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DEPOSITIONS AND A CASE CALLED *SAVARD*

COLONEL MARK L. ALLRED

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I. BACKGROUND AND INTRODUCTION

In May 2008, I presided over *United States v. Savard*, a six-day, theft of housing allowance trial. Factually, it was an interesting case. At about the time he reached twenty years in the service and retirement eligibility, MSgt Dennis Savard began drawing unauthorized Basic Allowance for Housing (BAH). Over a period of roughly three years, while on unaccompanied assignments to Korea and Japan, he went on to steal more than $83,000 in BAH. To pull this off, he made repeated false statements that his wife and daughter were living in an expensive California neighborhood, where BAH averaged about $2,300 per month, when in fact they were in the Philippines paying rent of 1,000 pesos (about $200) per month. A number of discoveries caught up with the accused. It was learned, for example, that during the time she was supposedly residing in California, Savard's daughter was not merely living in the Philippines but actually winning the Miss Teen Pageant for the entire nation. And the address the accused claimed as the family's California residence turned out to be not that of a private home but of an assisted living center for the elderly.

The *Savard* case was also interesting from the perspective of its extensive litigation practice. Among about twenty contested motions was an unusual array of depositions and challenges related thereto. In total, the parties sought to introduce nine videotaped depositions, with total run time of eight to ten hours. These depositions—taken in the United States and the Philippines—involved a host of issues beginning in the initial stages of litigation and lasting well into trial.

This article will use *Savard* as a case study to review and explore key legal and practical considerations related to the use of depositions in Air Force courts-martial. It is hoped that—in an era when trial experience is becoming increasingly rare among Air Force JAGs—this discussion might benefit trial practitioners in general, and particularly those who are new both to depositions and the military courtroom.

II. DEPOSITIONS—DEFINITION AND PURPOSE

At the risk of sounding too basic, let's start at the very beginning. What exactly is a deposition? As the Discussion to Rule for Courts-Martial (RCM) 702(a) explains, a deposition is "the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material."[1]

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES , R.C.M. 702(a) Discussion (2008) [hereinafter MCM].

The Discussion to RCM 702(a) adds that there are two different types of depositions. "A deposition taken on oral examination is an *oral deposition*, and a deposition taken on written interrogatories is a *written deposition*."[2] The use of oral depositions in military courts-martial is common, as is the use of written transcripts of these oral depositions. The use of true *written* depositions taken on written interrogatories is, on the other hand, rare, at least in Air Force criminal practice. Indeed, I have never so much as seen a true written deposition in my entire career; and my informal survey of the Air Force's five other chief trial judges indicates that neither have they.[3]

Next question, what is the purpose of a deposition? Under the Uniform Code of Military Justice (UCMJ), depositions may have ancillary uses, but their primary function is that of preserving testimony—for use at Article 32 investigations or, more importantly for our discussion, at trial.[4]

The *Savard* case helps illustrate how depositions can be useful (or damaging) to the parties. The case was tried at Yokota Air Base, Japan, where the accused and a number of witnesses were located. Several other witnesses lived in the Philippines and, as will be discussed further below, were either unwilling or unable to attend the trial in Japan. One of these witnesses was the landlord and caretaker of the house in which the accused's wife and daughter lived during much of the period in question. Another witness was a neighbor, who saw the

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[2] *Id.* (Emphasis added.)

[3] The non-use of written depositions in current trial practice is probably traced to a history of Confrontation Clause concerns. Decades ago, UCMJ Article 49 was construed to allow either party to use depositions, even when they were taken on written interrogatories without the presence of the accused. *United States v. Jacoby* put an end to that practice, declaring that, in light of the Sixth Amendment, the "correct and constitutional construction of [Article 49] . . . requires that the accused be afforded the opportunity (although he may choose knowingly to waive it thereafter) to be present with his counsel at the taking of written depositions." 29 C.M.R. 244, 249 (C.M.A. 1960). Today's MCM allows written depositions to be used only during sentencing proceedings under R.C.M. 1001, or with the consent of both parties. *See* MCM, *supra* note 1, R.C.M. 702(c)(3)(B). Oral depositions, on the other hand, do not require consent of the opposing party. *See* MCM, *supra* note 1, R.C.M. 702(c)(3)(B) Discussion. Thus, since parties will not routinely consent to depositions beneficial to the other side, and since oral depositions offer greater fluidity of discussion, the ability to capture verbal and/or visual demeanor, as well as other advantages, it follows that parties seeking to preserve testimony through depositions would typically not consider written depositions to be of great value.

[4] *See* MCM, *supra* note 1, R.C.M. 702(a). For examples of the ancillary purposes depositions may serve, *see* United States v. Baker, 33 M.J. 788, 789 (A.F.C.M.R. 1991) (deposition used to corroborate confession); United States v. Cumberledge, 6 M.J. 203, 205, n.13 (C.M.A. 1979) (deposition may be appropriate means to compel interview with witness where defense access has been impeded); United States v. Chestnut, 2 M.J. 84, 86 (C.M.A. 1976) (Cook, J., concurring in part, dissenting in part) (deposition may be used to cure defects in Article 32 investigation).

accused visiting his family in the Philippines, and who spoke with the accused about his daughter's success in the Miss Teen Pageant. There were government officials who knew of the wife's ongoing business activities in the Philippines, and there were other personnel who could testify that the daughter had graduated from their private high school after attending regularly for four years. In addition to these witnesses in the Philippines, there was a civilian friend of the accused living in Texas, who refused to travel to Japan for trial, and who was thought by both the government and the defense to have testimony helpful to their own cases.

In short, most if not all of these out-of-country persons could provide testimony vital to a meaningful trial of this case. Since they could not or would not come to trial, and since it was impractical if not impossible to take the trial to them, their testimony had to be captured in some form that would be admissible at trial. And depositions were that form.[5]

III. BASIC RULES OF ENGAGEMENT (ROE): ADMISSIBILITY AT TRIAL

If depositions can be of such value, what then are the rules for admitting them at trial? There are three key provisions under the *Manual for Courts-Martial* (MCM): (1) Article 49, UCMJ, (2) R.C.M. 702,[6] and (3) Military Rule of Evidence (MRE) 804.[7] These rules, not surprisingly, are clarified and augmented by case law.

Article 49—actually entitled "Depositions"—is an explicit declaration that deposition testimony may be introduced in courts-martial but only "so far as otherwise admissible under the rules of evidence[.]"[8] And here, the critical rule of evidence is the aforementioned MRE. 804. The provisions of Article 49 and MRE 804 blend, and their requirements can be distilled into four main criteria for the admission of deposition evidence. These are: (1) similar motive to develop testimony; (2) verbatim record; (3) unavailability of the witness; and (4) compliance with law.

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[5] *See Baker,* 33 M.J. at 790 (a deposition is one of the best substitutes for live testimony); *see also* United States v. Cokeley, 22 M.J. 225, 227 (C.M.A. 1986) (depositions can be "a useful tool in the search for truth in a criminal case by preserving evidence that would otherwise be lost to the finders of fact").

[6] MCM, *supra* note 1, R.C.M. 702.

[7] MCM, *supra* note 1, MIL. R. EVID. 804.

[8] UCMJ art. 49(d).

A. Similar Motive and Verbatim Record (Requirements 1 and 2)

The first two requirements for deposition admissibility give rise to little if any litigation today, and shall be touched upon only briefly.

Similar Motive. MRE 804, it will be remembered, is the broad hearsay rule covering a wide variety of situations in which declarants are unavailable at trial. Former testimony is but one of those situations, and depositions are but one type of former testimony addressed by the rule. Regarding former testimony in general, MRE 804(b)(1) states, in order for the testimony to qualify as a hearsay exception, the party against whom it is offered must have had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[9] Whether a party had such a "similar motive" to develop testimony can be a matter of serious dispute when addressing some types of former testimony.[10] With regard to depositions, however, the rule seems reasonably well settled. Generally speaking, if a deposition was taken in preparation for pending trial, and if the charges addressed at the deposition are those for which the accused is later tried, the MRE 804(b)(1) motive requirement is deemed to have been met vis-à-vis each party at the deposition.[11]

Verbatim record. MRE 804(b)(1) states that depositions (as well as other types of former testimony) qualify as admissible hearsay exceptions under that rule only if they are in the form of "a verbatim record."[12] Thus, any form of deposition less than verbatim will not be admissible at trial over objection from the opposing party.

B. Unavailability of Witness (Requirement 3)

Of all issues related to depositions, unavailability looms largest and deserves our most detailed discussion. The matter begins with a straight-forward proposition: If the witness who testified at a deposition (the "deponent") is available to testify at trial, the deposition testimony of that witness is not admissible at that trial; and, conversely, if the deponent is unavailable at trial, the deposition may be admitted (assuming the remaining evidentiary hurdles are cleared). However, tough questions arise, as does much if not most litigation over

[9] MCM, *supra* note 1, MIL. R. EVID. 804(b)(1).
[10] *See, e.g.,* United States v. Crockett, 21 M.J. 423, 426 (C.M.A. 1986), *citing* California v. Green, 399 U.S. 149, 195-198 (1970) (Brennan, J., dissenting) (preliminary hearings in civilian cases are settings where "similar motive" may be lacking).
[11] *See Crockett*, 21 M.J. at 426 (where a deposition is taken in preparation for pending trial, similar motive requirement of MIL. R. EVID. 804(b)(1) is deemed to have been met); United States v. Cabrera-Frattini, 65 M.J. 950, 954 (N-M. Ct. Crim. App. 2008) (similar motive requirement met where deposition involved same charges for which accused was tried).
[12] MCM, *supra* note 1, MIL. R. EVID. 804(b)(1).

deposition admissibility, in determining whether specific witnesses are in fact unavailable.

There are myriad reasons why a witness might be deemed unavailable for trial. MRE 804(a) defines unavailability with a laundry list, which includes: (1) exemption based upon privilege; (2) refusal to testify despite court order; (3) lack of memory; (4) death, or physical or mental infirmity; and, (5) non-amenability to process.[13] MRE 804(a) also expands its own definition by incorporating the unavailability language found in Article 49(d)(2).[14] This latter provision covers generally the same terrain as MRE 804(b), but also, and most significantly, adds the open-ended "other reasonable cause" as a basis for finding a witness unavailable.[15]

Thus, the reasons a witness might be deemed unavailable are virtually limitless. In my experience, however, deponent unavailability battles tend to be waged most frequently on two main fronts: (1) unavailability based upon non-amenability to process, and (2) unavailability involving military exigencies.

1. Non-Amenability to Process

Issues of "non-amenability to process" can arise either when no legal process exists for securing the attendance of a witness, or when a legal process does exist but cannot be enforced. When a court-martial is held within the United States, and witnesses located stateside will not testify voluntarily, they can of course be subpoenaed.[16] Generally, this process works in obtaining the appearance of witnesses, but not always.[17]

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[13] MCM, *supra* note 1, MIL. R. EVID. 804(a)(1)-(5).
[14] MCM, *supra* note 1, MIL. R. EVID. 804(a)(6).
[15] UCMJ art. 49(d)(2).
[16] MCM, *supra* note 1, R.C.M. 702 ("The presence of witnesses not on active duty may be obtained by subpoena.").
[17] One leading Court of Military Appeals case provides an example of the circumstance in which a witness is theoretically subject to legal process, but realistically probably not amenable to process. In *United States v. Cokeley*, 22 M.J. 225, a woman was the alleged victim of an attempted rape at or near Fort Jackson, South Carolina. Realizing that her husband was about to be discharged from the Army and that she would soon be leaving the area with him, trial counsel secured a deposition of the woman. The woman then moved to Oregon. When trial was later held at Fort Jackson, the woman was subpoenaed but would not come. The woman's deposition was used to convict the accused, and on appeal the critical issue was whether trial counsel had done enough to secure her attendance. In this case, the court found that the prosecution had not adequately proven the alleged victim's unavailability, and the deposition should not have been admitted at trial. The conviction and sentence were reversed and set aside. *Id. See also* United States v. Henderson, 18 M.J. 745, 747 (A.F.C.M.R. 1984) (witness unavailable when she refused to comply with subpoena ordering her to appear in court).

When courts-martial are convened outside the United States, in many instances there are host-nation agreements whereby reluctant local witnesses can be compelled to testify.[18] Regulations can require military and civilian employees of the U.S. government to attend courts-martial anywhere on the globe.[19] A court-martial convened in the United States, however, has no subpoena power over individuals residing in other countries. Nor can a court-martial convened in a non-U.S. country compel persons outside that country to attend.[20] Thus, as our military society is both highly mobile and of global reach, situations in which there is no legal process for securing the attendance of potentially important witnesses are not uncommon in courts-martial.

The fact that a deponent is not amenable to process and cannot be compelled to testify at a court-martial does not necessarily mean, however, that he or she is legally unavailable, thereby allowing admission of deposition testimony. Since a witness who cannot be compelled to appear may nonetheless be persuaded to do so, the government must show that it has made a "good faith" effort to obtain the voluntary presence of any witness who cannot be forced to attend.[21] There is no precise formula for determining whether the government has met this "good faith" requirement. Each case is fact-specific and must be addressed on its own merits.[22] A review of the case law does, however, provide several data points from which trial participants may orient themselves.

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[18] *See* MCM, *supra* note 1, R.C.M. 703(e)(2)(A) Discussion (presence of foreign nationals may be obtained through cooperation of the host nation).

It is probably worth mentioning, as a testament to the fact that host nation cooperation can prove effective, that the author has personally presided over cases in Japan, Germany, and Iceland, where uncooperative civilian residents were forcibly brought to the proceedings by police officials of their respective countries.

[19] *See, e.g.,* U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, para. 6.4.6 (21 Dec. 2007) [hereinafter AFI 51-201] (guidelines for obtaining presence of witnesses employed by the U.S. Government); *see also* MCM, *supra* note 1, R.C.M. 703(e)(2)(A) Discussion ("Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment.").

[20] *See* MCM, *supra* note 1, R.C.M. 703(e)(2)(A) Discussion ("A subpoena may not be used to compel a civilian to travel outside the United States and its territories."); *see also* United States v. Bennett, 12 M.J. 463, 472 (C.M.A. 1982) (holding military courts cannot enforce subpoena beyond United States territorial limits); United States v. Hampton, 33 M.J. 21, 22 (C.M.A. 1991) (holding a German national residing in the United States could not be compelled to attend court-martial held in Germany); United States v. Amarine, 17 M.J. 974, 952 (A.F.C.M.R. 1984) (holding a United States citizen living in North Carolina could not be subpoenaed to testify at court-martial held outside the United States).

[21] *See Crockett*, 21 M.J. at 427-430; *Cokeley*, 22 M.J. at 228.

[22] *See Cokeley,* 22 M.J. at 229 ("Unfortunately, there is not bright-line rule which will fit every situation. . . . The military judge must weigh all the facts and circumstances of the case, keeping in mind the preference for live testimony.").

First, it should be noted that this is one area of the law where "good faith" is treated as a rather high standard. There is judicial concern that, where depositions are used, "an accused's access to his constitutional right to confront a witness depends in part on the enthusiasm with which his antagonist seeks that witness' attendance at trial."[23] Thus, in this area the courts have laced into good faith a requirement that "'the Government has exhausted every reasonable means' to secure the witness' live testimony."[24]

Service of a subpoena and extending the deponent invitational orders, along with offering to pay travel-related expenses, are typically considered important first steps toward establishing good faith effort.[25] Where witness unavailability appears to be temporary, the trial judge must weigh such factors as the importance of the testimony and the amount of delay necessary to obtain it.[26] Delaying the trial may be required, particularly if the deponent is the alleged victim in the case or some other crucial witness.[27] Reliance upon a husband's claim that his spouse was refusing to testify has, for example, been held insufficient effort on the part of the government.[28] In one case, readiness to assist in obtaining a travel visa was apparently critical in proving governmental good faith.[29]

On the other hand, "good faith effort" does not require the government to prove *absolute unavailability*, or go to lengths the courts deem excessive. Cases have held, for example, that the government need not move the venue of trial to the locality of the deponent who is not amenable to process.[30] One case held that the government need not offer first class air accommodations, particularly where there was no indication doing so would have changed the minds of reluctant witnesses. And the government is not required to engage in obviously futile behavior, such as attempting to obtain the presence of a witness who is known to have died.[31]

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[23] *See* United States v. Baker, 33 M.J. 788, 790 (A.F.C.M.R. 1991).
[24] *See, e.g., Baker,* 33 M.J. at 790, quoting United States v. Burns, 27 M.J. 92, 97 (C.M.A. 1988).
[25] *See, e.g., Crockett,* 21 M.J. at 424, 430 (witnesses refused invitational travel and offer to pay travel costs); *Burns*, 27 M.J. at 97 (C.M.A. 1988) ("Obviously, the key to obtaining the presence of a civilian witness at a court-martial is service of a subpoena and tender of a witness fee and mileage."); United States v. Minaya, 30 M.J. 1179, 1180 (A.F.C.M.R. 1990) (convening authority approved travel, and plane ticket awaited deponent).
[26] *Cokeley*, 22 M.J. at 229.
[27] *Id.*
[28] *See Baker,* 33 M.J. at 789, 791.
[29] *Minaya,* 30 M.J. at 1180.
[30] *See, e.g., Crockett*, 21 M.J. at 427; *Minaya,* 30 M.J. at 1181.
[31] *Crockett*, 21 M.J. at 430. *See also Baker,* 33 M.J. at 790 (stating that the rules governing depositions "do not require the impossible").

Ultimately, as with so many areas where exact legal boundaries are sketchy, the final determination as to unavailability is often left to the discernment (some might argue, "whims") of the military judge. Trial judges are afforded "substantial discretion" in deciding whether the government has demonstrated a good faith effort to obtain the presence of witnesses, and the decision whether to admit or exclude deposition testimony will be reversed only if the judge has violated that discretion.[32]

Our *Savard* case helps illustrate how some of these deposition issues play themselves out, and affords a glance at some of the deliberative process a judge can go through in addressing deposition testimony. In *Savard*, finding certain depositions admissible was simple, almost perfunctory. Mentioned above was a friend of the accused living in Texas. This friend, named Ryan, worked for a civilian contractor doing business with the Air Force. He submitted to a deposition held at Lackland AFB but thereafter refused to attend trial in Japan. Residing in the States and not employed by the U.S. government, Ryan was not amenable to process. As trial got underway, however, both parties decided that elements of Ryan's testimony were helpful to their own causes. The defense eventually waived any objection to the deposition, and the unavailability question became moot. Similarly, both parties came to believe that the deposition of a Philippine police official helped their own cases, and his deposition was admitted without objection from either side. Situations such as these, where depositions are resolved through consent of the parties, are common in courts-martial.

The decision to admit deposition testimony from another category of witnesses in *Savard* was more challenging, but still relatively easy. The man who lived across the street from the accused's wife and daughter in the Philippines, and who actually spoke to the accused on occasions when he visited his family, is one example. This man, Mr. Pineda, was willing to testify at a deposition in the Philippines. He was, however, not amenable to process, and he refused to attend trial in Japan. In response to a defense motion to exclude his deposition at trial, the government produced logs of the many phone calls they had made to Mr. Pineda attempting to secure his presence. A member of the base legal office testified to repeated instances in which Mr. Pineda had declared that he would not travel to Japan. The government showed that it had provided invitational travel orders, had made airline reservations, and had promised Mr. Pineda witness fees and payment for travel, hotel and per diem. Still Mr. Pineda responded that he had more important obligations to his work and to an ailing wife, and also that he had no passport and would make no effort to obtain one.

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[32] *Cokeley*, 22 M.J. at 229.

In the case of Mr. Pineda, and some others who had demonstrated a similar unwillingness to attend trial despite similar efforts on the part of the government to secure their presence, I concluded without much difficulty that the witnesses were unavailable under MRE 804(b)(1), and their depositions were admitted at trial.

More difficult were a few situations like that of a business regulations official named Mr. Tanglao. He was familiar with the entrepreneurial activities of the accused's wife in the Philippines. After giving his deposition in the Philippines, Mr. Tanglao was cooperative and stated more than once that he would be willing to attend the court-martial in Japan. He had obtained a passport and was preparing to leave for Japan. But he hit a snag when, a few days prior to trial, he still had no Japanese visa. At this point the prosecution appeared to give up efforts to bring Mr. Tanglao to Japan. He stayed home. The defense contended that the government had not shown the "good faith effort" necessary to establish unavailability.

I was then required to do some balancing. On one hand, the government had made more than minimal efforts to secure the presence of the cooperative Mr. Tanglao. Trial counsel had, among other things, provided him invitational orders, had offered to pay travel related expenses, and had made airline reservations for him. On the other hand, information before the court indicated that the U.S. Air Force had resources and influence through which it could assist foreign witnesses in obtaining travel visas. Moreover, there was an Air Force appellate case very close to on-point. In *United States v. Minaya*, an Air Force noncommissioned officer (NCO) was accused of housing allowance theft, and the deponent in question was a resident of the Philippines.[33] In *Minaya*, good faith was established, at least in part, by showing that the government stood ready to help expedite a visa request, and still the witness refused to travel. Ultimately, in what amounted probably to hair splitting, I concluded in *Savard* that the Government had not "exhausted every reasonable means" to secure the attendance of Mr. Tanglao. As such, his deposition was not admitted at trial.

2. Military Witnesses

Issues involving depositions of military witnesses arise frequently, and the courts tend to view these matters through a somewhat specialized lens. Thus, it might behoove us to review a few particulars in this regard.

Because military members deploy to war zones, the high seas, and other locations from which they cannot easily return, taking their depositions is often wise. Indeed, Article 49 specifically cites "military

[33] *Minaya*, 30 M.J. 1179.

necessity" as a basis for finding a witness unavailable for trial so that a deposition might be used.[34] Deployments are not the only way in which military witnesses are unique, however. Uniformed service members are subject to court-martial jurisdiction, regardless of where trial is held. If military authority can send military deponents away from a court-martial situs, it can also bring them back.[35] Accordingly, while never suggesting that all military witnesses are available for trial because the government has the power to make them so,[36] the appellate courts have given close scrutiny to unavailability based upon military necessity. A few leading cases in this area help show the lay of the land.

United States v. Cokeley involved a victim-deponent who was not a military member herself, but the spouse of a U.S. Army soldier.[37] In that case the military judge found the deponent unavailable for trial, due primarily to pregnancy which prevented her from traveling, and admitted her deposition. Reversing the accused's conviction, the Court of Military Appeals (COMA) stated that, before admitting this substitute for crucial live testimony, the judge should have done more to address the temporary nature of the deponent's unavailability, and particularly the defense claim that by the time of trial the witness had given birth and would be able to travel shortly. COMA declared that, where a deponent is temporarily unable to testify at trial, the military judge

> must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony. Factors to be considered include the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay.[38]

Subsequently, in *United States v. Vanderwier*,[39] COMA applied the foregoing *Cokeley* standard to cases involving military deponents.[40]

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[34] UCMJ art. 49.(d)(2).
[35] *See, e.g.,* United States v. Davis, 41 C.M.R 217, 223 (C.M.A. 1970)(stating that "a serviceman, subject to military orders, is always within the jurisdiction of the military court").
[36] *Cf.* United States v. Marsh, 35 M.J. 505, 509 (finding military deponent performing essential military missions during Operation Desert Shield was unavailable under Article 49 and MIL. R. EVID. 804(a)(6)).
[37] *Cokeley,* 22 M.J. 225. The *Cokeley* case is described in greater detail at note 17, *supra*.
[38] *Id.* at 229.
[39] 25 M.J. 263 (C.M.A. 1987).
[40] *Id.* at 266.

Noting that deployment-related unavailability is typically temporary in nature, COMA found the trial judge had abused his discretion in concluding that a military deponent was unavailable at trial merely because he had training duties aboard a vessel at sea. According to COMA, the trial judge should have examined whether a critical training period had ended, and whether "the presence of the witness on board may no longer have been a matter of 'military necessity.'"[41] The trial judge was faulted for failing to consider whether another trial date could have accommodated the training, and for finding the witness unavailable for trial based only upon "the sparse and stale facts before him."[42]

In *United States v. Dieter*[43] an accused was caught with marijuana at a Dutch-German border crossing, then made self-incriminatory statements to a Special Agent of the Army Criminal Investigation Command (CID). The CID Agent was absent from the accused's subsequent trial in Germany, to be with his wife who was undergoing surgery in Belgium. Concluding that he was thus unavailable, the trial judge admitted a deposition of the CID Agent. On review, the Army Court of Criminal Appeals applied the above-mentioned *Cokeley-Vanderwier* standard quite strictly. The court pointed to ways in which the trial judge might have accommodated the Special Agent's schedule, thus enabling him to testify in person. The court concluded that the failure to make such accommodation, with little or no rationale supplied by the military judge, amounted to reversible error.[44]

Ultimately, in addressing the availability of military witnesses, practitioners should at least be aware of the *Cokeley-Vanderwier* precedents, and should know that the government's standard for proving unavailability is relatively high.

3. The "100-Mile Rule"

With regard to witness availability, practitioners should be warned of an existing provision of the UCMJ that, at least in the opinion of this military judge, is not merely archaic but perhaps even dangerous.

Article 49 lists, as one of the specific grounds for which a deponent may be found unavailable for trial, the following: "that the witness resides or is beyond the State, Territory, Commonwealth or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of the trial or

[41] *Id*. at 267.
[42] *Id.*
[43] United States v. Dieter, 42 M.J. 697 (Army Ct. Crim. App. 1995).
[44] *Id.* at 699-701.

hearing."[45] In its context and on its face, this rule seems to say that any witness who is either beyond the boundaries of the state in which a court-martial is held, or is more than one hundred miles from the site of trial, is automatically every bit as unavailable as the witness who is not amenable to process, the witness whose whereabouts are entirely unknown, or even the witness who is dead. Be advised that the appellate courts do not give this provision the credence it appears to demand. Indeed, they have ganged up on the verbiage and beaten it pretty well into oblivion.

As far back as the old CMR "red book" days, the courts had rejected any notion that the 100-mile provision could stand on its own as a basis for finding a military deponent unavailable. In 1970, for example, COMA discussed at some length its concern that deposition use might undermine an accused's confrontation rights, then declared, "Since a serviceman, subject to military orders, is always within the jurisdiction of the military court, we do not believe that he is *unavailable* simply because he is stationed more than one hundred miles from the situs of the trial. Something more is required."[46] Twenty-five years later, the Army Court of Criminal Appeals was putting it more bluntly, "[T]he 'hundred mile' rule of Article 49(d)(1), UCMJ, is not an acceptable excuse when it comes to military witnesses."[47]

There appears to be no case law wherein the appellate courts have so explicitly rejected any applicability of the 100-Mile Rule to civilian deponents. However, the courts have repeatedly resolved civilian unavailability questions without mentioning or giving any weight to the 100-mile provision,[48] their silent treatment of this rule thus suggesting the courts are not inclined to give it much weight when considering the non-availability of civilian deponents.

Today, it would seem a rare case indeed where citing the 100-Mile Rule would help decide a deposition admissibility issue in favor of the proponent. In fact, the opposite might hold true. In some cases, the mere mention of the 100-Mile Rule by counsel or the military judge, as even a partial basis for admitting depositions, tends to draw criticism from the appellate courts–the inference apparently being that the party resorting to the rule has given undue weight to nearly-irrelevant criteria.[49]

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[45] UCMJ art. 49(d)(1).
[46] *Davis*, 41 C.M.R at 223 (emphasis in original).
[47] *Dieter*, 42 M.J. at 700.
[48] *See, e.g., Hampton*, 33 M.J. 21 (C.M.A. 1991) (upholding trial judge's finding that civilian deponent was unavailable–no mention of 100-mile standard); *United States v. Baker,* 33 M.J. 788, 791 (A.F.C.M.R. 1991) (trial judge's finding civilian deponent unavailable reversed–no mention of 100-mile standard).
[49] *See Vanderwier*, 25 M.J. at 266 (trial counsel and military judge apparently faulted for even partial reliance upon 100-Mile Rule); *Dieter*, 42 M.J. at 700 (rejecting 100-Mile Rule as even partial basis for finding of non-availability).

Accordingly, I advise that trial practitioners either ignore the 100-Mile Rule completely, or resort to it only with considerable caution.

C. Compliance with the Law (Requirement 4)

MRE 804(b)(1) states that, in order to qualify as an admissible hearsay exception, a deposition must be *taken in compliance with law* during the course of the same or another proceeding.[50] It is unclear what specific law, if any, is intended by this reference.[51] However—in addition to UCMJ Article 49, which we have discussed in some detailtrial participants should remember R.C.M. 702. A thorough review of that provision will not be given here. A few comments and highlights may, however, be of value.

First, practitioners should study RCM 702 and its Discussion provisions carefully, for they provide the basic "how to" framework for initiating and conducting depositions.

Second, RCM 702 does not purport to govern the eventual admissibility of depositions at trial. As is noted in the rule's Analysis, "The admissibility of depositions is governed by MIL. R. EVID. 804 and by Article 49(d), (e), and (f) so it is unnecessary to prescribe further rules governing their use in R.C.M. 702."[52] Nevertheless, compliance or noncompliance with the RCM 702, and observance of matters set forth in its Discussions, can indeed affect significantly whether a deposition is admissible at trial. Captured therein is guidance, from case law and elsewhere, which if ignored can inject error, perhaps even prejudicial error, into the trial proceedings.

Just one example, the Discussion to RCM 702(a) reminds us that a "deposition which is transcribed is ordinarily read to the court-martial by the party offering it . . . and may not be inspected by the members."[53] A good word of caution. For in at least one closely analogous case–involving Article 32 rather than deposition testimony—sending a transcript of the witness's pretrial testimony into the deliberation room was not merely error on the part of the court, but serious enough to warrant reversal of a child sex abuse conviction.[54]

Other failures to meet RCM 702 guidelines could raise similar issues as to whether depositions are "in compliance with the law," and thus worthy of admission under MRE 804(b)(1). In our *Savard* case, the accused had hired a civilian defense counsel and had also retained the services of his military area defense counsel (ADC). When the

[50] MCM, *supra* note 1, MIL. R. EVID. 804(b)(1).
[51] The Drafters' Analysis is silent as to what law may have been intended. *See* MCM, *supra* note 1, MIL. R. EVID. 804(b)(1) Analysis, at A22-56 (2008).
[52] MCM, *supra* note 1, R.C.M. 702 Analysis, at A21-35 (2008).
[53] MCM, *supra* note , R.C.M. 702(a) Discussion (2008).
[54] United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

convening authority ordered several depositions taken in the Philippines, the civilian counsel elected not to attend, and the accused was represented only by his ADC at those depositions. Later at trial, the defense complained that the depositions should not be admitted, on grounds they had been ordered to occur at a time and manner inconvenient and unfair to the accused. Reviewing the evidence, I found the defense argument to be without merit and admitted the depositions. Had the evidence shown, however, that the defense had been denied reasonable notice of the time and place for taking the depositions,[55] that the depositions were carried out in a manner that adversely affected the accused's right to counsel,[56] or that there had been some other substantial RCM 702 breach, the thus defective depositions may have been found inadmissible.

In considering whether a deposition is taken "in compliance with the law," regulatory law should not be forgotten. In the Air Force, AFI 51-201, Section 4C, provides service-specific guidance related to depositions.[57]

When speaking of compliance with the law, perhaps one other matter is worth remembering. It is the government, of course, who bears the burden of proving the witness is unavailable when it seeks to introduce a deposition at trail. In at least one significant case, the trial court's getting this wrong contributed to a finding of prejudicial error.[58]

IV. PRACTICAL AND OTHER CONSIDERATIONS

A. Handling Objections

We have said above that in order to be admissible at trial, deposition testimony must meet four requirements. That statement is accurate, as far is it goes. But it should be remembered that clearing the four hurdles means only that the deposition testimony is admissible as to

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[55] *See* MCM, *supra* note 1, R.C.M. 702(e) ("The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.") For a discussion of cases where deposition admissibility at trial hinged on whether there had been reasonable notice to the defense as to time and place for taking a deposition, *see* United States. v. Marsh, 35 M.J. 505, 508-509 (A.F.C.M.R. 1992).

[56] *See* MCM, *supra* note 1, R.C.M. 702(g)(1)(A)(ii) (at a deposition the accused is entitled to same rights of counsel as at trial). *See also Marsh,* 35 M.J. at 509 (finding error in taking a deposition without affording accused adequate opportunity to have his counsel of choice present).

