreach activities, such as "Earth Day" and "Historic Preservation Week" activities;
> (2) Educational and public awareness projects, such as interpretive displays, oral histories, "watchable wildlife" areas, nature trails, wildlife checklists,

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[301] *Id.*
[302] *Id.* ¶ (F)(1)(c).
[303] *Id.*
[304] *Id.* encl. 4.

and conservation teaching materials;
[3] Restoration or enhancement of cultural or natural resources when no specific compliance requirement dictates a course or timing of action; and
[4] Management and execution of volunteer and partnership programs.[305]

Although the SAIA does not directly address the DoD's funding priority scheme, it contains two provisions aimed at lessening the budget woes of the military departments. One provision was included to "facilitate the execution of seasonal conservation projects."[306] It allows that "funds appropriated to [the DoD] for a fiscal year may be obligated to cover the cost of goods and services provided under a cooperative agreement . . . during any 18-month period beginning in that fiscal year, without regard to whether the agreement crosses fiscal years."[307] The second provision was the deletion of the requirement for cost sharing and cost matching.[308] This provides alternatives to natural resources managers who previously used "traditional contracting" for projects,[309] and paves the way for groups that could not otherwise afford a matching cost contribution to participate with projects.[310] In response to the first provision, the DoD guidance advises the military departments to "develop policies that delegate cooperative agreement authority to installation level and convey the authority to obligate funds beyond the current fiscal year."[311] The DoD guidance does not otherwise address the SAIA or funding priorities, and there is nothing to indicate DoD will alter the budget guidance found in its 1996 instruction[312] in response to the SAIA.

2. Reporting Requirements

Central to the implementation requirements of the Sikes Act and related to funding issues is the recurring reporting requirement found in the 1997 Amendments.[313] This requirement for a report, due on March 1 of each

[305] *Id.*
[306] DoD Guidance, *supra* note 6.
[307] Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2908, 111 Stat. 1629 (1997).
[308] *Id.* § 2908(2). The SAIA retained language allowing the Secretary of a military department (formerly "Secretary of Defense") to enter into cooperative agreements with States, local governments, nongovernmental organizations, and individuals, to provide for the maintenance and improvement of natural resources on or to benefit natural and historical research on Department of Defense installations. *See id.* § 2908(1). The provision deleted by the SAIA required the parties to these agreements to contribute funds or to furnish services on a matching basis to defray the cost of the programs, projects, and activities under the agreements. *See* 16 U.S.C.A. § 670c-1(b) (1985) (amended 1997).
[309] Air Force Draft Guidance, *supra* note 223.
[310] *Id.*
[311] DoD Guidance, *supra* note 6.
[312] DoDI 4715.3, *supra* note 11, encl. 4.
[313] Kerns, Mar. 16, 1995, *supra* note 56. *See* Sikes Act Improvement Act § 2907. The SAIA contains another reporting provision that is not recurring. *See id.* § 2905 (requiring one-time report, due Nov. 1998, in which the Secretary of Defense must submit to congress "a list of the

year,[314] can be traced to the notice of violation (NOV) provision that first appeared in House Bill 3300.[315] The NOV provision, which served as a device to raise natural resources conservation issues to a high enough priority level so they would be funded,[316] was dropped based largely on the assurances of the DoD that INRMPs would be a priority.[317] Even so, instead of just deleting the NOV provision, Congress replaced it with a comprehensive reporting requirement.[318] Undergoing only minor alterations throughout the several foregoing bills, the reporting provision was enacted as follows:

> Not later than March 1 of each year, the Secretary of Defense shall review the extent to which [INRMPs] were prepared or were in effect and implemented in accordance with this title in the preceding year, and submit a report on the findings of the review to the committees.[319] Each report shall include:
> (A) the number of [INRMPs] in effect in the year covered by the report, including the date on which each plan was issued in final form or most recently revised;
> (B) the amount expended on conservation activities conducted pursuant to the plans in the year covered by the report; and
> (C) an assessment of the extent to which the plans comply with this title.[320]

Designed to ensure the DoD plans and procedures comply fully with the Sikes Act Amendments, this reporting provision serves essentially the same purpose as the NOV provision.[321] As the president of the NMFWA described:

> The reports submitted to Congress will provide the public with a clear picture of Defense's commitment to conservation of the natural resources and lands under its control. It is our wish that Congress never has to resort

military installations [for which] the preparation of an INRMP is not appropriate" and an explanation of the underlying reasons for each). For a discussion of this reporting requirement, see *supra* notes 106-110 and accompanying text.

[314] *See* DoD Guidance, *supra* note 6 (DoD will submit its first report in 1999).

[315] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 189-194 (1993) (concerning H.R. 3300 § 5).

[316] Wray, Nov. 3, 1993, *supra* note 57. *See also* Stout, June 29, 1994, *supra* note 92 (explaining National Wildlife Federation position that if the DoD would issue a policy letter saying they will fund INRMPs, there would be no need for the enforcement clause).

[317] H.R. REP. NO. 103-718, at 6 (1994).

[318] H.R. REP. NO. 103-718, at 3.

[319] *See* Sikes Act Improvement Act § 2907 (defining "committees" as the Committee on Resources and the Committee on National Security, both of the House of Representatives, and the Committee on Armed Services and the Committee on Environment and Public Works, both of the Senate).

[320] *Id.* § 2907.

[321] Kerns, 16 Mar. 1995, *supra* note 56.

> to fines to force compliance with this common sense Act. Money spent on punitive fines is just money diverted from vital Defense programs, such as this one.[322]

The first two pieces of information to be reported, the number of plans and the monetary amount spent, are easily determined and provide an objective view of the DoD's progress in fulfilling the basic mandates of the Act–to prepare and implement INRMPs. Conversely, the third piece of information, an overall assessment of the extent to which INRMPs comply with the 1997 Amendments, is more subjective and requires further interpretation as to what exactly must be reported. In guidance to the military departments on how to respond to this query, the DoD instructed them to answer yes or no to the following questions for each INRMP: "(1) [w]hether the INRMP was coordinated with the [US]FWS and appropriate State fish and wildlife agencies; and (2) [w]hether the INRMP has a current list of projects or methodologies essential to implement the plan's objectives for the next fiscal year."[323] This information corresponds to the statutory requirements for mutual agreement and mandatory implementation of the INRMPS, respectively. With regard to the second question, the DoD's reference to a "list of projects or methodologies" seems to indicate that implementation includes a subset of projects, taken from all the possible projects listed or described in the INRMP.[324] In other words, the DoD considers an INRMP "implemented," even if not everything called for in the plan is funded.

A different opinion of what is meant by "implementation" is held by NMFWA. NMFWA interprets the statutory language, "shall prepare and implement an [INRMP],"[325] as a requirement to "conduct all the projects and activities in the plan, not just sign the plan."[326] NMFWA goes on to say, "[o]nce signed, the INRMPs should take on the funding status of any similar, interagency compliance agreement (Class I or II)."[327] NMFWA is joined in its position by the National Wildlife Federation (NWF). At a committee hearing on House Bill 3300, an NWF spokesman expressed fear the military would ignore the plans and continue to fund environmental requirements on a compliance-oriented basis instead of a proactive conservation-oriented one.[328] Calling the required implementation of the INRMPs "perhaps the greatest overall improvement in this revision of the Sikes Act," he characterized the implementation requirement as the solution to the problem that "all too often,

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[322] *Id.*

[323] DoD Guidance, *supra* note 6.

[324] *See id.*

[325] Sikes Act Improvement Act § 2904(a).

[326] NATIONAL MILITARY FISH AND WILDLIFE ASSOCIATION, THE ANNOTATED SIKES ACT AS AMENDED THROUGH DEC. 1997 3 (1998).

[327] *Id.* (referring to DoD budget priority classifications); *see supra* notes 299-305 and accompanying text.

[328] Stout, June 29, 1994, *supra* note 92.

good planing efforts have sat on the shelf awaiting implementation funding."[329]

The reason for these differing views seems to be different answers to this question: How many of the items contained within an INRMP must be funded to constitute "implementation" of the plan.[330] The more moderate approach taken by the DoD in its guidance seems more reasonable than that taken by NMFWA, in that it will almost certainly be impossible to immediately fund every action or project contained in a given INRMP. The genesis of the DoD approach can be seen in early testimony to Congress by Ms. Goodman.

> Mr. McCurdy: Does the Department consider that once a[n installation] commander has accepted a resource management plan, there is a commitment to fund and implement the plan's elements?
>
> Ms. Goodman: An effective resource management plan is a dynamic, comprehensive document. It should also be flexible, able to accommodate changing circumstances and requirements. We believe that a[n installation] commander should plan to implement compliance-based requirements of an integrated natural resource management plan with the same priority as all other environmental compliance requirements. Other plan elements should be funded whenever possible, to enhance resource stewardship. However, we believe that for these non-critical elements the plan should serve as the guidance document which it is intended to be, rather than as an absolute mandate to commit funds. The plans provide visibility to the conservation requirements. However, installation commanders must have the flexibility to establish priorities that support mission requirements.[331]

In its guidance, the DoD has linked compliance to two discreet pieces of information corresponding to mutual agreement and mandatory implementation of the INRMPs. However, the DoD fails to mention other requirements of the Sikes Act that may be considered compliance assessors. For example, the Act specifically delineates ten required elements of INRMPs:

> Consistent with the use of military installations to ensure the preparedness of the Armed Forces, each [INRMP] prepared under [this Title] shall, to the extent appropriate and applicable, provide for:
> (A) fish and wildlife management, land management, forest management, and fish- and wildlife-oriented recreation;
> (B) fish and wildlife habitat enhancement or modifications;
> (C) wetland protection, enhancement, and restoration, where necessary for support of fish, wildlife, or plants;
> (D) integration of, and consistency among, the various activities conducted

[329] *Id.*

[330] Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters U.S. Air Force Environmental Division, Pentagon, Arlington, Virginia (Apr. 13, 1998).

[331] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. 147 (1994).

> under the plan;
> (E) establishment of specific natural resource management goals and objectives and time frames for proposed action;
> (F) sustainable use by the public of natural resources to the extent that the use is not inconsistent with the needs of fish and wildlife resources;
> (G) public access to the military installation that is necessary or appropriate for the use described in subparagraph (F), subject to requirements necessary to ensure safety and military security;
> (H) enforcement of applicable natural resource laws (including regulations);
> (I) no net loss in the capability of military installation lands to support the military mission of the installation; and
> (J) such other activities as the Secretary of the military department determines appropriate.[332]

Currently, the DoD does not require its component departments to report on how well their INRMPs meet these statutory requirements in order to assess their compliance with the 1997 Amendments. The DoD Guidance does, however, specifically address subparagraphs (G) and (I) above. Quoting DoDI 4715.3, the Guidance reminds its component agencies that "INRMPs shall describe areas appropriate for public access." As for the "no net loss" provision, DoD Guidance states:

> Threats to mission land use shall be identified and addressed in INRMPs. Appropriate management objectives to protect mission capabilities of installation lands (from which annual projects are developed) should be clearly articulated in the process and should be high in the INRMP resourcing priorities. The effectiveness of the INRMP in preventing "net loss" shall be evaluated annually. There may be, however, instances in which a "net loss" may be unavoidable in order to fulfill regulatory requirements other than the SAIA, such as complying with a biological opinion under the provisions of the Endangered Species Act or the protection of wetlands under the provisions of the Clean Water Act. Loss of mission capability in this instance is beyond the scope and authority of the SAIA.[333]

Although the DoD Guidance draws attention to the public access and no net loss provisions, it does not impose corresponding reporting requirements for the purposes of evaluating plan implementation.[334]

3. Facing Legal Challenges

As discussed above, the Sikes Act Amendments constitute a statutory mandate where there was previously only departmental regulatory guidance.[335] This has enhanced the level of attention INRMPs receive from the DoD and may serve as a catalyst for increased public participation as well. The

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[332] Sikes Act Improvement Act § 2904.
[333] DoD Guidance, *supra* note 6.
[334] *Id.*
[335] *See supra* notes 111-117 and accompanying text.

Amendments may also precipitate judicial challenges to the content or implementation of the plans.

A recent Supreme Court case, decided on the issue of ripeness, is instructive as to what factors will weigh in the government's favor when faced with a legal challenge to an INRMP. The case addresses the question of when will a court review a natural resources management plan to assess its conformity with the underlying statute. As such, the case serves as guidance on how to develop and implement INRMPs.

In *Ohio Forestry Association, Inc. v. Sierra Club*,[336] the Sierra Club challenged a land resource management plan (LRMP) developed by the U.S. Forest Service pursuant to the National Forest Management Act of 1976 (NFMA).[337] The NFMA, passed after the landmark Monongahela decision,[338] amounted to a new organic act for the Forest Service.[339] The NFMA "addresse[s] on-the-ground forestry issues with a specificity unthinkable in earlier times."[340] In part, the NFMA requires the Secretary of Agriculture to "'develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.'"[341] Like DoD's INRMPs, the Forest Service uses LRMPs to "'guide all natural resource management activities,'" including use of land for "'outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.'"[342]

In *Ohio Forestry Association*, the Sierra Club contended that the plan permitted too much logging and too much clearcutting, in violation of the NFMA.[343] In a unanimous decision, the Court held the dispute was not ripe for court review.[344] According to the Court, the purpose of the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[345]

The Court found that the LRMP in question, developed for the Wayne National Forest in southern Ohio, "sets logging goals, selects the areas of the

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[336] 118 S.Ct. 1665 (1998).
[337] *Id*. at 1668
[338] West Virginia Division of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975) (holding that several Forest Service contracts allowing clearcutting in the Monongahela National Forest of West Virginia did not comply with the Organic Act of 1897).
[339] COGGINS, *supra* note 140. at 641.
[340] *Id*.
[341] Ohio Forestry Association, 118 S.Ct. at 1668 (citations omitted).
[342] *Id*. (citations omitted).
[343] *Id*. Among the requested relief, plaintiffs sought a declaration that the plan was unlawful and an injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan was revised. *Id*.
[344] Ohio Forestry Association, 118 S.Ct. at 1666.
[345] *Id*. at 1670 (citations omitted).

forest that are suited to timber production, and determines which 'probable methods of timber harvest' are appropriate."[346] In fact, the plan is a precondition to logging.[347] However, the Court concluded the case was not yet justiciable because the plan did not, by its terms, "authorize the cutting of any trees."[348] The procedural steps required before proceeding with an actual timber harvest included conducting NEPA analysis and ensuring the discrete project was consistent with the plan.[349]

Explaining its rationale, the Court identified from its jurisprudence two considerations relevant in determining ripeness: "'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'"[350] The Court further dissected these into three issues concerning the LRMP: "(1) whether delayed review would cause hardships to the plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action, and (3) whether the courts would benefit from further factual development of the issues presented."[351]

The Court concluded that the LRMP did not have enough impact on its own to create a justiciable issue. The Court reasoned that the plan's provisions "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations."[352] The Court refused to embark upon "time-consuming judicial consideration of the details of an elaborate, technically based plan . . . without the benefit of the focus that a particular logging proposal could provide."[353]

INRMPs, like LRMPs, recommend procedures for managing natural resources. Specifically, INRMPs provide for natural resources management "that is compatible with the installation mission, satisfies legal requirements, and is consistent with ecosystem management principles and guidelines."[354] INRMPs identify the types and locations of actions that may affect natural resources and prioritize those actions required to implement the goals and objectives of the plan.[355] Additionally, both INRMPs and LRMPs are subject to periodic review and revision.[356]

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[346] *Id.* at 1668 (citations omitted).
[347] *Id.* at 1669.
[348] *Id* at 1668.
[349] *Id.* at 1668-69.
[350] *Id.* at 1670 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967)).
[351] *Id.*
[352] *Id.* (citing United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310 (1927)).
[353] *Id* at 1671-72.
[354] DoDI 4715.3, *supra* note 11, encl. 7.
[355] *Id.*
[356] *See* 16 U.S.C.A. § 1604(a) (LRMP must be revised as appropriate); Sikes Act Improvement Act of 1997, Pub. L. No. 108-85, § 2904, 111 Stat. 1629 (1997) (calling for periodic review and revision of INRMPs).

Given the recent Supreme Court decision and the similarities between LRMPs and INRMPs, if faced with a legal challenge that an INRMP does not comply with the Sikes Act Amendments, a key argument for DoD attorneys to make is that the issue is not ripe for judicial review.[357] The argument will be most persuasive if agency attorneys can enumerate the procedural steps required before the challenged project or projects listed within the plan can be implemented. The agency attorneys will also want to argue that immediate judicial review could hinder agency efforts to "refine its policies," through revision of the plan or through application of the plan in practice.[358] As the Court pointed out in *Ohio Forestry Association*, "premature review 'denies the agency an opportunity to correct its own mistakes and to apply its expertise.'"[359] Plaintiffs may argue, as they did in *Ohio Forestry Association*, that "it will be easier, and certainly cheaper, to mount one legal challenge against the Plan now, than to pursue many challenges to each site-specific . . . decision to which the Plan might eventually lead."[360] Once again, the Supreme Court has provided agency counsel's argument.

> [T]he Court has not considered this kind of litigation cost-saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of–even repetitive–post-implementation litigation.[361]

As long as the "harm" raised by the plaintiffs is not caused by the plan, but by some remote future action to be taken based on the plan, a challenge based on that harm will not be ripe for judicial review. If, however, the plan itself results in harm, the result will most likely be different. For example, in *Ohio Forestry Association*, the Sierra Club argued that under the LMRP many "intrusive" activities (such as opening trails to motorcycles or using heavy machinery) would be conducted "'without any additional consideration of their impact on wilderness recreation.'"[362] Additionally, Sierra Club pointed to actions that would not take place on land designated for logging, such as building additional hiking trails.[363] The *Ohio Forestry Association* Court did not consider these arguments because they had not been raised in the lower

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[357] Note that ripeness will probably not be a winning issue for the agency on challenges based on failure of the INRMP to comply with NEPA. As the *Ohio Forestry Association* Court pointed out, "[a] person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." Ohio Forestry Association, 118 S.Ct. at 1672.
[358] Ohio Forestry Association, 118 S.Ct. at 1671.
[359] *Id.* (citations omitted).
[360] *Id.*
[361] *Id.*
[362] *Id.* at 1672.
[363] *Id.*

Permitting Systems Protection Monitoring: When the Government Can Look and What It Can See

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I. INTRODUCTION

Computers have become an integral part of today's Air Force. Most workplaces rely on computers for some aspect of their mission and many organizations depend upon electronic mail (e-mail) for a majority of their daily communication. Internet sites, whether accessible to the public, to military users only, or that are in some other way protected through access controls, also are used frequently to communicate and gather information. As Air Force dependence on computers and electronic communication grows, there is a corresponding need to guard the communications systems against attack or misuse, making asset protection a crucial part of the Air Force mission.

Because of the increasing importance of computer resources as a method of communication, it is important to define the legal issues surrounding the use of these government-provided resources. We must consider what steps are necessary to protect the information contained on our computers from unlawful intrusion and review. We must also look at the legal parameters surrounding the legitimate use of government resources. The need to ensure governmental systems are being used only for authorized purposes must be balanced against the need to recognize the protected nature of certain types of communications. The Government has an interest in ensuring government-provided resources are not abused or used for any illegal or improper purpose.

A way of ensuring that government computer systems are protected and that the resource is being used properly is through monitoring. While it is important to remember that "monitoring" means different things, in this context the term describes both the interception of transmitted messages and the act of accessing information stored on a computer or server. The reasons for accessing information or communications can also have an impact on the meaning of the term.

One example of monitoring is when the Air Force monitors to ensure operational security (OPSEC). The Telecommunications Monitoring and Assessment Program (TMAP) was established to conduct OPSEC monitoring

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under very specific requirements designed to protect an individual's privacy while ensuring operational security is not compromised.[1] Under this program, elements of the Air Intelligence Agency monitor communications to determine if sensitive or classified information, transmitted over an unsecured system, could have an adverse impact on United States or allied operations.[2] For those involved with TMAP, the term monitoring encompasses intercepting, recording, and analyzing the content of specific conversations or electronic communications.

Another instance of monitoring communications occurs for law enforcement purposes. When conducting this type of monitoring, which can include wiretapping or electronic surveillance,[3] a law enforcement agency or organization intercepts and records the content of a communication in order to determine if the communication constitutes evidence of a crime. Such monitoring must be based on consent of one party to the communication or authorized by court order, valid warrant, or search authorization supported by probable cause. Within the Air Force, nonconsensual surveillance for law enforcement also requires processing a request for a court order or warrant through the General Counsel of the Air Force.[4] Consensual interceptions, on the other hand, require approval of the Commander of the Air Force Office of Special Investigations (AFOSI).[5]

While OPSEC and law enforcement deal with the content of the communication, a third type of monitoring ensures that the operating system is functioning properly, that only authorized users are accessing the system, and that the resource is not being misused or abused. This is known as systems protection monitoring. The importance of systems protection monitoring cannot be overstated. Performed by system administrators, this is the Air Force's first line of defense against system malfunction and, more importantly, unlawful intrusions into our communications networks. Dr. John J. Hamre, the Deputy Secretary of Defense, has emphasized the importance of ensuring our

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[1] Air Force Instruction 33-219, Telecommunications Monitoring and Assessment Program (TMAP) (1 June 1998) [hereinafter AFI 33-219].

[2] *Id.* ¶ 2.

[3] *See* Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 *(1988)*

[4] Air Force Instruction 71-101, Criminal Investigations, vol. 1, ¶ 3.3.1 (1 August 1977) [hereinafter AFI 71-101].

[5] *Id.* vol. 1, ¶ 3.3.3. There are, however, some limitations on the authority of the commander of the Air Force Office of Special Investigations (AFOSI/CC) to approve consensual interceptions. For example, the AFOSI/CC must obtain Air Force General Counsel's approval before authorizing any surveillance involving a General Officer or a member of the Senior Executive Service, their family members, and Air Force Academy cadets, staff, and faculty. General Counsel approval is also required when there is an allegation of a violation of a national security law, procurement fraud in excess of $1,000,000, an investigation of sexual activity between consenting adults, and when the investigation involves any "significant" matter likely to receive extensive media coverage. *See id.* atch. 3.

information systems are protected. In a commentary by Lieutenant General William Donahue, the Air Force Director of Communications and Information, Dr. Hamre is quoted as saying,

> "We are entering a period when one individual, or small groups of individuals, are able to wage war on our entire country. The cyber attacks of last year highlight the threat we face and to be brutally candid, I view hackers and crackers as the enemy and the insider hacker as a traitor in information warfare."[6]

Lieutenant General Donahue also recognized the need for systems protection by trained professionals.