[57] *See* AFI 51-201, *supra* note 19, at sec. 4C.

[58] *See Cokeley*, 22 M.J. at 229.

form. It says nothing about the admissibility of the *substance* of the testimony. Put somewhat childishly, clearing the hurdles allows Mr. or Ms. Deposition to enter our courtroom and "testify." It does not, however, mean they can say things a live witness could not.

RCM 702(h)(2) states, "Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition."[59] The rule adds, "If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition." [60] Thus, R.C.M. 702 envisions—much like the testimony at an Article 32 Investigation—a proceeding in which the parties object to the questions and responses of witnesses, and the hearing or deposition officer defers any ruling upon those objections to the military judge at trial. The actual mechanics as to how these objections will be handled at trial, and how the testimony will be presented to the court members, deserve at least some forethought on the part of trial practitioners, and some mention here.

If a deposition is not video-recorded, and the oral testimony is transcribed, the matter tends to be relatively simple. Typically, the military judge and the counsel go through each deposition transcript in an Article 39(a) session. As they deem necessary, the parties renew objections made at the time the deposition was taken. The military judge rules on those objections. Inadmissible matters are redacted from the transcripts. And what is left is read to the court members.

In the case of video-recorded depositions—which, as shall be seen below, are now the preferred form—the matter is more complicated. Envision for a moment the situation in our *Savard* case. Before the court, as mentioned earlier, were nine separate videotaped depositions, with a total run time of eight to ten hours; each deposition was filled with objections made by counsel for both sides at the time the depositions were taken. How were the objections to be addressed at trial? Were the judge and counsel to play through each hour of each video, in court, stopping constantly to address and rule upon each objection, and thereafter attempting to pinpoint the portion of each recording to be deleted? How much of the court's time would this consume? (Full days, one would think.) As one court noted when facing a similar situation, videotaped depositions are a potential "a nightmare to edit."[61]

Our approach in *Savard*—one I learned from others—offered one fairly workable solution, and might be a good starting point for practitioners dealing with video-recorded depositions. First, the judge

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[59] MCM, *supra* note 1, R.C.M. 702(h)(2).
[60] *Id.*
[61] *Vanderwier*, 25 M.J. at 264.

ordered that all videotaped depositions be transcribed, with lines as well as pages numbered on the transcripts.[62] Then, as if these were transcripts of oral depositions, the judge and counsel went through the transcripts of the video recordings in an Article 39(a) session, addressing objections and identifying deletions by page and line number. Once rulings were made, government trial counsel were directed to ensure that copies of the video depositions were edited in accordance with those rulings. Defense counsel were directed to confirm that deletions had been properly made. The process of preparing the video recorded depositions for viewing by the court members was reasonably swift and painless.

B. Depositions and the Word "Video"

It was after referral of charges and a few weeks prior to trial in our *Savard* case that the government realized Ryan, the friend of the accused mentioned above, was refusing to attend the trial in Japan and could not be forced to appear. Pursuant to RCM 702(b), the government requested that the military judge order a deposition of Ryan.[63] In its motion the government requested, however, not merely that the deposition be video-recorded, but also that it be conducted via remote video teleconference (VTC). The government proposed that Ryan be allowed to testify from Lackland Air Force Base, in Texas, while government counsel, defense counsel, and the accused would participate in the VTC deposition from Yokota Air Base, Japan. This particular request by the government touched upon two of the most significant modern developments in military depositions—both involving the word "video."

The first of these developments—the use of video recordings—has arisen and been settled without much controversy. When I began my military service, audiotaped depositions were the state of the art. Then, when technology made it practical to record depositions and similar proceedings by video means as well, the military legal system wrestled briefly with this development, and embraced it. By 1984, Congress had expressly amended Article 49(d) to permit the recording of depositions via "audiotape, videotape, or similar material," and to allow the playing of these recordings to the

[62] Video depositions will have to be transcribed at some point in any event, assuming a verbatim record is required. So this requirement was unlikely to place any additional burden on the court reporters.

[63] R.C.M. 702(b) states: "*Who may order.* A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party." MCM, *supra* note 52, R.C.M. 702(b) (emphasis in original).

factfinder; these developments were incorporated into RCM 702.[64] Within a few years, Chief Judge Everett, in one of his scholarly opinions, welcomed the use of videotaped depositions.[65] Soon thereafter, COMA announced, "Use of a videotaped deposition is generally preferable to a written version, as it permits the factfinder to observe the demeanor of the witness, hear voice inflections, and view gestures and facial expressions."[66]

Accepting video-recorded depositions seems to have been relatively obvious and easy. This involved merely a new, and generally more effective, format. The second development—the use of video teleconferencing (VTC) to capture the testimony of witnesses whose locations are remote from one or both parties—raises legal issues that are more complicated and unsettled today.

The latest wave of technology has brought to legal offices across the Air Force impressive video teleconferencing (VTC) capabilities. At the very time staff judge advocates and others have been seeking to put this VTC technology to best use, there have been important developments in the law. The 2008 Manual for Courts-Martial (MCM) now specifically allows witnesses to testify "via remote means," when both the government and the accused *consent* to this procedure.[67] Even over objection by a party, if certain criteria are met, the military judge may allow a witness to testify on *interlocutory questions* by remote or similar means.[68] Testimony by remote means is now endorsed in *sentencing* proceedings.[69]

Important limitations on the use of remote testimony remain. The developments just mentioned, while substantial, are peripheral to the question of guilt or innocence. Any procedure that contemplates a witness's testifying as to actual guilt, from a location other than that of defense counsel and the accused, raises at a minimum significant Confrontation Clause concerns.[70] Mindful of this, the MCM specifically

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[64] UCMJ art. 49(d) (1984); MCM, *supra* note 1, R.C.M. 702(g)(3).
[65] *See* U.S. v. Crockett, 21 M.J. 423 (C.M.A. 1986).
[66] *Vanderwier*, 25 M.J. at 265 n.1.
[67] MCM, *supra* note 1, R.C.M. 703(b)(1).
[68] *Id.*
[69] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(e)(2)(D) (2008).
[70] *Maryland v. Craig*, 497 U.S. 836 (1990), is the seminal case involving testimony of remote witnesses. There, in upholding a procedure which allowed a child to testify outside the courtroom and presence of the accused, the Supreme Court stated that while "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," that preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849. For examples of judicial efforts to address non-child, remote witnesses, *see* United States v. Shabazz, 52 M.J. 585, 594 (N-M. Ct. Crim. App. 1999) (where trial judge failed to exercise adequate control over witness site, VTC testimony violated accused's Confrontation Rights); United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (remote testimony of witnesses in Australia violated accused right of confrontation under the Sixth Amendment); Harrell v. Butterworth,

states that remote testimony "will not be admissible over the accused's objection as evidence on the ultimate issue of guilt."[71]

Note, our present discussion thus far deals with the use of remote VTC testimony in general, and not VTC depositions specifically. In fact, nothing in the Manual for Courts-Martial as yet directly addresses the use of remote VTC testimony in depositions. Those responsible for researching and drafting amendments to the MCM and UCMJ are watching developments—in civilian legislation, case law, and elsewhere—eyeing ways to ensure military law keeps pace with technological progress. There are at present, however, no immediate proposals to expand the use of remote testimony into areas involving guilt or innocence, or to write remote testimony into the rules regarding depositions.[72]

Thus, in *Savard*, the fact that the government wished the deposition of Ryan to be *video-recorded* caused little or no concern. The defense neither objected to the video recording of Ryan's deposition, nor to the video recording of any of the eight other depositions involved in the case. The defense was unlikely to have had any legal grounds for doing so. As we have just seen, video is not merely acceptable but is, in fact, the generally "preferred" method for recording depositions.

The matter of a remote *VTC* deposition of Ryan was something else. The government apparently intended that the deposition of Ryan be used for the matter of guilt or innocence at trial. When the defense objected based upon the Confrontation Clause of the Sixth Amendment, I challenged the government to demonstrate, by case law or otherwise, that such a VTC deposition was authorized. (A compelling analysis might have convinced the trial judge to rule in the government's favor, perhaps raising an important matter for appellate review.) But the government provided little in response. Accordingly, the military judge denied the government's motion for remote VTC deposition. Then, subsequently, the convening authority ordered a traditional video recorded (not remote VTC) deposition. The accused and counsel for both sides wound up physically present in Texas, where the deposition of Ryan was taken without significant controversy.

Around the Air Force the words "video" and "deposition" tend to be juxtaposed somewhat sloppily these days. In some cases the lack of precision is of no real consequence—such as when people speak of "videotaped" depositions, when they really mean video recordings on

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251 F.3d 926, 931-32 (11th Cir. 2001) (upholding satellite testimony of robbery victims in Argentina against Confrontation Clause challenge).

[71] MCM, *supra* note 1, R.C.M. 703(b)(1).

[72] Telephone interview with Lieutenant Colonel Thomas E. Wand, Chief, Joint Serv. Policy and Legislation, Military Justice Div. (AFLOA/JAJM) (July 11, 2008).

digital and computerized media more advanced than actual video*tape*. In other instances, the distinctions matter. For example, attorneys and even some of us judges speak generically of "video depositions" as if video-recorded and remote VTC depositions were the same thing. In such instances poor articulation can lead to misunderstanding the legal issues pertaining to a given case.

C. Technology—Friend or Foe?

In *Savard*, as noted above, the judge and counsel went through each transcript of each video-recorded deposition in an Article 39(a) session. Each objection was addressed, objectionable materials were marked for deletion on each transcript, and counsel dutifully insured the video recordings were appropriately edited. After all this, the court members were brought in, and the first video recording of the first Filipino deponent was played for them. Or it began to play. But the tone quality turned out to be so poor that significant portions of the questions and answers could not be understood by anyone in the courtroom. The judge cut in a time or two to stop the playing of the depositions. The government scurried to make adjustments to the sound system. There was a recess. More scurrying. Eventually the members were sent on a longer lunch recess, while a technical crew did all they could to swap out speakers and otherwise improve sound quality, all to little avail.

Ultimately, the video-recorded deposition of only one witness—Ryan, in Texas—was of such quality that it could be played to the members. The depositions of all the witnesses in the Philippines had to be presented the old-fashioned way—with trial counsel reading transcripts in open court. All of this served as a reminder to the judge and parties that, when it comes to our great friend and enemy technology, it is hard to be too meticulous in assuring all systems are go.

V. CONCLUSION

The foregoing was intended to be a helpful starting point and review for those who find themselves involved with depositions in the military courtroom. Hopefully, the presentation has come close to achieving that purpose.

As for the *Savard* case itself, trial practitioners might want to watch it on appeal. On one level, it may be interesting to see what happens personally to this accused. A panel of officers ultimately convicted MSgt Savard of six specifications of false official statement, in violation of Article 107, UCMJ, and two specifications of larceny, under Article 121. His adjudged sentence included reduction to E-1,

confinement for one year, and a bad conduct discharge. If his conviction and sentence are upheld, this once-retirement-eligible NCO stands to lose hundreds of thousands of dollars in post-employment compensation.

More significantly, it might be useful to watch *Savard* from a legal standpoint. What if anything will the appellate courts have to say, as they write updates or amendments to this article on depositions?

MULTIPLICITY: RECONCILING THE MANUAL FOR COURTS-MARTIAL

MAJOR CHRISTOPHER S. MORGAN

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I. INTRODUCTION

The meaning and effect of the deceptively simple phrase, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," embedded in the Fifth Amendment of the United States Constitution,[1] have proven far more difficult to determine than James Madison, its principal author, likely envisioned.[2] Today, the Double Jeopardy Clause embodies several protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[3] In addition, it may also bar a second prosecution for the same offense after initial proceedings have been terminated before a final verdict is reached either by the declaration of a mistrial or dismissal of charges.[4] While each of these applications presents its own unique questions and formulae, the scope of the substantive protections afforded by the Double Jeopardy Clause turns largely upon the meaning of the words "same offense;" a phrase once described by former Chief Justice Rehnquist as "deceptively simple in appearance but virtually kaleidoscopic in application."[5]

This article is not an attempt to chart the entire double jeopardy terrain—the scope of many of the Clause's applications being far from self-evident—but focuses on the most challenging aspect of double jeopardy in military practice—"multiplicity," the charging of the "same offense" in several charges or specifications.[6] This aspect of the Double Jeopardy Clause has generated a complex and seemingly inconsistent body of military case law that provoked the United States Court of Appeals for the Armed Forces[7] (CAAF) to describe the requisite analysis in one case as that which "approaches the metaphysical."[8] Yet,

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[1] U.S. CONST. amend. V.

[2] For a comprehensive history of the Double Jeopardy Clause, see generally JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969).

[3] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[4] *See* Arizona v. Washington, 434 U.S. 497 (1978); United States v. Scott, 437 U.S. 82 (1978), respectively.

[5] Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting).

[6] "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 907(b)(3)(B), Discussion (2008) [hereinafter MCM].

[7] Hereinafter, the United States Court of Appeals for the Armed Forces will be referred to as the CAAF.

[8] United States v. Weymouth, 43 M.J. 329, 338 (1995). Other military jurists have used somewhat more colorful language, referring to this area of the law as a "minefield," United States v. Zupancic, 18 M.J. 387, 392 (C.M.A. 1984) (Cook, J., concurring in part, dissenting in part); "chaos," United States v. Baker, 14 M.J. 361, 372 (C.M.A. 1983) (Cook, J., dissenting); the "Sargasso Sea of Military Law," *Id.*; "confusing," United States v. Doss, 15 M.J. 409, 410 (C.M.A. 1983); and "that inner circle of the

routinely, military litigants and judges are called upon to make multiplicity determinations involving combinations of offenses of ever increasing complexity against a voluminous backdrop of oftentimes nebulous military jurisprudence.

The related, though distinct concepts of "unreasonable multiplication of charges," and "multiplicity for sentencing," each with their own body of often amorphous and malleable precedents, as well as the tendency of litigants and courts to conflate these separate concepts with "multiplicity," have significantly contributed to the confusion in this area.[9]

The CAAF is not unaware of the confusion—and its role in generating some of that confusion—that has plagued military practitioners and military judges alike in this area. In *United States v. Zupancic*,[10] the Senior Judge of the then United States Court of Military Appeals (CMA),[11] exclaimed, "[h]ow trial practitioners can be expected to proceed in implementing the myriad, fickle rules propounded by this Court, in light of my Brothers' failure to follow even their own dictates, is beyond me!" In somewhat less emotive language, the evolution of the doctrine of multiplicity prompted the current Chief Judge of CAAF, Judge Effron, to observe, "the Manual for Courts-Martial, [this Court, and other courts] have developed, revised, rejected, and regenerated a variety of tests for multiplicity. . . ."[12]

Nonetheless, in recent years, CAAF has developed hardy doctrinal constructs, embodying policy and charging considerations unique to military practice, within which to analyze the separate concepts of multiplicity, unfair multiplication of charges and multiplicity for sentencing. Despite these developments, the Manual for Courts-Martial,[13] the primary implementing regulation for the Uniform Code of Military Justice, does not embody these doctrinal frameworks. Accordingly, it is necessary that the Manual—the instrument relied upon most by military practitioners—be revised to reflect the requisite analysis applicable to these related, yet distinct concepts.

Inferno where the damned endlessly debate multiplicity for sentencing." United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990) (footnote omitted).

[9] For example, in the recent case of United States v. Markert, 65 M.J. 677, 683 (N-M. Ct. Crim. App. July 12, 2007), the Navy-Marine Corps Court of Criminal Appeals noted that while trial defense counsel "somewhat ambiguously" argued that appellant's convictions for involuntary manslaughter and reckless endangerment constituted an unreasonable multiplication of charges, appellate defense counsel asserted that such convictions were "unreasonably multiplicious." Yet the court found "no material prejudice" because the military judge found that the charges were "multiplicious for sentencing." *Id*.

[10] 18 M.J. 387, 393 (C.M.A. 1984) (Cook, Senior Judge, concurring in part and dissenting in part).

[11] Hereinafter, the United States Court of Military Appeals will be referred to as CMA

[12] United States v. Britton, 47 M.J. 195, 199 (1997) (Effron, J., concurring).

[13] MCM, *supra* note 6.

Indeed, the Joint Service Committee on Military Justice, charged with the task of reviewing and keeping the Manual current, explained that the Manual "should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible."[14] To this end, the Manual has been referred to by the CMA as "the military lawyer's Bible."[15] However, it is currently of slight value to practitioners and military judges in this area of the law. This is especially so given both the potential for myriad overlapping offenses created by the multiplication of criminal statutes of ever increasing complexity and the need for clear standards for interpreting legislative intent—the controlling, though typically unstated consideration in this area.

Consequently, a time to take stock of the major developments in this area, and the policies underlying those developments, is at hand. If the frameworks that CAAF has developed to separate the tangled meanings of "multiplicity," "unreasonable multiplication of charges" and "multiplicity for sentencing" were reflected in the Manual, those frameworks and their policies would be measurably fortified and significantly further the Manual's purpose as a comprehensive guide for practitioners.

This article is divided into four major sections: I will first discuss the legal basis underlying the doctrine of multiplicity and the current test employed in resolving multiplicity issues arising in the military criminal justice system. I will not attempt to explore the nuances of the various tests since abandoned by CAAF[16] or suggest doctrinal modifications to the current analysis as such, but I will seek to examine and clarify the current state of the law in this area and its supporting policies. Second, I will examine the distinction between legal multiplicity and the related concept of "unreasonable multiplication of charges," as well as the factors relevant in conducting that analysis. Third, I will address the related concept of "multiplicity for sentencing" that has stalked military jurisprudence. Finally, I will propose a series of revised Rules for Courts-Martial in each of these related areas.

The modifications I propose are straightforward, relatively speaking, and will serve to alleviate much of the confusion in this area.

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[14] MCM, *supra* note 6, Appendix 21, Analysis of Rules for Courts-Martial, A21-1.

[15] United States v. Morris, 42 U.S.C.M.A. 209, 212 (C.M.A. 1954). *See also* Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 97 (1999) (commenting that military practitioners must constantly turn to the Manual for guidance and that "attempting to conduct a court-martial without referring to the Manual's numerous rules would be impossible").

[16] For the historical development of the multiplicity doctrine, see generally Michael J. Breslin and LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed,* 45 A.F. L. REV. 99 (1998).

This could be accomplished with revisions to three Rules for Court-Martial: R.C.M. 907(b)(3)(B), the rule authorizing dismissal of a multiplicious specification; R.C.M. 906(b)(12), identifying "multiplicity for sentencing purposes" as a grounds for appropriate relief; and R.C.M. 1003(c)(1)(C), governing sentencing limitations. The framework I propose properly differentiates between the concepts of legal multiplicity and unreasonable multiplication of charges, incorporates the applicable law in these related areas, and disposes of the term "multiplicity for sentencing." These proposed revisions should be given serious consideration by the Department of Defense Joint Service Committee on Military Justice and forwarded to the President for consideration and final decision.[17]

II. LEGAL MULTIPLICITY/DOUBLE JEOPARDY

A. Overview

Multiplicity is a legal doctrine grounded in the Double Jeopardy Clause of the Fifth Amendment to the Constitution.[18] As CAAF explained in *United States v. Quiroz*, "the prohibition against multiplicity is necessary to ensure compliance with the constitutional and statutory restrictions against Double Jeopardy. . . ."[19]

By its terms, the Double Jeopardy Clause prohibits *successive* trials for the same offense. This prohibition regarding successive prosecutions is reflected in Article 44, Uniform Code of Military Justice, providing that "[n]o person may, without his consent, be tried a second time for the same offense."[20] However, the Clause has been interpreted by the Supreme Court to also prohibit *multiple punishments* for the same offense at a single criminal trial.[21] This prohibition against

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[17] For a comprehensive discussion of the Manual for Courts-Martial revision process, see Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

[18] While the United States Supreme Court has never directly held that the Bill of Rights applies to service members, it has assumed its applicability in several cases. *See e.g.* Parker v. Levy, 417 U.S. 733 (1974); United States v. Davis, 512 U.S. 452 (1994). However, in United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960), the CMA held that "the protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces." *See also* 1 GILLIGAN & LEDERER, COURT-MARTIAL PROCEDURE, § 1-52.00 at 1-25 (3d ed. 2006).

[19] United States v. Quiroz, 55 M.J. 334, 337 (2001).

[20] 10 U.S.C. § 844(a). *See also* Rule for Courts-Martial [hereinafter R.C.M.] 907(b)(2)(C), providing grounds for dismissal of a charge where the accused "has previously been tried by court-martial . . . for the same offense."

[21] North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (observing that the "role of the constitutional guarantee is limited to assuring that the court does not exceed its

"multiple punishments" applies not only to multiple sentences imposed for the same offense, but also to separate convictions for the same offense.[22] As the Supreme Court explained in *Ball v. United States*, in ascertaining congressional intent as to multiple convictions arising from the same act, "'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component."[23] As defined above, it is this context —imposition of multiple convictions at a single trial for the violation of two different statutory provisions arising from the same act or transaction—to which the term "multiplicity" pertains, and is so used in this article.[24]

B. Congressional Intent

The constitutional power to define both federal civilian and military offenses resides with the United States Congress.[25] The guarantee against double jeopardy, as the Supreme Court explained in *Whalen v. United States,*[26] embodies "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."[27] In *Brown v. Ohio*, the Supreme Court reasoned:

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legislative authorization by imposing multiple punishments for the same offense."). *See also* United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993).

[22] For a thoughtful argument that Double Jeopardy Clause protections should not extend to multiple punishments imposed in a single trial, see Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595 (2006).

[23] 470 U.S. 856, 861 (1985).

[24] The term "multiplicity," is not peculiar to military jurisprudence. The term has been defined by federal civilian courts as "the charging of a single offense in several counts." United States v. Universal C.J.T. Credit Corp., 344 U.S. 218, 244 (1952). Multiplicity should also be distinguished from "duplicity," the joining in a single count of two or more distinct and separate offenses. *See* United States v. Starks, 515 F.2d 112, 116 (3rd Cir. 1975).

[25] United States v. Teters, 37 M.J. 370, 373 (1993); *See also,* United States v. Handford, 39 F.3d 731, 735 (7th Cir.1994) (observing "the principle that the power to define criminal offenses and prescribe punishments . . . belongs solely to the legislature.").

[26] 445 U.S. 684, 689 (1980).

[27] *See also* Albrecht v. United States, 271 U.S. 1, 11 (1926), where the Supreme Court earlier explained that the Double Jeopardy Clause poses no independent bar that prevents Congress from imposing separate punishments for "each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

> the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. [28]

Thus, the protection afforded by the Double Jeopardy Clause is ascertained by reference to the legislature's prerogative to impose multiple punishments.[29] So long as Congress intended to impose the punishment, such punishment is constitutionally permissible. Accordingly, a double jeopardy violation occurs only if a court, *contrary to the intent of Congress*, imposes multiple convictions and punishments under different statutes for the same act or course of conduct.[30] If a federal court exceeds its authority by imposing multiple punishments not authorized by Congress, "it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."[31]

Because Congress creates offenses and authorizes punishments, the "same offense" inquiry thus turns on legislative intent. Where Congress has expressed its intent, the question of multiple convictions may be readily addressed. However, as CAAF commented in *United States v. Albrecht*, such intent is "oft-sought-after but frequently elusive . . . ."[32] In the absence of congressional intent, the Supreme Court, in *United States v. Blockburger*,[33] held that the test for determining if two distinct statutory provisions constitute separate offenses for double jeopardy purposes is whether each provision requires proof of an additional fact which the other does not. In that case, Blockburger was convicted of selling narcotics without the original packaging and, for the same sale, selling narcotics without a written order—violations of two separate statutes. The Supreme Court concluded that Blockburger was not twice convicted for the same offense because each statutory

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[28] 432 U.S. 161, 165 (1977)

[29] *See* Thomas Herrington, *Multiplicity in the Military*, 134 MIL. L. REV. 45, 49 (1991) (explaining that "the double jeopardy protection from multiple punishments is coextensive with legislative limitations on the courts and prosecutors under the separation of powers doctrine.").

[30] *See* United States v. Ball, 470 U.S. 856, 861 (1985) (emphasis added); Albernaz v. United States, 450 U.S. 333, 343-344 (1981).

[31] *Whalen* at 689.

[32] 43 M.J. 65, 67 (1995).

[33] 284 U.S. 299, 304 (1932). Discussed more fully in *infra* II.B.ii.

provision under which he was prosecuted required proof of an additional fact the other did not.[34]

However, this "separate elements" test is only a rule of statutory construction, it is not the panacea for resolving all questions of legislative intent. It is therefore, not controlling when Congress has otherwise expressed its intent regarding multiple convictions arising from the same conduct. As explained by the CMA in *United States v. Teters,*[35] Congress can express its intent concerning multiple convictions at a single trial under different statutory violations arising from the same act or transaction in three ways. Congress could first do so expressly in the pertinent statutes or in their legislative histories. Second, absent such overt expression, its intent can be presumed based on the separate elements test set forth in *Blockburger*. Third, other guidelines for ascertaining intent may be considered to determine whether *Blockburger's* presumption of separateness can be overcome.[36] This article begins with an examination of each of these methods of ascertaining congressional intent.

1. *Overt Expressions of Legislative Intent*

Congress may determine that an accused should not be convicted under separately charged statutes despite the existence of separate elements contained in those statutes. Conversely, it may

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[34] *Blockburger's* "same elements test," used to determine whether separate statutory provisions constitute the "same offense," arose in the context of the Double Jeopardy Clause's proscription against imposition of multiple punishments in a single proceeding. However, in United States v. Dixon, 509 U.S. 688 (1993), discussed more fully in *infra* II.B.ii.a, the Supreme Court held that Blockburger's "same elements" test is also the appropriate test to determine whether offenses are "the same" in the successive prosecution context. Similarly, in *Brown*, *supra* note 28, a successive prosecution case, the Supreme Court explained that the separate elements test of *Blockburger* is the "established test" for determining whether offenses are the same. Whether legislative intent and the "same elements" test should control in both the multiple punishment and successive prosecution context is beyond the scope of this article as "multiplicity" concerns arise in the context of a single proceeding. Certainly, not all Supreme Justices and commentators agree that the standard should be identical in both situations. *See* United States v. Dixon, 509 U.S. 688, 756 (1993) (Souter, J., concurring in part and dissenting in part) (arguing that "*Blockburger* is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case."); *See also* United States v. Garrett, 471 U.S. 773, 776 (1985) (reasoning that where the same conduct violates two statutory provisions in the successive prosecution context, the "first step" in the double jeopardy analysis is to assess Congressional intent. If Congress intended separate offenses, the inquiry then turns on whether the offenses are the same under the Double Jeopardy Clause). *See also* Poulin, *supra* note 22, at 603 (asserting that the *Blockburger* test, when used to determine whether offenses are the same for purposes of successive prosecution, "severely circumscribes double jeopardy protection.").

[35] 37 M.J. 379 (C.M.A. 1993).

[36] *Id.*

determine that dual convictions are appropriate despite the fact that application of the separate elements test would otherwise require dismissal of one of the statutory offenses.[37] As the Supreme Court explained in *Missouri v. Hunter*:

> Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[38]

In ascertaining legislative intent as to the treatment of multiple convictions, the CMA explained in *United States v. Hickson* that "an examination of all legislation in a particular field is necessary" and that such an inquiry "must probe basic policy and the pattern and development of the means and procedures used to activate that policy."[39]

While overt expressions of congressional intent seem to be the exception rather than the norm, there are several illustrative cases. In *United States v. Garrett,*[40] the appellant was first convicted of importation of marijuana.[41] He was subsequently indicted on several drug counts, including one count for engaging in a continuing criminal enterprise (CCE) under the Comprehensive Drug Abuse Prevention Act of 1970 (Act), requiring the commission of a felony that was part of a continuing series of drug offenses.[42] At trial, evidence underlying Garrett's prior conviction for importation of marijuana was introduced to prove one of the predicate series of offenses necessary to make out a CCE violation, of which he was then convicted. On appeal, Garrett argued that under *Blockburger*, each of the predicate offenses, including the marijuana offense for which he was previously convicted, were the same for double jeopardy purposes because none of them required proof of an additional fact not contained in the CCE offense; that is, the predicate offenses were lesser included offenses of the CCE violation.

In rejecting the appellant's double jeopardy argument, the Supreme Court initially observed that "the first step in the double jeopardy analysis is to determine whether the legislature—in this case

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[37] *See* Michael J. Breslin and LeEllen Coacher, *supra* note 16, at 114.
[38] 459 U.S. 359, 368-69 (1983).
[39] 22 M.J. 146, 153 (C.M.A. 1986), *overruled on other grounds*.
[40] 471 U.S. 773 (1985).
[41] Made punishable under 21 U.S.C. §§ 952, 960(b)(2) and 18 U.S.C. § 2.
[42] 21 U.S.C. § 848.

Congress—intended that each violation be a separate offense."[43] The Supreme Court further emphasized that the "*Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."[44] The Supreme Court added that *Blockburger* is simply a factual inquiry as to legislative intent and not a "conclusive presumption of law."[45]

The Supreme Court then held that the language, structure, and legislative history of the Act revealed "in the plainest way" that Congress intended the CCE provision to be a separate criminal offense punishable in addition to the predicate offenses.[46] Consequently, it concluded that "the *Blockburger* presumption must . . . yield to a plainly expressed contrary view on the part of Congress."[47] In ascertaining this contrary view, the Supreme Court first looked at the language of the CCE statute and noted that it contained its own separate penalty provisions and did not operate merely as a sentence enhancer for penalties established for other offenses. These penalty provisions specifically set forth penalties for "one or more prior convictions . . . under this section," indicating that the CCE offense was separate from its predicate offenses.[48] Further, the language of the statute indicated that it was "designed to reach the 'top brass' in the drug rings" and therefore plainly intended to create a separate offense.[49]

Next, turning to the legislative record, the Supreme Court observed that comments in the debate over the statute's adoption also plainly showed that Congress sought to add a new enforcement tool in addition to the substantive drug offenses already in existence. For example, rejecting the proposal that the CCE acted as a mere sentencing enhancer, the bill's sponsor stated that the statute, "made engaging in a continuing criminal enterprise a new and distinct offense with all its elements triable in court."[50] Ultimately, the Supreme Court concluded that it was "indisputable that Congress intended to create a separate CCE offense."[51] In sum, the CCE was not the "same offense" as its predicates.[52]

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[43] *Id.* at 778.
[44] *Garrett,* 472 U.S. at 779 (citing Missouri v. Hunter, 459 U.S. 359, 368 (1983); Albernaz v. United States, 450 U.S. 333, 340 (1981); and, Whalen v. United States, 445 U.S. 684, 691-692 (1980)).
[45] *Garrett,* 472 U.S. at 779.
[46] *Id*. at 772.
[47] *Id.* at 779.
[48] *Id*. at 780.
[49] *Id.* at 781.
[50] *Id*. at 783 (internal citations omitted).
[51] *Id*. at 784.
[52] *Id*. at 776.