> As the Air Force faces the growing danger of cyber attacks, our greatest countermeasures are vigilance, awareness, education and professional network management. We have professionalized our networks through the deployment of detection, management and protection tools. The key to their effectiveness is well-informed, well-trained network professionals and users.[7]

System protection monitoring may take several forms: reading the full text of every file on a computer or server, using a computer program to retrieve the content of files meeting certain parameters or containing certain keywords, listing files or messages by file name or header information, and tracking the number of files or messages passing through a certain point. Whatever the method used, the procedure is invasive and, as a result, privacy concerns become an issue.

This article will begin with a discussion of the Fourth Amendment's application to systems protection monitoring. To do so, we must consider whether the law recognizes an expectation of privacy in the data created or maintained on governmental computer systems. As one commentator has said, whether in the private sector or the governmental sector, "a person's right to privacy is violated only when the person has a reasonable expectation of privacy."[8] In addition to the Constitutional issues, there are other considerations that must be addressed when examining the legal and policy aspects of systems protection monitoring. For example, the Electronic Communications Privacy Act (ECPA)[9] extended the federal wiretap laws to include interception and accession of electronic forms of communication. This

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[6] Lieutenant General William Donahue, *Special Month Focuses on Cyber Responsibilities* (23 January 1999) <http://www.af.mil/news/Jan1999/n19990126_990123.html> (quoting Dr. John J. Hamre, Deputy Secretary of Defense).
[7] *Id.*
[8] Larry O. Natt Gantt, II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 HARV. J.L. & TECH. 345, 403 (1995).
[9] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Title I, § 101, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2521 (1988)).

article will address whether the ECPA's protections apply to a systems administrator's monitoring of computer-based communications. Finally, this article will explore whether there is a need to extend certain protections to specific types of privileged communications or information, to what extent the information discovered during monitoring may be used, and whether current policy is sufficient to handle the new technology of electronic communication.

II. CONSTITUTIONAL ISSUES

When a systems administrator accesses information stored on a government server or computer, that act is, to some degree, invasive. The initial question is whether such an action constitutes a search. Whether this is a search depends upon whether there is an expectation of privacy in the communication[10] and upon the purpose of the invasion.[11] As the Supreme Court said in *United States v. Montoya de Hernandez,*[12]

> The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. . . . The permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[13]

The Fourth Amendment to the Constitution guarantees persons will be protected against unreasonable searches and seizures.[14] An individual's Fourth Amendment rights are violated only if governmental officials "infringed on 'an expectation of privacy that society is prepared to consider reasonable.'"[15] In other words, not all privacy interests are constitutionally protected.[16] When looking at whether an Air Force member or employee has a constitutionally protected interest in their electronic communications, the important questions are whether there is an expectation of privacy protected by the Fourth Amendment and whether that expectation is "one that society recognizes as

[10] O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (acknowledging that a physician employed by government hospital had a reasonable expectation of privacy in his office).
[11] United States v. Monroe, 50 M.J. 550 (A.F.C.C.A. 1999).
[12] 473 U.S. 531 (1985).
[13] *Id.* at 537 (citing New Jersey v. T.L.O., 469 U.S. 325, 337-42 (1985); quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979); Camara v. Municipal Court, 387 U.S. 523 (1967)).
[14] Ortega, 480 U.S. at 715.
[15] *Id.* (quoting United States v. Jacobson, 466 U.S. 109, 113 (1984)).
[16] United States v. Roberts, 747 F.2d 537 (9th Cir. 1984) (residents of a house on a shared, unobstructed private road had no expectation of privacy in the road, despite posting signs indicating that the road was private).

reasonable."[17] If either prong of this test is not met, there can be no reasonable expectation of privacy.[18]

In 1987, the Supreme Court addressed workplace searches and seizures in *O'Connor v. Ortega* and concluded that the Fourth Amendment applies when government employers or supervisors search for or seize an employee's private property.[19] This is true even if the private property is located in a government-provided office.[20] The Court recognized that "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them home."[21]

Although the Court found that the Fourth Amendment applies when the government is also an employer, the Court acknowledged that what is considered a reasonable expectation of privacy differs according to the context of the case, especially when the search is done within the workplace.[22] The Court defined "workplace" as those areas and items related to work and generally within the employer's control, though "not everything that passes through the confines of the business address can be considered part of the workplace . . . ."[23] Items that are purely personal and have no connection to the employment relationship are not subject to standards for a workplace search. Hallways, offices, desks, and file cabinets are part of the workplace and remain so even though an employee may have placed personal items in or on them.[24]

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[17] Jacobson, 466 U.S. at 113; *see also* United States v. Neal, 41 M.J. 855, 860 (A.F.C.C.A. 1994) (citing Smith v. Maryland, 422 U.S. 735, 740-41 (1979)); California v. Ciraolo, 476 U.S. 207, 211 (1986). The United States Court of Appeals for the Armed Forces specifically addressed whether the originator of an e-mail message has a reasonable expectation of privacy in *United States v. Maxwell*, 45 M.J. 406 (1996). The court found that the originator of an e-mail message transmitted on a nongovernment, proprietary communications system had a reasonable expectation of privacy that police officials will not intercept the message without a warrant based on probable cause. Id. at 417. The court also realized that the reasonableness of an originator's expectation of privacy will "depend in large part on the type of e-mail involved and the intended recipient." Id. at 419.

[18] United States v. Curry, 46 M.J. 733 (N.M.C.C.A. 1997); *see also* United States v. Horowitz, 806 F.2d 1222, 1225 (4th Cir. 1986).

[19] Ortega, 480 U.S. at 715.

[20] *Id.* at 717.

[21] *Id.* at 725.

[22] *Id.* at 725-26.

[23] *Id.*

[24] *Id.* at 716. In the context of the typical Air Force workplace, the distinction between government property and personal property is quite clear. A government-provided computer is still, generally, within the employer's control. The employee may not take the computer when transferred or reassigned. Many data files are maintained on a local area network server. Hard copies of the data files are often filed in the employer's official files. Finally, there are statutory requirements for a governmental employer to maintain electronic records. *See* 44 U.S.C. § 2902 (1988). Thus, government-provided computer resources, such as computer

Besides making a distinction between workplace and personal items, the Court also made a distinction between intrusions by law enforcement and intrusions by supervisors. While employees may have a reasonable expectation of privacy against workplace intrusions by law enforcement personnel, when supervisory personnel are responsible for the intrusion "operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable. . . ."[25] The Court stressed that, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation."[26] Whether or not an employee believes his work area is private, that belief must be objectively assessed based on actual workplace practices and procedures. For example, the existence of a legitimate regulation, such as a systems protection regulation, which reduces an employee's expectation of privacy by allowing monitoring, would reduce the employee's expectation of privacy. The same could be said of a policy against unauthorized personal use of computer resources,[27] or as the Court said, "some government offices may be so open to fellow employees or the public so that no expectation of privacy is reasonable."[28]

In *Ortega*, the Court found that, given the operational realities of Dr. Ortega's workplace, Dr. Ortega had a reasonable expectation of privacy in items contained in his desk and file cabinets. This finding was based on evidence that Dr. Ortega did not share his desk or file cabinets with other employees, he had occupied the office for seventeen years, he kept personal correspondence in the office, including correspondence from patients unconnected to his employer hospital, and that items related to his employment were kept outside the office. Especially telling for the Court was that everything seized from the office was returned to Dr. Ortega. Finally, the Court relied on the absence of a regulation or policy discouraging employees from storing personal papers and effects in their desks or filing cabinets.[29]

Although the Court found that Dr. Ortega had a reasonable expectation of privacy in his workplace, the analysis did not end there. The Court also found it necessary to "determine the appropriate standard of reasonableness applicable to the search."[30] In order to make this determination, the Court balanced "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[31] The Court held that "in the case of searches

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equipment and e-mail services, would fall within the definition of workplace.

[25] Ortega, 480 U.S. at 717.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 718.

[29] *Id.* at 719.

[30] *Id.*

[31] *Id.* (citing United States v. Place, 462 U.S. 696, 703 (1983)).

conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[32]

After conducting this balancing test, the Court found that a supervisor's "work-related" noninvestigatory search of an employee's office, desk, or filing cabinets is reasonable under the Fourth Amendment.[33] This is because a supervisor's intrusion is "focused primarily on the need to complete the government agency's work in a prompt and efficient manner."[34] A requirement for a warrant to intrude into an office, desk, or file cabinet for a work-related purpose is unduly burdensome when the intrusion is incident to the business of the governmental agency.[35] Additionally, there is no need to find probable cause before a work-related search.[36] "To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons."[37]

The Court reached the same conclusion when considering investigative searches for work-related employee misconduct.[38]

> Public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner . . . [T]herefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.[39]

Thus, a workplace search does not violate the Fourth Amendment as long as the inception and the scope of the intrusion are reasonable.[40]

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[32] *Id.* at 719-20.
[33] *Id.* at 723.
[34] *Id.* at 721. Interestingly, the Court's determination in this regard was the subject of contention that resulted in *Ortega's* plurality opinion. Justice Scalia, writing separately, disagreed with the plurality opinion as to the importance of the searchers identity. *Id.* at 731 (Scalia, J., concurring). Whether a supervisor or law enforcement authorities performed the search is immaterial. The only issue was whether the search itself was reasonable under the circumstances. *Id.* As will be discussed, the distinction between a search by an employee or supervisor and one done by law enforcement can be significant when compliance with the ECPA is the issue. *See infra* Part III.
[35] *Id.* at 722.
[36] *Id.*
[37] *Id.* at 723.
[38] *Id.* at 724.
[39] *Id.*
[40] *Id.* at 726.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file.[41]

Ortega demonstrates that a three-tiered analysis is necessary to determine whether a workplace search violates the Fourth Amendment. The first question concerns the employee's reasonable expectation of privacy considering the "operational realities" of the workplace.[42] In determining whether an expectation of privacy is reasonable, the courts have not "developed a routinized checklist that is capable of being applied across the board, and each case therefore must be judged according to its own scenario."[43] The following factors are to be considered: whether the employee has exclusive use of the workplace, the extent to which others had access to the workplace, the nature of the employee's duties, whether the employee had notice that the workplace was subject to search, and the reason for the intrusion.[44]

The second prong of the analysis evaluates the reasonableness of the invasion of an employee's Fourth Amendment interest when balanced against the importance of the governmental interests justifying intrusion.[45] The Court found that when the governmental interest is either work-related or an investigative search for work-related employee misconduct, reasonable suspicion is sufficient grounds to justify the search.[46] Of course, what constitutes reasonable suspicion may differ with the conduct under examination and the specific facts of the case.

The final tier focuses on whether the search was reasonable at its inception and whether the scope of the intrusion was related to the circumstances that justified the search.[47] When there are grounds to suspect work-related misconduct or when the supervisor needs access for a noninvestigative purpose, the search is reasonable at its inception. Similarly, when the search is limited to meeting the need for the search, the scope of the search is reasonable.

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[41] *Id.*

[42] *Id.* at 717.

[43] Vega-Rodriguez v. Puerto Rico Telephone Company, 110 F.3d 174, 178 (1st Cir. 1997).

[44] *See id.* at 179 (citations omitted). The purpose for the intrusion was also important to the Air Force Court in its decision in *Monroe*. United States v. Monroe, 50 M.J. 550, 559-60 (A.F.C.C.A. 1999). Noting that their methods were not important, the court indicated the crucial issue was that the systems administrators' "actions were well within their official duties. They were doing what they had a responsibility to do in order to insure the base network was operating at maximum efficiency, and all of their actions were taken to achieve that end." *Id.*

[45] Ortega, 480 U.S. at 719.

[46] *Id.* at 723-24.

[47] *Id.* at 726.

The *Ortega* analysis has been applied to other cases involving workplace searches. For example in *Schowengerdt v. United States*[48] the Ninth Circuit applied the *Ortega* analysis to conclude that under the operational realities present in Schowengerdt's workplace, there was no reasonable expectation of privacy in papers found in a credenza.[49] Schowengerdt was a civilian engineer working on classified projects for the Navy. The facility in which he worked was searched frequently to determine if classified information was properly protected. Schowengerdt was well aware of these searches, nevertheless he placed a sealed manila envelope in his credenza containing evidence of multiple bisexual affairs. The envelope was labeled, "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it."[50] Even though the label indicated Schowengerdt had a subjective expectation of privacy in the material inside the envelope, the Ninth Circuit found that the environment in Schowengerdt's workplace, including searches for security purposes and the need for a security clearance to perform his duties, objectively removed any reasonable expectation of privacy.[51]

More to the point, an *Ortega* analysis was recently applied to nonwarranted intrusions into stored e-mail. In *United States v. Simons*,[52] the Eastern District of Virginia considered an appeal from an employee of the Foreign Bureau of Information Services, a component of the Central Intelligence Agency (CIA). The employee was convicted of various violations of child pornography statutes based on his Internet activity while at work. The system administrator, while examining the agency's firewall log to familiarize himself with the system, discovered evidence that the employee was accessing child pornography sites while at work. Upon noticing the log was unusually large, the systems administrator searched the log using the keyword "sex." He believed that if the firewall log contained indications of inappropriate activity, a search for the word "sex" would likely disclose such activity.[53] The keyword search found a significantly large number of "hits"[54] traceable to defendant's

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[48] 944 F.2d 483 (9th Cir. 1991).
[49] *Id.* at 488.
[50] *Id.* at 485.
[51] *Id.* at 488-89.
[52] 29 F. Supp. 2d 324 (E.D. Va. 1998).
[53] *Id.* at 326.
[54] A "hit" is a single request from a web browser for a single item from a web server. Hits are often used as a very rough measure of load on a server—a web site might get 300,000 hits per month. Because each hit can represent anything from a request for a tiny document (or even a request for a missing document) to a request that requires some significant extra processing (such as a complex search request), the actual load on a machine from a single hit is almost impossible to measure. Mattise Enzer, *Glossary of Internet Terms* (visited April 15, 1999) <http://www.matisse.net/files/glossary.html#D> [hereinafter Enzer, *Internet Terms*].

workstation that indicated the result of intentional, rather than casual or accidental, Internet cite searches.[55] The systems administrator could also tell by looking at the names of the web sites that they had no relevance to any business purpose.[56] The systems administrator disclosed the results of his discovery to his supervisor, who asked the systems administrator to access the employee's workstation computer to see if the employee had downloaded any pornographic pictures or files. The systems administrator did so, using the computer located in the systems administrator's office. He determined that over one thousand pornographic files had been downloaded. The systems administrator then made a copy of the hard drive on the computer in the employee's workstation and provided it to CIA special investigators to review. CIA investigators subsequently called the FBI, which obtained a search warrant for the employee's office, including the computer and the contents of its drives.[57]

The employee sought to suppress the evidence, arguing that the systems administrator's activities constituted illegal searches in violation of the employee's Fourth Amendment rights.[58] The district court disagreed, holding that the agency's policy limiting the Internet to official purposes and giving notice that audits may be done on unclassified networks was sufficient to eliminate any reasonable expectation of privacy the employee had regarding his Internet use.[59] Since the employee had no reasonable expectation of privacy, the court found the searches were permissible under the Fourth Amendment.[60] The court went one step further, holding that even if the employee did have a reasonable expectation of privacy, the systems administrator's activity in examining the firewall logs,[61] viewing the employee's work station computer, and copying the computer's hard drive were both justified at their inception and reasonable in scope.[62] The justification in this regard rested on the fact that it

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[55] Simons, 29 F. Supp. 2d at 326.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 327.
[60] *Id.* The district court in *Simons* noted that *Ortega* stood for the proposition one could have a reasonable expectation of privacy in the desk and cabinets located in their office but that a public employee's expectation of privacy can be reduced by the practices of the office. *Id.* The court went on to describe the policies and procedures that affected Simons' expectation of privacy, eventually concluding he did not have one. *Id.*
[61] *Id.* The court also questioned whether the systems administrator's keyword search was a search within the meaning of the Fourth Amendment. *Id.* at 328. A firewall is a combination of hardware and software that separates a network into two or more parts for security purposes. Enzer, *Internet Terms*, *supra* note 54.
[62] Simons, 29 F. Supp. 2d at 328.

was the systems administrator's duty to monitor Internet use and that the use of the word "sex" was a reasonable way to reveal inappropriate workplace activity.[63]

Like the CIA employee in *Simons*, the privacy rights of military members may be subjected to an overriding need to recognize the demands of discipline and duty.[64] The Air Force Court of Criminal Appeals addressed a military member's expectation of privacy in a "personal" e-mail account on a government server in *United States v. Monroe*.[65] In *Monroe*, the accused had an e-mail account on his personal computer located in his on-base dormitory. The account was provided to military members at this overseas location for official and authorized purposes. Authorized purposes included limited personal use to send and receive morale messages to and from friends and family.[66]

The systems administrator responsible for this government system noticed fifty-nine e-mail messages in the directory where e-mail is stored before being sent to the receiving mailbox. If a message is too large or if there is a defect in the message, the directory will store rather than forward them. A large number of stored messages will slow the system. In order to determine why so many messages were "stuck" in the system, the administrator and his supervisor opened several of the messages. They discovered that they were addressed to the accused's mailbox and were from newsgroups with sexually orientated names.[67] The administrators moved the messages to another directory, and determined that over half contained graphic images that upon closer inspection were found to be sexually explicit photographs of women. In order to find out if the accused requested the images or was simply the victim of a prank, the administrators accessed the accused's e-mail account. Upon opening one of the messages sent to the originator of the fifty-nine e-mail messages, the two administrators saw a reminder from the accused to "send the file."[68] Concluding that the accused was not a victim, the administrators disclosed this information to the commander.[69] After reporting the systems problem, the systems administrators then gave investigators from the AFOSI two diskettes containing the image files, printouts of two e-mail messages from the accused to the newsgroup, and a memo for record detailing their discovery of the files.[70]

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[63] *Id.*
[64] United States v. Curry, 46 M.J. 733, 739-40 (N.M.C.C.A. 1997) (citing Parker v. Levy, 417 U.S. 733 (1974); Middendorf v. Henry, 425 U.S. 25 (1976); Schlesinger v. Councilman, 420 U.S. 738 (1975)).
[65] 50 M.J. 550 (A.F.C.C.A. 1999).
[66] *Id.* at 554.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 555.
[70] *Id.*

The AFOSI investigators used this information to obtain a search authorization and then searched the accused's dormitory room and seized all computer-related items.[71]

At trial, the accused challenged the activities of the systems administrators, arguing that they exceeded the scope of their duties by opening any of the original fifty-nine e-mail files. The accused asserted that the systems administrators had opened an "investigation" on him and that while he may have consented to monitoring, he had not consented to being investigated.[72] The Air Force court disagreed. It found that the accused had no reasonable expectation of privacy in files lodged in the government server.[73] Additionally, the court concluded that there was no reasonable expectation of privacy in the e-mail box, "at least as regards his superiors and the [systems] administrator and his/her supervisors."[74] The court went on to note that even if the accused had some expectation of privacy, the systems administrators could access the material in the e-mail box, as long as they acted within the scope of their official duties.[75] The court thought it important that, "[t]hey were doing what they had a responsibility to do in order to insure the base network was operating at maximum efficiency, and all their actions were taken to achieve that end."[76] Because they were operating within the scope of their duties, the systems administrators did not become agents of law enforcement.[77]

In both *Simons* and *Monroe*, the systems administrator's actions were permissible because they were acting within the scope of their responsibility to protect their respective systems. Additionally, in *Simons* and *Monroe* the systems administrators notified appropriate law enforcement authorities and turned over the information they had obtained once it became clear there had been some criminal activity. The significance of the actions of the systems

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[71] *Id.*

[72] *Id.* at 556-57. The system was properly bannered with a warning indicating that use of the system would be considered consent to monitoring. *Id.* at 559. For an example of such a banner and a discussion of this issue, see *infra* footnotes 95-98 and accompanying text.

[73] Monroe, 50 M.J. at 558. The court reasoned that:

> [U]sing the analogy of a work area desk and the precedents applicable thereto and the facts of the instant case, we believe appellant's e-mail box within the EMH was most comparable to an unsecured file cabinet in his superiors' work area in which an unsecured drawer was designated for his use in performing his official duties with the understanding that his superiors had free access to the cabinet, including his drawer.

Id. at 559.

[74] *Id.*

[75] *Id.* at 559-60.

[76] *Id.* at 560.

[77] *Id.*

administrators rests with the Supreme Court's distinction between a workplace search and a search outside of the workplace[78] and the distinction between a private search and one conducted by law enforcement authorities.[79] The activities of a workplace systems administrator that are within the scope of his or her responsibility to protect an employer's system are more analogous to a private search and, therefore, permissible.[80] However, while it may not violate a user's reasonable expectation of privacy for a systems administrator to search stored communications, additional invasions by law enforcement agents, "must be tested by the degree to which they exceed the scope of the private search."[81]

A government employee using a government computer has no expectation of privacy with regard to information uncovered by systems administrators acting within the scope of their duties. The same employee also runs the risk the systems administrator will disclose information gained in the pursuit of that purpose to law enforcement authorities.[82] The Fourth Amendment only becomes an issue if law enforcement authorities desire to extend the scope of the search to obtain additional information or seize evidence. For this they must obtain a warrant or search authorization.[83]

Although not the basis of the decision, the court in *Monroe* could also have reasoned that military members have a reduced expectation of privacy in anything subject to command-directed inspection. In *United States v. Muniz*,[84] the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) found that the accused had no reasonable expectation of privacy in the locked drawer of a government-owned credenza in the accused's government office.[85] The court noted that:

> [T]he credenza, like any other item of government property within the command, was subject at a moment's notice to a thorough inspection. . . .

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[78] Ortega, 480 U.S. at 716.

[79] United States v. Jacobsen, 466 U.S. 109, 114-15 (1984) (Fourth Amendment does not require warrant before law enforcement agent removes trace amount of unknown substance from damaged package obtained by private shipping company in order to conduct chemical tests to determine identity of the substance). Justice Scalia's disagreement as to the identity of the searcher resulted in *Ortega's* plurality. Ortega, 480 U.S. at 731 (Scalia, J., concurring). *See supra* note 34.

[80] Monroe, 50 M.J. at 560.

[81] Jacobsen, 466 U.S. at 115.

[82] *Id.*; *accord* Securities and Exchange Commission v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984) (noting that there is no Fourth Amendment protection for one who communicates confidential information to a third party who later discloses that information to law enforcement authorities); United States v. Miller, 425 U.S. 435, 443 (1976) (recognizing that an individual risks disclosure to government authorities of confidential information given to a third party).

[83] Walter v. United States, 447 U.S. 649 (1980); Jacobsen, 466 U.S. at 115.

[84] 23 M.J. 201 (C.M.A. 1987).

[85] *Id.* at 206.

> That omnipresent fact of military life, coupled with the indisputable government ownership and the ordinarily nonpersonal nature of military offices, could have left [the accused] with only the most minimal expectation–or hope–of privacy in the drawer vis-à-vis his commander.[86]

This diminished expectation of privacy "must be distinguished from an unquestionably greater expectation of privacy" the military member ordinarily would enjoy as a citizen of the United States.[87] Indeed, the simple fact that inspections are a necessary part of life in the military has resulted in a reduced expectation of privacy in a berthing area on a naval vessel and in an unsealed open box, marked with the accused's name, when the box is located in the vessel's common area.[88]

Monitoring a computer-related information system such as Monroe's e-mail account could be analogized to an authorized inspection. Generally, an inspection permits limited intrusions for defined purposes when there is a special need, beyond that of law enforcement, making the warrant requirements for a search impracticable.[89] Within the military, an inspection is recognized as a tool for a commander to evaluate and ensure his assets are secure and his unit is able to accomplish the mission. An inspection is considered "incident of command" and part of the commander's responsibility.[90] However, a commander's authority to inspect is not completely unfettered. Inspections must be reasonable.[91] The primary reason for an inspection must focus on the security, military fitness, or good order and discipline of the commander's organization.[92] Finally, an inspection can never be used as a subterfuge for a search.[93] When a systems administrator monitors an information system, he or she ensures the system is secure, that it is not being misused, and that the system can perform its mission.[94] In other words, the systems administrator

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[86] *Id.* (citing United States v. Middleton, 10 M.J. 123 (C.M.A. 1981)).
[87] *Id.*
[88] United States v. Battles, 25 M.J. 58 (C.M.A. 1987); *see also* United States v. Neal, 41 M.J. 855 (A.F.C.C.A. 1994) (questioning whether a military accused had a reasonable expectation of privacy in an open wall locker located in a common area of the dormitory room the accused shared with another member).
[89] Montoya de Hernandez, 473 U.S. at 541-42; (concluding that border search of woman suspected of alimentary canal drug smuggling was reasonable); New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (determining that warrantless search of schoolchildren based on reasonable suspicion did not violate the Fourth Amendment). *See also* United States v. Cortez, 449 U.S. 411, 417 (1981); Terry v. Ohio, 392 U.S. 1 (1968).
[90] MANUAL FOR COURTS-MARTIAL, United States [hereinafter MCM], Military Rules of Evidence 313 (1998 ed.) [hereinafter Mil. R. Evid.]; United States v. Jackson, 48 M.J. 292, 293 (1998).
[91] Jackson, 48 M.J. at 294.
[92] *Id.*
[93] *Id.*
[94] Air Force Instruction 33-115, Network Management vol. 1, ¶¶ 6.4.3.4.5, 6.4.3.4.8 (1 June

inspects the system. As long as that inspection is focused on systems protection or has some similar purpose, the systems administrator's activities would be considered valid.

Another important aspect of the *Monroe* case was the court's reliance on "the fact that all users of the system received notice that the system was subject to monitoring each time they logged on."[95] Although not specifically mentioned by the court, this notification was based on Air Force Instruction 33-219, which provides general notification to all Air Force members that telecommunications systems or devices provided by the Department of Defense (DoD) for conducting official government business are subject to monitoring.[96] Telecommunications devices include computers attached to a network. The instruction also puts Air Force computer users on notice that simply using a government-owned computer system constitutes consent to monitoring. The same provision also requires a log-on banner on all computers that reads:

> This is a Department of Defense computer system for authorized use only. DoD computer systems may be monitored for all lawful purposes, including to ensure that their use is authorized, for management of the system, to facilitate against unauthorized access, and to verify security procedures, survivability and operational security. *Using this system constitutes consent to monitoring.* All information, including personal information, placed on or sent over this system may be obtained during monitoring. Unauthorized use could result in criminal prosecution.[97]

The banner makes no distinction between intercepting communications and accessing stored communications. The net effect of this banner is to eliminate any argument that a military member could subjectively believe communications to or from his computer would remain private.[98]

An argument could be made that this notice, coupled with the user's affirmative decision to continue using the government-provided computer resource, constitutes actual consent to monitoring.[99] Finally, the computer is owned by the government and provided to the member or employee only to facilitate government-related business. Even though in some limited circumstances a person may have an expectation of privacy in property owned by another,[100] the fact that a computer and hard drive are government property,

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1998) [hereafter AFI 33-115].
[95] Monroe, 50 M.J. at 558.
[96] Air Force Instruction 33-219, Telecommunications Monitoring and Assessment Program (TMAP) ¶ 13 (1 June 1998) [hereinafter AFI 33-219].
[97] *Id.* ¶ A2.3.5 (emphasis added).
[98] *See* Monroe, 50 M.J. at 558 (finding no reasonable expectation of privacy in e-mail system containing banner giving notice that system may be monitored).
[99] *See infra* Part III.A.
[100] *See* United States v. Salazar, 44 M.J. 464, 467 (1996).

provided only for official use, would cause a reasonable person to question whether a user's expectation of privacy was reasonable.

Using the three-tiered *Ortega* analysis, it is clear that systems protection monitoring is a legitimate workplace search. First, the operational realities of the Air Force workplace puts users of Air Force communications systems on notice and obtains their consent to systems protection monitoring. This notice and consent eliminate any expectation of privacy in the communication being monitored to determine the health and welfare of the communication system.[101] Secondly, the intrusion caused by systems protection monitoring is reasonable when balanced against the governmental interest in protecting our communications systems from misuse and abuse. Ensuring the integrity of our communications systems and the information transmitted over those systems is of vital national importance. With the increase in hackers and the potential for system denial attacks,[102] the need for systems protection is tremendous. The type of monitoring done by systems administrators is reasonable considering this overriding governmental interest in information protection. Finally, systems protection monitoring is reasonable in its inception because there is a well-defined need to protect our communications systems and the monitoring is limited to that necessary to protect the system.

III. STATUTORY ISSUES

In 1986 Congress enacted the Electronic Communications Privacy Act[103] "to bring new communication technologies under the umbrella" of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[104] "to protect against the unauthorized interception of electronic communications."[105] The legislative history of the ECPA also indicates the purpose of the law is "to update and clarify [f]ederal privacy protections and standards in light of dramatic changes

[101] Similarly, there is no expectation that a communication will not be monitored for operational security purposes. *See* AFI 33-219, *supra* note 96. Of course, although there is no expectation of privacy relative to systems protection there may be an expectation of privacy for other reasons. *See* Ortega, 480 U.S. at 723.

[102] Hackers are individuals who attempt to break into a computer system or to, in some other way, attempt to damage a computer system. System denial attacks are intentional actions by an insider or outsider that causes an information system to fail either permanently or temporarily. Air Force Office of Special Investigations, *Computer Crime Investigator's Handbook* (forthcoming Summer 1999).

[103] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2521, 2701-2710, 3117, 3121-3126 (1988)).

[104] Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1988).

[105] S. Rep. No. 99-541, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555. This section of the Omnibus Crime Control and Safe Streets Act is more commonly known as the Federal Wiretap Act and is codified at 18 U.S.C. § 2510 (1988). In addition, Title I of the ECPA has also come to be referred to as the Wiretap Act.

in new computer and telecommunications technologies."[106] Indeed, the ECPA was designed to confer an expectation of privacy to electronic and wire communications, and it generally prohibits the interception or accession of electronic communication.[107]

The ECPA consists of three distinct sections. The first section, often referred to as Title I, outlines statutory procedures for intercepting wire, oral, and electronic communications.[108] The second section, known as Title II, pertains to stored communications.[109] The final section, Title III, addresses pen registers and trap and trace devices.[110] Although designed to work together to provide "a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies,"[111] the statutory provisions are confusing and difficult to interpret. As the Ninth Circuit Court of Appeals noted, "[w]hen the Fifth Circuit observed that the Wiretap Act 'is famous (if not infamous) for its lack of clarity,' . . . it might have put it too mildly."[112]

The legislative history of the ECPA indicates Congress intended the Act to cover e-mail transmissions,[113] but the complexity of the statutory language obscures that intention. A careful analysis of the meaning of the Act must begin with an understanding of its key terms. The statute defines an "electronic communication" in the following manner:

> [A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,

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[106] S. Rep. No. 99-541, at 1.

[107] 18 U.S.C. § 2511(1). The original version of the Federal Wiretap Act was passed by Congress after the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967) held the Fourth Amendment applied to a government interception of a telephonic communication. The original provisions of the Federal Wiretap Act was Congress' attempt to protect the privacy interests in business and personal communications and still permit authorized interceptions.

[108] S. Rep. No. 99-541, at 3. The term "wire communications" is limited to voice communications. Because this article addresses electronic communications, there will be no attempt to discuss the interception of oral, voice, or voicemail communications. Nevertheless, much of the existing case law interpreting the ECPA addresses situations involving wire communications. The results of such case law have been extended, where appropriate to electronic communications.

[109] *Id.* Title II of the ECPA (Pub. L. No. 99-508, Title II, § 201, 100 Stat. 1848 (1986)) is often called the Stored Communications Act, and was Congress's attempt to protect personal and proprietary information stored on computers, while still allowing law enforcement access to the information for legitimate reasons. Title II is codified at 18 U.S.C. § 2701 (1988). *See* United States v. Smith, 155 F.3d 1051 (9th Cir. 1998).

[110] S. Rep. No. 99-541, at 3. This section is not pertinent to the issues addressed in this article and will not be discussed.

[111] *Id.* at 5.

[112] Smith, 155 F.3d at 1055 (quoting Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457, 462 (5th Cir. 1994)).

[113] *See* Gantt, *supra* note 8, at 351 n. 47.

electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--

> (A) any wire or oral communication;
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> (B) any communication made through a tone-only paging device;
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> (C) any communication from a tracking device (as defined in section 3117 of this title); or
>
> (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.[114]

The definition of electronic communication includes transfers of information from one computer to another computer, such as a user downloading data from an Internet site, but does not include electronic storage.[115] In other words, "an electronic communication may be put into electronic storage, but the storage itself is not a part of the communication."[116]

The ECPA defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication."[117] The Computer Crimes and Intellectual Property Section of the Department of Justice, which publishes the *Federal Guidelines for Searching and Seizing Computers*, interprets this definition to include only unopened e-mail messages on an e-mail server.[118]

> To understand the importance of this definition, it is critical to know how electronic mail works. Generally speaking, e-mail messages are not transmitted directly from the sender's machine to the recipient's machine; rather, the e-mail message goes from the sending machine to an e-mail server where it is stored (i.e., kept in "electronic storage"). A message is then sent from the server to the addressee indicating that a message for the addressee has been stored. The actual message remains on the server, however, until the addressee retrieves it by having a copy sent to his machine. Often, both the sender and receiver can delete the e-mail from the server.
>
> Section 2703 protects the electronic communication while it is stored in the server in this intermediate state. Once a message is opened, however, its

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[114] 18 U.S.C. § 2510(12).

[115] Bohach v. City of Reno, 932 F. Supp. 1232, 1235 (D. Nev. 1996).

[116] *Id.* at 1235.

[117] 18 U.S.C. § 2510(17); *see also* Bohach, 932 F. Supp. at 1237. In that case, the court said, "The computer's storage of an electronic communication, whether that storage was 'temporary' and 'intermediate' and 'incidental to' its impending 'electronic transmission,' or more permanent storage for backup purposes was 'electronic storage.'" *Id.*

[118] *See also*, Simons, 29 F. Supp. 2d at 329 (court held that e-mail retrieved from a government employees computer hard drive was not intercepted under the provisions 18 U.S.C. §§ 2515 and 2516, since nothing in the record indicated the e-mail was obtained while being transferred.)

storage is no longer "temporary" nor "incidental to . . . transmission," and it thus takes on the legal character of all other stored data. Therefore, the statute does not apply to all stored communications, such as word processing files residing on a hard drive, even when these files were once transmitted via e-mail.[119]

The ECPA definition of electronic storage includes data on back-up storage tapes or disks when made to protect the communication. The computer crimes section of the Department of Justice has also addressed this issue stating, "When a sysop backs up the mail server to protect against system failure, all e-mails stored on the server will be copied. Thus, if the e-mail is later deleted from the server, the backup copy remains. The statute protects this copy as well."[120]

Another important definition is that of "content." When applied to wire, oral, or electronic communications, the term content means "any information concerning the substance, purport, or meaning of that communication."[121] In other words, it is the information or the substance contained in the communication–what appears on the screen when the e-mail message is opened. It is important to distinguish between a communication's "contents" and its "context." Context refers to information about the electronic communication, including such things as the duration, size, and routing of the communication. This information is part of the electronic communication but does not necessarily appear on a computer screen. Depending on the tools used or the programming settings, a systems administrator may seek to monitor either content or context in order to protect the government system.

Finally, the ECPA defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[122] To fall within the definition of intercept, the acquisition of the electronic communication's content must be contemporaneous with its transmission.[123] The only concern revealed in the

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[119] United States Department of Justice, *Federal Guidelines for Searching and Seizing Computers* (visited Jan. 29, 1999) <http://www.usdoj.gov/criminal/cybercrime/search_docs/sect5.htm#C>.

[120] *Id.* (citing 18 U.S.C. § 2510(17)(B)). A sysop is a shorthand term for systems operator or systems administrator.

[121] 18 U.S.C. § 2510(8).

[122] 18 U.S.C. § 2510(4).

[123] Steve Jackson Games, 36 F.3d at 460-61; *accord*, Wesley College v. Pitts, 974 F. Supp. 375, 387 (D. Del. 1997). According to the Ninth Circuit in *Smith*, 155 F.3d 1051, wire communications are treated differently than electronic communications. In *Smith* the court found that voice mail messages fall within the statutory definition of wire communication. A wire communication is defined in 18 U.S.C. § 2510(1) as "'any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection' and expressly includes within its scope 'any electronic storage of such communication.'" *Id.* at 1055. Since the definition of wire communications

ECPA when intercepting an electronic message is with the acquisition of its content. The context of the message is not an issue. Indeed, the ECPA specifically allows a system provider to record a communication's context to protect the provider or the user from "fraudulent, unlawful or abusive use" of the provider's communication service.[124] This very narrow definition of intercept is important to the operation of the ECPA because whether the electronic communication was actually intercepted within the meaning of the Act has a determinative impact on which provision of the Act will apply to regulate the conduct.

In that regard, consideration must be given to whether the monitoring system intercepts the electronic communication during its transmission or, instead, accesses it from electronic storage.

> There are stark differences between the procedural and substantive requirements of Title I [the Wiretap Act] and Title II [the Stored Communications Act]. While a governmental entity can obtain access to the contents of electronic communications that have been in storage less than 180 days without a warrant, . . . there are additional requirements under Title I for the interception of electronic communications . . . Title I imposes limitations on the types of crimes that may be investigated . . . and the breadth and duration of the intrusion . . . Title II does not.[125]

Additionally, obtaining access to stored communications has substantially fewer procedural requirements than obtaining permission to intercept communications.[126]

Given the narrow definition of intercept, Title I's provision prohibiting the interception of electronic communications may not apply to e-mail transmissions. In fact, the interception must occur as the e-mail is being transmitted in order for Title I to apply.[127] For example, some systems administrators use a computer program or mechanical device on their system that immediately routes a copy of any e-mail message, including the content of the message, directly to an interceptor at the instant the e-mail is transmitted.[128]

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specifically includes stored information, the Ninth Circuit found that accessing and recording a stored voice mail message is considered an "intercept" even though the act of recording the stored voice mail message is not contemporaneous with its transmission. *Id.* at 1059. The court, however, refused to dispute the findings of the cases narrowly defining intercept as applied to electronic communications. The court said, "in cases concerning 'electronic communications'–the definition which specifically includes 'transfers' and specifically excludes 'storage'–the 'narrow' definition of 'intercept' fits like a glove; it is natural to except non-contemporaneous retrievals from the scope of the Wiretap Act." *Id.* at 1057.

[124] 18 U.S.C. § 2511(2)(h)(ii).

[125] Wesley College, 947 F.Supp. at 388 (statutory citations omitted).

[126] Steve Jackson Games, 36 F.3d at 463.

[127] *Id.* at 461.

[128] *See* Jarrod J. White, *E-Mail@Work.Com: Employer Monitoring of Employee E-Mail*, 48

In these situations, the provisions of Title I would apply. If, however, the systems administrator uses a tool to monitor unopened e-mail stored as electronic files on a computer server, the legal issues must be evaluated under Title II of the ECPA.[129]

In addition to the determination of which part of the ECPA to apply, both Title I and Title II have three primary exceptions to the general rule prohibiting the interception or accession of electronic communications: (1) interception or accession based on prior consent; (2) to ensure adequate service; and (3) allowing the service provider access, if done in the ordinary course of business. In the context of the use of e-mail and the Internet, it is necessary only to review the applicability of the first two exceptions. The third exception, often called the telephone extension exception,[130] does not apply to computer-based communication.[131]

ALA. L. REV. 1079, 1982 (1997).

[129] 18 U.S.C. §§ 2701-2711; *see also* Bohach, 932 F. Supp. at 1236 n.3.

[130] Williams v. Poulos, 11 F.3d 271, 280 (1993) (citing Campiti v. Walonis, 611 F.2d 387, 392 (1st Cir. 1979)).

[131] *See* White, *supra* note 128, at 1086. To the extent the actions of the Air Force do not fall within the first two exceptions, it is unlikely the third exception will prove useful as a means to avoid the ECPA's prohibitions. The business use exception depends on the type of equipment being used to intercept communications and the reason for the interception. Under the ECPA, intercept means "acquisition of . . . communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). But this definition excludes:

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business . . .

18 U.S.C. § 2510(5)(a). Subsection (a)(i) has two prongs, both of which must be satisfied to qualify for the exception. Sanders v. Robert Bosch Corp., 38 F.3d 736, 740 (4th Cir. 1994). First, the equipment used must be a "telephone or telegraph instrument [or] equipment" furnished in the normal course of a providers business. *Id.* Second, the use of the device must fall within the ordinary course of the subscriber's business. *Id.* The first prong is immediately problematic. "The plain language of this section indicates that telephone or telegraph equipment is required for the exclusion to apply, and it is doubtful that courts will consider a modem (assuming one is even involved) to be telephone equipment." White, *supra* note 144, at 1086. Computers and similar devices used to monitor e-mail and Internet systems also do not constitute a telephone or telegraph instrument or equipment. *See* Robert Bosch Corp., 38 F.3d at 740 (noting that the first prong of the exception was not satisfied because a tape recording device was not a telephone or telegraph instrument or equipment). Thus, it is unlikely this exception could ever be used to justify the Air Force's attempt to monitor electronic communication.

A. Consent

Under the provisions of the ECPA, a party to a communication may consent to interception of the communication or to a third party's access to the stored communication. The consent provision in Title I reads, "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."[132] A similar provision in Title II permits a person or entity to disclose the contents of stored electronic communications when the originator, addressee, or intended recipient of an electronic communication gives lawful consent.[133]

Lawful consent exists when "a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights."[134] Consent may be actual or implied. A party provides actual consent by taking some affirmative action indicating his/her agreement for the content of a communication to be monitored or accessed.[135] Implied consent "is 'consent in fact' which is inferred 'from the surrounding circumstances indicating that the [party] knowingly agreed'" to the monitoring or accession.[136] In most instances, consent will be implied from "language or acts which tend to prove (or disprove) that a party knows of, and assents to, encroachments on the routine expectation that conversations are private."[137] Several factors are important in determining whether a person has consented to intercepting or accessing electronic communications: a written policy that explicitly permits monitoring, using modes of communication reserved for official or authorized use, banners providing notice that communications are monitored, and training programs informing users of the extent of monitoring. These factors may also constitute proof that continued use of an electronic communication, after receiving notice the communication is monitored, constitutes express consent to monitoring.

Under most circumstances, use of a government computer constitutes actual consent to systems protection monitoring. As previously mentioned, Air Force computers are required to have a banner disclosing the possibility of

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[132] 18 U.S.C. § 2511(2)(c).

[133] 18 U.S.C. § 2702(b)(3). "A person or entity may divulge the contents of a communication. . . with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." *Id.*

[134] Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990).

[135] United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988).

[136] Griggs-Ryan, 904 F.2d at 117 (quoting United States v. Amen, 831 F.2d 373, 378 (2nd Cir. 1987)).

[137] *Id.* at 115.

monitoring, including monitoring "for management of the system."[138] This banner appears when the computer user logs onto the system. The user must affirmatively indicate understanding and acceptance of the banner's statement that "using this system constitutes consent to monitoring" and that "all information, including personal information placed on or sent over this system may be obtained during monitoring."[139] By clicking the "OK" button, the user gives consent to monitoring for all lawful purposes.[140]

Even if the act of accepting the conditions in the monitoring banner does not constitute actual consent, sufficient circumstances should exist to find implied consent for a number of reasons. Military members and civilian employees of the Air Force are aware that they are using government-provided computers during the course of their duties. Air Force instructions limit use of government communication resources to authorized and official purposes.[141] Furthermore, a government-provided computer is, generally, within the Air Force's control and does not accompany the member or employee upon reassignment. And finally, data files and e-mail messages are often maintained on a local area network or e-mail server to which the government computer is attached. Under these circumstances, it could be inferred that a military member or civilian employee has knowingly agreed to the monitoring.[142]

B. Provider Exception

The provider exception under both Title I and Title II focuses on the purpose of the interception and disclosure of the communication. If the purpose is to protect the system, the exception applies. Conversely, if there is another purpose behind the system provider's monitoring, the exception does not apply.