Similarly, in *United States v. Patel*,[53] the appellant contended that his convictions for arson, mail fraud and "using fire" to commit a felony[54] (the predicate felony of mail fraud) violated the guarantee against double jeopardy. That is, Patel argued that once the jury found him guilty of arson and mail fraud, all of the elements constituting the additional offense of using fire to commit a felony were met. The First Circuit agreed that convictions for mail fraud and using fire to commit mail fraud likely failed *Blockburger's* separate elements test since every element of mail fraud is also an element of the offense of using fire to commit mail fraud. Nonetheless, it observed that "*Blockburger* merely provides a default rule of statutory construction and should be employed only in the absence of a clear indication of legislative intent."[55] The court emphasized that the appellant's argument "ignored the threshold question for reaching the *Blockburger* analysis in the first place, namely, what was [Congress's intent] in enacting the using fire statute."[56]

In ascertaining congressional intent, the First Circuit first looked to the plain language of the statute, that read, "[w]hoever . . . uses fire . . . to commit any felony . . . shall, *in addition to the punishment provided for such felony*, be sentenced to imprisonment."[57] Thus, the court concluded that the statute itself, "plainly provides that a defendant who uses fire in the commission of a federal felony will be punished cumulatively for the predicate felony and for using fire to commit that felony."[58]

The court further held that the legislative history of the "using fire" statute reinforced this intent.[59] That history record reflected that the statute made "it an 'additional offense' to use fire in connection with a felony and provides for a 'sentence in addition to the sentence for the predicate offense.'"[60] Since "Congress explicitly authorized punishment for the predicate felony and using fire to commit the predicate felony, there was no Double Jeopardy violation . . . even though these constitute the 'same offense' under *Blockburger*."[61]

As indicated, Congress has the power to define offenses, including offenses under the Uniform Code of Military Justice. In *United States v. Morris*,[62] the appellant was convicted of both rape and carnal knowledge (both prohibited under Article 120, UCMJ) arising from the same incident. Article 120(a), UCMJ, defines rape as an act of

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[53] 370 F.3d 108, 114 (1st Cir. 2004).
[54] 18 U.S.C. § 844(i); 18 U.S.C. § 1341 and 18 U.S.C. § 844(h)(l), respectively.
[55] *Patel*, 370 F.3d at 114.
[56] *Id.* at 115.
[57] *Id*. at 115 (emphasis in original).
[58] *Id*.
[59] *Id*.
[60] *Id*. (internal citation omitted).
[61] *Id*. at 115-16.
[62] 40 M.J. 792 (A.F.C.M.R. 1994).

sexual intercourse by force and without consent; while Article 120(b), UCMJ, prohibits sexual intercourse with a female under 16 years of age under circumstances not amounting to rape. [63] The Air Force Court of Military Review held that Article 120(b), UCMJ, evidenced Congress' intent that no person may be convicted of both rape and carnal knowledge for the same act of sexual penetration.[64] Again, observe that this is so despite the existence of separate elements in each offense.

The critical inquiry therefore, is whether Congress intended to authorize multiple convictions arising from the same act. The fact that two offenses are deemed to be the "same" under *Blockburger* does not automatically prohibit the imposition of multiple convictions. Conversely, Congress may express its intent that despite the existence of separate elements, multiple convictions should not lie.

2. *Inferred Intent Based on the Elements of the Offenses and Their Relation to Each Other*

In the typical case, indications of congressional intent with respect to multiple convictions are neither apparent on the face of the statute nor appear in the legislative record. Where the legislative record is silent, the Supreme Court has indicated that the rule of construction found in United States v. Blockburger,[65] is appropriate to determine congressional intent. As the Supreme Court explained in Albernaz v. United States:

> Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we have previously noted, Congress is "predominantly a lawyer's body," and it is appropriate for us "to assume that our elected representatives . . . know the law." As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind.[66]

As discussed above,[67] in *Blockburger*, the Supreme Court ruled that "where the same act or transaction constitutes a violation of two

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[63] *See* UCMJ, Art. 120(a) and (b); 10 U.S.C. § 920(a) and (b).
[64] *Morris*, 40 M.J. at 795. *See also* Michael J. Breslin and LeEllen Coacher, *supra* note 16, at 114 (explaining that "by defining carnal knowledge as excluding those acts which may be defined as rape, Congress expressed its intent that a particular act may be either rape or carnal knowledge, but cannot be both").
[65] 284 U.S. 299 (1932).
[66] 450 U.S. 333, 341 (1981) (internal citations omitted).
[67] *Blockburger,* 284 U.S. at 294.

distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[68] The *Blockburger* rule can be illustrated as follows: If Crime 1 requires proof of elements A, B, and C, and Crime 2 requires proof of elements A, B, and D, the crimes do not constitute the "same offense" since each requires proof of an element that the other does not—C and D, respectively.[69]

Conversely, if both offenses have identical elements—they both consist of elements A, B and C—then they are the same offense. Additionally, if Crime 2 in this example requires proof of only elements A and B, then the offenses stand in relation as greater and lesser-offenses: when Crime 1 is proved, Crime 2 is necessarily proved and the two constitute the "same offense."[70]

Several key cases frame CAAF's current doctrinal approach to multiplicity. First, the CMA adopted the *Blockburger* rule of statutory construction in *United States v. Teters*.[71] In that case, the appellant argued that his convictions of forgery and larceny were multiplicious for findings where the forgeries were committed to effectuate the larcenies and thus, only the larceny conviction could stand. The court rejected the "fairly embraced" test of multiplicity, concluding, "the time has passed for a separate military-law doctrine to prevent multiplicious specifications."[72] It then adopted the analytical framework discussed above for determining Congressional intent.[73] In adopting the *Blockburger* rule of construction, however, the court emphasized, "[i]t is now unquestionably established that this test is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses."[74] The court ultimately held that because larceny requires a taking element not contained in forgery, while forgery contains an element of false writing not contained in larceny offense, the *Blockburger* rule was satisfied and separate offenses were presumptively authorized by Congress.[75]

Subsequently, in *United States v. Foster*,[76] the CMA adopted *Blockburger's* separate elements test for determining whether an offense is a lesser included offense.[77] In that case, the appellant was charged with forcible sodomy but convicted of committing an indecent assault. The Air Force Court held that the indecent assault was not a lesser-

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[68] *Blockburger*, 284 U.S. at 304. (internal citations omitted).
[69] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 205, 448 (1994).
[70] *Id*.
[71] 37 M.J. 370 (C.M.A. 1993).
[72] *Id*. at 376.
[73] *See supra* Part II.B.
[74] *Teters*, 37 M.J. at 377.
[75] *Id*. at 377-78.
[76] 40 M.J. 140 (C.M.A. 1994).
[77] *Id.* at 142.

included offense of sodomy, but affirmed a conviction for committing an indecent act. Interestingly, while appellants frequently argue that offenses should be dismissed as constituting lesser-included offenses, here, the appellant argued that an indecent act is not a lesser-included offense of forcible sodomy and therefore the charge for which he was convicted should be dismissed in its entirety.

The CMA observed that the language of Article 79, UCMJ, which provides that "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein,"[78] was virtually identical to Federal Rule of Criminal Procedure 31(c) and therefore adopted the Supreme Court's interpretation of that rule: "[o]ne offense is not 'necessarily included' in another unless the *elements* of the lesser offense *are a subset* of the *elements* of the charged offense."[79] The CMA then addressed the fact that offenses arising under Article 134, UCMJ (the General Article), proscribing unspecified disorders and neglects to the prejudice of good order and discipline in the armed forces as well as conduct of a nature to bring discredit upon the armed forces,[80] will always require proof of at least one additional element not required under the UCMJ's enumerated Articles—Articles 80 through 132, UCMJ. To avoid exposure to multiple convictions created when a service member is charged with both an enumerated offense under the UCMJ and an Article 134 offense for the same conduct, the elements of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the service, are deemed "implicit in the enumerated articles."[81] That is, prejudicial conduct or conduct bringing discredit upon the service are not separate elements for multiplicity purposes.

After adopting the separate elements test, the CMA proceeded to apply a somewhat loose interpretation of that test in determining whether offenses are "subsets" of greater offenses. For example, the elements of forcible sodomy, under Article 125, UCMJ,[82] can be summarized as:

1. unnatural carnal copulation,
2. done by force and without consent.

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[78] 10 U.S.C. § 879.
[79] *Foster*, 40 M.J. at 142 (quoting Schmuck v. United States, 489 U.S. 705, 716 (1989)) (emphasis in original).
[80] 10 U.S.C. § 934.
[81] *Foster*, 40 M.J. at 143.
[82] 10 U.S.C. § 925; MCM, pt. IV, ¶ 51.

A summary of the elements of indecent assault, under Article 134, UCMJ,[83] are:

> 1. assault on a non-spouse,
> 2. with the intent to gratify sexual desires,
> 3. which brings discredit upon the service or prejudices good order and discipline.

The elements of indecent acts, under Article 134, UCMJ,[84] as summarized, are:

> 1. a wrongful act,
> 2. that was indecent,
> 3. which brings discredit upon the service or prejudices good order and discipline.

A strict *Blockburger* analysis would seemingly yield the conclusion that these UCMJ Articles do not necessarily stand in relation as greater and lesser offenses since the Article 134, UCMJ, offenses are not literal subsets of the sodomy charge. Indeed, even discounting the service discrediting and prejudice to good order and discipline elements, they each contain additional elements not contained in the sodomy offense: indecent assault requiring an assault on a non-spouse and the intent to gratify sexual desires while an indecent act requires a wrongful act that was indecent. However, the CMA concluded that the first two elements of the indecent acts specification were "less serious" than the first two elements of the indecent assault specification and that, the first two elements of the indecent assault specification were likewise "less serious" than the first two elements of sodomy.[85] Further, the servicing discrediting/conduct prejudicial elements of the Article 134, UCMJ, offenses were "implicit" in the sodomy charge.[86] Distinguishing *Teters*, the court, somewhat conclusively, stated that the instant case required a "qualitative, not quantitative, approach" and that lesser-included claims "can only be resolved by lining up elements *realistically* and determining whether *each* element of the supposed 'lesser' offense is *rationally* derivative . . . ."[87]

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[83] 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶ 63.
[84] MCM, pt. IV, ¶ 87.
[85] *Foster*, 40 M.J. at 146.
[86] *Id.* at 143.
[87] *Id.* at 146. (emphasis in original). *See also* James A. Young III, *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159, 167 (1996) (commenting that the CMA, in adopting the *Blockburger/Teters* test for multiplicity as applied to lesser-included offenses, "abandoned the clear language of *Teters,* and substituted vague new terms which indicated the *Blockburger/Teters* standard might be subject to varying interpretations").

3. *The "Pleadings-Elements" Test*

One year later, CAAF decided *United States v. Weymouth*,[88] announcing a new standard for multiplicity and lesser-included offenses —the "pleadings-elements" test.[89] In that case, the appellant was charged with attempted murder; assault with the intent to commit murder; assault with a dangerous weapon; and, assault in which grievous bodily harm was intentionally inflicted for one alleged act of wounding a fellow airman by stabbing him in the abdomen with a knife. The trial defense counsel moved to dismiss the assault charges, arguing that they constituted lesser included offenses of attempted murder.

The CAAF began its opinion by stating, "[t]o resolve this case, it is necessary to clarify the very definition of an offense in the military. . . ."[90] The CAAF cited Article 79(1), UCMJ, which states that a "lesser offense is included in the charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it,"[91] and concluded that "in the military, the *specification*, in combination with the statute, provides notice of the essential elements of an offense."[92] The court explained that the charge indicates the article under which the accused is charged, while the specification sets forth the facts relied upon as constituting the violation.[93] Consequently, an "offense" in the military includes both the elements contained in the statute and those alleged in the specification.[94] This is where, according to CAAF, "military and federal practice begin to diverge."[95]

The CAAF provided the following example of how this approach contrasts with federal practice with respect to enumerated federal criminal offenses: under the federal civilian system, assault with a dangerous weapon is not a lesser included offense of voluntary manslaughter, even if a dangerous weapon was used in the commission of the manslaughter, because the use of a weapon is not an element of a manslaughter charge. However, in the military, the specification would require an allegation of use of a dangerous weapon in the commission of a voluntary manslaughter. By doing so, defense counsel is placed on notice of the need to defend against assault with a dangerous weapon as well as the manslaughter offense. Likewise, the government would be permitted to "fall back" on the lesser include offense of assault with a

[88] 43 M.J. 329 (1995).
[89] *Id.* at 335.
[90] *Id.* at 330.
[91] MCM, *supra* note 6, at pt. IV, ¶ 3.b.(1)
[92] *Weymouth*, 43 M.J. at 333.
[93] *Id*. at 334.
[94] *Id.*
[95] *Id.* at 333.

dangerous weapon were there a failure of proof with respect to the greater offense.[96]

The CAAF provided several rationales for departing from the federal rule. First, military offenses do not necessarily derive their "essential elements" from statutes, but from regulations, orders and customs or from traditional military crimes.[97] Simple recitation of statutory elements would provide no notice where, for example, a specification simply alleged that the accused "did or failed to do an act" and that "under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces" under Article 134, UCMJ.[98] Second, the military's policy of "bundling all known charges into a single trial" creates a greater danger for proliferation of charges.[99] Third, sentences run concurrently in the federal system, while in the military, they run consecutively. This increases the risk of greatly skewed sentencing. Fourth, there is no federal "corollary for the military concept of 'legally less serious' elements."[100] Finally, it explained that in that case, it was dealing with a "charging" prohibition, whereas the federal system does not preclude trying multiplicious counts.[101]

After applying this approach to the facts of the case, CAAF concluded that all of the assault charges, but for the assault in which grievous bodily harm was committed, were lesser included offenses of the attempted murder charge.[102]

The CAAF's approach in *Weymouth*, while departing from a strict statutory elements approach, nonetheless, finds support in the United States Supreme Court's opinion in *United States v. Dixon*.[103] *Dixon* involved two consolidated cases. In one, Dixon was arrested for second-degree murder and released on bond, subject to the condition that he was not to commit "any criminal offense."[104] Before his trial, he was arrested and charged with possession of cocaine with intent to distribute. Pursuant to an order requiring Dixon to show cause why he should not be held in contempt of court for violating the terms of his release order, the court found him guilty of criminal contempt for

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[96] *Id*. at 334.
[97] *Id*. at 335.
[98] *Id*. Note that the same can largely be said of offenses charged under Articles 92 and 133, UCMJ, failure to obey order or regulation and conduct unbecoming an officer and a gentleman, respectively.
[99] *Weymouth*, 43 M.J. at 336.
[100] *Id*.
[101] *Id*.
[102] *Id.* at 340.
[103] 509 U.S. 688 (1993).
[104] *Id.* at 691.

possessing cocaine with the intent to distribute. Dixon later moved to dismiss the cocaine indictment on double jeopardy grounds.

Justice Scalia, for the majority, reasoned that an "offense" could not be committed under the contempt statute until an order setting out the conditions of release was issued by the court.[105] Dixon's cocaine possession was therefore not an offense under the contempt statute until the judge incorporated the statutory drug offense into the release order. In this situation, the predicate substantive cocaine offense was the same offense as the contempt offense as it amounted to "a species of lesser-included offense" of the contempt charge.[106] The court order imposing the conditions of release had incorporated the entire criminal code and therefore, under *Blockburger*, the cocaine offense "did not include any element not contained in his previous contempt offense."[107]

Parallel reasoning can be drawn between the Supreme Court's reasoning in *Dixon* and the "pleadings-elements" approach. Indeed, Justice Scalia could only have concluded that the assault elements were a subset of the contempt elements by considering the pleadings, specifically the terms of the court order.[108] Chief Justice Rehnquist, dissenting from Justice Scalia's analysis, emphasized this fact, arguing that a strict comparison of the generic statutory elements of the two offenses, under *Blockburger*, reveals that each contains an element not found in the other and, therefore, multiple prosecution should not be barred.[109]

Article 134, UCMJ, the General Article, contains two elements: (1) that the accused did or failed to do certain acts; and (2) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[110] Like the contempt statute in *Dixon*, the General Article, in the abstract, does not describe with particularity the acts or conduct proscribed. Instead, it draws its essential elements from customs of the service, violations of local civil law or foreign law, military duties or extra-statutory sources.[111]

Additionally, violations of conditions of a judicial release order need not themselves amount to crimes. For example, the pretrial release statute at issue in *Dixon* authorized the judge to order, as part of the conditions of release, that an accused maintain employment, maintain or

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[105] *Id*. at 697.
[106] *Id.* at 698.
[107] *Id.* at 700.
[108] *See* United States v. Oatney, 41 M.J. 619, (N-M. Ct. C. A. Nov. 4, 1994) (Larson, J, concurring in part and dissenting in part) (making a similar observation).
[109] *Dixon*, 509 U.S. at 716 (Rehnquist, J., concurring in part and dissenting in part). *See also Oatney*, 41 M.J. at 619 (Larson, J., concurring in part and dissenting in part) (making a similar observation).
[110] 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶¶ 60.(b)(1), (b)(2).
[111] *See* 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶ 60.(c)(2), (c)(3).

commence an educational program, report on a regular basis to a designated law enforcement agency, *etc.*[112] Were such conditions of the release order violated, an accused would then be subject to a single contempt prosecution for violation of such conditions. By incorporating underlying statutory crimes into the release order in *Dixon*, those incorporated crimes likewise became lesser included offenses of contempt.

Similarly, conduct need not be criminal in and of itself to constitute a violation of the General Article.[113] In such a case, a member is generally subject to prosecution for a single offense charged under the General Article. However, where a General Article specification is crafted to parallel conduct already made punishable by another article of the Uniform Code of Military Justice, that article can be said to stand in relation as a "species of lesser include offense." In short, in either case, it is not until a general proscription is populated with "elements" of a specific offense that an accused is placed on notice and subjected to charges that may offend the Double Jeopardy Clause.

The CAAF continues to adhere to the "pleadings-elements" approach. In the recent case of *United States v. Roderick*,[114] the appellant argued that his convictions for using a minor to create sexually explicit photographs, under 18 U.S.C.S. § 2251(a), were multiplicious with his convictions for taking indecent liberties with a minor by taking sexually explicit photographs, under Article 134, UCMJ. Having determined that the legislative history was silent on the issue of multiple convictions, CAAF analyzed Congress' intent under the separate elements test but added, citing *Weymouth*, that in doing so, it looks "at both the statute and the specification to determine the essential elements of each offense."[115] The CAAF then determined that the specifications were not, under this test, legally multiplicious.

It is apparent from the holding in *Roderick* that CAAF will not stray far from the statutory elements in conducting the "pleadings-elements" analysis. In that case, the § 2251(a) offense required proof that Roderick used materials that passed in interstate commerce to produce "lascivious" photographs, while the offense of indecent liberties with a child, under Article 134, UCMJ, required the intent to satisfy his sexual desires.[116] Roderick contended, in arguments CAAF deemed "creative,"[117] that because images are deemed "lascivious" in

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[112] *See* D.C. Code Ann. 23-1321(c).
[113] Justice Stewart observed, in Parker v. Levy, 417 U.S. 733, 762 (1974) (Stewart, J., dissenting), that Article 134, UCMJ, has been applied to sexual acts with a chicken, window peeping in a trailer park, and cheating while calling bingo numbers (internal citations omitted).
[114] 62 M.J. 425 (2006).
[115] *Id*. at 432.
[116] *Id*.
[117] *Id*. at 433.

part based on whether they are designed to elicit a sexual response in the viewer *i.e.* to satisfy sexual desires, and because the case law recognized that it is "impossible to take such photographs" without using materials that passed in interstate commerce, neither specification contained an element not contained in the other.[118] However, CAAF held that whether an image is designed to elicit a sexual response in the viewer was but one "guideline" in determining lasciviousness, while the indecent liberties specification—though alleging use of a camera that by definition moves in interstate commerce—did not create "using materials that have traveled in interstate commerce" as an additional element of the indecent liberties charge."[119]

4. *Other Guidelines for Determining Intent*

The final step in the *Teters* analysis inquires whether other recognized guidelines for discerning congressional intent overcome *Blockburger's* presumption of separateness.[120] Note that this differs from the first part of the analysis that asks whether there are *overt expressions* of congressional intent, such that may appear on the face of criminal statutes or in the legislative record, as to the appropriateness of multiple convictions. Here, the legislative record is again examined; however, indications of congressional intent stem less from overt comments contained in the record, but from inferences drawn from attendant circumstances surrounding the passage of certain legislation, as well as the apparent goal Congress was attempting to achieve.

For example, in *Albernaz v. United States*,[121] the appellants challenged their convictions and consecutive sentences for both conspiracy to import marijuana and conspiracy to distribute marijuana, as violating the Double Jeopardy Clause. The Supreme Court determined that the two offenses could be punished cumulatively because each provision required proof of a fact that the other did not. The Supreme Court reasoned that *Blockburger* is a "'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where . . . there is a clear indication of contrary legislative intent."[122] *Blockburger's* rule of construction controlled in that case however, because nothing in the legislative history disclosed an intent "contrary to the presumption which should be accorded to these statutes *after* application of the *Blockburger* test."[123] The Supreme Court noted that the legislative

[118] *Id*. at 432.
[119] *Id*..
[120] United States v. Teters, 37 M.J. 370, 377 (C.M.A. 1993).
[121] Albernaz v. United States, 450 U.S. 333 (1981).
[122] *Id*. at 340.
[123] *Id*. at 340 (emphasis added).

history was "silent" on the question of whether consecutive sentences could be imposed for conspiracy to import and distribute drugs"[124] If anything was to be assumed from congressional silence on this point, it was "that Congress was aware of the *Blockburger* rule and legislated with it in mind."[125]

Conversely, in *Ball v. United States*,[126] the appellant was convicted of both receiving a firearm shipped in interstate commerce as well as possessing the same firearm, under separate provisions of the Omnibus Act,[127] arising from a single act. In that case, the Supreme Court held that "all guides to legislative intent" indicated that Congress intended that a felon in Ball's position be convicted of only one of the two offenses if the possession of the firearm was incidental to receiving it.[128] The Supreme Court cited Blockburger, but noted that proof of illegal receipt of a firearm necessarily includes proof of illegal possession and therefore Congress "seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions."[129] Additionally, the possession offense was a last-minute Senate addition to the Omnibus Act, which was "hastily passed, with little discussion," explaining why it partially overlapped with the existing receipt offense.[130] From this, the Supreme Court concluded that Congress did not intend duplicative convictions for this limited class of persons "falling within the overlap between the two titles."[131] The Supreme Court added that the overlapping statutes were not directed at "separate evils," but were both intended to keep firearms out of the hands of those not entitled to possess them.[132] Thus, there were indications, after application of the *Blockburger* test, that Congress did not intend separate convictions under both statutes for a single act.

Similarly, in *Prince v. United States*,[133] the appellant was convicted and sentenced to consecutive prison terms, under the Federal Bank Robbery Act (Act),[134] on a two-count indictment charging robbery of a federally insured bank and entering the bank with the intent to commit a felony. The latter offense did not appear in the Act as originally enacted, but was subsequently added along with another

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[124] *Albernaz*, 450 U.S. at 340.
[125] *Id*. at 341.
[126] 470 U.S. 856 (1985).
[127] 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202(a)(1).
[128] *Ball*, 470 U.S. at 862.
[129] *Id*.
[130] *Id*. at 863.
[131] *Id*. at 864.
[132] *Id*.
[133] 352 U.S. 322 (1957).
[134] 18 U.S.C. § 2113.

larceny provision.[135] The government argued that the statute as amended made each an independent and separately punishable offense. Rejecting this argument, the Supreme Court focused on the legislative history behind the amendment, in particular evidence that the Attorney General had provided Congress in support of the amendment. The Supreme Court observed that the Attorney General was concerned only with the "possibility that a thief might not commit all the elements of the crime of robbery," such as the absence of force. The Attorney General was not concerned with multiple convictions.[136] Further, based on the wording of the Act, the Supreme Court concluded that the unlawful entry provision was merely added to "cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated . . . before completing the crime."[137] Thus, Congress intended that the mental element of intent to steal, contained in the unlawful entry provision, merge with the completed bank robbery offense.

Similarly, *United States v. Heflin*,[138] also involved an amendment to the Federal Bank Robbery Act. In that case, the appellant was convicted, among other things, of taking property by force and violence as well as the recently added offense of knowing receipt of money that has been taken from a bank. The Supreme Court noted that the legislative history behind the amendment was "meager," indicating only that "present law [did] not make it a separate substantive offense knowingly to receive or possess property stolen from a bank."[139] The Supreme Court read into this fact that the new offense was not designed to increase the punishment of those that robbed a bank, but only to provide punishment for those receiving the "loot" from the robber.[140] That is, Congress' intent was to fill a gap in existing legislation by reaching a new group of wrongdoers not subject to prosecution, not to multiply offenses of the bank robbers themselves.[141]

To summarize, congressional intent concerning multiple convictions for different statutory violations arising from the same act or transaction may be discerned by overt expressions of intent appearing on the face of the statute or in the legislative record. Second, intent can be presumed based on the elements of the relevant offenses in the absence of such intent. Finally, all guides to legislative intent may be considered in determining whether the presumption of separateness is overcome. . Such considerations have led the Supreme Court to varying

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[135] *Prince*, 352 U.S. at 326.
[136] *Id.* at 327.
[137] *Id*. at 328.
[138] 358 U.S. 415 (1959), *overruled on other grounds.*
[139] *Id*. at 419.
[140] *Id*. at 420.
[141] *Id*.

conclusions, however, extrapolating from these cases, a linear approach can be described as follows: if Congress is clear as to its intent regarding multiple punishments on the face of the statute or in its legislative history, resort to the separate elements test is unnecessary and the analysis is at an end. In the absence of such congressional expression, legislative intent can be presumed under the separate elements rule of construction. Finally, after applying the separate elements test, other guides to legislative intent may indicate a purpose to either permit or disallow multiple punishments despite the existence of separate elements. For example, where it is clear that Congress was simply trying to fill a gap in existing law to create criminal liability where it did not previous lie, then it may not be said that Congress intended to pyramid convictions.

5. *Unit of Prosecution*

The statutory elements test addresses only the method of discerning Congress' intent regarding multiple convictions under *two separate statutes* for the same act or transaction. That test does not address a course of conduct involving repeated violations of *a single statute*.[142] In cases involving repeated violations of a single statute, the courts have used the term "unit of prosecution" to define "the offense" which the legislature intended to create.[143] Because Congress establishes and defines offenses, the question is whether Congress intended a particular course of conduct to make up a separate unit of prosecution.[144]

In the early case of *In re Snow*,[145] the Supreme Court held that the offense of cohabitating with more than one woman was a continuing offense. Snow was convicted of three counts of unlawful cohabitation with more than one woman. Each count divided the three-year period of cohabitation into 12 month time frames. The Supreme Court held that "the offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act."[146] It added, "[a] distinction is laid down in adjudged cases and in text-writers between an offense continuous in

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[142] *See* United States v. Inthavong, 48 M.J. 628, 630 (Army Ct. Crim. App. 1998) (observing that the separate elements test "provides no assistance in cases such as appellant's, which involves the same statutory provision and thus the same statutory elements."); United States v. Neblock, 45 M.J. 191 n.6 (1996) (observing that because the acts alleged in that case were discrete as a matter of fact and law; the *Blockburger* rule of determine legislative intent was not applicable).
[143] Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 313 (1965).
[144] *See* Sanabria v. United States, 437 U.S. 54, 69-70 (1978).
[145] 120 U.S. 274 (1887).
[146] *Id*. at 281.

its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed *uno ictu*."[147]

Similarly, in *Brown v. Ohio*,[148] the Supreme Court concluded that Brown's nine-day joyride was a continuous offense. In that case, following Brown's plea of guilty to joyriding, he was subsequently indicted for auto theft based on the same acts. The lower court affirmed both convictions reasoning that each focused on different dates within the nine-day joyride. The Supreme Court held "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[149] The Supreme Court examined the language of the applicable statutes and concluded that they made the theft and operation of a single car a single offense. However, it also concluded that a different result could obtain if either the legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent or the Ohio courts had construed the joyriding statute to have that effect. [150]

The Supreme Court reached a contrary result in *Ebeling v. Morgan*,[151] holding that one who, in the same transaction, tears or cuts successively mail bags of the United States, with intent to rob or steal any such mail, commits a separate offense for each act of tearing or cutting. Examining the statute under which the indictment was prosecuted, the Supreme Court determined that it was plainly "the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut, or injured, the offense is complete."[152]

The CAAF addressed a similar issue in *United States v. Neblock*,[153] where the appellant was convicted of one specification of committing indecent acts with a female under 16 years of age and of one specification of committing indecent liberties with the same female

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[147] *Id*. at 286.
[148] 432 U.S. 161 (1977).
[149] *Id.* at 169.
[150] *See also* United States v. Morris, 18 M.J. 450 (C.M.A. 1984). In that case, the accused was convicted of separate Article 128, UCMJ, specifications for events that occurred during a single, uninterrupted scuffle. In considering statutory intent, the Court stated that "when Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault;" United States v. Stegall, 6 M.J. 176, 177 (C.M.A. 1979) (holding that the physical contacts that are a part of a continuous course of conduct equate to one assault under Article 128, UCMJ); *and* United States v. Appel, 31 M.J. 314, 321 (C.M.A. 1990) (stating that each kiss, hug, or act of sexual intercourse between officer and an enlisted person which occurs in violation of military custom against fraternization should not be treated as a separate offense).
[151] 237 U.S. 625 (1915).
[152] *Id*. at 629.
[153] 45 M.J. 191 (1996).

under 16 years of age within the same time period, but occurring either on different dates or, if on the same date, at a different time. Both offenses were charged under Article 134, UCMJ. The CAAF initially determined that committing indecent acts with a child and taking indecent liberties with that child, in violation of Article 134, UCMJ (paragraph 87 of Part IV of the Manual), are alternative ways of violating the same provision of military law.[154] Citing *Ebeling*, CAAF phrased the issue as whether "Congress intended that the military offense of 'committing indecent acts or liberties with a child' be punished . . . as a continuous-course-of-conduct offense or as an individual-act offense."[155] Focusing on the court's own case law construing the statutory language at issue as well as "other language in the Manual provision and the history of its component offenses," CAAF rejected Neblock's argument that the offense was continuous in nature and concluded that separate convictions were permissible based on discrete acts occurring at different times.[156] Consequently, Neblock's two convictions for the offense based on discrete facts were "not the same offense for purposes of the Double Jeopardy Clause."[157]

Once it is determined that Congress intended, as a matter of law, to make criminal each individual act rather than a continuing course of action, it must be determined, as a matter of fact, whether an accused has committed separate discrete acts. That is, the military judge must determine whether each separately charged act was part of the same act or transaction. In *State v. Kersey*,[158] the Supreme Court of New Mexico explained that "if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense."[159] That court explained that indicia of distinctness may be found where "events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred)."[160]

In *United States v. Sepulveda*,[161] the Air Force Court of Military Review determined that the offense of indecent assault makes criminal each individual act rather than one continuing course of action. That court then explained that in making the determination whether each of the separately charged indecent assaults was part of the same act or transaction, the court "should consider the time difference between the

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[154] *Id*. at 195.
[155] *Id*. at 197.
[156] *Id*. at 198.
[157] *Id*. at 199.
[158] 120 N.M. 517 (N.M. 1995).
[159] *Id.* at 522 (citing Swafford v. State*,* 112 N.M. 3, 810 P.2d 1223, 1233 (1991)).
[160] *Id*. (internal citations omitted).
[161] 40 M.J. 856 (A.F.C.M.R. 1994).

offenses, the place or places where they were alleged to have been committed, whether there was a break in the criminal conduct between the offenses, whether the accused was on notice that such conduct was unacceptable to the victim, and whether, before reinitiating his criminal conduct, the accused had an opportunity to reflect on his actions and choose not to commit additional offenses."[162]

As the "unit of prosecution" cases show, whether an offense is a continuing one whose predicate acts constitute but one "offense" turns on the text of the statute and the legislative intent.

D. Rule of Lenity

The Supreme Court has developed a rule of construction in the single-statute context. Since Congress has the capacity to express its intent regarding the allowable unit of prosecution, where its intent is not declared, courts will follow the "rule of lenity" and assume that only a single punishment is authorized.[163]

In *Bell v. United States*,[164] the defendant was convicted of two separate violations of the Mann Act, which prohibits the knowing transportation in interstate commerce of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.[165] Bell conceded that he transported two women, but argued that he committed only a single offense because they were transported during the same trip.

In determining the allowable "unit of prosecution," the Supreme Court construed the Mann Act to create but one conviction even though more than one woman is transported at once.[166] The Supreme Court examined the words of the statute and concluded that while Congress could have made the act of simultaneous transportation of more than one woman subject to cumulative punishment for each woman so transported, it had not done so. Nor was "guiding light afforded by the statute in its entirety or by any controlling gloss" supporting such an interpretation.[167] Justice Frankfurter then announced what is now commonly referred to as the rule of lenity: "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."[168] He added, "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single

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[162] *Id*. at 859.
[163] *See* Bell v. United States, 349 U.S. 81 (1955).
[164] *Id.*
[165] 18 U.S.C. § 2421 (1949), current version at 18 U.S.C. § 2421 (1998).
[166] *Bell*, 349 U.S. at 83.
[167] *Id*.
[168] *Id*.

transaction into multiple offenses, when we have no more to go on than the present case furnishes."[169]

In *Ladner v. United States*,[170] the Supreme Court used the rule of lenity to preclude dual assault convictions when the defendant injured two federal officers by a single shotgun discharge. The Court reasoned that the applicable statute:

> may reasonably be read to mean that the single discharge of the shotgun would constitute an "assault" without regard to the number of federal officers affected, as it may be read to mean that as many "assaults" would be committed as there were officers affected. Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."[171]

The Supreme Court later emphasized that that the touchstone of the rule of lenity is statutory ambiguity. Where Congress has manifested its intention, an ambiguity may not be manufactured in order to defeat that intent. The Supreme Court explained, in *Callanan v. United States*,[172] that the rule of lenity "serves as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."