Title I statutorily created the provider exception for the interception of the content of electronic communications. The exception reads:

> It shall not be unlawful under this chapter for an operator of a switchboard or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize

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[138] AFI 33-219, *supra* note 96, at ¶ A.2.3.5.
[139] *Id.*
[140] *See* United States v. Monroe, 50 M.J. 550, 558-59 (A.F.C.C.A. 1999) (citing United States v. Maxwell, 45 M.J. 406, 417 (1996)).
[141] AFI 33-119, Electronic Mail (E-Mail) Management and Use ¶ 3 (1 March 1999) [hereafter AFI 33-119].
[142] *See* Monroe, 50 M.J. at 558-59.

service observing or random monitoring except for mechanical or service quality control checks.[143]

The exception has two parts. First, a switchboard operator or employee of a provider of wire or electronic communications service is permitted to intercept, disclose, or use a communication that passes through the service, if done as a necessary incident of the service or to protect the rights or property of the provider. The second part limits public service providers to observation or random monitoring only for mechanical or service quality control checks.

The term "electronic communication service" is defined in the statute as "any service, which provides to users thereof the ability to send or receive wire or electronic communications."[144] "Many commentators, including the Electronic Mail Association, interpret this provider exception broadly to exclude most private employers from ECPA liability for perusing and disclosing employee [e]-mail communications that were transmitted through employer provided [e]-mail systems that use an employer's internal computer system."[145] Thus, it seems the provider exception would apply to the Air Force, as it does to private employers who provide e-mail for their employees.[146] Moreover, the Air Force is not limited by the public provider clause because, while it does provide an e-mail system for official, authorized use, the system is not available for use "[by] the public."[147]

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[143] 18 U.S.C. § 2511(2)(a)(i).

[144] 18 U.S.C. § 2510(15).

[145] Gantt, *supra* note 8, at 359.

[146] The distinction between public and private communications is important. though far from settled. Although not directly applicable to 18 U.S.C. § 2511(2)(a)(1), the reasoning in *Andersen Consulting v. UOP*, 991 F. Supp. 1041 (N.D. Ill. 1998), is persuasive on the point of public versus private services. During other litigation UOP and their attorneys had disclosed the contents of e-mail communications to a newspaper. Andersen sued, claiming a violation of 18 U.S.C. § 2702. In reviewing a motion to dismiss, the court held Andersen failed to state a claim since it could not prove UOP was a provider of an "electronic communication service to the public" under 18 U.S.C. § 2702(a)(1). The court held that the phrase "to the public" limited the prohibition against disclosure found in 18 U.S.C. § 2702 to those providers who are is the business of providing electronic communications services. The court held that a provider of private e-mail systems, such as Andersen's system used by UOP during their business relationship, is not prohibited by 18 U.S.C. § 2702 from disclosing the contents of e-mail transmissions on their systems. *But see* Lopez v. First Union, 129 F.3d 1186 (11th Cir. 1997) (finding bank was a provider of an electronic communication service where complainant established a prima facie claim under 18 U.S.C. § 2702 of the ECPA when bank disclosed contents of electronic funds transfers pursuant to verbal instructions from government agency).

[147] Andersen Consulting, 991 F. Supp. at 1042-43. Despite the well-reasoned opinion in *Andersen Consulting*, the United States Court of Appeals for the District of Columbia in *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998), did not care for a similar argument regarding the provider exception to wire communications. The government had argued that Congress, in making the last clause of the provision applicable only to public providers, had, by negative implication, intended that non-providers could monitor at will. The court found the

Although not directly applicable to electronic communications, a recent case illustrates the application of the exception. In *Berry v. Funk*, the United States Court of Appeals for the District of Columbia found the provider exception extremely limited when applied to wire communications.[148] The appellant complained that various members of the government violated his Fourth Amendment rights and the Wiretap Act by monitoring telephone calls he placed to another individual through the State Department's Operations Center. Known as the "Watch," this "round-the-clock communications center performed a variety of functions, such as generating briefings on world events and serving as a focal point for handling urgent crises."[149] The Watch also serves as a communications node, allowing senior members of the State Department to communicate with other officials. The Watch is able to monitor telephone calls made through its consoles. At the time, the Watch's operations manual did not permit monitoring calls between senior department officials, unless they first requested monitoring. State Department employees monitored Berry's calls to another individual.

Disagreeing with the government's argument that the provider exception relieved Watch officers of civil liability,[150] the court found that monitoring telephone calls, in violation of existing policy, was not within the normal course of a Watch officer's employment.[151] Additionally, the court equated Watch officers with switchboard operators.

> A switchboard operator is authorized to overhear (and disclose and use) only that part of a conversation "which is a necessary incident to the rendition of his service." We think it rather obvious from the statutory language that Congress recognized switchboard operators, when connecting calls, inevitably would overhear a small part of a call, but the exception permitting them to use that content is limited only to that moment or so during which the operator must listen to be sure the call is placed. . . . In short, the switchboard operator, performing only the switchboard function, is never authorized simply to monitor calls.[152]

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government's construction "quite strained and unpersuasive." *Id.* at 1010. The court reversed summary judgment in favor of the government and remanded the case for further proceedings. Should the government argue that the last clause of this provision applies only to public providers, rather intending to allow anyone who is not a provider to monitor at will, the Court may be more accepting of the argument. Although the Air Force does contract for and use communications services provided by public carriers, the scope of this article focuses on monitoring of those systems provided by the Air Force for official use.

[148] Berry, 146 F.3d 1003 (reviewing a grant of summary judgment in the court below).

[149] *Id.* at 1005.

[150] *Id.* at 1010.

[151] *Id.*

[152] *Id.* Despite this broad statement, the circuit court also recognized that there were some instances when an operator is permitted to stay on a line, for example when the operator hears something troubling like murder plans. *See, e.g.,* Adams v. Sumner, 39 F.3d 933 (9th Cir.

The court went on to distinguish switchboard operators from providers of a public communications service, holding that the provision "actually recognizes two exceptions, one for switchboard operators of all kinds, and the second for employees of public providers of wire communications."[153] Unlike switchboard operators, service providers might have a reason requiring them to monitor communications beyond that necessary to determine if a connection has been made, such as providing or protecting the service. The court reasoned that Congress recognized this additional obligation on the part of a public service provider when they fashioned the last part of the clause.[154] Under that language, the only permissible purpose for a provider of public communications to engage in service observation or to perform random monitoring is to check for mechanical or service quality control problems.[155]

The provider exception in Title II is even broader than that in Title I. The statute exempts "a person or entity providing a wire or electronic communications service" from the provisions prohibiting intentional access to stored electronic communications.[156] Moreover, the statute also permits a person or entity to disclose the contents of a stored communication, "as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service."[157] These two provisions allow a service provider to access stored communications and to divulge the contents of those communications when it is necessary to do so to protect the system.[158]

IV. POLICY ISSUES

Monitoring communications for systems protection, which includes access to the content of e-mail messages, may be permissible under the Constitution and the ECPA under the circumstances described above. There are, however, certain policy considerations surrounding systems protection monitoring that impact the decision to intercept or access e-mail. The issues include questions about the extent of a system administrator's responsibility

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1994); United States v. Axselle, 604 F.2d 1330 (10th Cir. 1979); United States v. Savage, 564 F.2d 728 (1977).

[153] Berry, 146 F.3d at 1010.

[154] *Id.*

[155] *Id.* The court ultimately found that the government was not entitled to summary judgement on appellant's claims under the ECPA. *Id* at 1014. The Court vacated the grant of summary judgement and remanded the case for further proceedings. *See also* 18 U.S.C. § 2511(2)(a)(i).

[156] 18 U.S.C. § 2701(c)(1).

[157] 18 U.S.C. § 2702(b)(5).

[158] Bohach v. City of Reno, 932 F. Supp. 1232, 1236 (Dist. Nev. 1996).

when evidence of a crime is inadvertently discovered, whether certain types of privileged communication can or should be protected, and what is in the best interest of the Air Force and the Department of Defense.

A. Inadvertently Discovered Evidence

When the provider of an electronic communication service inadvertently discovers information within an electronic communication that appears to pertain to the commission of a crime, the provider may disclose the content of that communication to a law enforcement agency.[159] This statutory provision is quite different from the ECPA provision restricting an investigative or law enforcement agency that discovers evidence of additional criminal activity during an authorized interception.[160] Section 2517(5) does allow disclosure and use of information concerning criminal acts other than those which were the subject of a wiretap court order obtained by law enforcement.[161] However, disclosure is permitted only after receiving permission from the court following a separate review to determine whether the interception complied with the initial court order.[162] Sections 2511(3)(b)(iv) and 2702(b)(6), on the other hand, allow disclosure of inadvertently discovered information pertaining to the commission of a crime as long as the disclosure is to law enforcement authorities. The ECPA's legislative history supports this theory. Discussing inadvertent discovery, the Senate Report stated:

> [I]f an electronic communications service provider inadvertently obtains the contents of a communication during transmission and the communication appears to relate to the commission of a crime, divulgence is permitted when such divulgence is made to a law enforcement agency. If the provider purposefully sets out to monitor conversations to ascertain whether criminal activity has occurred, this exception will not apply.[163]

Both provisions are based on the theory that information inadvertently discovered during the course of a legitimate intrusion, whether the communication is in progress or is electronically stored, is not an unreasonable invasion of privacy or an unlawful intrusion.[164] The legitimacy of an intrusion by law enforcement officials pursuing a warranted search can be easily tested

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[159] 18 U.S.C. §§ 2511(3)(b)(iv), 2702(b)(6).

[160] 18 U.S.C. § 2517(5). This applies, for example, in situations in which law enforcement officials have a search authorization for the computer files to look for a particular type of evidence and, during the search, they unexpectedly find evidence of another type of criminal activity.

[161] *Id.*

[162] *See* United States v. Williams, 737 F.2d 594 (7th Cir. 1984).

[163] S. Rep. No. 99-541, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3580.

[164] *See* Jacobsen. 466 U.S. at 116.

by the court before the information is released or disclosed.[165] The legitimacy of disclosures of accidentally discovered evidence by a service provider is the more important issue where the Air Force is concerned.

The ECPA provisions permitting a service provider to disclose information to law enforcement authorities are less restrictive than those concerning disclosure of information relating to additional criminal activity discovered during an authorized interception. As noted previously, a provider of an electronic communication service may monitor communications to protect the system. Such monitoring is a legitimate and reasonable intrusion into the electronic communication and any inadvertently discovered evidence may be disclosed to law enforcement authorities. Again, this argument is supported by the ECPA's legislative history.

> The exceptions to the general rule of nondisclosure provided in subsection (b) [of § 2702] fall into three categories . . . . The third category are [sic] disclosures to the government. In this area there are two types of disclosures. Those pursuant to a court order . . . and those disclosures undertaken at the initiative of the service provider in the exceptional circumstances when the provider has become aware of the contents of a message that relate to ongoing criminal activity.[166]

In the military, where ultimate law enforcement authority rests with the commander, a case can be made that, in addition to law enforcement authorities, evidence of a crime inadvertently discovered on a military server may be disclosed to the commander.

From both a policy and a legal perspective, it is important to preserve the distinction between systems protection and law enforcement. Although inadvertently discovered evidence may be disclosed, systems protection monitoring cannot be conducted to identify an individual's criminal activity. The systems administrator's responsibility is to protect the system. To the extent the purpose of monitoring shifts from protecting the system to uncovering criminal activity, the systems administrator becomes an agent of

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[165] *See* United States v. McKinnon, 721 F.2d 19 (1983) (noting that Congress intended that evidence inadvertently discovered during an authorized search by law enforcement authorities be given retroactive judicial approval if the warrant was lawful and not a subterfuge and if the evidence was incidentally discovered). "Congress wished to assure that the government does not secure a wiretap authorization order to investigate an offense as a subterfuge to acquire evidence of a different offense for which the prerequisites to an authorization order are lacking." United States v. Southard, 700 F.3d 1 (1983) (noting that Section 2517(5) was nevertheless designed to permit the use of inadvertently discovered evidence different than that sought during a warranted search provided the court subsequently approves its use) (quoting United States v. Campagnuolo, 556 F.2d 1209, 1214 (5th Cir. 1977)).

[166] S. Rep. No. 99-541 at 37-38.

law enforcement.[167] Thus, after initial disclosure, further monitoring of communications to or from a particular individual or group of individuals, becomes a law enforcement activity and must comply with the requirements for law enforcement surveillance actions.[168] The decision whether there is sufficient information to proceed with a law enforcement investigation or whether to take action based on the evidence inadvertently discovered, should be based on factors outside the realm of systems protection.

B. Protected Communications

Systems protection monitoring also raises policy issues when the system is used to transmit protected communications. Protected communications include communications privileged under a rule of evidence or protected by statute or regulation. For example, communications between attorney and client should be protected in order to retain their privileged character. Communications containing medical information about a particular patient or certain mental health cases, such as drug and alcohol records, are protected. Protection for this kind of information does not cease simply because electronic communications are subject to monitoring. Indeed, the ubiquitous nature of this mode of communication requires greater care to preserve confidentiality. Given the need to monitor electronic communications systems, a policy and practice designed to maintain the protected nature of certain information should be implemented.

The Air Force has begun this process with a move toward professionalizing their systems administrators.[169] Network professionals should be trained in the technical and legal responsibilities of systems administration to identify the types of communications that should receive additional protection. They should be taught not to disclose information discovered during monitoring activities, except for official purposes. Clearly delineating when a systems administrator may make a disclosure of information is crucial in maintaining the protected nature of these communications. Although several different types of communications may be protected, the attorney-client

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[167] This was an important point for the Air Force court in *Monroe*. *United States v. Monroe, 50 M.J. 550, 560 (A.F.C.C.A. 1999).* Although not directly analogous, cases such as *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981), are illustrative. In *Duga*, the Court of Military Appeals found statements made to the accused's friend, a policeman who was not acting on behalf of the Air Force when he questioned the accused, were admissible. *See also,* United States v. Sullivan, 38 M.J. 746 (A.C.M.R. 1993) (interception of cellular telephone conversation by neighbor was not the act of a government agent), *aff'd,* 42 M.J. 360 (1995).

[168] *See* AFI 71-101, *supra* note 4, vol. 1, ¶ 3.3; Walter, 447 U.S. at 658.

[169] *See* AFI 33-115, *supra* note 94.

privilege and an attorney's ethical responsibility to protect client confidences provide a good illustration of the need for additional protection from secondary disclosures.

In the Military Rules of Evidence, the President recognized the existence of a testimonial privilege based on the attorney-client relationship.[170] The privilege protects communications made in confidence when obtaining legal advice.[171] "One of the principal purposes of the attorney-client privilege is to promote the free and open exchange between the attorney and the client . . . ."[172] The evidentiary privilege has two key components. First, the communication must be confidential. Second, the communication must be made for the purpose of seeking legal advice.[173] However, "[t]he attorney-client privilege is not absolute."[174] A communication is not confidential if a communicant intends to disclose it to a third party.[175] In fact, the privilege does not exist when the attorney or the client uses a mode of communication that does not protect confidentiality.

An example of this principle is found in *United States v. Noriega*.[176] This case concerned the recorded telephone conversations between Manuel Noriega and his attorney. The calls were made on a telephone outside the prison cell where he was detained pending trial. Prison officials had informed Noriega that telephone calls were monitored, and the telephone he used had a

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[170] MCM, *supra* note 90, Mil. R. Evid. 502.
[171] United States v. Romano, 46 M.J. 269 (1997); United States v. Rust, 41 M.J. 472 (1995).
[172] United States v. Neill, 952 F. Supp. 834, 839 (Dist. D.C. 1997).
[173] Rust, 41 M.J. at 479; United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991); *In re* Grand Jury Subpoena Decus Tecum, 112 F.3d 910, 920 (8th Cir. 1997). The Army Court of Criminal Appeals quoted *United States v. McCluskey*, 20 C.M.R. 261 (C.M.A. 1955), when addressing the creation of an attorney-client relationship. The Army court stated:

> Based on a policy to scrupulously protect the communications between clients and lawyers, the Court of Military Appeals has articulated the following prerequisites for establishing an attorney-client relationship: "(1) where legal advice of any kind is sough' (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client . . . [are protected as part of the attorney client relationship].")

United States v. Spriggs, 48 M.J. 692, 695 (A.C.C.A. 1998)(quoting McCluskey, 20 C.M.R. at 267 (citation omitted)).
[174] United States v. Noriega, 917 F.2d 1543, 1551 (11th Cir. 1990).
[175] MCM, *supra* note 90, Mil. R. Evid. 502(b)(4); Romano, 46 M.J. at 273. The Eleventh Circuit in *Noriega* describes a two-part analysis to determine when the attorney-client privilege protects a communication from governmental intrusion: (1) when the communication was intended to remain confidential and (2) when "under the circumstances" the communication was "reasonably expected and understood to be confidential." Noriega, 917 F.2d at 1551.
[176] 764 F. Supp. 1480 (S.D. Fla. 1991).

label indicating calls made on the telephone would be monitored. But there was also evidence that prison officials had told Noriega that calls to his attorneys would not be monitored. Because of the ambiguity and confusion in the instructions on how privileged calls should be made, the court found Noriega had a reasonable expectation of privacy in the calls to his attorneys.[177] Upon reaching this conclusion, the court cautioned that had Noriega "actually [been] aware that his calls to his attorneys were being monitored," he would have been unable to claim the protection of an attorney-client communication.[178]

Currently, electronic communications between an Air Force attorney and a client are not transmitted on secured systems, nor are most encrypted. Because otherwise protected remarks lose the privilege when communicated to a third party and both the attorney and the client should be aware that the systems administrator could intercept an electronic communication, the decision to use electronic methods to communicate could vitiate the existence of the attorney-client privilege.[179]

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[177] *Id.* at 1487.

[178] *Id.* at 1487-9. Despite finding an intrusion into the attorney-client privilege, the court refused to dismiss the indictment against Noriega. Intrusions into the attorney-client relationship are not per se unconstitutional. There must be some prejudicial effect from the intrusion. *Id.* (citing Weatherford v. Bursey, 429 U.S. 545, 588 (1977). To be prejudicial, the privileged information must be intentionally obtained, pertain to confidential defense trial preparations or strategy, and must be used to the detriment of the communicant. *Id.* at 1489; Neill, 952 F. Supp. at 840. There are four factors that must be satisfied to find a constitutional violation of the attorney-client privilege:

> (1) whether evidence to be used at trial was obtained directly or indirectly by the government intrusion; (2) whether the intrusion was intentional; (3) whether the prosecution received otherwise confidential information about trial preparation or defense strategy as a result of the intrusion; and (4) whether the privileged information was used or will be used to the substantial detriment of the defendants.

Neill, 952 F. Supp. at 840. In the *Noriega* case, there was no prejudice, since the government had sufficient protections to shield the trial team from intentional disclosures of attorney-client communications contained on the recorded telephone conversations. Noriega, 764 F.Supp. at 1489. Even though a disclosure "escaped" these protections in the *Noriega* case, the disclosure was not intentional. Additionally, the court held there was "no benefit to the prosecution, and no harm to Noreiga's defense, there was no prejudice and therefore no Sixth amendment violation." Noriega, 764 F. Supp. at 1489. The court in *Neill*, while disapproving of the government's choice to use "taint team" procedures to shield a trial team from attorney-client privileged material instead of submitting the materials for an *in camera* review, also found no prejudice from the government's intentional intrusion into attorney-client communications. Neill, 952 F.Supp. at 840-41; *see also* United States v. Calhoun, 49 M.J. 485 (1998) (regarding the procedure used in an Air Force case to shield potential attorney-client information during the search of a defense counsel's office).

[179] Although it is important to maintain the distinction between the evidentiary privilege and an attorney's ethical obligation to protect client confidences, this argument has been accepted by

Before reaching this conclusion, however, it is important to look at the use of electronic communications and the purpose of systems protection monitoring. If a government attorney uses the telephone to communicate with a client, there is the possibility the communication may be monitored under the provisions of TMAP.[180] This type of monitoring has not resulted in an elimination of the attorney-client privilege or the requirement that all communications be conducted in person. In recognition of the need to protect certain privileged information, the TMAP instruction limits secondary disclosures, especially when the communication is obviously protected.[181] In addition, the Eleventh Circuit recognized that "possession of [attorney-client] communications by one element of the government does not necessarily implicate another element."[182] It would seem, therefore, that the recognition that systems administrators may monitor communications does not necessarily eliminate the existence of an attorney-client privilege.

It should also be noted that the ECPA protects privileged communications. The provision reads, "No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."[183] Under this provision, a privileged communication remains privileged, notwithstanding the legality of its interception by a systems administrator monitoring the system.

Interestingly, the protections afforded electronic communications by the ECPA provide the basis for the majority approach on this issue. Although the ethical responsibility to protect client confidences is not resolved by the ECPA, most state bar associations have found that the use of unencrypted e-mail does not violate the attorney's ethical responsibilities, even without the client's express consent to use e-mail.[184] The New York State Bar Association

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the Iowa Supreme Court in addressing an attorney's ethical obligation. Iowa Supreme Court Board of Professional Ethics and Conduct, Opinion 96-1 (1996) (due to an attorney's ethical obligation to protect client confidences, an attorney should not use e-mail for sensitive client communications without encryption or the express consent of the client).

[180] *See* AFI 33-129, *supra* note 1.

[181] *Id.* ¶ 21.6.

[182] Noriega, 917 F.2d 1551 n.10.

[183] 18 U.S.C. § 2517(4).

[184] *See, e.g.,* American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999); Alaska Bar Association, Opinion 98-2, Communication by Electronic Mail (1998); Arizona State Bar Association, Formal Opinion 97-04 (1997); Opinion of the District of Columbia Bar's Legal Ethics Committee, Opinion No. 281 (1998); Illinois State Bar Association, Opinion No. 96-10 (1997); New York State Bar Association Committee on Professional Ethics, Opinion 709 (1998); State Bar Association of North Dakota, Ethics Committee Opinion No. 97-09 (1997); Pennsylvania State Bar Association, Opinion 97-130 (1997); South Carolina Advisory Bar Opinion 97-08 (1997) (overruling South Carolina Bar Ethics Advisory Committee Opinion 94-27). *But see* Iowa Supreme Court Board of Professional Ethics and Conduct, Opinion 96-1 (1996).

Committee on Professional Ethics explained,

> In considering the ethical issue, we believe that the criminalization of unauthorized interception of e-mail certainly enhances the reasonableness of an expectation that e-mails will be as private as other forms of telecommunication. That prohibition, together with the developing experience from the increasingly widespread use of Internet e-mail, persuades us that concerns over lack of privacy in the use of Internet e-mail are not currently well founded.[185]

While a systems administrator may monitor electronic communications, safeguards must be in place to protect against the inadvertent or deliberate release of protected communications. Our systems administrators must have clearly defined guidance on how to protect certain types of communications, and there should be clear penalties for unauthorized disclosure of privileged information. Specific guidance for systems administrators on the release and protection of information has not yet been drafted.[186] This must be done in order to ensure the continued protection of privileged information communicated by electronic methods.

Although current Air Force policy concerning the use of information gathered during TMAP/OPSEC monitoring is not directly applicable to systems protection monitoring and systems administrators, it may be helpful in formulating a policy for systems administrators. The policy relating to the use and disclosure of personal and proprietary information in TMAP reports is based on a requirement to balance the legitimate needs of the government to protect national security against the privacy and civil liberties of those involved in the monitored communication. Systems protection monitoring requires a similar balancing of the legitimate need to protect a communications system against the need to prevent certain types of communications and information from unauthorized disclosure.[187]

The TMAP policy specifically requires personnel monitoring communications to "protect the rights of individuals and proprietary information."[188] Indeed, several provisions offer protection in this regard. Monitors may not use the names of those involved in a monitored

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[185] New York State Bar Association Committee on Professional Ethics, Opinion 709 (1998).

[186] While AFI 33-115, Volume 1, discusses the responsibilities of a systems administrator, there is no guidance in the instruction about the information collected as a part of the systems administrator's duties. *See* AFI 33-115, *supra* note 94, vol. 1.

[187] Although there may not be an expectation of privacy in a government communications system vis a vis a trained systems operator performing systems protection functions, there is still a need to use that system to communicate protected information. Although we may legally monitor the content of these communications, there is a nevertheless a policy reason for instituting some protections of the disclosure and use of certain types of information.

[188] AFI 33-219, *supra* note 96, ¶ 23.

communication, their office symbols, transcripts, or facsimiles of a communication in a TMAP report.[189] A transcript or facsimile may be released, but only if necessary for operational purposes and only if names and personal privacy or proprietary information are removed before release.[190] Finally, inadvertently acquired information disclosing an "emergency situation or [a] situation threatening death or grievous bodily harm" must be reported to appropriate authorities immediately.[191] To the extent such information concerns only a significant crime or significant fraud, waste, or abuse, the communication cannot be reported if it is protected by the attorney-client privilege.[192] If identifying data is included in the report, the information can be used only to prevent future OPSEC problems or for administrative actions for disclosing classified national security information.[193] Disclosed information cannot be used for judicial actions without first submitting the matter to Headquarters Air Intelligence Agency Office of the Director of Operations and the Office of the Staff Judge Advocate, to Networks Division, Systems Directorate of the Air Force Communications and Information Center, and the Secretary of the Air Force General Counsel's Office.[194]

A similar policy should be applied to systems administrators. They should be required to protect information acquired while monitoring the system. If the systems administrator generates a report regarding systems protection activities, the report should exclude the content of a monitored communication, unless protected information, such as names or identifiers that can disclose identity or proprietary information, is removed. Since a systems administrator can disclose inadvertently discovered evidence of criminal activity to a law enforcement official, applicable policy should also protect against the disclosure of attorney-client information.[195] Such a policy will balance the need to protect our communications systems with the need to prevent certain types of information from wrongful disclosure.

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[189] *Id.* ¶ 23.1.
[190] *Id.* ¶ 24.1.
[191] *Id.* ¶ 24.5.
[192] *Id.*
[193] *Id.* ¶ 25.
[194] *Id.*
[195] It might be advisable for attorneys and their clients who use e-mail to communicate to clearly label any messages containing confidences. For example, most e-mail programs allow for a subject line. Similar to labels placed on most legal office FAX cover sheets, a smart attorney will use this subject line to label a confidential message as "Attorney-Client Information." This would put a systems administrator on notice that the information contained in the message is protected and should not be further monitored or released.

C. Department of Defense Policy

Currently, the DoD does not have a specific directive or instruction establishing policy for monitoring electronic communications. The Joint Ethics Regulation does, however, place users of government communications systems on notice that a communications system may be monitored.[196] The Joint Ethics Regulation (JER) also refers to two other DoD directives that apply to telephone monitoring. One directive governs telephone monitoring for communications security[197] and the other establishes policy for monitoring and recording telephone communications.[198] Although these two directives are pending revision, the DoD has indicated that the policy enunciated in both directives should be extended to all types of communications.[199] Unfortunately, both directives were drafted in the 1980s, prior to the explosion in the use of electronic communications. Trying to fit today's electronic communications issues into policy formulated for telephonic communications is like trying to fit a size "1999" foot into a size "1980" shoe. It is difficult at best and requires a great deal of wiggling.

An analysis of the policy found in DoD Directive 4640.1 reveals the problems encountered when trying to overlay telephonic monitoring policy onto electronic communication. This directive permits monitoring and recording communications, provided the information to be gained is necessary to accomplish the DoD mission.[200] The Directive defines "monitoring" as the aural acquisition of a communication.[201] This definition is natural, since the Directive was drafted to apply to telephonic conversations, which by their nature are verbal and can be aurally acquired. The definition's focus is the content of the communication, not that it was made. Because this directive has been extended to electronic communications, as now written the definition must be interpreted to include that type of communication. But, with the exception of video teleconferencing, electronic communications are not verbal communications. To be sure, language makes up the content of the message, but there is currently no way to acquire aurally an e-mail message. If this definition were rewritten to include electronic communications, the term

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[196] Department of Defense Directive 5500.7-R, The Joint Ethics Regulation ¶ 2-301(a)(3) (Aug. 1993) [hereinafter JER].

[197] Department of Defense Directive 4640.6, Communications Security Telephone Monitoring and Recording (June 26, 1981). This directive applies to communications security monitoring and will not be discussed.

[198] Department of Defense Directive 4640.1, Telephone Monitoring and Recording (Jan. 15, 1980) [hereafter DoDD 4640.1].

[199] Telephone Interview with Patti Aronsson, Staff Attorney, Secretary of the Air Force general Counsel's Office (Military Affairs), Pentagon, Arlington, Virginia (Dec 1998).

[200] DoDD 4640.1, *supra* note 198, ¶ D.1.

[201] *Id.* encl. 2, ¶ 1.

monitoring would apply to the acquisition of the content of the communication. The Directive also defines "recording" as the preservation of the contents of a communication through use of electronic, mechanical, magnetic, stenography, or other means.[202] The definition does not include the notes taken by a participant to the conversation.

Finally, the Directive discusses "communications management activities,"[203] defining them as "measures taken to ensure the proper mechanical operation and the efficient use" of a communications system.[204] Recording and analyzing the number and duration of a communication, the total load on the system, and records of communications including those accessed and their duration, all fall within the definition.[205] It appears this term is synonymous with the more current term "systems protection." It follows that any policy relating to communications management activities would, therefore, be applicable to system protection monitoring.

As with the Directive's definitions, the policy for telephonic communication does not mesh well with the realities of electronic communications. In establishing policy for communications management activities, the Directive prohibits recording the contents of a conversation, without specifically defining the term "conversation."[206] Although DoD has indicated that the policy contained in this Directive should apply to any communication, expanding the term "conversation" to include electronic communications without amending the prohibition precludes recording backup disks or tapes of e-mail stored on a server. Clearly, prohibiting backup tapes or disks is not the intention.[207] In order to reconcile the current policy with changes in technology, the term "conversation" would have to be limited to its plain meaning, as an verbal exchange of ideas,[208] or an exception would have to be made for electronic communication. Under this scenario, the directive would either limit the prohibition on preserving the contents of a verbal communication or specifically exempt recording electronic communications for storage.

Extending the telephonic policy in DoD Directive 4640.1 to electronic communications also conflicts with provisions in the JER that permit

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[202] *Id.* encl. 2, ¶ 2.
[203] *Id.* ¶ 3.
[204] *Id.* encl. 2, ¶ 4.
[205] *Id.*
[206] *Id.* ¶ 3a.
[207] Additionally, the directive prohibits interception of communications to determine whether the communication is official or authorized, a necessary purpose behind electronic systems monitoring. *Id.* ¶ 3b. See also 5 C.F.R. § 2635.704(a) (1999), which establishes a duty to protect and conserve Government property and prohibits an employee's use of such property, or allowing its use, for other than authorized purposes.
[208] WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 248 (2 ED. 1983).

monitoring for "any type of use, including incidental and personal uses, whether authorized or unauthorized."[209] The JER does not define "monitoring." In order to reconcile the Directive with the JER, the term "monitoring" in the JER would have to be read as permitting access to the content of stored communications rather than the content of communications in transit. Thus, a systems administrator would not be able to intercept communications as they occur, for example verbal conversations as a part of a video teleconference or keystrokes entering information in a chat room, solely to determine whether the communication was official or authorized. However, the systems administrator would be able to intercept an electronic communication and to access the content of stored communications for systems protection purposes.

Finally, the Directive allows incidental monitoring by operators and maintenance personnel, if the interception is necessary to perform service or mechanical checks and if the parties to the communication are aware of the duration of and the reason for monitoring.[210] This provision was drafted to allow telephone operators to listen to a conversation while making a connection. It also allows maintenance personnel to listen to or record conversations as a part of a service or mechanical check, as long as the parties are informed. To extend the application of this policy to the systems administration function would require that systems administrators be classified as maintenance personnel. Such an extension of policy is, at best, problematic. Systems administrators have a responsibility to ensure the proper operation of their system, however, that responsibility does not, of itself, make systems administrators maintenance personnel. Even if a systems administrator can be called a maintenance person, the DoD Directive would only allow limited monitoring and only for the purpose of testing the system. Additionally, the systems administrator would have to notify the user when the monitoring has begun and when it ends.

Simply extending the policies contained in the DoD Directive to electronic communications could result in gaps in policy and procedure that would ultimately frustrate system protection efforts. Because systems protection monitoring is so crucial to the Air Force and DoD missions, the Directive should be rewritten with electronic communications in mind. The duties and responsibilities of a systems administrator should be clearly established and the policy should be drafted with today's technology in mind. Unlike current policy, a rewritten policy must also be sufficiently flexible to permit application as technology changes.

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[209] JER, *supra* note 196, ¶ 2.3.1(a)(3).
[210] DoDD 4640.1, *supra* note 198, ¶ 3d.

V. CONCLUSION

Systems protection monitoring is an essential part of the Air Force's efforts to "provide effective, efficient, secure, and reliable information network services used in critical Department of Defense and Air Force communications and information processes."[211] As the use of electronic modes of communication increase, so does the potential for harm from both inside and outside the system. The systems administrator and the monitoring function performed by the administrator are essential parts of the defense of our information infrastructure.

Systems protection monitoring is a constitutionally permitted exercise of the government's authority. Air Force members and employees effectively consent to systems protection monitoring and are on notice that a systems administrator may obtain any information sent over the system. The operational realities of the Air Force workplace lead to the conclusion that there is no expectation of privacy for the purposes of systems protection monitoring, though there may be an expectation the content of communications will otherwise be protected. Indeed, just because there is no reasonable expectation of privacy for purposes of systems monitoring does not mean that an Air Force member or employee loses an expectation of privacy in their electronic communications for all purposes.

Systems protection monitoring also does not violate the ECPA's general rule prohibiting interception or accession of electronic communications. The consent exception allows interception or third party access to a stored communication when a party to the communication consents. The systems provider exception allows a provider to intercept an electronic communication or disclose the contents of a stored electronic communication if the interception is necessary to render services, or to protect the rights or property of the provider.

While monitoring communications for systems protection may be constitutionally and statutorily permissible, there are important policy considerations that must be addressed. Although a systems administrator may disclose inadvertently discovered evidence, a systems administrator should not act as the tool of a law enforcement agency. This distinction is important in maintaining the focus of systems protection monitoring as a means of protecting a system from misuse and abuse. The goal of systems protection is not to uncover criminal activity, but to keep the system running properly and ensure the information contained on the system maintains its integrity. If a systems administrator becomes a law enforcement tool, the purpose of monitoring would shift to obtaining evidence against a specific individual or

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[211] AFI 33-115, *supra* note 94, vol. 1, ¶ 1.

group of individuals and would require probable cause and appropriate authorizations.

Another policy consideration involves protected communications. The DoD, should establish specific policies delineating when and to whom a systems administrator can disclose information garnered during systems monitoring. These policies should carefully address subsequent disclosure of certain types of information that would otherwise be protected. The needs of a systems administrator must be balanced with the responsibility to protect privileged information and communications.

Finally, the DoD should specifically address systems protection monitoring of electronic forms of communication. Guidelines must be established that take into account the technological principles, legal parameters, and policy considerations surrounding system protection monitoring. Trying to extend existing policy, which when drafted applied to verbal communications over telephone wires, is extremely difficult and is not likely to be successful.

Challenges come with the growth of new technology. The DoD needs to be able to meet these new challenges. Systems protection monitoring is only one of the tools in the toolbox, but it is an important tool. As we professionalize the duties and responsibilities of the systems administrator, we must make every effort to provide them with well-defined legal guidance. In this way, systems administrators and other network professionals will be better able to serve as that first line of defense in today's extensive but sensitive information environment.

The Joint Commander as Convening Authority: Analysis of a Test Case

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"We're purple today . . . and you get what the Manual gives you."[1]

I. INTRODUCTION

The military joint operating environment has developed significantly since passage of the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Goldwater-Nichols).[2] Despite Goldwater-Nichols attempt to foster greater joint operations among the services, old tensions between joint integration and service autonomy continue at all levels of U.S. military organization.[3] In the administration of military justice in joint organizations, the overlapping authority of joint commander and individual service component commander can create conflicts concerning the resolution of difficult disciplinary cases.[4] As the integration of multi-service assets into

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[1] Statement by Colonel Peter A. Brownback III, Military Judge, in response to an argument by the defense counsel concerning the difference between Air Force and Army regulations and procedures. Record of Trial, United States v. Specialist Eric A. Egan (E-4), March 11, 1998, RAF Alconbury, United Kingdom, at 37 [hereinafter Record]. "Purple" is a term often used to refer to joint operations or the joint environment, an allusion to the mixing of uniform colors.

[2] 1986 DOD Reorganization Act, Pub. L. No. 99-433, 100 Stat. 1013 (codified as amended at 10 U.S.C.A. § 164 (1998) [hereinafter Goldwater-Nichols].

[3] *See* James R. Locher III, *Taking Stock of Goldwater-Nichols*, JOINT FORCES Q., Autumn 1996, at 10-11 (citing comments by former Secretary of Defense Dick Cheney that while Goldwater-Nichols had "significantly improved the way" the military functions, there was still institutional resistance to Goldwater-Nichols, with "each service want[ing] to do its own thing, with its own authority"). *See also* Peter W. Chiarelli, *Beyond Goldwater-Nichols*, JOINT FORCES Q., Autumn 1993, at 71, 78 (noting that service autonomy continues to impede reform of U.S. military organization).

[4] Generally, the joint commander is encouraged to exercise disciplinary authority through the respective service commander. *See*, Joint Chiefs of Staff Publication 0-2, Unified Action Armed Forces, ¶ IV-11 (Feb. 24, 1995) [hereinafter Joint Publication O-2]. However, some have argued that component command and regulatory authority should have no impact on joint organizations and their commanders.

joint units continues to develop, legal advisors to joint commanders are increasingly challenged as they try to juggle the interests of the joint organization and those of the respective component services.

While there is general guidance on how to resolve such issues, there is little in the way of comprehensive legal authority to guide the joint commander in the day-to-day administration of good order and discipline.[5] Both the joint commander and service component commander exercise concurrent jurisdiction for discipline.[6] However, the exercise of a joint commander's disciplinary authority is qualified by doctrine indicating the component authority should generally control the disposition of a case.[7] While doctrine may suggest a decision-making hierarchy with the service component commander at the top, it does not establish a hard-and-fast set of rules to resolve conflicts between joint and component authority. Thus, if a joint commander believes she has the authority to act, she may choose to do so without regard to the doctrinal preference for disposition by the service component commander. In other words, commanders like to command and they do not like limits placed on their authority, especially ones they perceive as advisory and not binding. As such, there exists a potential for conflicts between the joint and service component commanders.

If both the joint and service component commander agree on the disposition of a case, justice will usually be administered through the offender's component chain of command. However, the joint commander and the service component commander could differ in their opinions on the disposition of a case. In addition, if the joint commander is not satisfied with the service component commander's proposed solution, there could arise a question as to whose authority is paramount. A serious case could occur where a joint commander decides to exercise his or her authority to convene a court-martial without regard to the recommendations or desires of the service

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> The growing role of the joint commander will reduce the role of the component commander. As a result, the impact of component regulations and policies will diminish, and divergence among the regulations and policies will become increasingly vestigial. Absent compelling reasons to the contrary, joint force commanders should have clear disciplinary authority over their subordinates. Their judge advocates must push to make that happen.

Lieutenant Colonel Marc L. Warren, *Operational Law - A Concept Matures*, 152 MIL. L. REV. 33, 66 (1996)

[5] *See generally* Major Grant Blowers and Captain David P. S. Charitat, *Disciplining the Force, Jurisdictional Issues In the Joint and Total Force,* 43 A.F. L. REV. 1 (1997).

[6] *See* Joint Publication 0-2, *supra* note 4, ¶ IV-11.

[7] The weight of regulatory authority strongly encourages the administration of good order and discipline through the respective component service. Joint Publication 0-2, *supra* note 4, at ¶ IV-11(b); MANUAL FOR COURTS-MARTIAL, United States (1998 ed.) [hereinafter MCM], Rules for Courts-Martial 201 [hereinafter R.C.M.]; Air Force Instruction 51-201, Administration of Military Justice ¶ 2.4 (Oct. 3, 1997) [hereinafter AFI 51-201].

component commander. Joint doctrine and regulation do not steer a clear path through these issues and leave resolution of such matters to joint commanders and their advisors.

A recent special court-martial held in the United Kingdom highlights this problem and provides the foundation for this article. In that case, the commander of a joint unit (an Air Force colonel) disagreed with the recommendation of the service component commander (an Army lieutenant colonel) regarding resolution of a case, choosing instead to exercise her authority to convene a special court-martial against an Army enlisted member.[8] The case of *United States v. Specialist Eric A. Egan*[9] was the first truly joint court-martial of record tried in the United States armed forces and provided a myriad of unprecedented issues before, during, and after trial.[10] Consequently, the *Egan* case presented a "real world" test case for military justice in the developing joint environment.

This article first reviews the development of military justice authority in the joint environment created by Goldwater-Nichols, focusing specifically on its impact on a joint commander's authority to convene courts-martial. Thereafter, joint doctrine's impact on a joint commander's authority to administer military justice is examined. The focus then turns to the Joint Analysis Center (JAC) at RAF Molesworth, United Kingdom, and an analysis of the case of *United States v. Specialist Eric A. Egan.* Finally, the impact that the case may have on the future of military justice in the joint environment is discussed.[11]

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[8] A United States Air Force colonel was the commander (COMJAC) of the Joint Analysis Center (JAC), United States European Command (USEUCOM) at the time. The COMJAC position alternates between the Army and Air Force approximately every two years. The COMJAC has special court-martial convening authority. *See* United States European Command Directive 45-4, Administration of Military Justice ¶ 7(e)(7) (8 January 1997) [hereinafter USEUCOM Directive 45-4].

[9] The authors served as cocounsel in this case. At the time this article was written, the case had been forwarded to the Army Court of Criminal Appeals for review but had not yet been reviewed by the Court.

[10] Contact with representatives from the offices of all unified and specified command legal advisors, as well as representatives from the military justice divisions of the Air Force and Army legal services agencies, revealed no record of a previous case where a joint commander exercised court-martial convening authority (general or special) over a member of a joint unit. In fact, at the time this article was written, USEUCOM Directive 45-4, which confers such authority on the COMJAC, did not have a counterpart in the directives governing military justice in other unified or specified command. USEUCOM Directive 45-4, *supra* note 8, at ¶ 7(e)(7). In reference to the term "joint court-martial," while judge advocates from different services might have served as a military judge, trial counsel, or defense counsel in cases for branches other than their own, the term as used in this article refers to a court-martial convened by a joint commander empowered under R.C.M. 201(e)(2).

[11] This examination of a joint commander's authority to convene courts-martial and the prosecution of a joint court-martial is meant to provide a reference to the joint legal advisor and trial practitioner for convening, prosecuting, and defending similar joint cases in the future.

II. MILITARY JUSTICE IN THE JOINT WORLD FROM GOLDWATER-NICHOLS TO PRESENT

A. The Goldwater-Nichols Act, Article 23(a)(6), UCMJ, and Rule for Courts-Martial 201(e)

The debate over reciprocal court-martial jurisdiction, which began in 1949 as Congress considered proposed Uniform Code of Military Justice (UCMJ) Article 17,[12] remains alive nearly fifty years later. The drafters of Article 17, UCMJ, envisioned a future level of joint operability that would necessitate joint court-martial convening authority, but they likely never anticipated the remarkable moves towards joint operations that have taken place over the last fifty years.[13]

Goldwater-Nichols, which became law on 1 October 1986, was hailed at the time as "'one of the landmark laws of American history'"[14] and "probably the greatest sea change in the history of the American military since the Continental Congress created the Continental Army in 1775."[15] One of Congress's eight declared purposes in passing Goldwater-Nichols was to ensure that the authority of commanders of unified and specified combatant commands was fully commensurate with the responsibility of those commanders for the accomplishment of assigned missions.[16] To meet this objective, pertinent changes were made to both the UCMJ and the Rules for Courts-Martial (R.C.M.).