The analysis involved when construing multiple convictions pursuant to a single statute can be summarized as follows: first, the courts must examine the text of the statute to ascertain the unit of allowable prosecution for a particular course of conduct. If the text is unclear, the court should look for congressional intent in the overall statutory scheme, its legislative history or prior interpretive court opinions. If it can be determined that Congress intended discrete offenses, the court must then determine whether the conduct alleged bears sufficient indicia of distinctness to support separate specifications.

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[169] *Id*. at 84.
[170] 358 U.S. 169 (1958).
[171] *Id.* at 178.
[172] 364 U.S. 587, 596 (1961).

However, if the court finds that the allowable unit of prosecution remains ambiguous, it should then apply the rule of lenity and presume only a single punishment is authorized.

E. Sources of "Elements"

The rationale behind *Weymouth's* "pleadings-elements" approach applies with equal force to many offenses charged under Articles 92, UCMJ (failure to obey order or regulation) and 133, UCMJ (conduct unbecoming an officer and a gentleman).[173] As Judge Cook aptly explained in his concurrence in *United States v. Vasquez*:

> The "official" elements under Article 92, namely "(a) That there was a certain general order or regulation; (b) that the accused had a duty to obey it; and (c) that the accused violated or failed to obey the order or regulation," are, in my opinion . . . nonsubstantive elements for multiplicity purposes. Otherwise, it would be theoretically possible for a service or even a command to double the number of offenses and punishments by simply reenacting the punitive articles of the Code under the guise of punitive regulations.[174]

The same can essentially be said of conduct unbecoming an officer and a gentleman offenses charged under Article 133, UCMJ; conduct about which the CMA stated, "[t]hough 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 circumstances as to bring dishonor or disrepute upon the military profession which he represents."[175]

Accepting the "pleadings-elements" test to multiplicity set forth in *Weymouth*, there are the additional questions of what is meant by "elements" and what precisely is their source? To answer this, it is necessary to turn to the structure of the Manual for Courts-Martial and its relation to the Uniform Code of Military Justice. The Uniform Code of Military Justice, the statutory source of the military criminal justice system, was enacted by Congress in 1950 pursuant to Article I of the Constitution.[176] Its provisions are contained in 10 U.S.C. §§ 801-946.[177] The UCMJ includes substantive criminal offenses, the basic procedural

[173] 10 U.S.C §892; 10 U.S.C §933, respectively.
[174] 16 M.J. 444, (C.M.A. 1983) (Cook, J. concurring) (internal citations omitted).
[175] United States v. Howe, 17 U. S. C. M. A. 165, 177-78 (C.M.A. 1967).
[176] H.R. 4080, 81st Cong. (1950).
[177] The UCMJ appears in Appendix 2 of the MCM.

provisions, defines courts-martial jurisdiction and sets forth additional provisions for the military criminal justice system. Article 36 of the UCMJ delegates to the President the power to prescribe rules and procedures to implement the provisions of the UCMJ.[178] Pursuant to this authority, the President promulgated the Manual for Courts-Martial (Manual) via executive order.[179] The Manual has the force of law, but is subordinate to the UCMJ.[180] The Manual contains a preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles and Non-Judicial Punishment Procedures (Part I-V).[181]

The Manual also consists of supplemental materials prepared by the Department of Defense, including discussion paragraphs that accompany the Preamble, the Punitive Articles and the Rules for Courts-Martial; analysis of the Rules for Courts-Martial, the Military Rules of Evidence and the Punitive Articles; and additional appendices. These materials are not promulgated by the President and are thus not part of the Manual itself.[182]

Additionally, Congress granted the President the power, under Article 56, UCMJ,[183] to prescribe maximum punishments for offenses. As part of this authority, the President has established factors that aggravate offenses and increase the maximum punishment. These aggravating factors are identified as "elements" in Part IV of the Manual. The introductory Discussion to Part IV states:

[T]he punitive articles of the code are discussed using the following sequence:

> a. Text of the article
> b. Elements of the offense or offenses
> c. Explanation
> d. Lesser included offenses
> e. Maximum punishment
> f. Sample specifications
>
> The term "elements," as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President's authority which increases the maximum permissible

[178] 10 U.S.C. § 836 provides that procedures for courts-martial may be prescribed by the President so long as they are not inconsistent with the UCMJ.
[179] *See* United States v. Davis, 47 M.J. 484 (1998).
[180] *See* GILLIGAN & LEDERER, *supra* note 18, at 1-27.
[181] *See* MCM, *supra* note 6, pt. I, ¶ 4.
[182] *Id.*, Discussion.
[183] 10 U.S.C. § 856 states, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

> punishment when specific aggravating factors are pleaded and proven.[184]

Additionally, the Introduction to the "Analysis of Punitive Articles," states:

> The next to last paragraph of the introduction to Part IV was added to define the term "elements," as used in Part IV. In MCM, 1969 (Rev.), the equivalent term used was "proof." Both "proof" and "elements" referred to the statutory elements of the offense and to any additional aggravating factors prescribed by the President under Article 56, UCMJ, to increase the maximum permissible punishment above that allowed for the basic offense. These additional factors are commonly referred to as "elements," and judicial construction has approved this usage, as long as these 'elements' are pled, proven, and instructed upon.[185]

Aggravating factors are thus "elements" of the charged offense. This is emphasized by R.C.M. 307(c)(3), stating that a "specification is sufficient if it alleges every element of the charged offense . . . ."[186] The Rule further provides that aggravating factors "that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment."[187]

As the introduction to the Analysis of Punitive Articles states, treating aggravating factors as elements of the offense has been judicially approved, albeit not without limitation. In *United States v. Flucas*,[188] the accused was charged with assault upon a noncommissioned officer and assault upon a person engaged in the execution of military police duties, both under Article 128, UCMJ.[189] Flucas argued that the military judge erred in failing to instruct on his knowledge of each of his victims' status as a required element of the assault charges. He also argued that the government presented no evidence that would permit the factfinders to infer that he knew the status of one of the victims.[190] The government countered that lack of knowledge of the victim's status was an affirmative defense which was

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[184] MCM, *supra* note 6, pt. IV, Discussion, IV-1.
[185] *Id.* at Appendix 23, Introduction, A23-1.
[186] *Id.*, R.C.M. 307(c)(3).
[187] *Id.*
[188] 23 U.S.C.M.A. 274 (C.M.A. 1975).
[189] 10 U.S.C. § 928; current version at MCM, pt. IV, paras. 54b.(3)(a), b.(3)(b).
[190] *Flucas*, 23 U.S.C.M.A. 274 at 275-76.

not raised by the evidence in this case.[191] Rejecting the government's argument, the CMA emphasized that:

> the President has no authority to prescribe in the Manual matters of substantive law, his powers in connection with the Code being generally limited to the promulgation of modes of proof and rules of procedure. Article 36, UCMJ. Nevertheless, the Manual provision is valid, for the "element" of knowledge in each assault is expressly provided as part of an aggravating factor increasing the maximum permissible punishment "when the victim has a particular status or is performing a special function."[192]

The CMA further noted that in addition to the power under Article 36, UCMJ, to prescribe rules of procedure and modes of proof, the President, pursuant to Article 56, UCMJ,[193] also has authority to prescribe maximum limits of punishment for offenses under the Code and to "provide for increased punishment upon allegation, proof, and instructions regarding an aggravating factor."[194] The CMA then held that it was error to fail to instruct the factfinders that the accused must know that his victim occupied the requisite status.[195]

Similarly, in *United States v. Everett*,[196] the Air Force Court observed, "pursuant to his authority to prescribe limitations on the maximum sentence a court-martial may adjudge (Article 56, UCMJ), the President has established a hierarchy of maximum sentence levels within the statutory offense of sodomy." The court concluded that "while the offense of sodomy may be punished by up to 5-years confinement, if the offense was aggravated because it was committed upon a child under the age of 16 years or by force and without consent, the maximum confinement escalates to 20 years" pursuant to Part IV, paragraph 51.e. of the Manual.[197] Because the government alleged that the sodomy was "committed by force and without consent, it became an element of the offense."[198]

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[191] *Id.* at 275.
[192] *Id.* at 275 (internal citations omitted). *See also* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (holding that the President's rule-making authority does not extend to matters of substantive military criminal law.); United States v. Nickaboine, 3 U.S.C.M.A. 152 (C.M.A. 1953).
[193] 10 U.S.C. § 856.
[194] *Flucas*, 23 U.S.C.M.A. at 275.
[195] *Id*. at 275-76.
[196] 41 M.J. 847, 852 (A.F.C.M.R. 1994).
[197] *Id. See* MCM, *supra* note 6, pt. IV, ¶ 51.e.
[198] *Everett*, 41 M.J. at 852.

Additionally, the President has identified the "elements" of fifty-three separate Article 134, UCMJ, offenses described in Part IV of the Manual.[199] As the Army Court of Criminal Appeals explained in *United States v. Benavides*, "[i]n recognition of the factual variations that make out the hierarchy of Article 134, UCMJ violations, the President has listed several common violations of Article 134, UCMJ, with different pleading elements that describe different types of misconduct and different levels of guilty intent."[200]

In addition to these offenses enumerated by the President, Article 134, UCMJ, Clause 1 and 2 offenses depend upon the nature of the misconduct and are limited only by the government's allegations "(1) [t]hat the accused did or failed to do certain acts; and (2) [t]hat, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."[201]

It is readily apparent that determining *legislative* intent—at least with respect to "elements," prescribed by the *President* in Part IV of the Manual as aggravating factors beyond the basic statutory elements—is not possible. Neither do offenses enumerated by the President under Article 134, UCMJ, lend themselves to analysis of *legislative* intent.

Military courts, however, have not infrequently turned to the "elements" of Article 134, UCMJ, offenses enumerated by the President in conducting the requisite multiplicity analysis.[202] For example, in *United States v. Foster*,[203] CAAF compared the statutory elements of sodomy, under Article 125, UCMJ,[204] with the elements of indecent assault and indecent acts, offenses arising under Article 134, UCMJ.[205]

While multiplicity determinations typically turn on "legislative intent," CAAF has implied that *executive* intent is a relevant inquiry with respect to offenses charged under the General Article. In *United*

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[199] 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶¶ 61-113.
[200] 43 M.J. 723, 724 (Army Ct Crim. App. Dec. 13, 1995).
[201] 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶¶ 60.b.(1), b.(2).
[202] *See* William T. Barto, *Alexander The Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 16-17 (1996) (labeling these "regulatory" elements and arguing that "[b]ased on the inherent authority of the President, these regulatory elements could be considered by the courts and practitioners as the equivalent of statutory elements for multiplicity determinations; thus, eliminating the *need* for recourse to the pleadings in cases involving offenses described by the President as arising under the General Article") (emphasis in original).
[203] 4 M.J. 140 (C.M.A. 1994).
[204] 10 U.S.C. § 925; MCM, *supra* note 6, pt. IV, ¶ 51.
[205] 10 U.S.C. § 934; MCM, *supra* note 6, pt. IV, ¶¶ 63 and 87, respectively. *See also* United States v. Roderick, 62 M.J. 433 (2006) (comparing the elements of indecent liberties under Article 134, UCMJ, with the elements of using a minor to create sexually explicit photographs under 18 U.S.C.S. § 2251(a); United States v. Wheeler, 40 M.J. 242 (C.M.A. 1994) (comparing the elements of indecent acts and adultery, both charged under Article 134, UCMJ).

States v. Wheeler,[206] the court held that "[n]o evidence [had] been presented that Congress *or the President* intended [adultery and indecent acts charged under the General Article] to be the same offense."[207] This point was emphasized by the Chief Judge of the Navy-Marine Court of Criminal Appeals in *United States v. Oatney*[208] stating, "comparison of only the generic elements as listed in statutes or in the Manual for Courts-Martial, United States, 1984 (MCM) is useful to determine the intent of the Congress *and the President* as to whether multiple punishments are authorized . . . ."

Setting aside for the moment any separation of powers implications raised by executive influence over Congress' prerogative to define and punish offenses, it appears, however, that no indicia of Presidential intent, analogous to legislative history, is readily discernible. While changes in the Manual are ultimately implemented through Executive orders, the actual drafting is performed by the Joint Service Committee (JSC).[209] Explaining the composition of the Manual, the JSC emphasized that any commentary contained in the Manual's Analysis sections "represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President."[210] Thus, there is no executive equivalent of a legislative record to probe for intent regarding the appropriateness of multiple convictions beyond the Executive orders contained in the Manual.

To summarize, it appears that in conducting the analysis as to whether specifications are multiplicious, CAAF will look first to the generic statutory elements. Those elements include those prescribed by the President in Part IV of the Manual. However, when offenses are charged under Articles drawing their elements from sources other than those prescribed in the Manual, such as offenses alleged under the General Article (Article 134, UCMJ); conduct unbecoming offenses (Article 133, UCMJ) or allegations of failure to obey an order or regulation (Article 92, UCMJ), CAAF will then look not at the generic

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[206] *Wheeler,* 40 M.J. 242.

[207] *Id.* at 247 (emphasis added). Article 111, UCMJ, 10 U.S.C. § 911(a), proscribing drunk driving, provides another example of apparent Presidential intent as to multiple convictions. MCM, *supra* note 6, pt. IV, ¶ 35. c.(10) entitled, "*[s]eparate offenses*," states, "[w]hile the same course of conduct may constitute violations of both sections (1) and (2) of the Article, *e.g.*, both drunken and reckless operation or physical control, this article proscribes the conduct described in both subsections as separate offenses, which may be charged separately."

[208] 41 M.J. 619, 633 (N-M. Ct. Crim. App. 1994) (Larson, J., concurring in part and dissenting in part).

[209] GILLIGAN & LEDERER, *supra* note 18, at 1-30 n.153.

[210] MCM, *supra* note 6, Appendix 21, Analysis of Rules for Courts-Martial, A21-3.

statutory elements in the abstract, but to the "elements" as alleged in the specification.[211]

III. UNFAIR MULTIPLICATION OF CHARGES

A. Analytical Framework

Legal multiplicity and unreasonable multiplication of charges are related, yet distinct concepts. The concept of unreasonable multiplication of charges appears in the discussion accompanying R.C.M. 307(c)(4) and provides that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[212] In *United States v. Quiroz*,[213] CAAF cited with approval the lower court's observation that:

> although the concept of unreasonable multiplication has been placed in the non-binding Discussion, [it did] "not believe that the action of the President in placing this long-standing principle in a discussion section of the Manual for Courts-Martial had the effect of repealing it, thereby enabling imaginative prosecutors to multiply charges without limit."

Adopting much of the lower court's reasoning, CAAF explained that multiplicity is a concept that derives from the Double Jeopardy Clause, while the prohibition against unreasonable multiplication of charges "promotes fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress."[214] The CAAF further explained that the prohibition against unreasonable multiplication of charges "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."[215] Those features include the military's preference for trying all known offenses at a single trial as well as the existence of broadly worded offenses unknown in civilian society, such as "dereliction," and "conduct unbecoming an officer" offenses.[216]

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[211] *See* Barto, *supra* note 202, at 17 (arguing these are the "only categories of offenses that would appear to truly *require* the application of a pleadings-elements approach to multiplicity determinations") (emphasis in original).
[212] MCM, *supra* note 6, R.C.M. 307(c)(4), Discussion.
[213] 55 M.J. 334, 337 (2001) (quoting United States v. Quiroz, 53 M.J. 600, 605 (N-M. Ct. Crim. App. 2000)).
[214] *Id.* (quoting *Quiroz*, 53 M.J. at 604-05).
[215] *Id.* at 337.
[216] *Id.*

Note that these "features of military law" in support of the doctrine of unreasonable multiplication of charges echo the rationales articulated by CAAF in support of the "pleadings-elements" approach articulated in *Weymouth*.[217] The CAAF then summarized, "even if offenses are not multiplicious as a matter of law . . . the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."[218]

In *Quiroz*, the appellant was convicted of, among other things, wrongful sale of military property, in violation of Article 108, UCMJ, as well as unlawful sale of the same property, in violation of 18 U.S.C § 842, as incorporated under Article 134, UCMJ. After drawing the distinction between the concept of multiplicity and the well-established prohibition against unreasonable multiplication, CAAF then adopted the doctrine's current analytical framework for determining whether a given multiplication of charges arising from the same transaction is unreasonable. Those non-exhaustive factors include: whether the appellant objected at trial; whether the specifications are aimed at distinctly separate criminal acts; whether they represent or exaggerate the appellant's criminality; whether they unreasonably increase his or her exposure to punishment; and, whether they suggest prosecutorial abuse of discretion in drafting of the specifications.[219] In a later case, CAAF emphasized that the *Quiroz* factors "must be balanced, with no single factor necessarily governing the result."[220]

The CAAF emphasized that "reasonableness" is a determination of law and not an equitable standard.[221] Because CAAF had "reservations" about the lower court's reference to charges and specifications that "unfairly" increase an accused's punitive exposure and whether that court erroneously employed an "equitable rather than a legal standard," it remanded the case for further consideration.[222] Indeed, CAAF recently emphasized that the doctrine of unreasonable multiplication is a "doctrine of reasonableness and not an equitable doctrine of fairness."[223]

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[217] *See supra* note 88 and accompanying text.
[218] *Quiroz*, 55 M.J. at 338.
[219] *Id.*
[220] United States v. Pauling, 60 M.J. 91, 95 (2004).
[221] *Quiroz*, 55 M.J. at 339.
[222] *Id.*
[223] United States v. Roderick, 62 M.J. 425, 433, n.6 (2006).

B. Remedy

Following the *Quiroz* opinion, confusion in the lower courts persisted as to the appropriate remedy to address charges unreasonably multiplied. That is, once having determined that charges have been unreasonably multiplied, should they be consolidated for findings into one specification, considered as one offense for the purpose of sentencing, or should the offending specification be dismissed? Indeed, all of these remedies had previously been recognized by CAAF as appropriate. For example, in *United States v. Burris*,[224] the CMA concluded that once it becomes clear that what is substantially one transaction has been made the basis for an unreasonable multiplication of charges, it is incumbent on the trial judge—and subsequently the Court of Military Review either to "consolidate or dismiss" the specification.

In this respect, it is important to understand what happened in *Quiroz*. In that case, the lower appellate court, applying the analysis ultimately adopted by CAAF, determined that the Article 108, UCMJ, offense was unreasonably multiplied with the assimilated federal charge and *dismissed* it. On reconsideration *en banc*, that court agreed the charges were unreasonably multiplied and *consolidated* the two charges into a single offense under Article 134, UCMJ.[225] The CAAF then approved of the lower court's framework for addressing the unreasonable multiplication of charges error. Dissenting from CAAF's opinion, then Chief Judge Sullivan criticized the majority for creating a new legal power to dismiss legally separate findings deemed unreasonable based on R.C.M. 307(c)(4), arguing that, "[w]hile avoidance of unreasonable multiplication of charges has long been a general principle of military law, *its remedy has always been restricted to sentencing an accused only as to the more serious offense.*"[226]

Despite the authorization to dismiss or consolidate specifications emphasized in *Quiroz*, the military judge in *United States v. Roderick*,[227] a case tried shortly after *Quiroz* was released,

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[224] 21 M.J. 82 (C.M.A. 1985). *See also* United States v. Johnson, 39 M.J. 707 (N.M.C.M.R. 1993) (consolidating eight larceny specifications into one for findings).
[225] *Quiroz*, 55 M.J. at 336.
[226] *Id.* at 346 (Sullivan, J., dissenting) (internal citations omitted) (emphasis in original). *See also* United States v. Neblock, 45 M.J. 191, 206 (1996) (recognizing that an unreasonable multiplication of charges "could result in a sentence which violated the Eighth Amendment or Article 56, Uniform Code of Military Justice, 10 U.S.C. § 856"); United States v. Pauling, 60 M.J. 91, 96 (2004) (holding that Pauling's punitive exposure was not unreasonably increased because the military judge merged the specifications at issue for sentencing purposes and adjusted the maximum punishment accordingly).
[227] 62 M.J. 425 (2006)

concluded that he "had no power *at the findings phase* to address allegations of unreasonable multiplication of charges outside the multiplicity realm."[228] The military judge then merged the offenses for sentencing purposes. On appeal, CAAF held that *Quiroz* "tacitly acknowledged dismissal of unreasonably multiplied charges as a potential remedy."[229] The CAAF then held, "[t]oday we make our ruling clear. Dismissal of unreasonably multiplied charges is a remedy available to the trial court."[230] The CAAF then determined that Roderick "was prejudiced by the error because he was convicted of three additional charges" and therefore, dismissed the unreasonably multiplied charges.[231]

However, while *Roderick* answered one question—whether dismissal is a remedy for charges unreasonably multiplied—the court begged a new question: which remedy (dismissal, consolidation or merger for sentencing) is appropriate? Moreover, it provided no real guidance for making such a determination or whether it may constitute error to grant one form of relief over the other. On the one hand, CAAF's reasoning leads to the logical conclusion that dismissal is preferable since it is the only way to address the prejudice and adverse collateral effects inevitably associated with multiple convictions. Nonetheless, the court did not foreclose other remedies.

Without guidance as to the analytical mode, it remains unclear which remedy is appropriate in a given case. This is demonstrated by the holdings of two post-*Roderick* cases from two different service courts. In *United States v. Markert*,[232] the Navy-Marine Court, citing *Roderick*, simply held that, assuming the charges were unreasonably multiplied, the appellant suffered no material prejudice because the military judge consolidated the charges for sentencing purposes, which is "a viable alternative to dismissal."[233] The Air Force Court took a different approach in *United States v. Klukoff*,[234] dismissing a charge it determined was unreasonably multiplied, holding that an increase in punitive exposure "must be measured . . . in light of our superior court's caution that each conviction 'has potential adverse collateral consequences that may not be ignored.'"

Perhaps the most useful and comprehensive framework for relief, as well as the policies behind various potential remedies, was

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[228] *Id.* at 433 (emphasis added).
[229] *Id.* at 433 (citing *Quiroz* at 339).
[230] *Id.* at 433.
[231] *Id.*
[232] 65 M.J. 677, 683 (N-M. Ct. Crim. App. 2007).
[233] *Id.* at 684 (citing *Roderick,* 62 M.J. at 433)).
[234] 2006 CCA LEXIS 162 (A.F. Ct. Crim. App. June 20, 2006) (internal citations omitted). *See also* United States v. Moultrie*,* CCA LEXIS 208 (A.F. Ct. Crim. App. May 31, 2007) (rejecting the argument that consolidation for sentencing purposes avoids the prejudice associated with additional convictions that should have been dismissed).

articulated by the CMA in *United States v. Doss,*[235] addressing paragraph 26b of the Manual,[236] the precursor to R.C.M. 307(c)(4). Though the court conflated the concepts of multiplicity and unreasonable multiplication of charges, its analysis is true to the latter doctrine and remains instructive. The court explained first, with respect to charging, that:

> the prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. Moreover, where the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more of the charges as a result of a compromise verdict.[237]

This is consistent with the Discussion in R.C.M. 307(c)(4), stating that what is substantially one transaction should not be made "*the basis*"[238] for an unreasonable multiplication of charges. Second, the CMA in *Doss* explained that reasonable leeway should nonetheless be provided to the government in drafting charges to meet the exigencies of proof, and therefore a military judge "may act entirely appropriately in overruling a defense objection to multiplication of charges when this is raised at the outset of the trial, but then set aside findings of guilty on some of the charges at a later stage of the trial."[239] Third, "[e]ven when an accused may be entitled to no relief as to the findings of guilty entered on several charges arising from the same transaction, he may deserve relief for purposes of sentencing."[240] The court reasoned that, despite the separate elements test, a military trial may be more lenient than its civilian counterpart and that "this leniency was supported by [its] precedents extending back almost 30 years . . . ."[241]

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[235] 15 M.J. 409 (C.M.A. 1983).
[236] MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 26b (1969). This paragraph stated, "Offenses arising out of one transaction. One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person."
[237] *Doss*, 15 M.J. at 411.
[238] MCM, *supra* note 6, R.C.M. 307(c)(4), Discussion (emphasis added).
[239] *Doss*, 15 M.J. at 412.
[240] *Id.* at 413.
[241] *Id.*

IV. "MULTIPLICITY FOR SENTENCING"

The remaining strand of "multiplicity" in military justice jurisprudence is the concept of "multiplicity for sentencing." Congress has authorized the President to establish sentence limits in courts-martial, pursuant to Article 56, UCMJ.[242] R.C.M. 1003(c)(1)(C) is an exercise of that delegation, wherein the President prescribed the sentence limits when an accused is convicted of multiple offenses. That rule provides:

> Multiplicity. When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 of Part IV [Conspiracy], offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.

This language is virtually the same as the *Blockburger* separate elements test. However, the Rule's Discussion section also provides:

> No single test or formula has been developed which will resolve the question of multiplicity.
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> . . .
>
> The following tests have been used for determining whether offenses are separate. Offenses are not separate if one is included in the other or unless each requires proof of an element not required to prove the other.
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> . . .
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> Even if each offense requires proof of an element not required to prove the other, they may not be separately punishable if the offenses were committed as the result of a single impulse or intent . . . Also, if there was a unity of time and the existence of a connected chain of

[242] 10 U.S.C. § 856 states that the "punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

> events, the offenses may not be separately punishable, depending on all the circumstances, even if each required proof of a different element.

What then is the extent of the current limitations on sentencing? As Judge Heimburg, then Senior Judge of the Air Force Court of Criminal Appeals, observed in his concurring opinion in *United States v. Lenoir*,[243] despite CAAF's adoption of the separate elements test as the sole test for multiplicity, military courts "are still "foundering in the fog of prior military precedents and the unhelpful guidance in the Discussions to R.C.M.1003(c)(1)(C)."

Indeed, the text of R.C.M. 1003(c)(1)(C) raises several questions: first, if the Double Jeopardy Clause precludes multiple *convictions* for the same offense, why then would a legally multiplicious offense survive the findings phase? The last sentence of this rule apparently envisions a scenario wherein an accused is found guilty of offenses that "are not separate," *i.e.*, the same, and it then limits the punishment to the greater offense but preserves both convictions. Second, if *Blockburger* establishes the maximum punishment for separate offenses, and *Blockburger* is used to determine if offenses are separate, then R.C.M. 1003(c)(1)(C) provides no independent limitation whatsoever. That is, R.C.M. 1003(c)(1)(C) adds nothing to the sentence limitation if that limitation has already been established by the *Blockburger* test.

In *United States v. Britton*,[244] the current Chief Judge of CAAF, in commenting on the volume and complexity of multiplicity litigation, observed that "the same word—'multiplicious'—has been used to describe two different matters: (1) a non-discretionary legal limit on offenses during findings; and (2) a discretionary decision by the military judge to combine offenses during sentencing." He then suggested that a term other than "multiplicity" be used to describe a military judge's decision to provide relief in sentencing.[245] Indeed, he later reiterated this point in authoring *Quiroz*, [246] stating:

> the power to treat offenses "multiplicious as for sentencing" may well be subsumed under the concept of an unreasonable multiplication of charges when the military judge or the Court of Criminal Appeals determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings. The President may decide to amend

[243] 39 M.J. 751, 754 (A.F.C.M.R. 1994) (Heimburg, J., concurring).
[244] 47 M.J. 195, 202 (1997) (Effron, J., concurring).
[245] *Id*.
[246] *Quiroz*, 55 M.J. at 339.

> the Manual to refer to the doctrine of multiplicity for sentencing in the future in terms of an unreasonable multiplication of charges for purposes of sentencing. Until the Manual is amended, however, a motion to treat offenses as "multiplicious for sentencing" remains a valid basis for relief under the Manual.

Presumably, this is why the service courts continued to look to the Rule's Discussion section for guidance. For example, the Air Force Court of Military Review observed in *United States v. Hancock*[247] that "until the Court of Military Appeals indicates whether the 'single impulse' and 'insistent flow of events' tests remain valid measures of multiplicity for sentencing, we are bound to apply them." Similarly, in *United States v. Loughlin*, the Navy-Marine Court concluded that "R.C.M. 1003(c)(1)(C) is a threshold consideration only, and that there is no single test in resolving sentencing multiplicity problems."[248] A leading commentator on military justice observed that the "Discussion makes it apparent that at the time of the Rule's promulgation, multiplicity for sentencing was understood to incorporate far more than the *Blockburger* element test."[249] Indeed, Judge Cox, in *United States v. Beaudin*,[250] once emphasized that absent a formal sentencing scheme, "military judges must be accorded broad discretion to compress the cumulative sentence ceiling as the interests of justice requires."

Likewise, the CMA observed in *United States v. Wheeler*,[251] that the Discussion to R.C.M. 1003(c)(1)(C) "makes clear" that the Rule itself was not dispositive. However, the following year CAAF observed in *Weymouth*,[252] that in courts-martial "separate for findings equals separate for sentencing." In arriving at this conclusion, CAAF may have been influenced by the United States Supreme Court's holding in *United States v. Dixon*,[253] announced shortly before *Weymouth*. In reversing, in part, the convictions at issue in *Dixon*, the Supreme Court held that in both the successive prosecution and successive punishment contexts, resolution of the double jeopardy question is governed solely by the separate elements test contained in *Blockburger*.[254] The Supreme Court explained, "there is no authority . . . for the proposition that [the Double Jeopardy Clause] has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same

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[247] 38 M.J. 672, 677 (A.F.C.M.R. 1993).
[248] 1986 CMR LEXIS 2402 (N.M.C.M.R. June 27, 1986).
[249] GILLIGAN & LEDERER, *supra* note 18, at 6-17.
[250] 35 M.J. 385, 389 (C.M.A. 1992) (Cox, J., concurring).
[251] 40 M.J. 242, 245 (C.M.A. 1994).
[252] 43 M.J. 329, 336 (1995) (internal citations omitted).
[253] 509 U.S. 688 (1993). *See supra* note 103 and accompanying text.
[254] *Dixon*, 509 U.S. at 696.

offense' (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense."[255]

Given the inclusion of *Blockburger's* separate elements test in R.C.M. 1003(c)(1)(C), CAAF's reluctance to ascribe sentencing multiplicity a "different meaning" from multiplicity in the findings context is understandable. In *United States v, Morrison,*[256] released one year after *Weymouth*, CAAF concluded that Congress intended to permit separate convictions and punishment for the offenses of willful disobedience and missing movement, under Articles 87 and 90, UCMJ. The CAAF explained that it "presume[d] congressional intent to permit prosecution and punishment for both offenses, because they have different elements and neither is included in the other."[257] In the subsequent case of *United States v. Lloyd,*[258] CAAF stated plainly that *Morrison* held that the "rules of multiplicity for sentencing as presently established by the President are the same as those for determining multiplicity findings."[259]

Despite the apparent concerns that military judges possess discretion to adjust maximum sentences in the interests of justice, this discretion is apparently lacking if military judges are limited to application of the separate elements test in both the findings and sentencing phases.

V. RECOMMENDED CHANGES TO THE MANUAL FOR COURTS-MARTIAL

A. In General

Congress delegated to the President the authority to prescribe "[p]retrial, trial and post-trial procedures" for courts-martial.[260] The President may not, however, overrule or diminish an act of Congress or diminish CAAF's interpretation of a statute.[261] Like the federal and state criminal justice systems, the military system has "hierarchical sources of rights."[262] These sources are the United States Constitution; federal statutes, including the UCMJ; executive orders; Department of Defense directives; Service directives; and, federal common law,

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[255] *Id*. at 704 (emphasis in original).
[256] 41 M.J. 482 (1995).
[257] *Id*. at 484.
[258] 46 M.J. 19, 24 (1997).
[259] *See also* United States v. Inthavong, 48 M.J. 628, 633 n.10 (A.C.C.A. 1998) (noting that "multiplicity for findings and sentencing are now the same") (internal citations omitted).
[260] 10 U.S.C. § 836; *see also* United States v. Kossman, 38 M.J. 258, 260 (C.M.A. 1993).
[261] *Kossman*, 38 M.J. at 260-61.
[262] United States v. Taylor, 41 M.J. 168, 169 (C.M.A. 1994).

respectively.[263] The highest authority is controlling "unless a lower source creates . . . greater rights for the individual."[264] The revisions to the Manual that I propose in the following sections are intended to be consistent with these authorities and within the President's rule making authority.