Goldwater-Nichols amended Article 22, UCMJ,[17] with the creation of Section 211(b),[18] which enhanced joint commander-in-chief command authority. This extended general court-martial convening authority to "the commanding officer of a unified or specified combatant command."[19] In

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[12] Uniform Code of Military Justice [hereinafter UCMJ] art. 17, 10 U.S.C.A. § 817 (1998) (concerning jurisdiction for courts-martial).

[13] *See generally* Peter M. Murphy and William M. Koenig, *Whither Goldwater-Nichols*, 43 NAV. L. REV. 183, 185-187 (1996).

[14] Locher, *supra* note 3, at 10 (quoting Congressman Les Aspin, then Chairman of the House Armed Services Committee).

[15] *Id.* The delineation of military authority was a controversial issue for the new United States Congress in the years following the American Revolution. *See* Pablo Ruiz-Tagle, *Reflections on the Origins of American Military Institutions*, 2 J. LEG. STUD., 113, 115 n.23 (1991) ("[T]he Secretary of War, other civilian officers, and the military chiefs shared functions which were imprecisely delineated. This understandably resulted in competition.").

[16] Locher, *supra* note 3, at 11.

[17] UCMJ art. 22, 10 U.S.C.A. § 822 (1998) (concerning the identification of the proper authority to convene general courts-martial).

[18] Goldwater-Nichols, *supra* note 2, § 211(b).

[19] *Id.* General court-martial convening authority is the authority given to commanders at certain levels to order a general court-martial to be held to try serious violations of the UCMJ, such as rape and murder. By contrast, special court-martial convening authority is the

addition, R.C.M. 201(e) was amended to allow those commanders-in-chief granted general court-martial convening authority pursuant to Article 22, UCMJ, to "expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces under regulations which the superior commander may prescribe."[20]

Subsequently, three ways developed in which a commander of a joint unit could be authorized to exercise special court-martial convening authority. First, the Secretary of Defense could designate or empower the commander to exercise special court-martial convening authority.[21] Second, the commander could be authorized to act as a convening authority by the joint or specified commander-in-chief.[22] Third, joint commanders not otherwise authorized to exercise special court-martial convening authority could still be authorized to do so pursuant to Article 23(a)(6), UCMJ, if they qualified as a "subordinate [joint force commander] of a detached command or unit."[23] Separate or detached unit is defined as a unit that is "isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline."[24] While the changes to the UCMJ and the R.C.M. appear straightforward, the actual exercise of court-martial convening authority continued to be somewhat restricted by joint doctrine that developed after passage of Goldwater-Nichols.

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authority granted to commanders at certain levels to order a special court-martial to try allegations of less serious criminal conduct.

[20] MCM, *supra* note 7, R.C.M. 201(e)(2)(C). This provision of R.C.M. 201 was amended by Change 3 to the *Manual For Courts-Martial on* March 3, 1987. It should be noted this provision could potentially be interpreted to limit commander-in-chief special court-martial convening authority authorization to those commanders who are already empowered by their service to convene special courts-martial; in other words, those who are "dual-hatted" as single service and joint commanders. Although the defense did not raise this issue during the *Egan* case, an argument could have been made that COMJAC did not qualify as a special court-martial convening authority under R.C.M. 201(e)(2)(C) because she had not been independently provided this authority by the Air Force.

[21] UCMJ art. 22(a)(3), 10 U.S.C.A. § 822.

[22] MCM, *supra* note 7, R.C.M. 201(e)(2)(C). This regulatory authority is cited by USEUCOM Directive 45-4 as the basis for providing COMJAC with special court-martial convening authority.

[23] Joint Publication O-2, *supra* note 4, ¶ IV-12. As discussed above in note 20, if an argument were made that the COMJAC was not a duly authorized special court-martial convening authority under R.C.M. 201(e)(2)(C) because she was not "dual-hatted," a contrary argument could be made that the JAC is a "separate or detached unit" such that COMJAC would, indeed, have special court-martial convening authority pursuant to Article 23(a)(6), UCMJ. *See* UCMJ art. 23(a)(6), 10 U.S.C.A. § 823(a)(6) (1998).

[24] MCM, *supra* note 7, R.C.M. 504(b)(2)(A).

B. The Evolution of Joint Military Justice Doctrine In The European Command

1. Joint Actions Among European Armed Forces

Joint actions among services in Europe are controlled by Joint Publication O-2. Joint Publication O-2 places primary responsibility for good order and discipline in a joint command on the joint force commander.[25] That document also stresses the importance of having the service component commander utilize the actual exercise of authority, a fundamental principle of joint doctrine which tips the balance of military justice command authority in favor of the service component commander.[26] Nevertheless, Joint Publication O-2, consistent with Goldwater-Nichols and with the amendments to Article 22, UCMJ, and R.C.M. 201(e), authorized commanders-in-chief to designate subordinate joint force commanders as special-court-martial convening authorities.[27] In the United States European Command (USEUCOM),[28] the commander-in-chief utilized this authority to designate the Joint Analysis Center commander (COMJAC) as a special court-martial convening authority under USEUCOM Directive 45-4.[29]

[25] Joint Publication O-2, *supra* note 4, ¶ IV-11(a). "The [Joint Forces Commander] is responsible for the discipline and administration of military personnel assigned to the joint organization." *Id.*
[26] *Id.* ¶ IV-11(c). "The [Joint Forces Commander] should normally exercise administrative and disciplinary authority through the Service component commanders to the extent practicable." *Id.* The implication is that while the joint commander has initial decision-making authority, the actual administration of military justice remains with the service component commander.
[27] *Id.* ¶ IV-12.
[28] The United State European Command (USEUCOM) is one of nine unified and specified joint commands under which United States Armed Forces have been organized since passage of the Goldwater-Nichols Act. *See,* ARMED FORCES STAFF COLLEGE, DEPARTMENT OF DEFENSE, PUBLICATION 1, THE JOINT STAFF OFFICER'S GUIDE 2-206(h) (1997).
[29] USEUCOM Directive 45-4, *supra* note 8, ¶ 7(e)(7). "Pursuant to R.C.M. 201(e)(2)(A) and 201 (e)(2)(c) . . . COMJAC is authorized to convene Special Courts-Martial and Summary Courts-Martial over a member of any of the Armed Forces assigned to the JAC." *Id.* The Directive goes on to qualify this provision. "Generally, this option will be exercised when the misconduct arises from a joint origin or has joint force implications. Normally, courts-martial cases will be referred to the appropriate servicing legal office for referral and disposition." *Id.* Thus, the Directive mirrors the joint-component service balancing of interests incorporated into the Joint Publication 0-2. One might argue, however, that any case within a joint organization has "joint service implications" simply because the soldiers, sailors, Marines, and airmen work side by side and are aware of disciplinary actions taken within the unit, thus affecting the deterrent impact of any disciplinary action. Of course, this is the concern that lead the JAC commander to convene *United States v. Egan.* Nevertheless, in the interests of maintaining the unique standards of each service, the provision is generally interpreted narrowly, requiring articulation of a specific joint impact.

2. The European Military Justice Directive

Senator Goldwater predicted that meaningful implementation of many of the changes included in Goldwater-Nichols would require five to ten years time.[30] In the arena of joint military justice, this prediction was particularly prescient. In early 1997, USEUCOM promulgated a military justice directive for joint commanders within the command. USEUCOM Directive 45-4, Administration of Military Justice, dated January 8, 1997, implemented the policies and principles of Joint Publication O-2. Among other things, it marked the first time that joint court-martial convening authority was delegated to a subordinate special court-martial convening authority pursuant to R.C.M. 201(e)(2)(C).[31] It was upon this unique development in joint command authority that the *Egan* case would later be based.

III. *UNITED STATES v.* *SPECIALIST ERIC ANTHONY EGAN*

A. Background

The setting for the *Egan* case was the Joint Analysis Center (JAC), USEUCOM. The JAC is the primary intelligence organization for USEUCOM. It is located approximately sixty miles north of London at RAF Molesworth in Cambridgeshire, England.[32] At the time of the *Egan* case, it consisted of over 850 military personnel, including 560 Air Force, 149 Army, 145 Navy, and ten Marines.[33] The JAC, which stood up in 1991, is a tenant unit at RAF Molesworth, United Kingdom, supported by the host unit, the 423rd Air Base Squadron (423 ABS), a United States Air Forces in Europe organization consisting of over 280 Air Force personnel.[34] The support agreement between these organizations states that the Office of the Staff Judge Advocate for the 423 ABS (423 ABS legal office) will provide general legal services to the JAC, to include areas such as military justice, on the same basis as that provided to the 423 ABS.[35] Nevertheless, each branch has available to

[30] *See* Locher, *supra* note 3, at 10.
[31] *See supra* note 10 and accompanying text.
[32] The acronym "RAF" stands for Royal Air Force, and it serves as a means to identify British Air Force bases.
[33] Interview with Patrick D. Murray, Chief of Manpower, Joint Analysis Center, RAF Molesworth, United Kingdom (May 31, 1998); and Staff Sergeant John V. Hover, 423 Air Base Squadron Commander Support Staff, RAF Molesworth, United Kingdom (May 31, 1998). The manning information is actually contained in the base computer system known as PC III. The JAC also had over 700 civilian personnel assigned from different federal agencies.
[34] Interview with Patrick D. Murray, *supra* note 33; Interview with Staff Sergeant John V. Hover, *supra* note 33. The term "stood up," a military term, means to begin operation.
[35] DD Form 1144, Interservice Support Agreement No. FB5643-950712-001, ¶ B-23, at 17 (dated 12 Jul 95) (on file with the 423 ABS/XP, RAF Molesworth, United Kingdom). Other services include claims, legal assistance, civil law, and international law.

it a component legal office and, as originally conceived, substantive military justice matters were to be processed through the respective component service legal office. In other words, 423 ABS legal office, an Air Force unit, was to provide only general military justice guidance, leaving the ultimate disposition of a case to the component service legal office.[36]

The servicing legal offices for the Navy are located in London at the Naval Legal Service Office[37] and the office of Commander, Naval Activities, United Kingdom.[38] The Army legal office, which services the JAC, is at the 254th Base Support Battalion (254th BSB) in The Netherlands.[39] While each branch of the service maintains a legal point of contact for their component services at the JAC, the Air Force is the only branch with a legal office located at the installation.[40] Over time, the geographic convenience of 423 ABS legal office resulted in greater reliance by all branches at the JAC on that office for legal advice and the processing of military justice actions.[41] Until the *Egan* case, however, all courts-martial of JAC personnel had been convened by the respective service's convening authority.

B. Facts of the Case

On July 28, 1997, Specialist Eric Anthony Egan, an imagery intelligence specialist assigned to the Joint Analysis Center, reported to his orderly room for random urinalysis.[42] Subsequent testing of his sample revealed the presence of "Ecstasy," a Schedule I controlled substance.[43] On September 23,

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[36] For example, if a Navy member engaged in misconduct, the senior Naval officer at the JAC might call 423 ABS legal office to find out how to obtain an investigation or to gain a general idea of how the case should be handled, but the staff judge advocate for the component service commander would provide a recommendation for disposition and process the case from that point forward.

[37] The Naval Legal Service Office, London, which previously provided defense and legal assistance to Navy personnel assigned to the JAC, was shut down in October 1998.

[38] The office of Commander, Naval Activities, United Kingdom, serves as the component special court-martial convening authority for Navy cases at the JAC.

[39] The Commander, 254th BSB, serves as the summary court-martial convening authority for Army cases at the JAC. The Commander, 21st Theater Army Area Command, serves as the special and general court-martial convening authority for Army cases at the JAC.

[40] This has resulted in the 423 ABS legal office providing significant legal support to all branches of service at the JAC, to include prosecutorial support as well as drafting non-judicial punishment for all three branches of the service.

[41] The 423 ABS legal office officially became the sole contact point for all military justice matters with the enactment of Joint Analysis Center Directive 45-4, *Administration of Military Justice at the Joint Analysis Center, USEUCOM* ¶ 1.6 (15 December 1998). The 423 ABS legal office is required to coordinate with the respective component service staff judge advocate, but most military justice matters are handled "in-house."

[42] Record, *supra* note 1, Prosecution Exhibit 1, at 19.

[43] The chemical name for Ecstasy is 3,4-methylenedioxymethamphetamine (also commonly referred to as "MDMA"). It is listed as a Schedule I controlled substance under 21 U.S.C.A. § 1308.11 (1998).

1997, shortly after the unit was notified of the test results and the local detachment of the Air Force Office of Special Investigations began its investigation, Specialist Egan voluntarily waived his Article 31, UCMJ,[44] rights and provided a signed, sworn statement. In this statement, he admitted to an extensive history with illegal drugs while on active duty, including: using cocaine and marijuana near Fort Gordon, Georgia, in December 1995 with two other Army members; using Ecstasy near his current duty station in the United Kingdom in January 1997 after purchasing the drug with a British friend; distributing Ecstasy near his current duty station in the United Kingdom to British nationals in June 1997; obtaining amphetamine and marijuana near London to provide to British nationals in the spring 1997.

After notification of the urinalysis results and Specialist Egan's confession, the Army element commander at the JAC (a captain) forwarded the evidence to the Army Legal Service Center at the 254th BSB. On October 15, 1997, the Army element commander received a response from the Army legal office at the 254th BSB recommending Specialist Egan be discharged as a first time offender without further non-judicial or administrative action.[45] Subsequently, the Army element commander contacted the local Air Force legal office. She was advised that in the previous two years, five courts-martial had been convened against JAC personnel (including three Air Force and two Navy members, all of similar rank to Specialist Egan), for drug offenses less serious in nature and degree than those presented in the case of Specialist Egan. Accordingly, the 423 ABS legal office advised the Army element commander to take Specialist Egan to a court-martial in order to prevent an appearance of inconsistent treatment among the services.

C. Initial Army Disposition of Case

In November 1997, the Army element commander decided to accept the recommendation of the 423 ABS legal office and prefer court-martial charges against Specialist Egan. At this point, a decision was made that pursuant to USEUCOM Directive 45-4 and Joint Publication O-2, both of which establish a preference for using the service component convening authority of the accused, this action should be processed through the Army chain of command. After extensive communication with both the Army and Air Force legal offices, the Army element commander preferred charges against Specialist Egan on January 9, 1998, and, in accordance with Army

[44] UCMJ art. 31, 10 U.S.C.A. § 831 (1998).

[45] Memorandum for Record, Captain Melinda K. Tilton, United States Army Element Commander, JAC, USEUCOM, entry for October 15, 1997 (July 28, 1997 to February 9, 1998) (on file with 423 ABS legal office). During additional communications with the Army legal office, Capt Tilton was told there was insufficient evidence for a court-martial because of a lack of corroboration and that if Specialist Egan was court-martialed, he would probably only receive a reduction in rank without jail time or a punitive discharge. *Id.*, at entry for October 20, 1997.

regulations, the charges were forwarded to the commander of the 254th BSB, the summary court-martial convening authority, for review.[46]

On February 3, 1998, the commander of the 254th BSB returned the charges to the element commander at the JAC with a recommendation for dismissal and disposition at a lower level. As a result, the Army element commander and the JAC command section were at a crossroads. The Army element commander had to either accept the 254th BSB's recommendation and resolve the matter at her level or forward the case to COMJAC with a recommendation to convene a special court-martial under the authority granted by USEUCOM Directive 45-4.[47] In the interest of consistency, she chose the latter.

D. Convening a Joint Special Court-Martial

The task of taking Specialist Egan to a joint court-martial fell to the Air Force's 423 ABS legal office. The most troublesome problem was the simple fact that utilizing joint court-martial convening authority was unprecedented. While some "interservice" courts-martial involving reciprocal jurisdiction had taken place, there had been no reported cases of a joint commander on any level convening a court-martial.[48] Consequently, there was an absence of authority and precedence to guide the processing of a joint court-martial.

Nevertheless, the decision was made to proceed. The COMJAC was asked to consider convening a special court-martial pursuant to USEUCOM Directive 45-4. The charges were repreferred on February 19, 1998, by the JAC Chief of Staff (an Army lieutenant colonel).[49] On February 27, 1998,

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[46] Army Regulation 27-10, Military Justice ¶ 13-6 (May 6, 1996) [hereinafter AR 27-10]. Under Army regulations, the summary court-martial convening authority could, among other things, forward the charges to the special court-martial convening authority, order an Article 32, UCMJ, hearing to determine if a general court-martial was appropriate, or return the charges for other disposition. In this case, the 254th BSB commander chose the latter. Preferral of charges refers to the process by which the accused is officially notified of the charges against him. This act begins the court-martial process. *See* MCM, *supra* note 7, R.C.M. 307.

[47] *See* USEUCOM Directive 45-4, *supra* note 8, ¶ 7(e)(7).

[48] Reciprocal jurisdiction under R.C.M. 201(e) refers to that authority which allows a single service convening authority from one branch to convene a court-martial against a member from another branch. *See, e.g.,* Major Michael J. Berrigan, *The UCMJ and the New Jointness: A Proposal to Strengthen the Military Justice Authority of Joint Task Force Commanders*, 44 NAV. L. REV. 59, 114 n.197 (1997) (citing cases involving reciprocal jurisdiction). In those cases, the court-martial would presumably have been processed according to the customs and regulations of the convening authority's branch of service. However, when the authority to convene a court-martial comes from a joint directive, it is not precisely clear which regulations control basic procedural issues. *Id. See also supra* note 10 and accompanying text.

[49] Record, *supra* note 1, DD Form 458 (Charge Sheet), at 19. The charges were repreferred because the belief was that the Army summary court-martial convening authority had actually dismissed the charges on February 3, 1998. Memorandum from Lieutenant Colonel Guadalupe, Commander, 254th Base Support Battalion (February 3, 1998) (on file with 423

COMJAC referred the charges to a special-court martial consisting of a panel of Army officers assigned to the JAC.[50] After coordination with the Army's Fifth Judicial Circuit (serving both European and Central Commands), an Army judge was assigned and arraignment was scheduled for March 11, 1998.

E. Trial

1. Detailing Participants to a Joint Court-Martial

The case of *United States v. Specialist Eric A. Egan*, was convened on March 11, 1998 in the United States Air Force courtroom at RAF Alconbury, United Kingdom. Assembled in the courtroom were the accused, a military judge and defense counsel from the Army, an Air Force defense counsel, an Air Force prosecutor, and a civilian court reporter who worked for the Air Force.[51] While a special court-martial obviously needs a military judge, trial and defense counsel, and a court reporter to proceed, the determination which service the respective participants should come from was a novel issue.

R.C.M. 503 and Articles 26 and 27, UCMJ,[52] discuss the detailing of military judges and counsel, but provide no guidance for a joint court-martial. R.C.M. 503(b)(1) and (c)(1) state the military judge and counsel, respectively, "shall be detailed in accordance with regulations of the Secretary concerned."[53] However, in the case of a joint court-martial, there is no "Secretary concerned," nor are there any joint publications addressing specific administrative military justice procedures in the kind of detail provided in Air Force Instruction 51-201 or Army Regulation 27-10 (AR 27-10).[54] As a result, the parties in *United States v. Egan* were assembled using the time-tested principles of expediency, availability, and common sense.

ABS legal office); Record, *supra* note 1, Appellate Exhibit VIII, at 27. In fact, he had only recommended dismissal and the initial charges where not actually dismissed until the military judge did so at trial. Record, *supra* note 1, at 31.

[50] The discussion adjoining R.C.M. 503(a)(3) states that "[M]embers should ordinarily be of the same armed force as the accused." MCM, *supra* note 7, R.C.M. 503(a)(3). As such, the initial decision was to select Army officers to sit as members. The COMJAC's decision in that regard was consistent with R.C.M. 503. Later, as discussed below, the accused requested enlisted members. Record, *supra* note 1, at 45. At that time, the decision was that any enlisted members would be selected from among all of the branches serving at the JAC. *Id.* at 11-12, 40-45. The term "referred" is used to describe the order by the convening authority that a court-martial take place. See MCM, *supra* note 7, R.C.M. 202.

[51] Record, *supra* note 1, at 2.

[52] UCMJ arts. 26, 27, 10 U.S.C.A. §§ 826, 827 (1998).

[53] MCM, *supra* note 7, R.C.M. 503(b)(1), (c)(1).

[54] Joint Publication O-2 only provides a theoretical/policy-oriented overview of military justice in the joint operations world. *See generally* Joint Publication 0-2, *supra* note 4. Likewise, although USEUCOM Directive 45-4 designates COMJAC as a special court-martial convening authority for JAC personnel, it provides no detailed guidance for conducting any courts-martial COMJAC might convene. *See* USEUCOM Directive 45-4, *supra* note 8, ¶ 7(e)(7).

The military judge, Colonel Peter A. Brownback III, assigned himself to the case.[55] The lead defense counsel, Captain Jason B. Libby, a Trial Defense Service Counsel in Kaiserslautern, Germany, was assigned to the case by the Regional Defense Counsel, Region VII, United States Army.[56] A second defense counsel, Air Force Captain Edward Damico, was assigned to the case by the Chief Circuit Defense Counsel for the Air Force's European Judicial Circuit.[57] The prosecutor, Air Force Captain Thomas A. Dukes, Jr., was assigned to the case by COMJAC's staff judge advocate, Major Chris Farris.[58] The court reporter, Ms. Jackie Davidson, was made available by the 100th Air Refueling Wing's legal office at RAF Mildenhall, United Kingdom.[59] The accused raised no objection to the participation of the above-mentioned personnel, and the record duly reflected that each of them had been properly certified, designated, assigned, and sworn.[60]

The Manual for Courts-Martial (MCM) is silent, however, on many minor procedural considerations. Thus, it was not surprising, given the branch of the service of the presiding judge, that the proceedings often had a decidedly olive tinge. This was particularly evident during the initial Article 39(a), UCMJ,[61] session where all parties wore the battle dress uniform.[62] Another

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[55] Record, *supra* note 1, at 2. Based on the lack of precision in the wording of R.C.M. 503(b)(3), the military judge obtained permission from the designee of the United States Army Judge Advocate General to detail himself to the case. While R.C.M. 201(e)(4) does not prohibit detailing a military judge to a case in which the military judge is not of the same service as the accused or the convening authority, R.C.M. 201 does not specifically authorize such detailing. *See* MCM, *supra* note 7, R.C.M. 201.