B. Revisions Regarding Legal Multiplicity

The prohibition against multiplicity is found in R.C.M. 907, governing motions to dismiss. R.C.M. 907(a) defines a motion to dismiss as "a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issues of guilt." R.C.M. 907(b)(3)(B), provides that a specification may be dismissed if "[t]he specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review and appellate action, and should be dismissed in the interest of justice."[265]

The Discussion section following R.C.M. 907(b)(3)(B) provides that "[a] specification is multiplicious with another if it alleges the same offense, or any offense necessarily included in the other."[266] It does not however, define what constitutes a legally multiplicious specification. Additionally, the Discussion section references R.C.M. 1003(a)(1)(C), which, as discussed more fully below, is a *sentencing* rule. But since motions to dismiss focus on *termination* of charges that are capable of resolution without trial, its reference to a sentencing Rule seems out of place and is an added source of potential confusion.

While the current R.C.M. 907(b)(3)(B) is sufficient to state multiplicity as grounds for relief, potential for confusion would be reduced if significant modifications were made to its Discussion section. First, the Discussion section should define "multiplicity." The definition contained in the current Discussion, defining a specification as multiplicious if it alleges the "same offense," is rather circular.[267] Second, a concise explanation of the requisite analysis, embodied in current military jurisprudence, would greatly assist practitioners in making multiplicity determinations. Since these tests are already embodied in military jurisprudence, by making such modifications the President would not run afoul of the requirement that Executive orders of Courts-Martial Rules not diminish CAAF's interpretation of the law. Additionally, the current Discussion section's reference to R.C.M. 1003(c)(1)(C) should be removed. Doing so would go far in doctrinally

[263] *Id*. at 169-70.
[264] *Id*. at 170.
[265] MCM, *supra* note 6, R.C.M. 907(b)(3)(B).
[266] *Id.*, R.C.M. 907(b)(3)(B), Discussion.
[267] *Id.*

partitioning the concept of legal multiplicity from the power of a military judge to provide relief in sentencing.

For these reasons, I propose that the following Discussion to R.C.M. 907(b)(3)(B) replace the Discussion in the current Manual:

> Multiplicity is the charging of a single offense in several charges or specifications. Multiplicity is a legal concept grounded in the Double Jeopardy Clause of the Fifth Amendment to the Constitution, which provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb." U.S. Const. amend. V. For offenses to be the "same," they must be *factually* based on the same act or transaction. The charges or specifications must also constitute the "same" *legal* offense. A constitutional violation under the Double Jeopardy Clause occurs if a court, *contrary to the intent of Congress*, imposes multiple convictions and punishments for the same offense. Congress may express its intent overtly in the pertinent statutes violated or in their legislative histories. Absent such expression of legislative intent, it can be inferred based on the elements of the charged statutes and their relationship to each other. An inference of separateness may be inferred if each contains an element not contained in the other. Other guides to legislative intent may then be considered to determine whether the inference of separateness is overcome by a contrary legislative intent.
>
> The essential elements are determined by examining the statute upon which the charge is based, and, when necessary, the specification pled. In addition to the statutory elements, the term "element" includes any aggravating factors prescribed by the President under Article 56, UCMJ, which increases the maximum permissible punishment. *See* MCM, pt. IV, Discussion, IV-1; MCM, Appendix 23, Introduction, A23-1. The President has also identified the "elements" of offenses enumerated in Article 134, UCMJ; MCM, pt. IV, paragraphs 61-113. Elements of offenses alleged under Article 134, UCMJ, Clauses 1 and 2; Article 133, UCMJ; and Article 92, UCMJ, that are not the products of statutes or enumerated under Article 134, UCMJ, are determined by reference to the specification alleged in the particular case.

> Unit of prosecution—in cases involving multiple charges or specifications involving repeated violations of a single statute, the allowable unit of prosecution—that is, whether the offense is a continuing one whose acts constitute but a single offense, or consists of separate individual offenses, is determined by congressional intent. Congressional intent is discerned by examining the text of the statute, the overall statutory scheme, its legislative history or interpretive court decisions. If legally, discrete offenses were intended, the court must determine whether the conduct alleged bears sufficient indicia of distinctness to support separate specifications. However, if the allowable unit of prosecution is ambiguous, the court should apply the rule of lenity and presume that only a single conviction and punishment is authorized.
>
> An accused may not be convicted for offenses that are not separate.

While no truncated Discussion section is likely to serve as the panacea for resolving the myriad potential for multiplicious charging scenarios, this proposed Discussion to the rule does provide a cogent, doctrinal construct for approaching such issues. Importantly, in addition to identifying the requisite *factual* "sameness," it establishes the initial framework, consistent with *Teters*, for discerning congressional intent. It then provides a hierarchical framework for ascertaining the source of "elements" by which to ascertain whether offenses are *legally* the "same" under the separate elements test. First, it directs practitioners to the statutory elements identified in the relevant statute. Second, it directs the reader to the "elements" prescribed by the President as either aggravating factors or offenses enumerated under Article 134, UCMJ. Third, in cases involving offenses deriving their elements from non-statutory sources, such as regulations, orders and customs of the service—such as offenses alleged under Clauses 1 and 2 of Article 134; conduct unbecoming an officer, charged under Article 133, UCMJ; or some offense charged under Article 92, UCMJ—it directs litigants to apply the "pleadings-elements" approach articulated in *Weymouth*. Finally, the proposed language identifies the separate analysis necessary in cases involving multiple violations of a single statute, *i.e.* the unit of prosecution.

C. Revisions Regarding Unreasonable Multiplication of Charges

Currently, there is no Rule for Courts-Martial that independently identifies unreasonable multiplication of charges, as that concept is defined in *Quiroz*, as a distinct ground for relief. The only reference to charges unreasonably multiplied appears in the Discussion section to R.C.M. 307(c)(4), articulating the policy that "[w]hat is substantially one transaction should not be the basis for an unreasonable multiplication of charges against one person."[268] This Discussion, however, does not establish a legally binding limitation.[269] Nor, of course, does the Manual identify what analysis governs the proper remedy or when relief should be granted for charges unreasonably multiplied.

The Discussion to R.C.M. 307(c)(4) does, however, reference R.C.M. 906(b), which delineates various issues that may be addressed by a "motion for appropriate relief."[270] One of those specific grounds is contained in R.C.M. 906(b)(12), which reads in its entirety, "Determination of multiplicity of offenses for sentencing purposes."[271] That sub-rule's Discussion reads, in total:

> *See* R.C.M. 1003, concerning determination of the maximum punishment. *See also* R.C.M. 907(b)(3)(B) concerning dismissal of charges on grounds of multiplicity.
>
> A ruling on this motion should ordinarily be deferred until after findings are entered.[272]

Similarly, the Discussion to R.C.M. 307(c)(4) also references R.C.M. 1003(c)(1)(C) concerning "multiplicity" of offenses for sentencing purposes. Thus, both R.C.M. 307(c)(4) as well as R.C.M. 906(b)(12) reference "multiplicity" for sentencing purposes. However, the term "multiplicity," as discussed above, is associated with the Double Jeopardy Clause and the body of case law governing congressional intent, a doctrine divorced from concepts of pure sentencing relief . . . . The separate elements test has no place doctrinally in the sentencing equation. Yet, all authority in the Manual addressing charges and specifications unreasonably multiplied directs the practitioner to R.C.M. 1003(c)(1)(C), a rule governing sentence

[268] MCM, *supra* note 6, R.C.M. 307(c)(4), Discussion.
[269] Drafters' Analysis, Manual, at A21-3.
[270] MCM, *supra* note 6, R.C.M. 307(c)(4), Discussion.
[271] *Id*., R.C.M. 906(b)(12).
[272] *Id*., R.C.M., 906(b)(12), Discussion.

limitations entitled, "multiplicity."[273] Of course, if it is determined that Congress did not intend multiple convictions under the doctrine of multiplicity, the offending specification should be dismissed *before* the sentencing phase. As explained by the Supreme Court in *United States v. Dixon*,[274] there is simply no authority "for the proposition that [the Double Jeopardy Clause] has different meanings in the two contexts."[275] This principle applies equally in both the findings and sentencing phases of courts-martial.

Therefore, the phrase "multiplicity of offenses for sentencing purposes," contained in R.C.M. 906(b)(12), should be abandoned and the phrase "unreasonable multiplication of charges," used in its stead. This will make clear both that the *Quiroz* factors are implicated and that *Weymouth's* "pleadings-elements" test is not in issue in deciding either whether charges have been unreasonably multiplied.

In response to Chief Judge Effron's suggestion that a term other than "multiplicity" be used in granting sentencing relief, I suggest that such relief be granted only for offenses "unreasonably multiplied." Doing so excises the superfluous phrase, "multiplicious for sentencing" from the judicial vocabulary while reducing the potential for conflation of what are separate doctrinal considerations.

For these reasons, a substituted R.C.M. 906(b)(12) should replace the existing rule. I propose the following language:

> R.C.M. 906(b)(12) Relief from unreasonable multiplication of charges.
>
> (a) *In general*. The military judge may, at his discretion, act on a motion for appropriate relief for an unreasonable multiplication of charges either before or after the entry of findings.
>
> (b) *Unreasonable multiplication of charges for purposes of findings*. Whether charges arising from what is substantially the same transaction, while not legally multiplicious, are nonetheless unreasonably multiplied, is determined by the following non-exhaustive factors: whether the specifications are aimed at distinctly separate criminal acts; whether they represent or exaggerate the accused's criminality; whether they unreasonably increase his or her exposure

[273] *See* MCM, *supra* note 6, R.C.M. 1003(c)(1)(C).
[274] 509 U.S. 688, 696 (1992).
[275] *Id.* at 704; *see supra* note 253 and accompanying text.

to punishment; and, whether they suggest prosecutorial abuse of discretion in the drafting of the specifications.

(i) Remedy. Where the military judge finds that the offenses which the accused has been charged have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offense unreasonably multiplied or consolidation of the offenses into one specification.

(c) *Unreasonable multiplication of charges for purposes of sentencing*. Where the military judge finds that offenses for which the accused stands convicted do not meet the conditions set out in subsection (b) to justify dismissal or consolidation, but does find, under the totality of the circumstances, that the nature of the harm requires a remedy that focuses more appropriately on the sentence than on findings, the maximum punishment for those offenses shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment.

The Discussion should read as follows:

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. For example, multiple convictions or punishment for an offense incorporated under Article 134(c)(4) and for violation of a punitive Article under the Uniform Code of Military Justice should be avoided when both specifications address the same misconduct. *See United States v. Quiroz*, 55 M.J. 334 (2001); *United States v. Roderick*, 62 M.J. 426 (CAAF 2006). *See also* R.C.M. 307(c)(4), Discussion, and examples cited therein. *See also* R.C.M. 907(b)(3)(B) for determining whether offenses are legally multiplicious.

A ruling on the motion should ordinarily be deferred until after findings are entered. However, the military judge may submit the specifications complained of to the fact finder with the instruction that they may (1) return a finding of not guilty to both specifications, or (2) guilty to one specification, but not the other, but (3) may not find the accused guilty of both.

These revisions to the Rule accomplish several things. First, it elevates the doctrine from the non-binding supplementary Discussion to the status of a binding Rule for Court-Martial. Second, it codifies the *Quiroz* test, which currently appears nowhere in the Rules for Courts-Martial. Third, it eliminates any reference to "multiplicity for sentencing" and the attendant confusion as to what test should then be applied. Fourth, the proposed Rule helps construct a solid doctrinal framework that differentiates between the concept of legal multiplicity and when that doctrine is applicable (in findings only) and that of unreasonable multiplication of charges. Application of the latter concept provides for dismissal or consolidation of the specifications for findings or, alternatively, consideration of the charges as one offense for the purpose of sentencing. This framework for relief is consistent with CAAF's holding in *Roderick*, suggesting that dismissal of charges unreasonably multiplied is the preferred remedy to address the prejudice inherent in multiple convictions for offenses unreasonably multiplied. The framework also addresses Judge Cox's concerns in *Beaudin*[276] for providing military judges the flexibility to consolidate offenses that should, in the interests of justice, not be the basis for consecutive sentences, though dismissal may be unwarranted.

The Discussion section sets forth the basic policy underscoring the Rule and cites *Quiroz* and *Roderick*, thus incorporating by reference the substance and policy embodied in those opinions. Additionally, by liberating the Rule from any reference to "multiplicity," the proposed Rule would not run afoul of the Supreme Court's admonition that the Double Jeopardy Clause not have different meanings in different contexts. Finally, the change accommodates Judge Effron's suggestion that a term other than "multiplicity" be used to describe a military judge's decision to provide relief in sentencing and tracks the language of his invitation in *Quiroz* that 906(b)(12) "refer to the doctrine of multiplicity for sentencing in the future in terms of an unreasonable multiplication of charges for purposes of sentencing."[277]

D. Revisions to R.C.M. 1003(c)(1)(C)—Sentencing

Perhaps Judge Cook, in his dissenting opinion in *United States v. Baker*, summed it up best, stating, "[t]hat multiplicity for sentencing is a mess in the military justice system is a proposition with which I believe few people familiar with our system would take issue."[278] Indeed, R.C.M. 1003(c)(1)(C), the current rule governing sentencing, has many shortcomings. First, it does not reflect the proscription

[276] *See supra* note 250 and accompanying text.
[277] Quiroz v. United States, 55 M.J. 334, 339 (2001).
[278] 14 M.J. 361, 372 (C.M.A. 1983) (Cook, J. dissenting).

against multiple convictions, articulated in *United States v. Ball*,[279] based on the same offense. Second, as appellate judges have bemoaned, by setting forth sentencing limitation in terms of the separate elements test, the Rule, on its face, provides no independent limitation. Third, there is a dissonance between the somewhat inflexible terms of the Rule itself and the wide discretion afforded military judges by the Rule's Discussion.

To remedy the understandable confusion in this area and harmonize this Rule with R.C.M. 307(c)(4), R.C.M. 906(b)(12) and 907(b)(3)(B), I propose that R.C.M. 1003(c)(1)(C) be amended as follows:

> (C) Multiple Convictions. When the accused is found guilty of two or more offenses in one court-martial, the maximum authorized punishment may be imposed for each separate offense. An accused may not be convicted or punished for offenses that are not separate.
>
> I propose the Discussion be redrafted as follows:
>
> *See* R.C.M. 907(b)(3)(B) for determining whether offenses are separate. *See* R.C.M. 906(b)(12) according military judges the discretion to provide sentencing relief for charges unreasonably multiplied.

Simplifying the Rule and its Discussion in this manner resolves numerous problems engendered by the current Rule and its accompanying Discussion. First, consistent with the new R.C.M. 906(b)(12) proposed above, it eliminates "multiplicity for sentencing" as an independent grounds for relief, harmonizing all of the proposed Rules for Courts-Martial in this regard and bringing the Manual into accord with the holdings of CAAF providing that "separate for findings equals separate for sentencing."[280] Second, it purges the current Rule's implicit approval of the imposition of multiple convictions for offenses that are "not separate," which is in conflict with the Supreme Court's holding in *United States v. Ball,*[281] that "Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one . . . ." Third, it does away with the discord between the limiting language of the Rule itself and the broad discretion seemingly conferred in the subsequent Discussion. However, the Discussion section in the newly proposed R.C.M. 906(b)(12) does

[279] *See supra* note 30 and accompanying text.
[280] *Weymouth*, *supra* note 88 and accompanying text.
[281] Ball v. United States, 470 U.S. 856, 861 (1985).

reference the discretion retained by military judges to adjust maximum sentences. Nothing is lost, while much needed clarity is gained by this proposed Rule.

VI. CONCLUSION

R.C.M. 102 provides that the Rules for Courts-Martial "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustified expense and delay."[282] The revisions propounded in this article were designed to further these goals by articulating in the Manual a series of comprehensive Rules embodying the substance and policies enunciated by CAAF in approaching issues of multiplicity and unreasonable multiplication of charges.

The current Rules in the Manual governing these doctrines do not reflect the current state of the law and are internally discordant. The need for explication is unquestionable. It is therefore, necessary that the instrument most available to practitioners, the Manual for Courts-Martial, be employed to implement the controlling frameworks for these concepts. If changes to the Manual are not made, the significance of the protection against multiplicious and unreasonably multiplied charges will continue to be ambiguous and dated tests and formulae perpetuated. The revisions I propose, if adopted, will help achieve the fundamental purpose of the Manual, described by the Joint Service Committee, as "a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and non-lawyers in the operation and application of such law."[283]

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[282] MCM, *supra* note 6, R.C.M. 102(b).
[283] *Id*., Appendix 21, Analysis of Rules for Courts-Martial, A21-1.

STATE SUPERVISION OF SPACE ACTIVITY

MAJOR RONALD L. SPENCER, JR.

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I. ORIGIN OF STATE SUPERVISION

> *The activities of non-governmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State Party to the Treaty.*
>
> -*Outer Space Treaty*, Article VI (2)

In the aftermath of the January 2007 direct ascent anti-satellite weapon test by the Peoples Republic of China, the international community renewed its interest in the principle of state responsibility for activities in outer space. The relevance of this principle was brought into focus by the destruction of the targeted Chinese weather satellite which generated a record setting debris field in the much used low earth orbit.[1] In February 2008, the United States of America demonstrated a similar capability when it prevented a satellite containing hazardous fuel from re-entering the atmosphere intact.[2] More recently, the first quarter of 2009 witnessed the Islamic Republic of Iran's successful launch of the Omid communication satellite accompanied by multiple demonstrations of ballistic missile launches.[3] The Democratic People's Republic of Korea's attempted to launch a communications satellite to perfect its ballistic missile capability.[4] The Russian Federation's in-active COSMOS 2251 collided with the active Iridium 33 satellite owned by a commercial operator in the United States adding to the overall debris risk.[5] And, the crew of the International Space Station was forced to lower its altitude due to the increased risk and took the unprecedented precaution of boarding their escape capsule during a high risk conjunction with a rocket body fragment.[6]

The principle of state responsibility for national space activities predates our present headlines. It was created in the contentious times of the Cold War arms control negotiations between the former Union of Soviet Socialist Republics and the United States. During these negotiations, the Soviet's initial position was to limit space activity to government agencies and the United States' position was to open space

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[1] William J. Broad & David E. Sanger, *Flexing Muscle, China Destroys Satellite in Test*, N.Y. TIMES, Jan. 19, 2007, at A1.
[2] Thom Shanker, *Pentagon Is Confident Missile Hit Satellite Tank*, N.Y. TIMES, Feb. 21, 2008.
[3] Nazila Fathi & William J. Broad, *Iran Launches Satellite in a Challenge for Obama*, N.Y. TIMES, Feb. 3, 2009, at A1.
[4] Choe Sang-Hun & David E. Sanger, *North Koreans Launch Rocket Over The Pacific,* N.Y. TIMES, Apr. 5, 2009, at A1.
[5] William J. Broad, *Debris Spews Into Space After Satellites Collide*, N.Y. TIMES, Feb. 11, 2009, at A28.
[6] Kenneth Chang, *Space Station Crew Board 'Lifeboat' to Dodge Debris*, N.Y. TIMES, Mar. 12, 2009, at A16.

to private entities. The negotiations resulted in both government agencies and non-governmental entities active in space, but under the expressed authorization and continued supervision of the state. This political compromise was aided by the fact that both sides of this contest obfuscated their respective space activities to avoid revealing their true capabilities and limitations. This practice necessitated all space activities of the respective states be subject to the negotiated restraints for this space agreement to be meaningful.[7] The innovation of national space activity including both governmental agencies and non-governmental entities first occurred through a non-binding resolution adopted by the United Nations' General Assembly in 1963[8] as spy satellites and other military space applications were operating under the cover of scientific programs.[9] The State Parties to the *Outer Space Treaty*[10] adopted nearly identical language to the earlier resolution binding themselves to the obligation of continuing supervision over non-governmental, or private, space activity in 1967[11] as manned space activity progressed from brief orbital missions to extended lunar expeditions and the inhabitation of space stations with military applications.[12] Iran as the most recent state to join the space faring

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[7] WALTER A. MCDOUGALL, THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 272 (1985).

[8] G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, UN Doc. A/5515 (1963) [hereinafter Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space].

[9] DAVID DARLING, THE COMPLETE BOOK OF SPACEFLIGHT, FROM APOLLO 1 TO ZERO GRAVITY (2003). *Corona* was the United States' first imagery intelligence satellite program launched over 100 times under the cover of the *Discoverer* scientific program from 1959 to 1972. Launched into polar orbit aboard an Air Force Thor rocket, it photographed the Soviet Union and ejected the film to be recovered by an aircraft which captured the film drum as it descended by parachute. *Corona* was declassified in 1995. The *Cosmos* series was launched by the Soviets/Russians for both scientific and military purposes since 1962. The series included military electronic intelligence, reconnaissance, communications, and navigation satellites. The Soviet system characterized all space activities as scientific and concealed the true objectives of these missions.

[10] Treaty Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410 [hereinafter Outer Space Treaty].

[11] *See id.* art VI.

[12] DARLING, *supra* note 9. The *Salyut* series of Soviet space stations from 1971 to 1985 were used for both civilian and military use. In particular the *Almaz* military missions carried a synthetic aperture radar operated by a military crew to obtain high resolution surveillance of land and ocean surfaces, and it was also armed with a cannon to defend the station against an American attempt to dock with it while on orbit. The *Skylab* space station operated by the United States from 1975 to 1979 was for civilian use, while the Air Force developed the *Manned Orbiting Laboratory (MOL)* for military use as a manned optical and radar surveillance station like the Soviet *Almaz*. The *MOL* was cancelled in 1969 before coming into operation because the unmanned intelligence satellites provided an adequate capability at reduced cost and risk.)

nations of the world was also one of the original signatories of the *Outer Space Treaty* while North Korea recently acceded to the treaty prior to its April 2009 launch attempt.[13]

The general principle of state responsibility for national activities in space is evident for governmental agencies as the respective states appropriate funds for its space programs, albeit obscured for national defense and domestic security interests. Also, government officials, or their contracted representatives, participate in the planning, construction, operation, and supervision of their governmental space programs to ensure a successful outcome. Conversely, commercial entities operate out of self interest; therefore, they are subject to the general supervision exercised by government to ensure compliance with its common regulations, such as, labor standards, environmental protection, revenue collection, etc.[14] But, these regulations secure domestic interests, not the type of interests the foreign state signatories to a public international treaty seek to protect. Therefore, the *Outer Space Treaty* specified the twin requirements of authorization and continuing supervision for commercial space activities.[15] The authorization obligation requires the appropriate state to exercise its sovereign power to restrict space activity to those it authorizes. As a consequence of its authorization (explicit or implicit), the state bears international responsibility in general and liability for the damage such activity may cause.[16] The space law authors[17] thoroughly address state responsibility for authorization as evidenced by the state's conduct, territory, launch facility, or procurement of a launch for commercial activity.[18] The size and nature of space launch activities make the authorization obligation relatively easy to ascertain or impute when necessary. The more difficult challenge for the international community lies in ascertaining compliance with the continuing supervision

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[13] United Nations Office for Outer Space Affairs, *Treaty Database*, http://www.oosa.unvienna.org/oosa/index.html (last visited April 7, 2009).

[14] *See, e.g.*, 49 U.S.C. 70117(c)(2).

[15] Outer Space Treaty, *supra* note 10 art. VI. "Non-governmental entities" include those entities which are not governmental. The term private indicates an individual or activity which is not official or public in nature, while the term commercial is used by the supervision regime of the United States to emphasis the business affiliation and control as opposed to government control. Both terms are used in the literature, and either term can be confused when the activity engaged in is government directed but the space goods and services are obtained from a non-governmental source. The term commercial when used in this paper will normally be used to indicate the ownership or control over the entity or activity described.

[16] *Id*. art VII.

[17] *See, e.g.*, Bin Cheng, *Article VI of the 1967 Space Treaty Revisited: International Responsibility, National Activities, and the Appropriate State,* 26 J. SPACE L. 1 (1998), at 8 (see note 2).

[18] *Supra* note 16; Convention on the International Liability of Damage Caused by Space Objects, Mar. 29, 1972, art I(c), 24 U.S.T. 2389 [hereinafter Liability Convention].

obligation. The transmission of commands to the spacecraft may be difficult to detect or decipher. And, direct observation of all operations on orbit is not feasible. Thus their effects are not discovered until after the harmful interference or destruction occurs. Today, such obfuscation continues to frustrate the international community as it seeks transparency to promote security and safety of flight.

Continuing supervision, or simply supervision, addresses the operation of spacecraft until its eventual disposal.[19] The *Outer Space Treaty* provides no guidance on the scope, development, or implementation of supervision standards. The vagueness of this obligation was not controversial during the negotiations as all space activity by its nature involved governmental oversight at that time.[20] The purpose for this principle was to increase the breadth of national activity to allow the proper attribution of a given space activity to the responsible state.[21] Once attributed, the State Party is internationally liable for the damage resulting from the activity subject to its supervision. Therefore, at a minimum the state has a financial incentive to provide adequate supervision to curb its international liability[22] and in the worst case scenario to prevent attribution for an aggressive act.[23] Thus, mischievous space activity does not avoid ascription to the responsible state by mere obfuscation of state activity. However, the Cold War opponents retained the political benefit of operating under cover while international stability was maintained by associating national activity with state responsibility. But today, the proliferation of missile technology to irresponsible or mischievous states jeopardizes the careful balance the *Outer Space Treaty* struck in the Cold War to stabilize an arms race while accommodating great advances in space exploration.

II. INTERNATIONAL OBLIGATION TO SUPERVISE

The *Outer Space Treaty* established the obligation to provide continuing supervision of its national space activities by the appropriate state. The implementation of this obligation remains a matter of state

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[19] *Inter-Agency Debris Coordination Committee Space Debris Mitigation Guidelines,* IADC-02-01 (Sept. 2007), ¶ 3.5.3 [hereinafter IADC Guidelines] ("disposal phase begins at the end of the mission phase for a space system and ends when the space system has performed the actions to reduce the hazards it poses to other space systems").

[20] MCDOUGALL, *supra* note 7 (Soviet policy position was that all space activity should be governmental and United States established Comsat by the *Communications Satellite Act of 1962 s*ee *infra* 74-75).

[21] *Supra* note 10, art. VI; CHENG*, supra* note 17 at 29 ("All in all "the appropriate State" appears thus to be a rather elusive notion. In practice there may well be more than one "appropriate State", *de facto* or even *de jure*").

[22] Liability Convention, s*upra* note 18.

[23] U.N. CHARTER art 2(4).

discretion. Since this Treaty came into force the world has become reliant on space based utilities to enable the global economy and state governance. Today, space faring states are increasingly dependent upon the supervision practices of other states to assure its space interests as the attribution of state responsibility becomes more difficult to ascribe. This section presents the current international requirement for supervision and the applicable standards are described. This includes the *Outer Space Treaty* regime applicable to supervision and other sources of international law outside the scope of Article VI, but which play a significant part in creating *de facto* supervision standards.

A. Outer Space Treaty

The purpose of the *Outer Space Treaty* was to establish general principles to be applied prospectively to govern space activity. Authors describe it as the *Magna Carta* or the constitution of space law. This Treaty is the most widely accepted of the five space law agreements[24] creating binding legal obligations for the State Parties. Some of these principles are judged to now constitute customary international law applicable to parties and non-parties alike as they have become so widely accepted by the international community. However, the *Outer Space Treaty* Article VI obligation to provide supervision is not one of these. But, its more general principle of state responsibility as outlined above is a well established principle in the body of public international law.

The space law regime is a specialized area of international law, thus when interpreting these agreements one must be mindful that some of its principles differ from general international law norms. Space is a newly regulated international commons which shares similarities, as well as dissimilarities, with the terrestrial international commons whose accompanying bodies of law were developed over time to reflect their usage. Space law's rapid development in a complex environment, occurring during a contentious period, did not benefit from the observance of long established state practice as other international commons benefitted prior to promulgating their conventions.[25] As technology proliferates to permit new space actors and applications

[24] *Outer Space Treaty* with 98 State Parties, *Rescue Agreement* with 88 State Parties, *Liability Convention* with 82 State Parties, *Registration Convention* with 45 State Parties, and *Moon Agreement* with 11 State Parties (*Moon Agreement* is not accepted by any State with a lunar program).

[25] *See, e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter Law of the Sea].

expand, this international commons will require an evolving legal structure to remain relevant.[26]

Briefly, the well accepted principles of space law include the principle of common interest. Found in the first sentence of Article I, this principle recognizes the most pragmatic difference between space and other international commons by recognizing that it borders every state and by declaring it a natural resource for all states to enjoy and respect. The following sentence establishes the complementary principle of freedom by expressing that states are free to explore and use space in accordance with international law. Article III reaffirms the application of international law to space activity in recognizing that space activities affect the entire international community, not just the supervising state. However, it is important here to recall that international law differs from state to state. And, Article IX requires a State Party to conduct international consultations prior to conducting activities with potential for harmful interference with the activities of other Parties. Although this provision is limited to the *Outer Space Treaty* Parties, it finds widespread observance and implementation through the larger body of ITU Member States.

The obligation to authorize and supervise commercial activity is found in Article VI of the *Outer Space Treaty.* As adopted from the earlier *Declaration of Legal Principles Governing the Activities of States in Outer Space (1963)* and reaffirmed by the *Resolution on the Application of the concept of the "Launching State"(2004),* it recognizes a fundamental change to the prevailing international law by redefining national activities to include both government and non-government actors in space. This shift brings the actions of the state's commercial sector within the original responsibility of the appropriate state rather than the more remote category of vicarious responsibility.[27] The liability provision in Article VII holds the state internationally liable for damage caused by national space activity wherever the damage may occur.[28] In the English text, separate terms are employed to distinguish the concept of *responsibility* from that of *liability*. The Treaty in other languages[29] loses this distinction by employing the equivalent term for the more general concept of *responsibility* in both articles. A State Party assumes responsibility for the harm caused by its commercial space activity. Conversely, a non-Party may be vicariously

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[26] MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING, ch. III (1972).

[27] Outer Space Treaty, *supra* note 10 art VI ("State Parties to the Treaty shall bear international *responsibility* for national activities in outer space").

[28] *Id.* art VII ("internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air or in outer space, including the moon and other celestial bodies").

[29] *Id*. art XVII ("English, Russian, French, Spanish and Chinese texts are equally authentic").

liable if it fails to use due diligence in accordance with the prevailing international standard to prevent harm committed by its nationals or from its territory. Such standards are established over time through the practices of the space faring states.[30]

The elimination of the public versus private distinction for the State Parties necessitates the appropriate state provide continuing supervision over its commercial activity in order to provide assurance to the other Parties that all space activity is conducted in accordance with the principles of the *Outer Space Treaty*. State Parties are to ensure its space activities comply with the Treaty, recognize international law as it applies to the state, and to both authorize and supervise its non-governmental activities. It is understood that states authorize and supervise governmental activity as it funds and directs the activities of national space programs. In contrast, non-governmental or commercial undertakings are normally neither explicitly authorized nor directly supervised by the national government. Therefore, the Treaty adds these additional requirements for commercial activity to assure other State Parties a regulatory void does not excuse negligence or mischievous acts by the nationals of another Party.

The duty to authorize ensures the state recognizes the activity about to be undertaken by a commercial entity through an a priori licensing procedure. This process requires the proposed operator to provide the authorizing department or agency sufficient information to base its decision to either grant or deny the operator's request. Whereas, the continuing supervision duty ensures the national activity remains in compliance with the state's *Outer Space Treaty* obligations. A regulating body may either directly observe an activity or rely on reports from the operator, or a third party, to determine compliance. However, the Treaty does not provide minimal standards or procedures to satisfy this requirement. Therefore, individual states determine the form and scope of authorization and supervision required for their national activities in space. Consequently, the degree of regulatory oversight varies greatly by state. But as states commercialize their space operations, the trend has been to increase regulatory requirements as private activity becomes more independent of daily governmental involvement.[31]

The substantive provisions of the Treaty to be enforced through supervision include the principle of non-appropriation of space or celestial bodies,[32] space activities subject to international law,[33]

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[30] CHENG, *supra* note 17 at 11-12.
[31] Professor Ram Jakhu, Faculty of Law, McGill University, Government Regulation of Space Activity Lecture Notes (Jan. 2008).
[32] Outer Space Treaty, *supra* note 10, art II.
[33] *Id*. art III.

restraints on permissible security measures,[34] requirements to render assistance to fellow space travelers,[35] avoidance of harmful interference with others use of space,[36] and compliance to inspection of all space facilities.[37] Article III's recognition of international law opens the door to a great number of international obligations to the continuing supervision requirement. These requirements in addition to those each state imposes to satisfy its own domestic interests provide the foundation for authorization and supervision of regulatory regimes.

By its nature, continuing supervision is applied extraterritorially as the nationals or object operates beyond the territorial boundaries of the appropriate state's airspace.[38] Additionally, the ground segment normally requires extraterritorial sites to communicate with the orbiting spacecraft. Each state creates and exercises its extraterritorial jurisdiction in accordance with its constitution or national legal charter.[39] Unlike the aviation analogy, there is no international organization to implement the *Outer Space Treaty* such as the International Civil Aviation Organization (ICAO)[40] which implements the *Chicago Convention*.[41] Therefore, national governments lack the generally agreed upon international standards such a body generates[42] for adoption by the state's rulemaking apparatus.[43] Such an organization is not precluded by the Treaty. In fact, its prospective nature caused the drafters to employ broad principles to support the growth of space activity as this forum matures. One example of an international space organization is found in the *Moon Agreement.*[44] Although it failed to receive acceptance by the major space faring nations, Article 11(5) of the agreement provides for the establishment of an international regime and the appropriate procedures to govern the exploitation of the moon whenever such activity becomes feasible. A supervision standard setting body or procedures must not conflict with the principles of the *Outer Space Treaty*. But, presently the

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[34] *Id*. art IV.
[35] *Id*. art V.
[36] *Id*. art IX.
[37] *Id*. art XII.
[38] Susan J. Trepczynski, Edge of Space: Emerging Technologies, The "New" Space Industry, and the Continuing Debate on the Delimitation of Outer Space (2006) (unpublished LL.M. Thesis, McGill University Institute of Air and Space Law) on file with McGill University Law Library).
[39] *See, e.g.*, 18 U.S.C. § 7.
[40] International Civil Aviation Organization, http://www.icao.org (last visited Apr. 7, 2009) (ICAO is a specialized agency of the United Nations, located in Montreal, Canada).
[41] Convention on International Civil Aviation, Dec. 7, 1944, 61 U.N.T.S. 1180.
[42] *Id*. art 37.
[43] *Id*. art 38.
[44] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3.

international community lacks consensus to form a new international body or to expand the mandate of an existing body, to establish such standards.[45]

In summary, Article VI supervision is without explicit and binding standards. However, the supervision obligation is bolstered by separate obligations to insure against space damage, register spacecraft, regulate radio transmissions to and from space stations, and prevent rogue acts. Nonbinding standards address export controls and debris mitigation. The evolving state practice with regard to these aspects of state supervision over time may reflect the international norm for space activities. But today, the state practice varies greatly and compliance with the limited binding and nonbinding standards do not enjoy universal application. Therefore, there exists an obligation to supervise but states are left to implement this general obligation as they determine best. To date, this author is unaware of any complaint or démarche against a state for failure to satisfy their obligation to supervise.

B. International Telecommunication Union

The singular international body to provide substantive and obligatory international standards for national space activity is the International Telecommunication Union (ITU).[46] ITU's role is to maintain and extend international cooperation between its 190 Member States for the improvement and rational use of telecommunications of all kinds.[47] Originally founded to coordinate telegraph and telephone transmission protocols,[48] ITU expanded its mandate to create radio emission standards shortly after the radio age emerged.[49] As the space age began, ITU standards became central to coordinating transmissions to and from satellites with other uses of the limited radio frequency

[45] Nicholas Bahr *et al*., ICAO for Space (2007) (Unpublished white paper for the International Association for the Advancement of Space Safety); Corinne Contant-Jorgenson *et al*., Cosmic Study on Space Traffic Management (2006) (Unpublished paper prepared for the International Academy of Astronautics); William Marshall *et al*., Space Traffic Management (2007) (Unpublished paper presented by International Space University summer session at Beijing).

[46] International Telecommunication Union, http://www.itu.org (last visited Apr. 7, 2009) (ITU is a Specialized Agency of the United Nations, located in Geneva, Switzerland).

[47] Constitution of the International Telecommunications Union, Dec. 22, 1992, art 1(1), 1825 U.N.T.S. 31251 [hereinafter ITU Constitution].

[48] Lawrence D. Roberts, *A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union*, 15 BERKELEY TECH. L.J. 1095, 1105-1106 (2000). ITU can trace its official existence back to 1865 to coordinate the various domestic telegraphic systems through international agreements to standardize the telegraph systems and codes. Later telephone standards were integrated into the ITU.

[49] *Id.* at 1107. The Radio-telegraph Union formed to administer radio services through restrictions on the use of frequencies and power output of transmitters to minimize interference, but merged with ITU in 1932.

spectrum. Although originally concerned with terrestrial radio station transmissions, the advent of space station emission had the potential to disrupt the spectrum management globally.[50] Effective coordination of these earth orbiting stations require a global forum to avoid interference among the competing earth and space stations. As the demand for satellite operations increased, ITU formally expanded its mandate to provide adequate satellite licensing and operation standards to include the orbital positions on the GEO as well as uplink and downlink transmissions.[51]

Now constituting the largest international forum addressing space activity by involving the Member States,[52] intergovernmental organizations,[53] and other non-governmental entities,[54] ITU formulates regional and global standards to be applied through the member's national administration.[55] By establishing global radio frequency standards in such a broad forum, ITU exceeds the participation level of the UNCOPUOS[56] and the CD[57] in the establishment of supervision standards. However, the ITU forum is used by the international community to address broader issues such as making communications more widely available, increasing security of transmissions in the interests of cyber security, and developing life saving communications for widely impacting events such as natural disasters.[58] Therefore, the space supervision interest competes with the many non-space priorities within this forum as its mandate is much broader than space supervision.

The standards created by ITU are expressed through its *Administrative Regulations,*[59] which includes the technical standards as presented in the *Radio Regulations.* Member States are obligated to conform their use and supervision of the radio frequency spectrum to these regulations. As these regulations require frequent modifications to

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[50] MATTHEW BRZEZINSKI, RED MOON RISING: SPUTNIK AND THE HIDDEN RIVALRIES THAT IGNITED THE SPACE AGE (2007) (Sputnik signal was not transmitted on the agreed IGY assignment and multiple reports were made of interference occurring while passing overhead); John C. Cooper, *The Russian Satellite-Legal and Political Problems*, 24 J. AIR L. AND COM. 379 (1957).

[51] ITU Constitution, *supra* note 47 art 44.

[52] *Supra* note 46 (191 Member States).

[53] *Id.* (5 Intergovernmental Organizations).

[54] *Id.* (713 non-governmental entities with 567 Sector Members and 146 Associate Members).

[55] National administration for the United States is the Federal Communications Commission, other states refer to their administration generically as the Post Telegraph and Telephone administration or PTT.

[56] United Nations Office for Outer Space Affairs, *supra* note 13 (69 Member States).

[57] United Nations Office at Geneva, http://www.unog.ch (last visited Apr 7, 2009) (65 Member States).

[58] Secretary General Hamadoun I. Touré, ITU, (Address to the International Telecommunication Union in Cairo, Egypt) (May 11, 2008).

[59] ITU Constitution, *supra* note 47, art. 4(3) (constitutes *International Telecommunications Regulations* and *Radio Regulations)*.

stay abreast of the technical changes, ITU employs an innovative provision which permits ratification of the convention to entail acceptance of the regulations existing at the time of the convention. Thereby, Member States remain current with the large and technical regulatory regime with limited reservation provisions to promote uniformity through a single act of ratification. [60] This generates a near universal set of standards for near space activity relating to the use of the radio frequency spectrum and the physical location of GEO assignments.

All frequency assignments are made by the Member State's national administration with coordination through the Radiocommunication Bureau at ITU.[61] And, Member States are to require its private entities to use radio frequencies in accordance with the *Radio Regulations*.[62] But to obtain an internationally enforceable assignment, ITU established three steps to effectively coordinate the global use of the limited frequency spectrum. All Member States are obligated to follow the *Radio Regulations* when making assignments.[63] Prior to making an assignment capable of harming the service of another administration,[64] for use in international communication,[65] and under other circumstances,[66] it is to follow the prescribed coordination procedures.

First, ITU provides the forum for coordinating the use of the radio frequency spectrum through allocation. The spectrum is allocated by the frequency band, the geographic location, and the type of service best suited to the characteristics of the band and the physical environment associated with the region. The result of these negotiations is the Table of Frequency Allocations. The next step is the allotment of frequency band segments to the requesting state. This may occur in one of two ways. Allotment most commonly occurs on the *first come, first served* basis.[67] This process is initiated by the national administration of the requesting state on behalf of the ultimate user and coordinated through the Bureau. The Bureau administers the coordination, notification and registration processes to ensure no prior authorized use will be adversely affected by the proposed assignment. This process allows all interested parties to comment and de-conflict the proposed operation. This process may be lengthy depending on the extent it affects other uses.[68] Allotment may also occur on an *a priori* basis for

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[60] *Id.* art. 54.
[61] *Id.* pmbl.
[62] *Id.* art. 45(1).
[63] *Id.* art. 4.2.
[64] *Id.* art. 11.3.
[65] *Id.* art. 11.4.
[66] *See generally, id.* art. 11.
[67] *Id.* art. 11.6.
[68] *Id.* art. 9.

the limited frequency band in which the allocation process has already occurred at the world level and is incorporated into the *Radio Regulations*.[69] The requesting state applies to the Bureau for a simplified coordination procedure with other states as the band width is already reserved for its use.

Under either allocation process, successful coordination results in the application's entry on the Master International Frequency Register.[70] The final step is the assignment by the national administration for use by an individual or entity within its jurisdiction under a license. Assignments are the sovereign right of the Member State, but membership in ITU requires such authorization and continuing supervision by the national administration in accordance with the *Radio Regulations* and the Master Register.[71] The result for the administration and operator is an internationally recognized right to use the assigned frequency and a forum to address interference with its use.

The *Radio Regulations* creates additional standards to be implemented by the national administration. In return for assurances of no interference by other Member States, the national administration is likewise required to respect the Table of Frequency Allocations, Master Register, and the *Radio Regulations* when assigning frequencies to its domestic stations.[72] It requires the administration to limit the number of frequencies and the spectrum used to the minimum essential to provide satisfactory services and to employ the latest technical advances when issuing a license.[73] It is also required to minimize the assigned bandwidth and emission strength to avoid causing harmful interference to other radio stations.[74] This is required to maximize the beneficial use of this limited international resource by extending the available bandwidth and the associated orbital positions through responsible measures.

Although ITU regulates the use of the spectrum for all applications, some provisions apply specifically to space stations, or satellite operations. First, commercial satellite operations must be licensed by a national administration prior to operation.[75] They must be capable of cessation of emissions when required by the supervising administration in order to protect a superior interest. The *Radio Regulations* also distinguishes activity in the geostationary orbit from non-geostationary orbits. This is due to the special relationship the orbital slots in the GEO have with the given region on the earth within

[69] *Id.* art. 11.5.
[70] *Id.* art. 8.
[71] *Id.* art. 18.
[72] *Id.* art. 8.
[73] *Id.* art. 4.1.
[74] *Id.* art. 15.
[75] *Id.* art. 18.

its footprint. On the other hand, satellites on all other orbital planes pass over the surface of the earth during its orbital period and do not occupy a specific slot over a given region.[76] Therefore, special considerations are given to the Member States based upon their relationship to the GEO. Traditionally, supervision was conducted through the licensing of transmissions to and from the satellite station to a fixed ground station. Such fixed satellite services (FSS) required a separate uplink and downlink frequency to operate. Technological advances in antennas now permit broadcast satellite services (BSS) to transmit from the satellite station to any receiver within its coverage area. The supervising state is to ensure all technical means available to reduce radiation over foreign territory unless a prior agreement is reached by the underlying state. This expands the administration's obligation to supervise its commercial sector by supervising its activity with regard to foreign states.[77]

The essence of the ITU regime is to maximize the utility of the frequency spectrum and to avoid harmful interference during its use as a coordination body for the supervising states. This is accomplished by recognizing the priority of use as established in the Master Registry and the coordination procedures to integrate new users efficiently into the spectrum. ITU is instrumental to both the authorization phase prior to commencing a space activity and to the supervision phase in order to ensure the activity conforms to the *Radio Regulations* out of necessity to coordinate the international use of the radio frequency spectrum.

C. Inter-Agency Debris Coordination Committee

The *Inter-Agency Debris Coordination Committee (IADC)*[78] formed an intergovernmental body composed of space faring nations to address the growing hazards of manmade and natural debris in space. Orbital debris, or *space junk*, consists of artificial objects orbiting the Earth that are not functional spacecraft.[79] Debris is a common hazard shared by all space faring nations whose individual mitigation measures were deemed insufficient to the task. To better address this collective hazard, space agencies[80] exchanged their mitigation standards and

[76] Roberts, *supra* note 48. Assuming a spacing of one satellite at approximately one-tenth of a degree separation, the GEO has a total capacity of 1,800 slots. However, only a subset of these slots is suitable for communications.
[77] Radio Regulations art 23.
[78] Inter-Agency Space Debris Coordination Committee, http://www.iadc-online.org (last visited Apr. 7, 2009).
[79] Department of Defense now catalogs over 19,000 items greater than 10 centimeters in diameter on orbit.
[80] Italian Space Agency (ASI), British National Space Centre (BNSC), Centre National d'Etudes Spatiales (CNES), China National Space Administration (CNSA), Deutsches Zentrum fuer Luft-und Raumfahrt e.V. (DLR), European Space Agency (ESA), Indian

handbooks to create common guidelines with the goal of preventing on-orbit break-ups, removing spacecraft from densely populated orbital regions at the end of their missions, and limiting the debris released during normal operations. The *IADC Guidelines*[81] recognized that expensive debris mitigation provides negligible benefits to the operator, but would have an immediate and adverse impact of the financial feasibility of the planned space activity. Therefore, the guidelines are voluntary and the scope of the recommendations is limited to cost effective measures to mitigate debris when planning and designing space activities to improve compliance.

The *IADC Guidelines* define space debris as all manmade objects including fragments and elements thereof, in near earth orbit and non-functional spacecraft. Mitigation measures include limiting the debris released during normal operations by minimizing the number, area, and orbital lifetime of the debris, as well as preventing explosions and ruptures at the end of missions and not initiating intentional destructions which will generate long lived orbital debris. Remedies include post mission disposal in GEO by boosting the satellite into a graveyard orbit outside this useful region, designing propulsion systems which do not separate from the spacecraft, or taking other measures to avoid their long term presence in this region. Finally, prevention of on-orbit collisions is enhanced by estimating and limiting the probability of accidental collision with known objects during the system's orbital lifetime.

The *IADC Guidelines* are not binding on the supervising state, but the collective wisdom of the IADC Member States and international organizations voluntarily implement these standards through their authorization and supervision regimes. These reflect the general consensus of minimal standards by responsible space faring states as reflected by existing practices, standards, codes, and handbooks developed by national and international organizations. And, the international body UNCOPUOS acknowledges the benefit of the *IADC Guidelines*.[82]

D. Export Controls

Export controls have addressed space activities since the inception of the space age. Born contemporaneous to the atomic bomb, space and security are inextricably intertwined. The supervision requirement was created to assure State Parties that all national activities

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Space Research Organisation (ISRO), Japan, National Aeronautics and Space Administration (NASA), the National Space Agency of Ukraine (NSAU) and Russian Aviation and Space Agency (Rosaviakosmos).

[81] IADC Guidelines, *supra* note 19.

[82] G.A. Res. 62/20, U.N. GAOR, 62nd Sess., Supp. No. 20, UN Doc. A/62/20 (2007).

will be conducted in the spirit of the *Outer Space Treaty*. Export controls are a natural extension of this philosophy as responsible space faring governments provide assurances that their national space capabilities will not be extended to irresponsible ones.

The international community recognizes the need to exercise arms control over certain weapons and dual-use technologies. However, since the end of the cold war, the community has failed to reach a consensus to make a binding list of regulated items or the procedures by which to enforce such restraints. Therefore, arrangements are substituted by the partner states who share a common interest to limit a particular class of weapons or technology. The Achilles heel to these security arrangements is that implementation and enforcement is left to the member states' discretion. Below is a brief review of the arrangements which directly affect national space activity.

The *Missile Technology Control Regime (MTCR)*[83] established in 1987 specifically addresses missiles, their subcomponents, and related technology to advance the goal of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction. This is accomplished through an informal and voluntary body to coordinate national export licensing efforts aimed at preventing their proliferation. This export control arrangement is the most stringently applied regime on space transportation systems and payload integration.

The *MTCR* documents include the *MTCR Guidelines*[84] and the *Equipment, Software and Technology Annex*.[85] The *Guidelines* describe the purpose, organizational structure, and rules to guide the partner states and those who unilaterally apply *MTCR*. It recognizes that *MTCR* Partners must exercise particular care with sub-orbital launch vehicle equipment and technology transfers as this technology is virtually identical to that used in a ballistic missile. However, the *Guidelines* condition its application on the basis they are not meant to impede national space programs or international cooperation in such programs as long as such programs could not contribute to delivery systems for weapons of mass destruction.

The *Annex* lists the items subject to *MTCR* controls and is updated every two years. The most recent *Annex* was adopted by the partner states in March 2007. The *Annex* is divided into Category I and Category II items. It includes a broad range of equipment and technology for both military applications and dual-use that are relevant to missile development, production, and operation. Partner states are to exercise restraint in the consideration of all transfers of items contained in the *Annex* and are to make their decisions on a case by case basis.

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[83] Missile Technology Control Regime, http://www.mtcr.info (last visited Apr. 7, 2009) (34 State Members).
[84] *Id.*
[85] *Id.*

Greatest restraint is reserved for Category I items. These items include complete rocket systems (including ballistic missiles, space launch vehicles, and sounding rockets) and unmanned air vehicle systems (including cruise missiles systems and target and reconnaissance drones) with capabilities exceeding the 300 kilometers range and 500 kilogram payload threshold. It also includes the production technology or major sub-systems including rocket stages, re-entry vehicles, rocket engines, guidance systems, and warhead mechanisms. The remainder of the *Annex* is regarded as Category II, which includes systems not covered in Category I capable of a maximum range equal to or greater than 300 kilometers. Also included are a wide range of equipment, material, and technologies, most of which have uses other than for missiles capable of delivering weapons of mass destruction (WMD). While still agreeing to exercise restraint, partners have greater flexibility in the treatment of Category II transfer applications.

The *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*[86] was formed in 1996 to address conventional arms, but unlike its predecessor, the *Coordinating Committee for Multilateral Export Controls (COCOM)*, it is not directed at any specific state. Rather, its purpose is to isolate destabilizing rogue states by denying them eight categories of weapon systems.[87] Category 7 includes rockets, ballistic or cruise missiles capable of delivering a warhead or WMD to a range of at least 25 kilometers, and the means to design or modified systems for such purpose.[88] The more recent *Nuclear Suppliers Group*[89] and *Zangger Committee*[90] address WMD on a cooperative basis to limit the transfer of such materials and the technology related to their delivery in weapon form. The *Australia Group*[91] was established in 1984 to prevent the proliferation of chemical and biological weapons as banned by the Chemical Weapons Convention of 1993 through export controls. As these arrangements are implemented by the individual states, the degree

[86] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies, http://www.wassenaar.org/ (last visited Apr. 7, 2009) (65 State Members).
[87] Guidelines & Procedures, including the Initial Elements (1996 as amended in 2003, 2004 and 2007), http://www.wassenaar.org/guidelines/index.html (last visited Apr. 7, 2009).
[88] Lists of Dual Use Goods and Technologies And Munitions List (2007), *available at* http://www.wassenaar.org/controllists/index.html (last visited Apr. 7, 2009).
[89] Nuclear Suppliers Group, http://www.nuclearsuppliersgroup.org/ (last visited Apr. 7, 2009) (45 State Members).
[90] Zangger Committee, http://www.zanggercommittee.org (last visited Apr. 7, 2009) (36 State Members).
[91] The Australia Group, http://www.australiagroup.net (last visited Apr. 7, 2009) (40 State Members).

of compliance and care varies by state.[92] For the supervising state, the interest of security is systemic in its national space activity.

In conclusion, Article VI of the *Outer Space Treaty* establishes the principle of supervision for commercial space activity. The Treaty does not provide specific guidelines or minimum standards for adequate state supervision. However, the subsequent body of binding and non-binding international agreements regulating the conduct of space operations is created in furtherance of this principle. To re-open the Treaty to promulgate such standards is not appropriate in such a universal Treaty.[93] The better method is to enter a separate agreement[94] to provide state administrations a set of general supervision principles by which to conduct supervision and a mechanism to create minimal standards based upon technical feasibility and best practices of the time.

III. SUPERVISION BY THE UNITED STATES

> *It is in the interest of the United States to foster the use of [United States] commercial space capabilities around the globe and to enable a dynamic, domestic commercial space sector. To this end, departments and agencies shall . . .* [*m*]*aintain a timely and responsive regulatory environment for licensing commercial space activities.*
>
> -United States National Space Policy

This section examines the major supervisory functions performed by the United States government. In such a review, it must be acknowledged that many factors make regulating commercial space activities a complex regime. Beyond the explicit international obligations and commitments by the United States toward other nations, it also has internal interests to implement through a continuing supervision regulatory regime. The concept of national self interest can be divided into three separate, but mutually supporting, categories. They are internal security,[95] external defense,[96] and economic[97]

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[92] Department of Commerce, http://www.bis.doc.gov/policiesandregulations/multilateralexportregimes.htm (last visited Apr. 7, 2009).

[93] Outer Space Treaty, *supra* note 10, art. XV.

[94] *See, e.g.*, Liability Convention, Rescue Agreement and Registration Convention.

[95] Department of Homeland Security (DHS) is responsible for internal security by unifying the national network of organizations and institutions into one department, but Congress has delayed the opening of the National Applications Office intended to coordinate the use of satellites for activities such as border security, natural disasters, and support to state and local law enforcement. The existing Civil Applications Committee (CAC) is an interagency committee that coordinates and oversees the civil use of government space applications.

development.[98] This list is not exhaustive and the relative weight given each interest changes over time.[99] However, these categories represent the national interest paradigm for which the United States' government is structured to address. A second set of dynamics comprises the organizational priorities within each bureaucracy. The politically appointed head of the agency has a political agenda to implement each election cycle in response to the electorate.[100] Likewise, the non-appointed professional executive service has a longer term agenda to preserve and develop the personnel and programs within the organization. Finally, the level at which implementation is discharged ranges from strategic political decisions undertaken by the Congress,[101] President,[102] or agency head[103] to the technical and procedural decisions entrusted to civil servants, and increasingly delegated outside the government to contractors.[104] The prevailing balance of the interests since the 1980s has favored economic stimulation of the commercial space sector while maintaining the status quo in civil and military space capability through privatization.[105]

The resulting national regulatory regime is shaped by many competing interests outside the continuing supervision obligation. The

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[96] Department of Defense (DOD) is responsible for national security with the National Security Space Office (NSSO) acting as the focal point for the integration and coordination of defense, intelligence, civil, and commercial space activities; Department of State (DOS) is responsible for international relations with Directorate of Defense Trade Controls (DDTC) administers the International Traffic in Arms Regulations (ITAR) to control the export of defense items on the United States Munitions List (USML) to prevent the proliferation of sensitive weapons and defense technology through commerce.

[97] Department of Commerce (DOC) is responsible for economic development with the National Oceanic and Atmospheric Administration (NOAA) as the principal unit for space commerce policy activities to foster economic growth and technological advancement of the commercial space industry.

[98] National Security Presidential Directive 49, U.S. National Space Policy (Aug. 31, 2006) (Unclassified).

[99] Department of Transportation (DOT) is responsible for enhancing the economy and defense through transportation development, the Office of Commercial Space Transportation (AST) promotes the commercial development of launch, re-entry, and space port services; National Aeronautics and Space Administration (NASA) stimulates commercial enterprises in space to support specific missions and to encourage development of the commercial space sector. It indirectly supports defense by disclosing discoveries it would find beneficial.

[100] *See, e.g.* HOUSE AND SENATE COMM., 107TH CONG., COMMISSION REPORT TO ASSESS UNITED STATES NATIONAL SECURITY SPACE MANAGEMENT AND ORGANIZATION (Comm. Print 2001) [hereinafter Rumsfeld Report].

[101] *See generally* United States Code.

[102] *See especially* The White House, U.S. Space Transportation Policy (2005).

[103] *See generally* Code of Federal Regulations; *See, e.g.* National Aeronautics and Space Administration, 2006 NASA Strategic Plan (2006).

[104] Commercial Space Transportation, 14 C.F.R. §§ 400.1 *et seq*. (1999).

[105] S*upra* note 4; *supra* note 8.

interests advanced are broader than the three trends discussed here or the international obligations untaken by the United States. The resulting supervision regime also has considerable influence on other states. This regime establishes the technology means available for space activity.[106] The resulting national position delivered to international bodies influences the final form of the agreement or arrangements,[107] and shapes international customary law over the long term by providing evidence[108] of state practice.[109]

Authorization only addresses the commencement of the commercial activity at which point noncompliance is easily addressed on the ground. Continuing supervision continues over the life of the commercial space activity. As a consequence, this regime addresses the classic legal quandary of how to motivate behavior which is beneficial to society at large and what coercion is adequate to prevent harmful or destructive activity in space.[110] Unlike government activity, commercial space is directed by investors whose values and objectives are not the same as the supervising government.[111] Supervision must address the lifetime of the activity, station keeping, re-mission, disposal, and remediation. Unlike the aviation regulatory environment, spacecraft may never return to earth and the expense of physically obtaining possession of the spacecraft will almost never be warranted. Therefore, it is important for the United States to possess a comprehensive regulatory regime administered effectively over commercial space activity prior to granting its authorization.

For the United States, the major departments and agencies conducting supervision are the Department of Transportation (DOT), Federal Aviation Administration (FAA), Federal Communications Commission (FCC), Department of Commerce (DOC), Department of State (DOS), Department of Defense (DOD), and, the National Aeronautics and Space Administration (NASA). And to a lesser extent, Department of Interior, Department of Agriculture, National Science Foundation, Department of Energy, and Smithsonian Institute.[112] No one department or agency has exclusive or even priority over such supervision for the United States.

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[106] Radio Regulations art 23.
[107] *See, e.g.*, IADC Guidelines*, supra* note 19 (Implemented by AST).
[108] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 6-12 (2003).
[109] Statute of the International Court of Justice*,* Jun. 26, 1945, art 38, 59 Stat 1031.
[110] David Barboza, *Technology Briefing: Telecommunications Iridium Satellite Wins Pentagon Contract*, N.Y. TIMES, Dec. 8 2000, at C3 (Commercial space providers carry large business risk).
[111] SELECT HOUSE OF REPRESENTATIVES COMM. ON U.S. NATIONAL SECURITY AND MILITARY/COMMERCIAL CONCERNS WITH THE PEOPLE'S REPUBLIC OF CHINA, 106TH CONG., COMM. REPORT (Comm. Print 1999) [hereinafter Cox Report].
[112] National Aeronautics and Space Administration, *Aeronautics and Space Report of the President: Fiscal Year 2006 Activities* (2006).

State implementation of the continuing supervision obligation varies greatly by the amount of expressed regulatory guidance,[113] capability to monitor activities,[114] and capacity to compel compliance.[115] The example of implementation by the United States is particularly useful because it is expressed so thoroughly in its laws and regulations. Furthermore, it possesses an unsurpassed capability as a result of its Cold War era surveillance systems. The regulatory authorities exercise power over the commercial space sector through a complex structure of administrative, civil, and criminal law forums in order to obtain compliance. Therefore, the United States' implementation of the general principle of state responsibility through the exercise of supervision over non-governmental entities is an excellent test case for this international obligation as the State Party to the *Outer Space Treaty* with the most comprehensive regulatory and compliance mechanisms.

A. Department of Transportation

The purpose of the Department of Transportation (DOT) is to ensure fast, safe, efficient, accessible and convenient transportation systems that meet the vital national interests and enhance the quality of life of the American people.[116] The DOT was established by Congress in 1966 and signed into law by President Lyndon B. Johnson, who was instrumental in the development of the civilian space program. As a cabinet level executive department, the Secretary of Transportation is responsible for the development and coordination of policies for the national transportation system and is to give due regard for the transportation need, environment, and the national defense.[117]

DOT consists of the Office of the Secretary and eleven individual Operating Administrations: Federal Aviation Administration, Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, National Highway Traffic Safety Administration, Federal Transit Administration, Maritime Administration, Saint Lawrence Seaway Development Corporation, Research and Innovative Technologies Administration, Pipeline and Hazardous Materials Safety Administration, and Surface Transportation

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[113] G.A. Res. 59/115, U.N. GAOR, 59th Sess., UN Doc. A/RES/59/115 (2004) (hereinafter Application of the Concept of the "Launching State").
[114] DARLING, *supra* note 9.
[115] *See, e.g.*, Baikonur Cosmodrome, Kazakhstan leased by the Russian Federal Space Agency until a replacement site is developed at Plesetsk, Russia; Kourou Space Center, French Guiana located in South America as an overseas region of France under the rule of a Prefect.
[116] Department of Transportation, http://www.dot.gov/mission.htm (last visited Apr. 7, 2009).
[117] Department of Transportation, http://dotlibrary.dot.gov/Historian/ history.htm (last visited Apr. 7, 2009).

Board. In 2002, the Department of Homeland Security (DHS) assumed management of both the Coast Guard and the Transportation Security Administration.[118]

Throughout the nation's history, transportation projects were subjected to poor long term planning and funding. The creation of a single department level overseer was to allow a more efficient national transportation policy by consolidating widely varying programs to address the larger transportation need. Facing a similar dilemma, Congress decided to place the Office of Commercial Space Transportation (AST) within the DOT upon enactment of the *Commercial Space Launch Act of 1984*. This new and yet to be defined mission to promote and to regulate commercial space launch vehicles was initially located in the Office of the Secretary because no operating administration had a comparable mission and because of its modest initial funding.[119]

B. Federal Aviation Administration

In November 1995, the Office of Commercial Space Transportation was transferred to the Federal Aviation Administration (FAA) and designated the Office of the Associate Administrator for Commercial Space Transportation (AST, collectively abbreviated FAA/AST). Its purpose is to ensure protection of the public, property, and the national security and foreign policy interests of the United States during commercial launch or reentry activity. AST also encourages, facilitates, and promotes United States commercial space transportation services.[120] The combination of regulating an inherently dangerous activity while also promoting its commercial success can be viewed as both complementary and contradictory. Presently AST has four licensed launches pending and no permitted launches.[121] With a relatively safe performance record and a declining share of the commercial launch market, the balance appears on the surface to be in favor of compliance with safety and security.

AST is administered by the Office of the Associate Administrator. It is further divided into three divisions. First, the Space Systems Development Division provides space systems engineering, space policy, and economic and launch forecasts. It also consults with prospective launch and site license applicants, develops regulations for new technologies as they prepare to enter service, and integrates space launch activities into a Space and Air Traffic Management System

[118] *Supra* note 116.
[119] *Supra* note 117.
[120] Federal Aviation Administration, http://www.faa.gov/about/office_org/headquarters_offices/ast/ (last visited Apr. 7, 2009).
[121] *Id*.

(SATMS) as part of the FAA's national airspace modernization plan.[122] Second, the Licensing and Safety Division ensures public health and safety by licensing commercial launches and re-entries, licensing the operation of non-federal space launch sites, and determining minimum insurance requirements for commercial launch activities. Third, the Systems Engineering and Training Division creates safety standards for existing and proposed launch and re-entry systems and sites and verifies that standards are met by the licensee. It provides regulatory assistance and vehicle safety assessments to license applicants. It also issues Experimental Permits for Reusable Suborbital Rockets.[123] AST provides authorization through the approval of license applications. Finally, it provides continuing supervision by monitoring licensee compliance throughout the commercial activity.