[56] Record, *supra* note 1, at 3.

[57] *Id.*

[58] *Id.* at 2. The U.S. Army's 21st Theater Army Area Command Legal Office was, not surprisingly, unwilling to provide a trial counsel for the prosecution of an accused against whom they had recommended dismissing all charges and processing for administrative discharge. After the initial Article 39(a), UCMJ, session and before trial on March 18, 1998, Air Force Captain William H. Walsh was assigned as trial counsel with Captain Dukes. Army SGT Daniel Griffith, replaced the civilian court reporter who had been present during the initial Article 39(a) session on March 11, 1998. *Id.* at 38-39.

[59] *Id.* at 2.

[60] *Id.* at 1-3.

[61] UCMJ art. 39(a), 10 U.S.C.A. § 839 (1990). Article 39(a), UCMJ, sessions are hearings outside the presence of the court member panel, during which evidentiary or other issues may be discussed.

[62] Record, *supra* note 1, at 6. The battle dress uniform (BDU) is generally regarded as the utility/fighting uniform in the Air Force and Army. This uniform has a mottled greenish brown appearance. Those familiar with Naval trial practice know that participants are often required to appear in court in short-sleeve khaki uniforms, a custom that has developed due to the necessity to limit the type of uniforms one takes to sea. The custom applies to courts-martial on land and sea. Air Force members are virtually always required to wear formal service dress uniforms for all open sessions of court unless permitted to wear another uniform by the military judge.

interesting note for Air Force trial practitioners was the fact that in accordance with Army practice, the arraignment was held as soon as possible–in this case fourteen days–after referral of charges. In addition to considering motions and the entry of pleas, this initial Article 39(a) session included the negotiation and determination of the trial date.[63] Prior to entry of pleas, there were several unique issues and motions that arose from the joint nature of the trial.

2. Forum Selection – Enlisted Members

The convening order included seven Army officer court members selected by COMJAC.[64] As the military judge advised the accused of his forum rights, including the right to request enlisted court members, there arose the question of how to define the accused's "unit" for purposes of Article 25(c), UCMJ.[65] Article 25(c)(1), UCMJ, provides that "[a]ny enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve" as a member of a court-martial of that enlisted accused.[66] Article 25(c)(2), UCMJ, states that a unit is "any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them."[67] In an attempt to determine what constituted the accused's unit, the JAC's first sergeant was called as a witness and testified the JAC had approximately 180 assigned Army personnel, organized into an element commanded by an Army captain.[68]

The military judge initially ruled that based upon the JAC first sergeant's testimony it appeared that all Army enlisted personnel assigned to the JAC were members of the accused's unit, thereby rendering them ineligible to sit as court members.[69] Defense counsel challenged this position on two grounds: first, that the same "fundamental fairness concepts" which had led COMJAC to select only Army officers as court-members on the convening order should apply to enlisted members;[70] and second, that this was a "unique situation . . . not envisioned by the drafters of [Article] 25(c)."[71] Through

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[63] *Id.* at 34. Although this practice requires the parties to assemble at least twice in most cases, it reduces the delay often caused by negotiating an initial trial date, eliminates most speedy trial concerns, and generally speeds up the initial processing of a case.
[64] *See supra* note 50 and accompanying text.
[65] 10 U.S.C.A. § 825 (1998); Record, *supra* note 1, at 8-18.
[66] UCMJ art. 25(c)(1), 10 U.S.C.A. § 825(c)(1) (1998).
[67] UCMJ art. 25(c)(2), 10 U.S.C.A. § 825(c)(2).
[68] Record, *supra* note 1, at 8-11. A First Sergeant is a senior noncommissioned officer who is specially selected and trained for the position. They exercise general supervision over all enlisted members in the unit and assume responsibility for the health, welfare, morale, and readiness of the unit by serving as a liaison between a unit's enlisted members and the commander.
[69] *Id.* at 11.
[70] *Id.* at 14, 17-18.
[71] *Id.* at 13.

further discussion, defense counsel conceded certain points to the military judge. First, if the U.S. Army enlisted contingent satisfied the Article 25(c), UCMJ, definition of unit, then all Army enlisted personnel assigned to the JAC would be ineligible to sit as court-members in the case. Second, the entire JAC enlisted contingent of approximately 700 personnel was larger than a unit as contemplated by Article 25(c), UCMJ. Finally, Article 25(c), UCMJ, would allow enlisted personnel from other services assigned to the JAC to be detailed as court-members.[72] Following a lengthy discussion between the military judge and counsel, the judge decided to defer ruling on the issue, pending the production and review of "assumption of command orders" for the Army element commander.[73] Ultimately, the issue was rendered moot when the accused elected trial by military judge alone.[74]

3. Applicability of Service Regulations to a Joint Court-Martial

The next pretrial motion raised by the defense pertained to issues involving COMJAC's authority to convene special courts-martial. The defense conceded that COMJAC had the authority, pursuant to Article 23(a)(6), UCMJ, R.C.M. 201(e), and USEUCOM Directive 45-4, paragraph 7(e)(7), to convene a special-court-martial.[75] However, the accused, in a motion for appropriate relief, asked the military judge to find as a matter of law that COMJAC did not have the authority to convene a special court-martial that could adjudge a bad conduct discharge.[76] This motion was based on AR 27-10, which states that only a court-martial convened by a GCMCA may adjudge a bad conduct discharge, a limitation unique to Army trial practice.[77] The accused argued that the language of USEUCOM Directive 45-4, paragraph 7(e)(7), stating, "Normally, courts-martial cases will be referred to the appropriate servicing

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[72] *Id.* at 11-18. The second point was viewed as a concession because the military judge denied the defense's request to have Army enlisted members assigned to the JAC serve on the panel because they were part of the accused's unit. If, however, the entire enlisted contingent assigned to the JAC (made up of Army, Air Force, Navy, and Marines) was larger than a unit for purposes of Article 25(c), then the defense would have been given the option of enlisted members selected from the airmen, sailors, or Marines assigned to the JAC. This was not acceptable to the defense. Thus, an acknowledgement that the JAC was larger than a unit, thereby permitting selection of non-Army enlisted personnel, was a concession.

[73] *Id.* at 13, 18.

[74] *Id.* at 45. Defense counsel stated on the record that but for the judge's view that Army regulations did not restrict a joint commander in the selection of enlisted members, the accused would have elected to be tried by members to include enlisted members. *Id.* at 40-45.

[75] *Id.* at 20-21. Defense counsel stated: "Just so the record's clear, I do not object to her being a special court-martial convening authority . . . ." *Id.*

[76] *Id.*

[77] AR 27-10, *supra* note 46, ¶ 5-25(b). The general court-martial convening authority in this case would have been the Commander in Chief of USEUCOM, General Wesley Clark, United States Army.

legal office for referral and disposition," implies AR 27-10 should be followed.[78] The military judge, in denying the motion, pointed out that the only punishment limitations applicable to this court-martial were those contained in the MCM and UCMJ. Further, the judge ruled that the designation of joint convening authorities under R.C.M. 201(e), promulgated by the President, obviously trumped AR 27-10, a service regulation issued by the Secretary of the Army.[79] In short, the military judge found that service regulations did not apply to a court-martial convened by a joint commander.

4. Army vs. Air Force: Challenging the Air Force's "Inflexible Predisposition" Toward Illegal Drug Use

The final pretrial motions raised by the defense brought issues of perceived interservice rivalry into the courtroom. The combined motions for appropriate relief asked the military judge to dismiss all charges on the grounds that COMJAC was an Air Force colonel, serviced by an Air Force legal office, whereas the accused was a member of the Army.[80] Accordingly, COMJAC was, in mind of the defense, inappropriately applying an inflexible Air Force standard in drug cases against an Army accused.

The first ground cited was based upon the proposition that "the Air Force has an appearance of an intolerance of drug use or an attitude towards disposing of drug offenses which is different than the Army."[81] In response to this, the prosecution offered a stipulation of expected testimony from COMJAC, agreed to by the accused. The stipulation stated that COMJAC was aware that prior to her assumption of command, both Air Force and Navy enlisted personnel assigned to the JAC had been court-martialed for less serious drug offenses; that she had administered non-judicial punishment to an Army enlisted member for using drugs with the accused; and that, ultimately, "the consistency of discipline overall in the JAC as a joint unit led her to determine that it was appropriate to refer charges in this case to a special court-martial."[82]

The second ground cited was based upon the defense's "concerns about the Air Force's, as a service, intolerance of drug use [and] the Air Force's singling out the Army."[83] In arguing this position, defense counsel stated "it's a matter of fairness. Specialist Egan was on his way home, and the Air Force grabbed hold of the case and pulled him back in."[84]

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[78] Record, *supra* note 1, at 23.
[79] *Id.* at 24.
[80] *Id.* at 25.
[81] *Id.* at 25.
[82] *Id.* at 26.
[83] *Id.* at 27.
[84] *Id.* at 28. Specialist Egan was scheduled to separate from the Army prior to trial, but his separation was postponed by preferral of court-martial charges against him.

The Army judge was not persuaded. In denying the defense motions, the judge noted, "[COMJAC] is not an Air Force commander. She's a joint commander."[85] In issuing his ruling, the military judge informed the defense, "[T]he court understands your concern, but doesn't find that the Air Force has done anything in this case. The court finds that COMJAC has [handled] matters in this case, and that motion, along with the inflexible predisposition motion, is denied."[86] Simply put, the judge determined *Egan* was a case of the United States against the accused, not the Air Force against the Army.

5. *The Merits*

During presentation of the case on the merits, the focus moved away from joint procedural issues to the more routine evidentiary matters which are standard in all courts-martial. Of significance was the issue of corroboration of Specialist Egan's September 23, 1997 confession, with the government relying primarily on hearsay statements that had been provided by eyewitnesses to the accused's use, possession, and distribution of illegal drugs.[87] The government also offered the testimony of a British police constable who specialized in anti-drug enforcement in the local community.[88] The constable testified that the details contained in the accused's confession as to the persons, places, and prices he was involved with were consistent with the persons, places, and prices involved in the local drug trade.[89] Also, the government offered the testimony of a witness to whom the accused had made an admission that corroborated two of the specifications of alleged drug use.[90] Ultimately, the military judge found that much of the confession had been corroborated, and that the accused was guilty of four of the eight specifications against him.[91]

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[85] *Id.* at 29.

[86] *Id* at 30.

[87] While a full discussion of evidentiary matters raised at trial is beyond the scope of this article, it is important to note that the corroboration issue was one of many factors raised by Army legal personnel in stating reasons the case should not go to trial. *See supra* note 45 and accompanying text. Simply put, they believed the confession could not be corroborated. During the findings portion of the trial, the written statements of British nationals who had witnessed Egan's use and possession of drugs were admitted under Military Rule of Evidence 804(b)(3). *See generally* MCM, *supra* note 7, Mil. R. Evid. 804(b)(3). Interestingly, the British witnesses in question took the stand only to refuse to testify pursuant to the Fifth Amendment to the United States Constitution. Record, *supra* note 1, at 175, 178.

[88] Record, *supra* note 1, at 96.

[89] *See* United States v. McCastle, 40 M.J. 763, 765 (A.F.C.M.R. 1994) (finding that the details of the accused's confession were consistent with known details of the local drug trade was sufficient to corroborate a confession), *aff'd*, 43 M.J. 438 (1996), *modified on other grounds*, 44 M.J. 77 (1996) (modified on reconsideration).

[90] Record, *supra* note 1, at 126-138.

[91] Record, *supra* note 1, at 198. A specification is "a plain, concise, and definite statement of the essential facts constituting the offense charged." MCM, *supra* note 7. R.C.M. 307(c)(3). In a post-trial discussion, the military judge stated that he found Egan not guilty on four of the specifications due to a lack of corroboration on the facts that gave rise to those allegations.

6. *Sentencing*

During the sentencing portion of the case, the joint environment which produced his court-martial provided some benefit to Specialist Egan as non-commissioned officers from three branches of the service testified on his behalf. A Marine staff sergeant who had previously supervised him referred to Specialist Egan as "the best performer I had."[92] A former Army noncommissioned officer and supervisor concurred, adding, "As far as the Army went, he was *hooah*."[93] An Air Force staff sergeant who had supervised him since his apprehension called Egan "dependable[,] . . . reliable[, and] outstanding."[94]

After this testimony and a defense argument to consider "the unique posture of this case,"[95] the military judge imposed a sentence of confinement for forty-five days, reduction to the lowest enlisted grade, forfeiture of $600.00 a month for six months, and a bad conduct discharge.[96] Clearly, the bad conduct discharge was significant because it would mean an automatic appeal and appellate consideration of all the issues presented by this unique case.[97]

F. Post-Trial and Appellate Review

Post-trial procedures in the *Egan* case followed Army guidelines, which are substantially similar to those in the Air Force.[98] Since most of what

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Interview with Colonel Peter A. Brownback, Military Judge, at RAF Alconbury, United Kingdom (March 21, 1998). The only corroboration the government provided on these four specifications were admissions by the accused to third parties. Thus, citing *United States v. Maio*, the government attempted to corroborate a confession with admissions of the accused, arguing that such admissions were sufficient to "raise an inference of truth as to the actual drug use admitted by the [accused]." United States v. Maio, 34 M.J. 215, 218 (C.M.A. 1992). Essentially, the military judge based his opinion on the reasoning of Chief Justice Cox who stated in his concurring opinion in *Maio*, "I know of no conviction that has been sustained in which, apart from the words of the accused, there was no evidence whatever that a crime occurred." *Id.* at 221.

[92] Record, *supra* note 1, at 202.

[93] *Id.* at 208. Hooah (spelled phonetically) is a term used by members of some of the military services, most often the Army and Marines, to express, among other things, a positive opinion of someone or something.

[94] *Id.* at 214-216.

[95] *Id.* at 227.

[96] *Id.* at 230. A bad conduct discharge is one of two punitive discharges a member can receive as part of a sentence at a court-martial. Though serious, it is not as severe as a dishonorable discharge.

[97] Department of the Army Pamphlet 27-173, Trial Procedure ¶ 35-3(c)(2) (December 31, 1992) [hereinafter DA PAM 27-173].

[98] *Compare* DA PAM 27-173, *supra* note 97, Chapter 34, *with* AFI 51-201, *supra* note 7, Chapter 9.

occurs procedurally after trial under military law is governed by specific provisions in the MCM, this is not surprising.[99]

Specialist Egan exercised his right to submit information to the convening authority for her consideration prior to taking action on his case.[100] In his post-trial matters, Specialist Egan, through counsel, once again challenged the manner in which his case had been convened.[101] Primarily, Specialist Egan objected to the fact that COMJAC chose to refer the charges to trial despite the fact the Army summary court-martial convening authority had recommended dismissing them, thereby violating his rights to substantive due process.[102] Specialist Egan argued further that he was entitled to be treated like any other Army member and should not have been punished simply because he was assigned to a joint command. As an Army member, Specialist Egan felt he was entitled to the protection of Army regulations and procedures that were not applied by the military judge because, in the judge's view, such regulations did not apply to a courts-martial convened by a joint commander.[103] In arguing this point, his counsel stated, "Joint trials are a relatively new phenomenon and, perhaps, the wave of the future, but this does not mean that they comply with the due process requirements of the Constitution."[104]

While the due process argument is intriguing, it is undermined by the fact the protections afforded by the regulations of one service do not necessarily rise to a constitutional level simply because similar protections are not provided by the other services (absent a higher court ruling to the contrary). For example, if the Army regulation requires GCMCA approval of a bad conduct discharge adjudged by a special court-martial when the Air Force and Navy do not, it is questionable whether such a requirement amounts

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[99] *See generally* MCM, *supra* note 7, R.C.M. Chapters XI, XII.

[100] MCM, *supra* note 7, R.C.M. 1105; DA PAM 27-173, *supra* note 97, ¶ 34-2(b)(3).

[101] Record, *supra* note 1, at Volume II, Post-Trial Documents, Memorandum for Commander, United States European Command Joint Analysis Center [address omitted], from Trial Defense Service, Wurzburg Field Office, Region IX, ¶ 4(a)(2) (22 July 1998). Specialist Egan also challenged many of the evidentiary rulings of the military judge, arguing the government had not fully corroborated Specialist Egan's confession.

[102] *Id.* ¶ 4(a)(1). Specialist Egan's procedural objections as stated in the memorandum were stated as follows:

> At trial, the defense challenged the referral of this case. The defense also challenged the ability of the court-martial to adjudge a bad conduct discharge. In addition, the defense contested the apparently inflexible attitude of the command and the inappropriate referral of the case of an Army soldier against whom the Army had elected not to prefer charges. The defense also desired to request a panel composed of one-third enlisted members but the military judge's ruling effectively precluded SPC Egan from exercising that right.

[Citations omitted].

[103] *Id.* ¶ 4(a)(2).

[104] *Id.*

to a fundamental right under the Constitution. In fact, if the interest is to have all military members treated equally (rather than all Army members treated equally), then there is a great deal of logic to the judge's decision in *Egan* to not follow service regulations in a court-martial convened by a joint commander. Regardless, the applicability of service regulations to joint courts-martial is sure to be a key issue on appeal.

Despite the post-trial matters raised by the defense, COMJAC approved the sentence as adjudged on August 4, 1998. Subsequently, the case was forwarded to Headquarters, Department of the Army for review and eventual consideration by the Army Court of Criminal Appeals.[105]

IV. POST-*EGAN*: WAVE OF THE FUTURE OR ANOMALY?

Looking ahead, it is unclear whether *Egan* represents the beginning of a trend toward "joint justice" or simply an unusual case that was a product of unique circumstances. The weight of joint doctrine still favors referring military justice matters to the service component commander for resolution. Also, the joint commander in this case had the advantage of being empowered with special court-martial convening authority under a USEUCOM directive provision that currently has no counterpart in the other unified commands.

The circumstances that compelled the joint commander to convene the *Egan* case were, arguably, not unique. COMJAC simply experienced frustrations which may be shared by other joint commanders who feel unduly restricted by having to refer military justice matters to service component commanders. As such, the *Egan* case begs the question of whether, in the interests of providing joint commanders full command authority, doctrine (as well as the MCM and R.C.M.) should be modified to permit and perhaps encourage joint commanders to convene courts-martial against members within their respective command, regardless of branch of service.

In favor of such modification is the argument that a commander's authority must, by definition, include the full ability to enforce it.[106] Primary component service jurisdiction dilutes the authority of the joint commander and takes away one of the most important elements of command–the authority to hold members accountable. Moreover, as we continue to emphasize integration into joint operating units, the impetus to enhance joint command

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[105] *See* DA PAM 27-173, *supra* note 97, ¶ 35-3. As noted above, the military judge ruled that Army regulations did not apply to the trial of the case at bar. *See supra* note 75-79 and accompanying text. However, R.C.M. 201(e)(5) requires that appellate review be conducted by the service court of the accused. MCM, *supra* note 7, R.C.M. 201(e)(5). Consequently, the Army regulations on post-trial processing of records of trial prior to forwarding to the Army Court of Criminal Appeals were followed as required.

[106] For an excellent discussion of this view, see Berrigan, *supra* note 48.

authority will only increase. It seems fundamentally inconsistent to promote joint operations at the same time that we adhere to single service processing of military justice matters. This approach suggests that operations and military justice are severable, which, as anyone experienced with command issues knows, is not the case.

Additionally, concurrent military justice jurisdiction highlights the fact that we may not have fully developed the concept of the "joint warrior." We may mix the various services into a joint unit, but they still wear their distinctive service uniforms, are still promoted within their services, and still answer to their own chains of command. By denying a joint commander the primary authority to deal with misconduct from all branches of the service, we enhance a feeling of segregation within the unit that degrades discipline and morale by sending mixed messages about competing loyalties and standards of conduct. As a consequence, the joint warrior continues to be a warrior serving two masters.

Conversely, there are compelling reasons to maintain the status quo. First, military justice is essentially defined in terms of the mission environment, which has traditionally been service specific. The differing cultures and traditions of the Air Force, Army, Navy, and Marines, as well as the varied approaches they take to training and fighting, have had a tremendous impact in shaping how each service views and practices military justice. What we expect of our sailor at sea is different than the Marine assigned to staff or the airman assigned to the missile launch facility. It follows then, that as a matter of fairness, a member who enlists in a specific service should be entitled to be judged by the standards applied to his peers who serve in single-service units and not a "fifth standard" of joint military justice. As the defense argued in *Egan,* a soldier should not be punished for being assigned to a joint unit and should not have to live up to standards which may be inconsistent with his training and single service experience. If we want to create a joint standard of military justice, we have to do more than modify doctrine, we have to revise the way we recruit, train, and fight in an increasingly joint world.

Second, how is a joint standard of military justice to be defined? Standards tend to develop according to the custom and experience of a group, be it a uniformed branch of the military or a single military unit. Consequently, USEUCOM may develop unique standards that are distinct from those developed within United States Pacific Command or United States Strategic Command. Is it fair for someone within USEUCOM to receive different disciplinary treatment than someone assigned to these other commands? In that case, aren't we right back to where we started? The bottom line is that simply modifying doctrine to enhance the joint commander's military justice authority does not solve the larger problem of eliminating inconsistent standards of justice.

With strong arguments on both sides of this issue, it is likely that *Egan* will remain a unique case that tested the frontiers of joint military justice but did not extend them. Hopefully, for those practitioners who continue to chart the waters between joint and service component command authority, the lessons learned from the *Egan* case will assist them in the event that it is the first but not the last joint court-martial.

Territorially Intrusive Intelligence Collection and International Law

COMMANDER ROGER D. SCOTT*

I. INTRODUCTION

A recurring question regarding operational law is whether surreptitious spying in another nation's territory is "illegal." The cases raising this question involved no sabotage or other destructive acts, but simply the collection of information through various surreptitious, intrusive means inside a foreign nation's territory without that nation's knowledge or consent. Several highly classified legal reviews of such intelligence collection operations, performed at the highest levels in the Department of Defense, stated essentially that the operations were illegal and were undertaken at the risk of the personnel or units involved.[1] This nonsupportive, almost hand-washing kind of approach fails to state exactly what law such spying violates. While possible answers include United States domestic law, international law, or the law of the target nation, a close analysis does not support any of these.

United States domestic law does not prohibit nondestructive, surreptitious intelligence collection and, in fact, affirmatively supports it.[2] The United States is not a party to any treaty or agreement that prohibits surreptitious, nondestructive intelligence collection. Such intelligence collection also does not violate customary international law. In fact, customary international law has evolved such that spying has become the long-standing practice of nations. Indeed, while the surreptitious penetration of another nation's territory to collect intelligence in peacetime potentially conflicts with the customary principle of territorial integrity, international law does not specifically prohibit espionage.

Conversely, surreptitious intelligence collection in another nation's territory probably violates the target nation's domestic law just as espionage

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[1] Interview with Representatives of the Office of Senior Deputy General Counsel (International Affairs and Intelligence), Department of Defense, in Arlington, Virginia (March 1995). Of course, the documents cannot be cited specifically due to their classified status. However, the reader may contact the author for further information concerning the documents.

[2] *See infra* note 13 and accompanying text.

against the United States violates United States domestic law.[3] However, the fact spying on other countries violates their law is far different from the assertion that the activity itself is illegal, as if some skulking shame of criminality were attached to the enterprise. Our spies are patriots. They take the risk of target country detection and punishment for espionage as a basic tenet of their trade, but the United States is under no legal obligation, domestic or international, to refrain from engaging in espionage. High levels of security classification for information relating to espionage operations are appropriate to help ensure the success of the operations, but not because we need to cloak illegal activity in code words while we wink and nod in furtive staffing conspiracies.

No international convention has ever addressed the legality of peacetime espionage. Indeed, espionage has been practiced by the nations of the world for centuries. Individual states have, however, enacted laws that severely punish espionage against their own interests. The law of espionage is, therefore, unique in that it consists of a norm (territorial integrity), the violation of which may be punished by offended states, but states have persistently violated the norm, accepting the risk of sanctions if discovered. This article addresses the issues surrounding the question whether international law prohibits espionage. It first explores whether principles of customary law prohibit such acts. Next, this article addresses peacetime espionage and the principles of unlawful intervention in the affairs of sovereign nations. Finally, it examines the interaction of peacetime espionage and the inherent right to self-defense.

II. NO PRINCIPLE OF *JUS COGENS* AGAINST ESPIONAGE

The international community recognizes some principles of international law as so fundamental that they constitute peremptory norms. Such principles, referred to as *jus cogens*, prevail over international agreements and other principles of international law in conflict with them.[4] Espionage is not prohibited by international law as a fundamentally wrongful activity; it does not violate a principle of *jus cogens*. The law of war recognizes the well-established practice of employing spies.[5] Resort to that practice involves no

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[3] For a good introduction to espionage crimes against the United States, see Major Carol A. DiBattiste, *Air Force Espionage: Two Recurring Issues*, 32 A.F. L. REV. 377 (1990).

[4] REST. (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1995). *See also* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 68 (1990).

[5] Instructions for the Government of the Armies of the United States in the Field, Headquarters, United States Army, Gen. Order No. 100, art. 88(1) (Apr. 24, 1863) [the Lieber Code], *in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988); Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto, arts.

violation of the laws of war, though spies may be harshly punished when captured by belligerents. Spies caught behind enemy lines during armed conflict are not entitled to treatment as prisoners of war and may be put to death, but under international law they are entitled to a trial.[6] A spy who successfully accomplishes his mission and returns to his own lines may not be tried as a spy upon subsequent capture.[7] In addition to the specific acknowledgement of espionage in the law of war, intelligence gathering in peacetime from outer space and from the high seas is clearly permitted under international law.[8]

III. PEACETIME ESPIONAGE AND UNLAWFUL INTERVENTION

The conduct of espionage inside the territory of another nation during peacetime is treated differently. The respect of each sovereign for the territorial integrity and political independence of others is a basic principle of international law.[9] The traditional doctrinal view is that intelligence gathering within the territory of other states during peacetime constitutes an unlawful intervention.[10] The essence of the international law norm against peacetime

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29-31, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, *in* THE LAWS OF ARMED CONFLICTS, 63 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Hague Convention No. IV]. "Spying does not violate the law of war. 'Spies are punished not as violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible.'" United States Army Judge Advocate General's School, OPERATIONS LAW HANDBOOK, at 17-5 (1997).

[6] Hague Convention No. IV, *supra* note 4, art. 30. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), arts. 39(3), 46, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) (recognizing existing international law applicable to espionage during armed conflict).

[7] Hague Convention No. IV, *supra* note 4, art. 31. *See* GREEN HAYWARD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 581, at 304-06 (1943).

[8] J. BRIERLY, THE LAW OF NATIONS 59-61 (H. Waldock ed., 6th ed. 1984). *See* Oliver J. Lissitzyn, *Electronic Reconnaissance from the High Seas and International Law*, *in* 61 U.S. NAVAL WAR COLL. INT. L. STUDIES, 1947-1977, at 563, 567 (R. Lillich & J. Moore eds., 1980); Julius Stone, *Legal Problems of Espionage in Conditions of Modern Conflict*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 29, 34 (Roland J. Stranger ed., 1962).

[9] 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 183 (1965); 1 L. OPPENHEIM'S INTERNATIONAL LAW 288 (H. Lauterpacht ed., 8th ed. 1955) ("A State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory . . . without permission."). *See* Quincy Wright, *Legal Aspects of the U-2 Incidents*, 54 AM. J. INT'L L. 836 (1960) [hereinafter Wright, *U-2 Incidents*]. The principle of territorial integrity is recognized in article 2(4) of the United Nations Charter, but the Charter only prohibits "the threat or use of force against the territorial integrity or political independence of any state." U.N. Charter art. 2, para. 4. It does not prohibit every trespass. Wright, *U-2 Incidents, supra*, at 844.

[10] Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3 (Roland J. Stranger ed., 1962) [herinafter Wright,

espionage is the lack of respect for the territorial boundaries of another sovereign, including national airspace, internal waters, and territorial seas.[11] Notwithstanding the apparent clarity of the traditional view, espionage is not prohibited by any international convention because all states have an interest in conducting such activity.

Hays Parks, a national security law expert, described the fundamentally self-interested nature of domestic espionage law in the following manner:

> Each nation endeavors to deny intelligence gathering within its territory through domestic laws . . . . Prosecution under domestic law (or the threat thereof) constitutes a form of denial of information rather than the assertion of a *per se* violation of international law; domestic laws are promulgated in such a way to deny foreign intelligence collection efforts within a nation's territory without inhibiting that nation's efforts to collect intelligence about other nations. No serious proposal has ever been made within the international community to prohibit intelligence collection as a violation of international law because of the tacit acknowledgement by nations that it is important to all, and practiced by each.[12]

A review of the espionage laws of the United States[13] aptly illustrates the point that national laws designed to defend national interests against foreign espionage generally do not prohibit espionage against other nations. These laws forbid activity that would facilitate the use of United States national defense information to the prejudice of the United States or to the advantage of any foreign power, but they do not prohibit United States espionage against other nations. In fact, many other United States laws are designed to facilitate foreign intelligence collection by exempting such activity from laws that would impose inconsistent burdens. For example, the Fiscal Year 1991 Intelligence Authorization Act provided the Secretary of Defense new authority to establish and operate overseas "proprietaries," or commercial "covers," for military intelligence activities.[14] Under the new law, activities

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Espionage]; Myres S. McDougal et al., *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 394 (1973) [hereinafter McDougal, *World Public Order*].

[11] Wright, *Espionage*, *supra* note 10, at 2-12. *See also* Wright, *U-2 Incidents*, *supra* note 9, at 845 (concerning airspace); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 67-69 (1984) (concerning internal waters and territorial seas).

[12] W. Hays Parks, *The International Law of Intelligence Collection*, *in* NATIONAL SECURITY LAW 433-34 (John Norton Moore et al. eds., 1990).

[13] 18 U S.C. §§ 792-798 (1976 & Supp. 1985).

[14] These provisions have been codified at 10 U.S.C. §§ 431-437 (1990) ("Authority to engage in commercial activities as security for intelligence collection activities."). Explaining the purpose for this new legislation, the Report of the Senate Select Committee on Intelligence stated that, "intelligence elements of the Department of Defense that carry out intelligence collection operations abroad currently lack the statutory authority to establish cover arrangements, similar to the [Federal Bureau of Investigation] and [Central Intelligence Agency], that would withstand

associated with commercial covers, including for example, falsification of official records, enjoy the sovereign immunity of the United States. Other nations have similar laws promoting national espionage but prohibiting foreign espionage.

International law develops from the practice of nations. The long-standing state practice of deviation from the norm of nonintervention in sovereign territory by spying creates the dilemma for international law. International law must sustain a fundamental norm against a tidal wave of contrary state practice. An "espionologist" could devote a lifetime to documenting both the prevalence of peacetime spying throughout history and the punishment of captured foreign spies.[15] This dilemma has led some

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scrutiny from the internal security services of foreign governments . . . ." S. REP. No. 102-85, 101st Cong., 2d Sess. (1991), 8 U.S.C.C.A.N. 193, 216 (1991).

[15] There are a number of famous examples. Sending twelve spies into Canaan, Moses had them "see what the land is like: whether the people who dwell in it are strong or weak, few or many . . . whether the cities they inhabit are like camps or strongholds . . . ." *Numbers* 13:17-25. The date for the sailing of the Spanish Armada was provided to Sir Francis Walsingham by the spy Ousley in a wine cask shipped back to England from the port of Malaga. ALLISON IND, A SHORT HISTORY OF ESPIONAGE 29 (1963). Elizabethan England's knowledge of the threat posed by Philip II's Spain came principally from its intelligence network. Christopher Andrew, *The Nature of Military Intelligence*, *in* GO SPY THE LAND 1-2 (Keith Neilson & B.J.C. McKercher eds., 1992). Intelligence specialists in Poland, France, and Great Britain attempted to break the German ULTRA/ENIGMA code from 1925-1938 during the Nazi military buildup. Poland's early success depended on a copy of instructions for the modified ENIGMA machine which were provided by a spy. Linda Yolande Gouaze, NEEDLES AND HAYSTACKS: THE SEARCH FOR ULTRA IN THE 1930S 20-35 (1983) (Naval Post Graduate School thesis, published by the Defense Technical Information Center). The Soviet Union engaged in extensive overseas intelligence activity during the Cold War, including signal intelligence (SIGINT) activities at its diplomatic facilities all over the world, the use of disguised trucks and vans equipped for SIGINT collection (including one Czech truck which toured the United States from 17 July to 2 December 1987), the use of naval auxiliary ships equipped for SIGINT collection (these vessels periodically entered United States territorial seas), and the use of individual agents to collect human intelligence. DESMOND BALL, SOVIET SIGNALS INTELLIGENCE 38, 45, 70-80, 95-100, 126, 134 (1989). Cases of Soviet spies discovered in Western countries are too numerous and well-known to rehearse in detail, but among them is the case of Conon Molody (alias Gordon Arnold Lonsdale). Exposed in England when his carefully constructed cover as a Canadian citizen fell apart for inattention to the detail of circumcision, which, according to medical records, had been performed on the real infant Lonsdale. *See* ALLISON IND, A SHORT HISTORY OF ESPIONAGE 274-76 (1963). Other famous spies for the Soviet Union included Rudolf Abel, Klaus Fuchs, and the Rosenbergs. G.J.A. O'TOOLE, THE ENCYCLOPEDIA OF AMERICAN INTELLIGENCE AND ESPIONAGE 1-2, 395-96 (1988). Incidents of United States Cold War espionage include the Berlin Tunnel (Project Gold), which tapped Soviet and East German telephone and teletype networks, and U-2 flights over the Soviet Union and Cuba. *Id.* at 66-68, 230, 458-60. Espionage continues unabated after the end of the Cold War. Regarding economic espionage against United States firms by allies, see generally PETER SCHWEIZER, FRIENDLY SPIES (1993); Ronald Ostrow, *Economic Espionage Poses Major Peril to U.S. Interests*, L.A. TIMES, Sept. 28, 1991, at A1. McDougal and Feliciano note that espionage and counterespionage activities are conducted

prominent jurists to conclude that peacetime espionage does not violate international law. According to Lauterpacht's edition of *Oppenheim*:

> Spies are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all states constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to international law, since they are not agents of states for their international relations. Every state punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot be legally excused by pleading that he only executed the orders of his government and the latter will never interfere, since it cannot officially confess to having commissioned a spy.[16]

Professor Quincy Wright, however, vigorously resists the notion that spying has become legal through constant practice. It is, he argues, a consistently practiced illegal activity.[17] By contrast, the Yale scholars, McDougal, Lasswell, and Reisman, perceive, in the toleration of peacetime spying, "a deep but reluctant admission of the lawfulness of such intelligence

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throughout the territories of belligerents and non-belligerents during armed conflict. MYRES S. MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 559 (1961). France recently expelled five American agents for political, economic, and industrial espionage. Suzanne Lowry & Hugh Davies, *France Expels Five Americans on Spy Charges*, DAILY TEL., Feb 23, 1995, at 11. Antonin Scalia, serving as an Assistant Attorney General in 1975, authored a classified memorandum of law on spying against foreign embassies, finding the practice so widespread that general language in the Vienna Convention on Diplomatic Relations on the "inviolability" of embassies should not be read as prohibiting such activities. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Memorandum for the Attorney General on The Vienna Convention (Dec. 24, 1975).

[16] 1 L. OPPENHEIM'S INTERNATIONAL LAW § 455, at 862 (H. Lauterpacht ed., 8th ed. 1955). By "recognized position," Oppenheim refers to diplomatic or consular status, visiting armed forces, or status as an individual foreign guest or visitor with host nation permission. International law has not defined the "status" of spies. In the case of a diplomat, article 9 of the Vienna Convention on Diplomatic Relations clarifies the status of diplomatic immunity and recognizes expulsion by the host state as the correct remedy for diplomats caught spying. *See* DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 40-44 (1976); Jonathan Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53-88 (1988). Similar to diplomatic immunity, warships and auxiliaries have long enjoyed sovereign immunity. As reflected in the United Nations Law of the Sea Convention (article 32), sovereign immune vessels caught engaging in activities inconsistent with "innocent passage" in foreign waters, such as spying, are obliged to comply with host nation demands that such vessels depart. *See* DeLupis, *supra* note 10, at 55, 75; Roma Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, 10 YALE J. INT'L L. 34, 45-46 (1984).

[17] Wright, *Espionage*, *supra* note 11, at 3; Wright, *U-2 Incidents*, *supra* note 9, at 845; *Comments of Professor Wright, in Panel – The Pueblo Seizure: Facts, Law, Policy*, 63 PROC. AM. SOC. INT'L L. 1, 28-30 (1969) [hereinafter *Comments of Professor Wright*].

gathering, when conducted within customary normative limits."[18] The "New Haven School" views information gathering as necessary to reduce international friction and to guard against surprise.[19] As long as the world remains divided and hostile, special measures to gather secret information from closed societies are necessary to maintain world public order.[20] Such measures, however, would not be justified if they were so intrusive or offensive as to threaten the internal order of a state in which they were employed.[21] Presumably, fidelity to such customary norms would preclude the use of torture, drugs, or murder. Given this variety of views, the status of espionage under international law remains ambiguous, not specifically permitted or prohibited.

Notwithstanding the prevalence of espionage, however, it is doubtful that espionage in another nation's territory will ever be explicitly acknowledged as "legal" under the law of nations. International law continues to support the existence of a territorial integrity norm with which espionage potentially conflicts, but even the nature of such a potential conflict remains ambiguous. International law has left enforcement against espionage entirely to the discretion of offended states. Individual states do not treat different forms of espionage by different countries in the same way. France has expelled suspected United States agents, while North Korea has detained them. The treatment of espionage is a matter of the domestic regulatory discretion inherent in sovereignty and is a part of the risk inherent in espionage activity.

IV. PEACETIME ESPIONAGE AND THE RIGHT OF SELF-DEFENSE

Particular forms of espionage, for example by ships, submarines, or aircraft, may raise issues of national self-defense instead of issues of domestic criminal law. Examples of nations treating particular forms of espionage as armed aggression include the following incidents: the shoot down of U-2s on United States or Taiwanese missions over China and the former Soviet Union

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[18] McDougal, *supra* note 10, at 394.

[19] The Yale "New Haven School" is associated with a "world public order" approach to international law. *See* Michael N. Schmitt, *New Haven Revisited: Law, Policy, and the Pursuit of World Order*, 1 A.F. ACAD. J. LEG. STUD. 185 (1990).

[20] McDougal, *supra* note 10, at 394. In a remarkably prophetic statement, the authors commented on the compulsory collection of information in extreme cases: "In theory, the compulsive powers of the United Nations Security Council, operative upon a finding of a threat to the peace, could be applied to the gathering of critical intelligence and could, moreover, be delegated to another international organ . . . ." *Id.* This describes the activity of the United Nations Special Commission (UNSCOM) in Iraq after the Gulf War of 1990.

[21] *Id.* at 394-95, 418-19, 444-45.

in the late 1940s and the 1950s,[22] the Soviet shoot down of the civilian airliner KAL 007,[23] the shouldering of the Yorktown and the Caron in the Black Sea off the coast of the former Soviet Union,[24] the North Korean attack upon the U.S.S. Pueblo,[25] and the Swedish government's use of depth-charges against Soviet submarines in Sweden's territorial sea.[26] The Charter of the United Nations recognizes the right to use force in national or collective self-defense against armed aggression.[27] Nations perceive the threat of armed aggression differently, and international law has not attempted to codify precisely the circumstances that justify the use of force in self-defense. Accordingly, particular forms of espionage may give rise to the use of force as well as a response under domestic criminal law. This is an added risk of espionage particularly applicable to ships and aircraft.

The right of self-defense may also justify the collection of intelligence. Intelligence is necessary to give substance and effect to the right of self-defense, including the customary international law right of anticipatory or peremptory self-defense. Appropriate defensive preparations cannot be made without information about potential threats.

The Charter of the United Nations prohibits the use of force in international relations,[28] but preserves the "inherent right of individual or collective self-defense."[29] In other words, force may not be used aggressively, but it may be used defensively. Scholars have argued over the scope of the right of self-defense, but there is no question that the United States has exercised it vigorously, including the right of anticipatory or peremptory self-defense.[30] Given the destructiveness of modern weapons, it may be too late to wait for the enemy to strike the first blow. The need for intelligence to support effective exercise of the right of anticipatory self-defense is greater in today's friction-filled, multipolar world than it has ever been before.

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[22] *See* Wright, *U-2 Incidents*, *supra* note 11, at 836 (1960). From 1945 to 1955, the Warsaw Pact shot down nine non-military aircraft. Major Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace,* 30 A.F. L. REV. 49, 54 (1989).

[23] Donahue, *supra* note 22, at 62-63.

[24] *See* Lieutenant Commander John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992).

[25] *See Comments of Professor Wright*, *supra* note 19, at 28-30.

[26] *See* Sadurska, *supra* note 16, at 34, 45-46; Delupis, *supra* note 10, at 67-69.

[27] U.N. Charter art. 51.

[28] U.N. Charter art. 2, para. 4.

[29] U.N. Charter art. 51.

[30] *See* 2 MOORE, DIGEST OF INTERNATIONAL LAW, *The Caroline Case*, 412 (1906), *discussed in* George Bunn, *International Law and the Use of Force in Peacetime*, NAV. WAR C. REV. 70 (May-June 1986); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938). *See also* Stuart G. Baker, Note, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99 (1994).

secret nuclear powers.[38] To the extent intelligence collection makes it possible for the United States, or any other nation, to prevent such incidents, the use of international espionage as instrument of self-defense seems justified.

V. SUMMARY AND CONCLUSION

As a general principle, territorially intrusive intelligence collection by United States agents is not illegal under United States or international law. No treaties or other sources of international law specifically prohibit espionage. International law does require respect for the territorial integrity of other states, but states have practiced territorially intrusive intelligence collection by air, sea, and on land, through a variety of means, from time immemorial. The domestic law of almost every state promotes the territorially intrusive collection of foreign intelligence by its own agents. As long as unexpressed but generally accepted norms and expectations associated with espionage are observed, international law tolerates the collection of intelligence in the territory of other nations. However, international law also recognizes the authority of penetrated states to apply their domestic law to agents and instruments of a foreign power caught collecting intelligence within their boundaries. Different states have different policies toward the interdiction and punishment of foreign agents caught within national boundaries. The domestic law of most states proscribes such activity; some states have even executed suspected foreign agents without a trial. The legal status of foreign intelligence collection is, therefore, a classic double standard–states prohibit espionage against themselves, but they do it to others. In this contest for information between states, international law still stands ambiguously aloof,[39] but the record of state practice is clear–espionage is traditional state activity. The international community might never explicitly recognize territorially intrusive espionage as legal under international law, but there are at least strong arguments against our own lawyers treating their clients' intelligence activity as illegal.

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[37] *See* N.R. Kleinfield, *Explosion at the Twin Towers*, N.Y. Times, Feb. 27, 1993, at § 1, p. 1, col. 2.

[38] For a good review of at the integral role intelligence plays in threat planning and response. see generally ARIEL LEVITE, INTELLIGENCE AND STRATEGIC SURPRISES (1987).

[39] In an unusual case, the United Nations Security Council could find that a particular espionage activity threatened international peace and security under article 39 of the United Nations Charter. The Security Council then could authorize Chapter VII sanctions or military action to prevent it.

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