AST's statutory authority is provided in the *Commercial Space Launch Act of 1984*, as amended.[124] Congress found that private space activities achieved a significant level of commercial activity and offered potential growth in telecommunications, information services, microgravity research, human space flight, and remote sensing. Therefore, it empowered AST to authorize launch services and reentry services in the private sector consistent with the national security and foreign policy interests of the United States through stable, minimal, and appropriate regulatory guidelines.[125] It found AST should encourage private sector launches, reentries, and associated services. And to the extent necessary, it should regulate commercial activity to ensure compliance with international obligations and protect the public health, safety, property, national security, and foreign policy interests of the United States.[126] Furthermore, the AST regulations[127] cite its authority under the Act, and the applicable treaties and international agreements to which the United States is party.[128] AST's mandate is limited to non-governmental space activity as the Act specifically excludes launch, reentry, operation of a launch vehicle or reentry vehicle, operation of a launch site or reentry site, or other space activity which the government carries out for itself.[129]

AST implements its supervision obligation through its licensing authority in this Chapter. It requires a license or experimental permit to be issued by AST before any person may operate a launch vehicle or

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[122] FEDERAL AVIATION ADMINISTRATION, NEXT GENERATION AIR TRANSPORTATION SYSTEM, http://www.faa.gov/regulations_policies/reauthorization/.
[123] Federal Aviation Administration, http://www.faa.gov/about/office_org/headquarters_offices/ast/about/ (last visited Apr. 7, 2009).
[124] Commercial Space Launch Act of 1984, 49 U.S.C. §§ 70101 *et seq*.
[125] *Id*. § 70101(6).
[126] *Id.* § 70101(7).
[127] 14 C.F.R. Part 400 *et seq*.
[128] *Id.* § 400.1.
[129] *Supra* note 124, § 70117(g)(1).

site in the United States, or for a citizen to do so outside the United States.[130] A citizen is defined as an individual who is a citizen of the United States, an entity organized or existing under its domestic laws, or an entity organized or existing under the laws of a foreign country if the controlling interest is held by the individual or entity described above.[131]

The *Commercial Space Launch Amendments Act of 2004* added provisions regarding the safety of human flight in expectation of suborbital flights in the near future. The payload[132] carried may only be launched if the holder of the license complies with all requirements of the laws of the United States related to launching or reentering the payload.[133] Toward this end, coordination between AST and the other departments is directed.[134] A licensee must allow AST to continuously monitor its activities for the duration of licensed activities, including placing an officer at the licensee's site.[135] AST may modify a license already issued or transferred to ensure conformity with AST regulations.[136] Operations such as launch and reentries may be halted at any time if found to be detrimental to public health, safety, or property or contrary to national security or foreign policy interest.[137] The effective period of such orders remains in effect until an administrative review is conducted by the DOT. An adverse administrative ruling is subject to judicial review as the final action by the Secretary.[138] Additionally, government launch activity may preempt commercial activities at government sites, but is to be avoided through close coordination with DOD and NASA when possible.[139]

AST implements the *Outer Space Treaty Article* VII and *Liability Convention* in part by requiring the commercial operator to indemnify the United States for the first $500 million for third party damages and $100 million for government property damages.[140] The participants are to enter a reciprocal waiver of claims with one another. In addition, the United States statutorily acknowledges its own liability up to $1.5 billion.[141] This last provision is inconsistent with both international obligations in that neither contains a cap on damages. However, the fiscal law peculiar to the United States does not permit unlimited obligations and this provision implements the general

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[130] *Id.* § 70104.
[131] *Id*. § 70102(1)(A-C).
[132] *Supra* note 127, at §§ 415.51-415.63.
[133] *Supra* note 124, at § 70104(b).
[134] *Id*. §§ 70116 and 70117.
[135] *Id*. § 70106.
[136] *Id*. § 70107.
[137] *Id*. § 70108.
[138] *Id*. § 70110.
[139] *Id*. § 70109.
[140] *Id*. § 70112.
[141] *Id*. § 70113.

principle of state liability. Even if Congress acknowledged its unlimited liability, such expenditure would require a separate act to appropriate the sum to be paid by the Department of the Treasury.[142]

AST also implements the *Outer Space Treaty* Article VIII and *Registration Convention*[143] obligations to ensure openness and transparency by registering space objects. Prior to launch, the operator must provide notification to AST, DOD and FCC through a Launch Notification Form providing the launch site and date, launch vehicle and payload description, and orbital parameters.[144] Post launch, but not later than 30 days after the launch, the operator must provide to AST the following information for each object placed in space by a licensed launch, including a launch vehicle and any of these components: the international designator of the space object, date and location of launch, general function of the space object, and final orbital parameters.[145]

Debris mitigation is regulated by AST by requiring a debris analysis for an orbital or suborbital launch to identify the inert, explosive, and other hazardous launch vehicle debris that result from normal and malfunctioning launch vehicle flight. In case of launch vehicle breakup, a debris analysis must account for each cause of launch vehicle breakup and debris fragment lists for each cause of breakup and any planned jettison of debris, launch vehicle components, or payload. The lists must account for all launch vehicle debris fragments, individually or in groupings of fragments whose characteristics are similar enough to be described by a single set of characteristics. The debris lists must describe the physical, aerodynamic, and harmful characteristics of each debris fragment.[146]

Space Traffic Management provisions are implemented to a limited extent by AST. It requires a collision avoidance analysis to establish a launch wait in order to protect any manned orbiting objects. A launch operator must account for uncertainties associated with launch vehicle performance and timing and ensure that any calculated launch waits incorporate all additional time periods associated with such uncertainties. For an orbital or suborbital launch, the analysis must establish any launch waits needed to ensure that the launch vehicle, any jettisoned components, and its payload do not pass closer than 200

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[142] 31 U.S.C. 1301(d) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made"); *U.S. v. MacCollom*, 426 U.S. 317 at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress").

[143] Convention on the Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15.

[144] *Supra* note 127, § 415 Appendix A (Launch Notification Plan).

[145] *Id*. § 417.19.

[146] *See generally id*. § 417; *See especially id.* §§ 211, 225 and 417.107.

kilometers to a manned orbiting object during ascent to initial orbital insertion through at least one complete orbit.[147]

The FAA's traditional air traffic management system has coordinated government and commercial space launches from government ranges for several decades. As the ranges are primarily located along the coasts and launches are infrequent, its impact on the national airspace has not caused severe constraints on national airspace management. However, the FAA recognizes the difficulties of managing an increasing aviation traffic load as governmental and non-governmental space activities increase in frequency and locations. Especially activity originating from interior domestic spaceports will require a new approach to its traditional air traffic management system. AST began a strategic initiative in 2001 to develop a concept of operations for an integrated SATMS as initially set out in the *Concept of Operations for Commercial Space Transportation in the National Airspace System Narrative*[148] and its *2005 Addendum*[149] (collectively referred to as CONOPS). SATMS represents a conceptual aerospace environment in which space and aviation operations are seamless and fully integrated in a modernized national airspace system to meet the increased demands on space and air traffic management. This will require a new approach to airspace management by introducing new technology and management practices. It is important to note that these documents support the larger Next Generation Air Transportation System (NextGen) infrastructure re-design by the FAA[150] and the Communications, Navigation, and Surveillance Systems for Air Traffic Management (CNS/ATM) by ICAO.[151] As the FAA modernizes its infrastructure and procedures, AST provides its input to ensure the commercial space activity it predicts to be possible over the next 20 years can be accommodated without interrupting the transportation needs of space or aviation.

The CONOPS is intended to serve as the cornerstone upon which to build an efficient air traffic management system with commercial space transportation as an integral component. SATMS thereby limits its scope to space launch activity within a national airspace management context. To manage space activity as it transitions

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[147] *Id*. § 417.231.

[148] FEDERAL AVIATION ADMINISTRATION. CONCEPT OF OPERATIONS FOR COMMERCIAL SPACE TRANSPORTATION IN THE NATIONAL AIRSPACE SYSTEM NARRATIVE, VERSION 2.0 (2001).

[149] FEDERAL AVIATION ADMINISTRATION. CONCEPT OF OPERATIONS FOR COMMERCIAL SPACE TRANSPORTATION IN THE NATIONAL AIRSPACE SYSTEM, ADDENDUM 1: OPERATIONAL DESCRIPTION (2005).

[150] Federal Aviation Administration, http://www.faa.gov/news/facts_sheets/news_story.cfm ?newsId_8145 (last visited Apr. 7, 2009).

[151] Vincent Galotti, *Global Air Traffic Management: ICAO's Efforts toward Implementation* 63 THE ICAO JOURNAL 2 (2006).

through the national air space to and from space, the concept for future space transportation operations relies on a domestic Space Operations Coordinator (SpOC) to manage the space activity within the domestic national airspace and who will be physically located at the aviation traffic management center.[152] The SpOC manages the integration of space missions into the national air space only, but recognizes the role of an International Space Flight Organization (ISFO) as an internationally sanctioned organization whose function would be to exchange information and collaborate on orbital and sub-orbital flights which transcend national traffic management. Such an organization is not in existence and is possibly contrary to the present *U.S. National Space Policy of 2006*. The SATMS utility in applying continuing supervision of non-governmental activity such as RLVs and suborbital flight operations which extend beyond the national airspace is not realized.[153] Presently, AST does not have authority or a realistic plan for managing commercial orbital space traffic. To the degree such coordination occurs within the government, USAF cooperates with commercial operators under the Commercial and Foreign Entities (CFE) pilot program.

The breadth of supervision continues to expand to address the new space applications. Recent regulatory developments include private human space flight regulations.[154] As multiple suborbital space travel vehicles and providers near operation, AST issued regulations in 2007 establishing crew and space flight participant (passenger) requirements. This action represents the first implementation of continuing supervision obligation with regard to commercial space travel. The United States now regulates crew and vehicle qualifications in a manner similar to aviation regulations as required to comply with the *Chicago Convention* and the ICAO Standards and Recommendations (SARP).[155] Experimental launch permit regulations are an accommodation to entrepreneurs to promote the commercial space industry by avoiding the more restrictive licensing process. Permits allow unlimited launches and reentries during a given period and reduce the burdens associated with the licensing process. However, permitted activity may not transport cargo or passengers and does not enjoy indemnification.[156]

In summary, AST implements the supervision obligation with respect to commercial space transportation systems operated by nationals and activities within its territory. The DOT does not extend its supervision to orbital activities. Other departments and agencies

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[152] *Supra* note 148, at 8.
[153] *Id.* ch. 3.
[154] *Supra* note 124, § 70101(a)(15); See generally s*upra* note 32.
[155] *Supra* note 127, Part 431.
[156] *Supra* note 124, § 70105a.; *Supra* note 127, § 437.21 *et seq*.

regulate some activity on orbit and at the ground segment. As for implementing national interests, DOT and AST coordinate with DOD, DOS and DOC to further national defense. Its internal security is supported through safety regulations and oversight. And, AST actively encourages economic development through commercial space transportation. These interests are mutually supporting, as a strong commercial base makes possible the current policy to rely on commercial entities for defense space access.

C. Federal Communications Commission

The purpose of the Federal Communications Commission (FCC) is to regulate interstate and international communications by radio, television, wire, satellite, and cable. The FCC was established by the *Communications Act of 1934* as amended, as an independent agency directly responsible to Congress and directed by five Commissioners appointed by the President and confirmed by the Senate for 5 year terms. The President designates one Commissioner as Chairperson who serves as the chief executive officer of the Commission.[157]

The FCC consists of the Commission staff and seven operating Bureaus whose responsibilities include the following: processing applications for licenses and other filings, analyzing complaints, conducting investigations, overseeing regulatory programs, and administrative hearings. First is the International Bureau which represents the Commission in satellite and international matters.[158] This Bureau has three divisions. The Policy Division conducts international spectrum rulemakings, develops international telecommunications policy, licenses international telecommunications facilities (including submarine cables), and advises on foreign ownership questions. The Division's goals for international telecommunications policy are to achieve low calling rates for domestic consumers and to facilitate competition in international services. In furtherance of these goals, the Division authorizes satellite systems as quickly as possible to facilitate deployment of satellite services, minimize regulation and maximize flexibility for satellite telecommunications providers to meet customer needs, and to foster efficient use of the radio frequency spectrum and orbital resources. The Division also promotes commercial satellite activities through domestic spectrum management and advocates for United States' satellite radiocommunication interests in international coordination and negotiation meetings. The Strategic Analysis & Negotiations Division oversees the Commission's participation at ITU conferences, including World Radiocommunication Conferences and

[157] Federal Communications Commission, http://www.fcc.gov/aboutus.html (last visited Apr. 7, 2009).
[158] *Id*.

regional organizations, such as the Asia-Pacific Economic Cooperation (APEC), the Inter-American Telecommunications Conference (CITEL), the Organization for Economic Cooperation and Development (OECD), and bilateral negotiations with Canada and Mexico on Region 2 issues. The Division analyzes international economic and regulatory trends to shape policy.[159]

The Consumer & Governmental Affairs Bureau informs consumers about telecommunications services and coordinates telecommunications policy efforts with industry and with the other governmental agencies. The Enforcement Bureau makes compulsory the *Communications Act* and Commission's rules, orders, and authorizations. The Media Bureau regulates AM, FM radio and television broadcast stations, cable television, and satellite services. The Wireless Telecommunications Bureau oversees cellular and PCS phones, pagers and two-way radios. This Bureau also regulates the use of radio spectrum to fulfill the communications needs of the telecommunications business, aircraft and ship operators, and individuals. The Public Safety & Homeland Security Bureau addresses public safety, homeland security, national security, emergency management and preparedness, disaster management, and other related issues. The Wireline Competition Bureau is responsible for regulations concerning telephone companies that provide interstate telecommunications services through wire transmission. Additionally, the Office of Administrative Law Judges presides over hearings, and issues Initial Decisions to decide disputes at the Bureau level.[160]

Like the DOT, the FCC manages a myriad of communication functions within one government body. The FCC emphasizes economic development interests while recognizing the importance of the technical parameters required to maximize the use of telecommunications satellites. Congress authorizes and directs the FCC to promulgate a regulatory regime to implement the provisions of the Act, international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention that relates to the use of radiocommunications, to which the United States is or may hereafter become a party.[161] The comprehensive regulatory regime fulfills the obligation of the national administration codified in the *ITU Constitution* and *Convention*, and *Administration Regulations*. Of the *Administrative Regulations*, the *Radio Regulations* express more specifically the procedures instrumental to continuing supervision by national administrations such as the FCC with respect to radio frequency and associated orbital positions.

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[159] *Id*. at http://www.fcc.gov/ib/.
[160] *Id*. at http://www.fcc.gov/aboutus.html.
[161] 47 U.S.C. § 303(r).

The *Communications Act of 1934*[162] as amended provides for the regulation of interstate and foreign communication by wire or radio. This Act provides the backbone of the FCC legal regime and is supplemented and amended by other Acts. For example, the *Telecommunications Act of 1996*[163] promotes competition and reduces regulation to lower prices and raise the quality of service for American consumers and to encourage the rapid deployment of new telecommunications technologies. The *Communications Satellite Act of 1962*,[164] although largely revoked, was intended to establish and regulate a commercial communications satellite system. The *Communications Assistance for Law Enforcement Act*[165] supplements the *Communications Act of 1934* and amends the criminal code at Title 18 to make clear the telecommunications operator's duty to cooperate in the interception of communications for law enforcement purposes.[166] However, telecommunications carriers have a contra duty to protect the confidentiality of proprietary information of customers.[167]

Collectively, these provisions are ultimately implemented through FCC regulations[168] to maintain control by the United States over all the channels of radio transmission under station licenses granted for limited periods of time. No person shall operate any apparatus for the transmission of energy, communications, or radio signals without an operator license. And, no license is to be construed to create any right beyond its terms, conditions, and period. Finally, interference caused by station transmissions are prohibited except when done in accordance with this Act and with a license granted under the provisions of this Act.[169] As an extra measure, a station license may be modified by the FCC for a limited time if in the judgment of the FCC such action will promote the public interest, convenience, and necessity, or the provisions of the Act or treaty ratified by the United States will be more fully complied with.[170]

The FCC implements the ITU Table of Frequency Allocations by regulating the nature of the service to be rendered by each station.[171] It implements the *Radio Regulations* in part by assigning bands of frequencies to classes of stations consistent with ITU allotment and assigns frequencies to each individual station in accordance with the Master International Frequency Register. Its domestic authority directs

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[162] Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*.
[163] Telecommunications Act of 1996*,* Pub. L. No. 104-104, 110 Stat. 56 (1996).
[164] Communications Satellite Act 47 U.S.C. §§ 731 *et seq*.
[165] Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001 *et seq*.
[166] *Supra* note 162, § 229(a).
[167] *Id.* § 222.
[168] 47 C.F.R. ch. I.
[169] *Supra* note 162, § 301.
[170] *Id.* § 316(a)(1).
[171] *Id.* § 303(a).

it to allocate the electromagnetic spectrum within its territory consistent with international agreements and the public interest. It also adds the duty to promote investment in communications services and systems, technology development, and to avoid harmful interference among users.[172] Consistent with the *Outer Space Treaty* principle of non-appropriation and the ITU consensus that licenses are not permanent, each FCC license, initial or renewal, to operate a broadcasting station shall be for a term not to exceed 8 years.[173] The practical result of this regulation is that subsequent licenses may be issued indefinitely just as licenses on the *Master Register* may likewise continue indefinitely after the initial satellite is placed in orbit.

Prior to receiving an operation license under the authority of the Act, the station must have been constructed pursuant to a permit also granted by the FCC. The application for a construction permit prescribes regulations as to the citizenship; character; financial, technical, and other ability of the applicant to construct and operate the station; the ownership and location of station; frequencies; hours; purpose for which the station is to be used; type of transmitting apparatus to be used; power to be used; date the station is expected to be completed and in operation; and such other information as the FCC may require.[174] Such a permit for construction is automatically forfeited if the station is not ready for operation within the time specified unless prevented by causes not under the control of the grantee.[175] The FCC regulates devices which in their operation cause interference with radio reception to include systems for use by the Government of the United States, taking into account the unique needs of national defense and security.

A station licensed by the FCC shall not be subject to action by a State or local government with respect to the station license, but is subject to other local regulation.[176] The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license, and no person shall operate any such apparatus except under and in accordance with an operator's license issued by the FCC. Exceptions are made for stations for which licensed operators are required by international agreement and stations for which licensed operators are required for safety purposes.[177]

The FCC further implements the *Radio Regulations* by determining the power each station shall use and the time of

[172] *Id.* § 303(y).
[173] *Id.* § 307(c)(1).
[174] *Id.* § 319(a).
[175] *Id.* § 319(b).
[176] *Id.* § 302a.
[177] *Id.* § 318.

operations.[178] In all circumstances, except in case of radio communications or signals relating to vessels in distress, radio stations are to use the minimum amount of power necessary to carry out the communication desired.[179] The FCC determines the location of stations,[180] the kind of apparatus affecting emissions,[181] and regulations to needed prevent interference between stations and to carry out the provisions of this Act.[182] It has authority to establish areas to be served by stations[183] and require stations to keep records of transmissions of energy, communications, or signals.[184] It has authority to suspend the license of any operator upon proof sufficient to satisfy the FCC that the licensee has violated, or caused, aided, or abetted the violation of any Act, treaty, or convention binding on the United States.[185] It is to ascertain whether the construction, installation, and operation of stations conform to the requirements of the Act, Treaty, or Convention. To ensure compliance with the same or to investigate allegations of violations, the FCC has authority to inspect stations requiring a license under this Act or which are subject to the provisions of a treaty or convention.[186]

Content controls are prevalent in both free and closed societies. The customary rule under international law for terrestrial broadcasts is the principle of freedom of broadcasting. On earth, every state has the right and ability to broadcast information by radio across national border without agreement or prior consent. Exceptions to this principle are to not incite armed revolt, revolution, war, or propaganda endangering internal security or order.[187] In 1948, the United Nations famously recognized the right of all people to seek, receive, and impart information and ideas.[188] Conversely, the receiving state may not take countermeasures which are not strictly limited to its own territory. The FCC provides that no station shall rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.[189] No person shall willfully or maliciously interfere with or cause interference to any radio communications of any

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[178] *Id*. § 303(c).
[179] *Id*. § 324.
[180] *Id*. § 303(d).
[181] *Id*. § 303(e).
[182] *Id*. § 303(f).
[183] *Id*. § 303(i).
[184] *Id*. § 303(j).
[185] *Id*. § 303(m).
[186] *Id*. § 303(n).
[187] International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, L.N.T.S. 186, 301.
[188] U.N. GAOR, 3rd Sess., Res. 217A(III) at 71, UN Doc. A/810 (1948) (Universal Declaration of Human Rights, Article 19).
[189] *Supra* note 162, § 325(a).

station licensed or authorized by or under this Act or operated by the government.[190]

In space, however, this principle does not apply. Although the United States promotes free access and is against content control,[191] the majority of states do not concur with this position when the transmission comes from space.[192] Prior consent by the receiving state is required for Direct Broadcast Services. Unlike terrestrial broadcasting, this capability is unbalanced between developed and developing countries. Therefore, sending states require prior consent for content transmitted to the receiving state. The right to license and regulate content is a domestic responsibility. ITU requires consultation and agreement between the states prior to broadcasting. Furthermore, overspill is to be limited to the extent possible.[193] In contrast, ITU Members generally recognize the right of the public to correspond, but it has no mechanism to address content control as the *Radio Regulations* are limited to technical issues.[194]

The FCC provides the domestic content regulations for the stations under its control. A highly visible form of content control to the public are the guidelines rating video programming that contains sexual, violent, or other indecent material under the *Telecommunications Act of 1996*. The FCC develops rules requiring distributors of such programming to enable parents to block the programming they determine is inappropriate for their children.[195] In contrast, the FCC shall not have the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated which shall interfere with the right of free speech by means of radio communication.[196] And, broadcast licensees must promote political speech by permitting any legal candidate for public office to use licensed broadcasting stations and to afford an equal opportunity to the other candidates.[197]

Although much of the regulatory scheme applies to all radiocommunication activity, the FCC specifically regulates the following mass media services for commercial space activities: Direct Broadcast Satellite, Fixed Satellite Transmit/Receive Earth Stations, Small Transmit/Receive Earth Stations (2 meters or less and operating in the 4/6 GHz frequency band), Receive Only Earth Stations, Very

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[190] *Id* § 333.
[191] Matte, N.M., *Legal Issues of Satellite Broadcasting Services,* AEROSPACE LAW: TELECOMMUNICATIONS SATELLITES (1982) at 197.
[192] G.A. Res. 37/92, U.N. GAOR, 37th Sess., 100th mtg. at 92, U.N. Doc. A/37/92 (1982).
[193] Radio Regulations art 523.13(4).
[194] ITU Convention, s*upra* note 51, art 33.
[195] *Supra* note 162, §§ 303(w) and 231.
[196] *Id.* § 326.
[197] *Id.* § 315(a).

Small Aperture Terminal (VSAT) Systems, Mobile Satellite Earth Stations, Radio determination Satellite Earth Stations, Space Stations, and Low-Earth Orbit Satellite Systems.[198]

Mass communication station licenses do not permit the licensee to operate their station nor use frequencies assigned beyond the terms of the license. Nor does the issuance of a license grant a right to assign or transfer a station in violation of the Act, which by implication includes treaty or convention provision.[199] No station license shall be transferred, assigned, or disposed of in any manner to any person except upon application to the FCC.[200] The term ''media of mass communication'' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.[201]

Congress grants the FCC exclusive jurisdiction to regulate "direct-to-home satellite services." This term is defined as the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.[202] Congress was careful to add that these regulations shall at a minimum prescribe that the political candidate's access is guaranteed for this technology.[203] And, require providers to reserve between four and seven percent of its channel capacity for noncommercial educational or informational programming at reasonable prices, terms, and conditions.[204]

Government owned stations operated by the United States are not subject to the general provisions concerning frequency assignments and apparatus design. Government stations are to use such frequencies as assigned by the President. All government stations, except stations beyond the limits of the continental United States, when transmitting non-governmental business shall then conform to the regulations designed to prevent interference with other radio stations and the rights of others as the FCC prescribes.[205] Additionally, the President may authorize a foreign government to construct and operate a fixed service station at or near the site of its embassy for transmission to points outside the United States. These foreign government stations shall

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[198] *Id.* § 158.
[199] *Id.* § 309(h).
[200] *Id.* § 310(d).
[201] *Id.* § 309(i).
[202] *Id.* § 303(v).
[203] *Id.* § 335(a).
[204] *Id.* § 335(b).
[205] *Id.* § 305(a).

conform to the regulations the President may prescribe.[206] However, the general rule is that no station license will be granted to or held by a foreign government or its representative.[207]

In the case of war, the President is authorized to direct that communications essential to national defense and security shall have priority with any carrier subject to the Act. Any carrier complying with such orders shall be exempt from all laws imposing civil or criminal penalties, obligations, or liabilities.[208] It is unlawful for any person during war to obstruct or retard interstate or foreign communication by radio or wire. The President is authorized to employ the armed forces to prevent such obstruction or retardation of communication.[209] Upon proclamation by the President in the case of war, national emergency, or to preserve the neutrality of the United States, the FCC may suspend or amend regulations applicable to all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States.[210]

Congress provided broad powers to the FCC to enforce the telecommunications Acts, treaties, and conventions. Under administrative procedures, the FCC may revoke a station license for false statements made in the application or any statement which may be required thereafter. Willful or repeated failure to operate as set forth in the license and willful or repeated violations of the Act or an FCC regulation authorized by the Act or treaty are forbidden.[211] A person who fails to operate a station in accordance with the conditions of the license, in violation of the Act or FCC regulation, may be ordered to cease and desist from such action.[212]

Penal provisions and forfeitures[213] are provided for unauthorized publication. No person receiving or transmitting interstate

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[206] *Id.* § 305(c).
[207] *Id.* § 310(a).
[208] *Id.* § 606(a).
[209] *Id.* § 606(b).
[210] *Id.* § 606(c).
[211] *Id.* § 312(a).
[212] *Id.* § 312(b).
[213] *Id.* § 401 (e)(1)

> Any person who willfully violates subsection (a) shall be fined not more than $2,000 or imprisoned for not more than 6 months. (2) Any person who violates subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years for the first conviction, and fined not more than $100,000 or imprisoned for not more than 5 years for subsequent conviction. (3) Any person aggrieved by any violation of subsection (a) may bring a civil action.

or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except to the addressee, his agent, or attorney, or for proper accounting or distributing officers. No person having received any intercepted radio communication shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication.[214] To enforce such provision, the District Courts of the United States have jurisdiction over criminal and civil cases brought before it by the Attorney General on behalf of the FCC. This includes actions alleging a failure to comply with or a violation of any of the provisions of this Act or the orders of the FCC.[215]

The philosophy of deregulation has been codified by Congress. It requires the FCC to review all regulations issued under the Act that apply to telecommunications service providers and to repeal those it determines are no longer in the public interest as the result of meaningful economic competition between providers of such service every even year.[216] A giant step towards privatization of space was taken by Congress to terminate the *Communications Satellite Act of 1962* and the transfer of assets to the successor entity of COMSAT.[217] The privatization of INTELSAT and Inmarsat[218] was found to be consistent with the principle of privatization encouraged by the FCC.[219] COMSAT no longer enjoys privileges or immunities under the laws of the United States on the basis of its status as a signatory of INTELSAT or Inmarsat. And only enjoys limited immunity to the extent any successor will not be liable for action taken by it in carrying out the instruction of the United States issued in connection with its relationships and activities with foreign governments, international entities, and the intergovernmental satellite organizations.[220] And, the FCC will impose similar regulatory fees on the United States signatory which it imposes on other entities providing similar services. [221] Repealed is the preference in Federal Government procurement of telecommunications services, for the satellite space segment[222] provided by INTELSAT, Inmarsat, or any successor or separated[223] entity.[224]

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[214] *Id.* § 605(a); *See* 18 U.S.C. § 2511(2) (authorizes interception in the course of a criminal investigation pursuant to a court order); *See also*, §§ 102(a)(4) and 105(f)(2)(C)) (authorizes electronic surveillance for foreign intelligence purposes).
[215] *Id.* § 401(a).
[216] *Id.* § 161.
[217] *Id.* § 769(a)(18); *See also* §§ 731 *et seq*.
[218] *Id.* § 769(a)(4)(A-B).
[219] *Id.* § 765d.
[220] *Contra* Francis Lyall, *Expanding Global Communications Services* (Proceedings of the Workshop of Space Law in the 21th Century) (1999).
[221] *Id.* § 765a.
[222] *Id.* § 769(a)(10).
[223] *Id.* § 769(a)(7-8).
[224] *Id.* § 765b.

Users or providers of telecommunications services are permitted to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT.[225]

The FCC and satellite companies are held to the ITU procedures for technical coordination with INTELSAT and its successor entities and separated entities, rather than INTELSAT procedures.[226] The President is to pursue privatization through his representatives at the ITU.[227] To this end, the FCC is to ensure the United States remains the ITU notifying administration for the privatized INTELSAT's existing and future orbital slot registrations.[228] The FCC shall not assign orbital locations or spectrum by competitive bidding for the provision of international or global satellite communications services. The United States will oppose such in the ITU and in other bilateral and multilateral fora.[229]

In 2004, the FCC adopted rules to mitigate the amount of orbital debris potentially created by commercial satellite systems the United States authorizes. Under the rules, entities seeking approval for their operations in space must submit a plan showing that they have taken into account the possibility of their operations generating orbital debris and demonstrating that they have taken steps to mitigate that possibility. Earth station operators are required to submit this plan as part of their application for authorization. The Satellite Division provides guidance on the content of orbital debris mitigation plans.[230]

The FCC's two-degree orbital spacing policy maximizes the number of satellites in orbit by ensuring that Fixed Satellite Service (FSS) satellites in geostationary-satellite orbit (GSO) can operate without causing harmful interference to other GSO FSS satellites located as close as two degrees away. Prior to the Commission's adoption of the two-degree spacing policy, GSO FSS satellites were usually spaced three or four degrees apart. By adopting rules that enabled satellite operators to place their space stations two degrees apart, the FCC was able to accommodate more GSO FSS satellites. The two-degree orbital spacing policy is important for earth station applicants because the FCC adopted a number of rules that would ensure that earth stations communicating with satellites at two-degree orbital separations would not cause unacceptable interference to adjacent satellite systems using the same frequency bands. These rules include earth station antenna diameter and performance requirements,

[225] *Id.* § 765.
[226] *Id.* § 765c(a).
[227] *Id.* § 767.
[228] *Id.* § 765c(b).
[229] *Id.* § 765f.
[230] 47 C.F.R. § 25.114(d)(14).

and power restrictions.[231] Routine earth station applications comply with the two-degree spacing technical standards and are processed on an expedited basis. The FCC regulations allow expedited granting of earth station license applications seeking to communicate with GSO FSS satellites by way of fixed earth station antennas that are certain minimum sizes and which operate at power levels less than or equal to those specified. Routine earth station applications are also limited to the conventional C-band or Ku-band.[232]

The FCC's strategic goals include responsive regulation for the commercial environment, safety, and security. The goal for broadband is to give all Americans affordable access to robust and reliable broadband products and services. Competition in communications services is viewed as advantageous to the United States' economic development. A competitive framework for communications services will foster innovation and meaningful choice in affordable services. Media regulations will promote competition and diversity and facilitate the transition to digital modes of delivery. Public safety and homeland security requires communication capabilities during emergencies and crises must be available for public safety, health, defense, and emergency personnel, as well as all consumers in need. The communications infrastructure must be reliable, interoperable, redundant, and rapidly restorable.[233]

The FCC is the government body with the greatest active supervision of commercial space activity. The use of radio frequencies is essential to the operation of all space applications and requires coordination on a global basis to be effective. As a developed and pervasive regulatory regime of radio emissions and content controls, the FCC supervision extends beyond the radio spectrum use to address orbital location and debris mitigation. The FCC exercises continuing supervision of commercial activity and its objects placed into orbit through implementing the ITU regime. The FCC also supports the national interests by preserving the radio spectrum for governmental activity required for defense and security to be further addressed under the DOC. And, it is equally important for economic development by preserving the spectrum for commercial activity.

D. Department of Commerce

The purpose of the Department of Commerce (DOC) is to foster, promote, and develop the foreign and domestic commerce and technology advancement of the United States. DOC was established in

[231] *Id.* §§ 25.134, 25.209, 25.211, and 25.212.
[232] *Id*.
[233] Federal Communications Commission, http://www.fcc.gov/omd/strategicplan/#goals (last visited Apr. 7, 2009).

1903 as a cabinet level department to participate with other government agencies in the creation of a national policy to promote job creation and improved living standards for all Americans by creating an infrastructure that promotes economic growth, technological competitiveness, and sustainable development. DOC consists of 12 operating units: National Telecommunications and Information Administration; National Oceanic & Atmospheric Administration; Bureau of Industry and Security; Economics and Statistics Administration; Bureau of the Census; Bureau of Economic Analysis; Economic Development Administration; International Trade Administration; Minority Business Development Agency; National Institute of Standards and Technology; National Technical Information Service; and, Patent and Trademark Office.[234]

The National Telecommunications and Information Administration (NTIA) was created in 1978 to be the President's principal adviser on telecommunications and information policy issues.[235] This requires close coordination with the FCC to represent the Executive Branch in both domestic and international telecommunications and information policy activities. NTIA implements policies to help American companies compete globally in the information technology and communications sectors. It also manages the government's use of the radio spectrum and the coordination and registration of government satellite networks.[236]

The National Oceanic & Atmospheric Administration (NOAA) was created in 1807 as the United States' first scientific agency for the purpose of surveying the coast. Its present purpose is to understand and predict changes in earth's environment and conserve and manage coastal and marine resources to meet economic, social, and environmental needs. Now best known for its national weather services, it operates a constellation of scientific and weather satellites. However, Congress expanded its role to include the promotion of commercial use of satellites and space to benefit the economy under the broader mandate of the DOC.[237] Congress authorized the Office of Space Commercialization to promote commercial provider investment in space activities, assist commercial providers to conduct business with the government, and ensure the government meet its space requirements by using commercially available space goods and services.[238] The office

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[234] Department of Commerce, http://www.commerce.gov/ (last visited Apr. 7, 2009).

[235] *See generally,* National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 901 *et seq*.; *See especially* § 901(6); 47 C.F.R. Part III.

[236] Department of Commerce, National Telecommunications and Information Administration, http://ntia.doc.gov (last visited Apr. 7, 2009).

[237] 15 U.S.C. § 1511e.

[238] Department of Commerce, Office of Space Commercialization, http://www.space.commerce.gov/ (last visited Apr. 7, 2009).

promotes the export of space goods and services through policies and negotiations with foreign countries to ensure free and fair trade in the area of space commerce. With the USAF, it coordinates the management of the Global Positioning System as a vital part of the economic infrastructure to promote its commercial application. It coordinates with other agencies to promote commercial remote sensing through acquiring government imagery needs from domestic commercial sources and representing the commercial sector interests in international negotiations.[239] It works closely with the DOT[240] and NASA[241] to promote the space transportation industry's assurance of government access to space.[242] And, it works to foster new market opportunities in near space by promoting RLV development. Like the FCC, Congress directs NOAA to seek every opportunity to remove legal, policy, and institutional impediments to space commerce.[243]

DOC exercises licensing authority over commercial remote sensing activities pursuant to the *Land Remote Sensing Policy Act of 1992*.[244] No person subject to the jurisdiction or control of the United States may operate any private remote sensing space system without a license granted under this Act. In making a licensing decision, DOC is obligated to consult with other departments and agencies. In the case of a private space system capable of other purposes; the authority of the DOC is limited to remote sensing operations. And, to promote commerce, Congress requires applications be acted upon within 120 days.[245] A license denial is not permitted in order to protect an existing licensee from competition.[246] DOC promulgates further regulations on remote sensing activities as appropriate under the authority of the Act.[247] A license shall only be granted after a written determination is made that the applicant will comply with the requirements of this Act, any regulations issued pursuant to this Act, and any applicable international obligations and national security concerns of the United States.[248]

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[239] National Security Presidential Directive 27, U.S. Commercial Remote Sensing Policy (Apr. 25, 2003).
[240] Memorandum of Understanding Between Office of Commercial Space Transportation, Federal Aviation Administration, U.S. Department of Transportation, and Office of Space Commercialization, National Environmental Satellite, Data, and Information Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, (2007).
[241] Commercial Orbital Transportation Services program to develop commercial access to the International Space Station after the Space Shuttle program terminates.
[242] National Security Presidential Directive 40, U.S. Space Transportation Policy (Dec. 21, 2005).
[243] 15 U.S.C. § 1511e(c); § 5625(b).
[244] *Id*. §§ 5621 *et seq*.
[245] *Id*. § 5621(c).
[246] *Id*. § 5621(d).
[247] *Id*. § 5624.
[248] *Id*. § 5621(b).

DOC's continuing supervision requirements call for its licensees to operate the system in such manner as to preserve national security and to observe international obligations.[249] Licenses must make available to governments unenhanced data collected concerning their territory as soon as such data are available and on reasonable terms and conditions.[250] This provision implements in part the *Principles Relating to Remote Sensing of the Earth from Outer Space* which require that all unenhanced data be made available to the United States regardless of the territory sensed.[251] Licensees are required to furnish DOC with the complete orbit and data collection characteristics of the system and make immediate notification of any deviation.[252] Notification of any significant or substantial agreement the licensee intends to enter with a foreign nation, entity, or consortium is required as well and licenses must[253] maintain shutter control in support of national security and foreign policy interests. Upon termination of operations, the licensee is to dispose of the satellite in a manner satisfactory to the President.[254]

To accomplish its continuing supervision responsibilities, DOC is empowered to grant, condition, or transfer licenses.[255] The DOC may obtain an order of injunction or similar judicial determination from a District Court with personal jurisdiction over the licensee to terminate, modify, or suspend licenses on an immediate basis, if the licensee has substantially failed to comply with any provision of this Act, terms of such license, or with any international obligations or national security concerns of the United States.[256] Penalties are provided for noncompliance with the requirements of licenses or regulations, including civil penalties up to $10,000 each day of operation in violation of such licenses or regulations.[257] It will also issue subpoenas for any materials,[258] seize any object pursuant to a warrant from a magistrate judge,[259] and make investigations and inquiries.[260] However, nothing in this Act shall contradict the authority of the FCC pursuant to the *Communications Act of 1934*.[261]

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[249] *Id*. § 5622(b)(1).
[250] *Id*. § 5622(b)(2).
[251] *Id*. § 5622(b)(3); *Contra*, G.A. Res. 41/65, U.N. GAOR, 41st Sess., 95th mtg. at 115, U.N. Doc. A/RES/41/65 (1986) (not all provisions of the *Principles Relating to Remote Sensing of the Earth from Outer Space* implemented, *see* restrictions on data sharing).
[252] *Id*. § 5622(b)(5).
[253] *Id*. § 5622(b)(6).
[254] *Id*. § 5622(b)(4).
[255] *Id*. §5623(a)(1).
[256] *Id*. § 5623(a)(2).
[257] *Id*. § 5623(3).
[258] *Id*. § 5623(5).
[259] *Id*. § 5623(6).
[260] *Id*. § 5623(7).
[261] *Id*. § 5625(e).

The *U.S. Commercial Remote Sensing Policy* directs DOC to provide timely and responsive regulations for licensing the operations and exports of commercial remote sensing space systems in order to balance the competing interest of defense and security against economic development, while also meeting its broader obligation of continuing supervision. The policy recognizes the roles of the Secretary of Defense and the Secretary of State to protect national security and foreign policy concerns through coordination with DOC and encourages domestic companies to build and operate commercial remote sensing space systems whose operational capabilities, products, and services are superior to any current or planned foreign commercial systems. To accomplish these disparate goals, the government procures its remote sensing needs from the commercial providers and in turn restricts the collection and dissemination of certain data and products to other customers. The government considers remote sensing exports on a case-by-case basis pursuant to DOC's Commerce Control List[262] and the DOS's United States Munitions List to implement these export controls.[263]

DOC implements continuing supervision by promoting remote sensing data access to peaceful states while restricting data to non-peaceful ones. Its supervision chiefly occurs through tracking the location of remote sensing systems and the receipt of all data obtained. And this authority continues for the life of the system to include transfers until the disposal of the satellite pursuant to the direction of the President. The domestic interests promoted may be viewed as paradoxical in that they promote commercial applications for economic development while restricting similar data for security purposes. As DOC's mandate is to promote the nation's economic development, coordination through other departments retard this purpose to balance the defense and security interests. For example, the split in authority to exercise export controls over space applications with the DOS addressed below significantly limits the commercial potential of space applications involving domestic manufacturers or technology.[264]

E. Department of Defense

The purpose of the Department of Defense (DOD) is to provide for the national defense and was reorganized for this purpose by the *National Security Act of 1947*.[265] The cabinet level head of this department is the Secretary of Defense who oversees the Joint Chiefs of

[262] Commerce Control List, 15 C.F.R. §§ 738.1 *et seq*.
[263] United States Munitions List, 22 C.F.R. §§ 121.1 *et seq.*
[264] Export Administration Act, 50 U.S.C. Appx 2401 *et seq*. (expired but continued under Executive Order on Aug. 17, 2001); Cox Report*, supra* note 111.
[265] National Security Act of 1947, 10 U.S.C. §§ 101 *et seq*.

Staff, Department of the Army, Department of the Navy, Department of the Air Force (USAF), unified and specified combatant commands, Defense Agencies, Department of Defense Field Activities, and such other offices, agencies, activities, and commands as established by law or the President.[266] DOD space programs are located throughout this large and complicated structure. The principle of jointness underlying the 1947 reorganization complicates the task of ascertaining the responsible office for a given program.[267] To understand DOD, one must be aware of the two layers of organization Congress created in fashioning a joint force. First, geographic[268] and functional[269] joint commands conduct the military operations directed by the President or the Secretary. The geographic and functional commands rely on the personnel and equipment provided by the separate armed services at the direction of the President or Secretary. Second, the five uniformed services[270] organized into three departments train and equip the forces necessary for these missions. Space applications are the primary responsibility of the United States Strategic Command, a functional command as it is not responsible for a specific geographic area and supports the needs of all other commands through its space applications. The service providing the majority of space personnel and equipment is the USAF.[271]

The USAF likewise is divided into major commands[272] with Air Force Space Command (AFSPC) to deliver space and missile capabilities to America and its warfighting commands. AFSPC works closely with commercial space providers to purchase space services to include launch vehicles and satellites. AFSPC also cooperates with space providers by providing ranges, export control security, and coordination with other departments and agencies on export decisions. The National Reconnaissance Office is the USAF's chief partner in providing space applications to the national security establishment.

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[266] *Id.* § 111.

[267] DEPARTMENT OF DEFENSE, ORGANIZATION AND FUNCTIONS GUIDE, *available at* http://www.defenselink.mil/odam/omp/pubs/GuideBook/ToC.htm.

[268] Africa Command, Central Command, European Command, Northern Command, Pacific Command, and Southern Command.

[269] Joint Forces Command, Special Operations Command, Strategic Command, and Transportation Command.

[270] United States Army, United States Air Force, and United States Navy which administers the United States Marine Corps and during wartime operations administers the United States Coast Guard which is a component of the Department of Homeland Security.

[271] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (May 14, 2007).

[272] Air Combat Command, Air Education and Training Command, Air Force Cyber Command, Air Force Materiel Command, Air Force Reserve Command, Air Force Space Command, Air Force Special Operations Command, Air Mobility Command, United States Air Forces in Europe, and Pacific Air Forces.

The National Security Space Office (NSSO) was established in 2004 in response to the *Rumsfeld Report*.[273] It found that a number of issues transcend the multiple organizations within the national security establishment that would benefit by an interagency body to coordinate its collective defense, intelligence, civil, and commercial space activities. Of these issues, the revision of national space policy to address the security needs of the United States and a sound acquisition strategy to support this policy rated high.[274] The DOD and the Intelligence Community together acquire and operate most of the satellites used to support national security. NSSO is to improve disparate acquisition processes developed by the USAF and the National Reconnaissance Office. It is currently addressing the need for operationally responsive space access, coordination of the multiple uses of the current and future Global Positioning Satellite constellation, and research on future Space-Based Solar Power.[275]

The *Rumsfeld Report* recognizes that the commercial sector is critical to the success of the national security mission and requires a comprehensive approach to incorporate its capabilities and services into the national security space architecture. The United States Government as a consumer, regulator, and investor can improve its partnership with the space industry by creating a more expeditious licensing process while safeguarding security interests, rely on commercial space services to meet security requirements, privatize government launch facilities, and foster multinational alliances to help maintain the United States' position as a leader in the space market.[276]

In fact, Congress requires AFSPC and NASA to coordinate to ensure that the United States has the capability to launch and insert national security payloads into space whenever needed.[277] To accomplish this requirement, it must sustain the availability of at least two space launch vehicles and a robust space launch infrastructure and industrial base.[278] Furthermore, it is to establish an Operationally Responsive Space Program Office to develop low-cost, rapid reaction payloads, busses, spacelift, and launch control capabilities.[279]

DOD's impact on commercial space is significant in that it is one of its largest customers and is now beginning to provide limited traffic management services to commercial operators. A central aspect to continuing supervision is the physical tracking of commercial

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[273] Rumsfeld Report*, supra* note 100.
[274] U.S. National Space Policy*, supra* note 98; U.S. Space Transportation policy*, supra* note 242.
[275] National Security Space Office *available at* http://www.acq.osd.mil/nsso/ index.htm (last visited Apr. 7, 2009).
[276] *Supra* note 6, at 25-28.
[277] 10 U.S.C. § 2273 (a).
[278] *Id*. § 2273 (b)(1-2).
[279] *Id*. § 2273a.

spacecraft while in orbit. The concept of Space Traffic Management has been discussed academically,[280] but the primary source of space situational awareness is AFSPC. The Commercial and Foreign Entities (CFE) pilot program was implemented by AFSPC to provide satellite tracking support to entities outside the United States Government.[281] Unlike the FAA which limits its involvement in traffic management at the borders of the national airspace, CFE tracks items in orbit and reports possible conflicts with a variety of messages. CFE distributes Two Line Elements (TLEs), satellite catalog messages, satellite decay messages, Project TIP messages, and other messages previously issued by the NASA Orbital Information Group (OIG). Congress authorized AFSPC's CFE program through September 2010.[282] As AFSPC was the source of NASA's OIG data, this move takes NASA out of the distribution chain to commercial and foreign entities.

The goal of the CFE pilot program is to determine the feasibility and desirability of providing to non-United States Government entities space surveillance data and analysis support.[283] The space surveillance data and analysis is derived from military satellite tracking services operated by DOD and provided to outside entities subject to the national security interests.[284] Eligible entities include local domestic governments,[285] domestic commercial entities,[286] governments of foreign countries,[287] and foreign commercial entities.[288] This service is provided on the condition that the recipient agrees not to transfer any data or technical information received without the express approval of DOD.[289] Congress authorized AFSPC to charge a fee[290] for this service and to outsource this service to a private contractor.[291] The current plan is to transition the CFE Pilot Program to USSTRATCOM when proposed legislation to make this authority permanent becomes law. But for now, the SSA system of the DOD provides the most reliable data set for decentralized space traffic management decisions.

DOD also provides the United States with the ultimate power of supervision most recently displayed in February 2008 in its ability to physically disable or destroy a spacecraft.[292] Although it is the sole

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[280] *Supra* note 45.
[281] 10 U.S.C. § 2274.
[282] *Id*. § 2274(i).
[283] *Id*. § 2274(a).
[284] *Id*. § 2274(b).
[285] *Id*. § 2274(c)(1-2).
[286] *Id*. § 2274(c)(3).
[287] *Id*. § 2274(c)(4).
[288] *Id*. § 2274(c)(5).
[289] *Id*. § 2274(d)(2).
[290] *Id*. § 2274(f-g).
[291] *Id*. § 2274(h).
[292] Thom Shanker, *Missile Strikes a Spy Satellite Falling From Its Orbit*, N.Y. TIMES, Feb. 21, 2008, at A15.

department with the capability to exercise the ultimate government supervision by way of destruction of the space or ground segment, its role in supervision is expanding. DOD's role in continuing supervision prior to 2003 had been primarily one of coordination with the other departments. Now it is entering the domain of Space Traffic Management slowly as Congress recognizes the critical role of SSA in the defense of the space based global utilities critical to both economic and security interests. The growing ability to track objects in orbit in real time and the advancement of maneuvering technology will create a robust environment akin to that of the air space managed by the FAA. In the meantime, the national security interest will drive DOD's observation role.

As the largest customer of commercial space providers, DOD now supplements its space capabilities with systems operated by civil agencies and commercial entities. These space systems are owned and operated by the civil agency, corporation, or international consortium, but USSTRATCOM establishes agreements and working relationships with organizations such as NASA, NRO, NOAA, Intelsat and Inmarsat to increase its security capabilities.[293] The challenge to this dependence is to prevent the USSTRATCOM Commander from losing his military authority over these vital security assets and reduced to a consumer standing in queue for a scare commodity. What is being touted as a beneficial relationship between DOD and the commercial space sector will become more challenging for DOD as the most capable space application providers become more international. And ultimately, DOD may find itself in queue for space services with its adversary.[294]

In summary, the supervision function by DOD is primarily one of coordination with other departments to ensure national security is not adversely affected by the commercial activity. Its role has expanded to include providing a space monitoring service to participating commercial providers with the possibility it may grow into a space traffic management function analogous of air traffic control. DOD has a unique relationship with these providers as the largest consumer of commercial space goods and services. The future of this partnership will evolve as export controls and the domestic supervision regime significantly affect the development of this sector. In the short term, its implementation of national interests includes providing for national security and supporting economic development of the space sector.

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[293] JOINT CHIEFS OF STAFF, JOINT PUB. 3-14, JOINT DOCTRINE FOR SPACE OPERATIONS II-7 (Aug. 2, 2002) (revised Jan. 6, 2009).
[294] *Id.* III-1.

F. National Aeronautics and Space Administration

The purpose of the National Aeronautical and Space Administration (NASA) is responsible for all aeronautical and space activities sponsored by the United States, except those associated weapons systems, military operations, or the defense of the United States.[295] Established in 1958[296] after the launch of Sputnik its present objectives include supporting the preeminence of the United States' commercial operators and manufacturers, expand our knowledge of the space environment, and support the national security needs.[297]

Increased reliance upon commercial manufacturers and operators is one of NASA's strategic goals.[298] NASA encourages the pursuit of partnerships with the emerging commercial space sector. NASA has historically supported commercial activity with its support to communications satellites beginning in the 1960s, its procurement of launches services, and most recently the Ansari X-Prize. NASA now plans to seek the commercial space sector's support to accomplish its core mission of discovery through the Commercial Crew/Cargo Project for its access to the International Space Station after the retirement of the Space Shuttle. With the outlook to encourage the domestic commercial space sector through competitions to develop space applications in support of more ambitious goals to the moon and human space flight.[299]

NASA is the leading government agency in the area of debris mitigation. To control the growth rate of orbital debris, it developed its

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[295] 42 U.S.C. § 2451(b).

[296] National Aeronautics and Space Act of 1958 as amended, 42 U.S.C. §§ 2451 *et seq*.

[297] 42 U.S.C. § 2451 (d) ([NASA] objectives: (1) The expansion of human knowledge of the Earth and of phenomena in the atmosphere and space; (2) The improvement of the usefulness, performance, speed, safety, and efficiency of aeronautical and space vehicles; (3) The development and operation of vehicles capable of carrying instruments, equipment, supplies, and living organisms through space; (4) The establishment of long-range studies of the potential benefits . . . of aeronautical and space activities for peaceful and scientific purposes; (5) The preservation of the role of the United States as a leader in aeronautical and space science and technology . . . to the conduct of peaceful activities within and outside the atmosphere; (6) The making available to agencies directly concerned with national defense of discoveries that have military value or significance . . . (7) Cooperation by the United States with other nations . . . in work done pursuant to this Act . . . ;(8) The most effective utilization of the scientific and engineering resources . . . n order to avoid unnecessary duplication of effort, facilities, and equipment; and, (9) The preservation of the United States' preeminent position in aeronautics and space . . . manufacturing . . . .).

[298] National Aeronautics and Space Administration, *2006 NASA Strategic Plan* (2006) (Strategic Goal 5).

[299] *Id.*

own guidelines[300] in the 1990s and has since coordinated the expansion of debris mitigation procedures throughout the United States Government[301] and the major space faring nations[302] to preserve the near earth space environment for future space activity. These mitigation procedures range from preventing the creation of new debris through spacecraft designed to withstand the impact of small debris, launch vehicles designed to reduce unnecessary debris separation, and operational procedures which place satellites in orbits with less debris, maneuverability to avoid collisions, and a disposal plan for the end of the spacecrafts' lives. Towards this end, Debris Assessment Software was created by NASA to standardize its analysis in order to evaluate the impact which designs and operations will have on debris growth. This software is made available to manufactures and operators to assess whether a program meets the established debris mitigation standards.[303]

Export controls are a significant challenge to NASA as an agency tasked with encouraging commercial development and international cooperation on space activities.[304] NASA created the Export Control Program (CEP) to educate its employees on the export control laws and regulations of the United States and to monitor its compliance. The wide scope of the *Export Administration Regulations*[305] and *International Traffic in Arms Regulations*[306] make such a program necessary to prevent violations and, more importantly, to reduce the spread of missile technologies to irresponsible states.[307]

In summary, NASA's role in continuing supervision is strongly affected by its promotion of innovation and its position as a large consumer. As the originator of the space debris mitigation policies, it shaped the binding debris limitation regulations exercised through DOT and DOC. And, its contract requirements strongly influence the prevailing state practices through its leverage as the lead agency in the International Space Station. The national interests advanced are economic through its implementation of the transportation policy and coordination with other agencies.

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[300] National Aeronautics and Space Administration, *NPR 8715.6A NASA Procedural Requirements for Limiting Orbital Debris* (2008) http://orbitaldebris.jsc.nasa.gov/mitigate/mitigation.html.

[301] National Aeronautics and Space Administration, *U.S. Government Orbital Debris Mitigation Standard Practices* (1997) http://orbitaldebris.jsc.nasa.gov/mitigate/mitigation.html.

[302] IADC Guidelines, *supra* note 19.

[303] National Aeronautics and Space Administration, NASA Orbital Debris Program Office http://orbitaldebris.jsc.nasa.gov/mitigate/mitigation.html (last visited Apr. 7, 2009).

[304] 42 U.S.C. § 2452(b).

[305] Export Administrative Regulations, 15 C.F.R. §§ 730 *et seq*.

[306] International Traffic in Arms Regulations, 22 C.F.R. §§ 120 *et seq*.

[307] National Aeronautics and Space Administration, *NASA Administrator's Export Control Policy Statement* http://www.hq.nasa.gov/office/oer/nasaecp/.

G. Department of State

The Department of State (DOS) was established in 1789[308] to represent the United States in its diplomatic relations and to implement the President's international policies.[309] DOS's most recent mission statement recognizes the need for a more democratic, secure, and prosperous world and the role of state responsibility for its people and the international community.[310] The *Strategic Plan* focuses on security and is aware of the role of the global economy in achieving its goal.

The Space and Advanced Technology (SAT) staff address the international space issues, and the science and advanced technology questions for the DOS. This office represents the DOS in interagency decisions and then presents the United States' position before UNCOPUOS. SAT also implements the *Registration Convention* by maintaining the national registry of objects launched into outer space[311] and provides the Secretary General of the United Nations quarterly updates to the United Nation's registry.[312] And, SAT reviews export license requests for space technology. Its goals are to protect the competitiveness of the commercial space sector, preserve the environment, and protect national security.[313]

The Office of Defense Trade Controls (ODTC) directly administers the export controls for the DOS. ODTC's purpose is to develop and maintain security relationships with other countries and international organizations through defense trade and export control regimes.[314] The *Arms Export Control Act*[315] is administered by the DOS in concert with the *Export Administration Act*[316] by DOC. The DOS implements[317] the multiple export controls arrangements affecting space goods and technology through ITARs.[318] Briefly in the 1990s, DOC exercised control over propulsion systems, space vehicles, and related equipment under the Commerce Control List[319] in an effort to better

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[308] 22 U.S.C. § 2651.
[309] The White House, U.S. National Security Strategy (Mar. 16, 2006).
[310] Department of State and U.S. Agency for International Development, Strategic Plan: Fiscal Years 2007–2012 (2007).
[311] Department of State, U.S. Space Objects Registry *available at* http://www.usspaceobjectsregistry.state.gov/.
[312] U.N. Office for Outer Space Affairs, Registry Search *available at* http://www.unoosa.org/oosa/showSearch.do.
[313] Department of State, Bureau of Oceans and International Environmental and Scientific Affairs *available at* http://www.state.gov/g/oes/sat/ (last visited Apr. 7, 2009).
[314] *Supra* note 19 ¶13-14.
[315] Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq*.
[316] *Supra* note 255.
[317] 22 U.S.C. § 2778(a)(1).
[318] 22 C.F.R. §§ 120 *et seq*.
[319] 15 C.F.R. §§ 730 *et seq*.

promote the domestic commercial space sector.[320] Congress redirected space trade to the DOS after it found that the need for security outweighed the benefits of expedited trade following two significant security lapses with China.[321] Congress determined that satellites are more properly controlled under the United States Munitions List (USML)[322] due to the inherent relationship such technology has to strategic weapons capability. The USML implements the MTCR through its inclusion of all Category I and II items.[323]

All producers of ITAR goods and technologies are required to register with ODTC even if they do not engage in exports.[324] Sales and transfers are controlled through licenses and any sale exceeding $50 million requires Congressional notification.[325] Besides intra-agency coordination, ODTC coordinates licensing decisions with offices outside the DOS to include the DOD[326] and other agencies[327] as required. Even to enter into discussions with a foreign entity on an ITAR product or service, the commercial providers must obtain permission in advance. This data includes information relevant to the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles, or classified information relating to them.[328] To conduct such discussions the ODTC may issue a Technical Assistance Agreement (TAA) after appropriate coordination with the affected agencies.[329]

Once a sale or service is approved, safeguards to prevent unauthorized disclosures are documented in a Technology Transfer Control Plan (TTCP) and an Encryption Technology Control Plan (ETCP) if applicable, which requires extensive coordination with DOD's Defense Threat Reduction Agency. Monitoring and continuing approvals are required through the life of a transfer creating frequent delays for the project. Even in the case of a failed launch of an approved satellite, a sale requires an independent TAA in advance of the

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[320] John Mintz, *2 U.S. space giants accused of aiding China Hughes, Boeing allegedly gave away missile technology illegally*, WASH. POST (Jan. 1, 2003).
[321] Cox Report, *supra* note 111. In the aftermath of three failed satellite launches between 1992 and 1995, the U.S. satellite manufacturers Hughes and Loral transferred missile design information and know-how to China. The illegally transmitted information is useful for the design and improved reliability of future Chinese ballistic missiles.
[322] United States Munitions List, 22 C.F.R. Part 121 (USML has XXI categories: Category IV Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines and Category XV Spacecraft Systems and Associated Equipment).
[323] 22 U.S.C. § 2797(a); 22 C.F.R. § 121.16.
[324] 22 U.S.C. § 2778(b); 22 C.F.R. Part 122.
[325] 22 U.S.C. § 2797(d).
[326] *Id.* § 2797(b)(1).
[327] *See, e.g.*, 15 U.S.C. 5621(a) (DOC) and 49 U.S.C. § 70116 (DOT).
[328] 22 C.F.R. § 120.10.
[329] 22 C.F.R. Part 125.

accident investigation in the fear that technology may be transferred in the resulting discussions of the potential causes of the launch failure. And, the resulting insurance claim must be reviewed to ensure technical data is not disclosed.[330] These provisions are enforced through criminal and civil sanctions.[331]

The impact of export controls on the commercial space sector is debated by the government agencies providing oversight,[332] and the commercial providers and academic researchers are retarded in their efforts to advance space development. What is clear is that foreign providers are advertising their space products as ITAR free and even allied governments who are members of the export control arrangements are taking steps to avoid ITAR entanglements.[333] The ITAR taint which results from a non-uniform implementation of international export control arrangements is a growing impediment to the United States commercial development and national security in the long run. The commercial space sector must choose between government contract work or purely commercial projects. This hobbesian choice reduces the market opportunities for business and makes fewer technology options available for national security.[334] Indirectly this trend may also harm space safety as ITAR free launches will not benefit from the United States Government's debris mitigation guidelines.

The DOS's role in continuing supervision is primarily concerned with arms control compliance. This aspect of supervision is difficult to balance with the competing interest to promote space use by other Parties to the *Outer Space Treaty* and the national interests in economic development. The DOS and DOC must coordinate their efforts to accomplish both interests.

In conclusion, the implementation of continuing supervision by the United States is complicated by the national interests woven into its commercial space regime. The mere establishment of an obligation to exercise supervision alone is not effective in assuring the interests of the Parties to the *Outer Space Treaty*. Future international space supervision standards are the critical link between the establishment of this obligation and assuring a safe and secure space environment to the

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[330] Department of State, Directorate of Defense Trade Controls *available at* http://pmddtc.state.gov/ personnel.htm (last visited Apr. 7, 2009).

[331] 22 U.S.C. § 2778(c) (criminal sanction $1 million fine and 10 years); § 2797a (civil sanction against nationals); § 2797b (civil sanction against foreigner); 22 C.F.R. Part 127.

[332] Government Accountability Office, *Export Controls: Vulnerabilities and Inefficiencies Undermine System's Ability to Protect U.S. Interests* (GAO-07-1135T) (July 26, 2007).

[333] Michael Bruno, *Now Is Best Chance To Remake U.S. Export Controls*, AVIATION WEEK, Sept. 6, 2007.

[334] Peter B. de Selding, *European Satellite Component Maker Says It is Dropping U.S. Components Because of ITAR*, SPACE NEWS, June 13, 2005, at 6.

space faring states. Unless states assert themselves to enforce minimal standards against the private sector and demand similar compliance from rogue states, the current legal regime will become obsolete in a world requiring a secure and safe space environment.

IV. CONCLUSION

The United Nations Committee on the Peaceful Use of Outer Space recognizes the need for state supervision to be implemented[335] and encourages all space faring states to adopt an a supervisory regime[336] to meet their Outer Space Treaty obligation. Review of existing national space legislation illustrating how States are implementing, as appropriate, their responsibilities to authorize and provide continuing supervision of non-governmental entities in outer space establishes a lack of state supervision and the imploring Application of the Concept of the "Launching State" is unlikely to fill the lacunae in the near term.

Meanwhile, the stop gap measures of the International Telecommunication Union has carried space supervision to the extent required not to spoil terrestrial radio communications by creating binding standards[337] concerning the use of radio frequencies to and from space stations.[338]

The danger of State Parties' failure to implement a supervision regime is to effectively amend this obligation through subsequent state practice.[339] The United States in acutely exposed to the risk of other State Parties' failure to implement supervision due to its reliance on space and the number of satellites it operates.[340] Conversely, the benefits of the close supervision undertaken by the United States are enjoyed by all space actors while the United States is equally exposed to the hazards dilatory states create.

Progress toward creating binding standards can be made in one of three ways. First, continue the course of encouraging ratification and compliance with the *Outer Space Treaty* by all space faring states[341] and

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[335] U.N. COPUOS, 40th Sess., UN Doc. A/AC105/C.2/L.224 (2001) (review of existing national space legislation illustrating how States are implementing, as appropriate, their responsibilities to authorize and provide continuing supervision of non-governmental entities in outer space).

[336] Application of the Concept of the "Launching State", *supra* note 113.

[337] ITU Constitution, *supra* note 47, art. 54.

[338] *Id.* art. 44.

[339] Brownlie, *supra* note 108, at 601 ("Modification may also result from . . . the emergence of a new preemptory norm of general international law").

[340] Andrew C. Revkin, *Wanted: Traffic Cops For Space*, N.Y. TIMES, Feb. 18, 2003, at F1.

[341] Speech by Paul A. DeSutter, "Is An Outer Space Arms Control Treaty Verifiable?" (Remarks to the George C. Marshall Institute Roundtable at the National Press Club, Washington D.C., Mar. 4, 2008).

the enacted implementation legislation.[342] Second, create an international body to promulgate the minimum standards to be implemented by the participating states.[343] Or, finally, create a supra-national organization to govern space activity conducted in the international commons.[344] The alternative is to demand *all* states to demonstrate the ability to supervise prior to authorizing national space activity.[345]

[342] *Supra* note 335; *supra* note 113.
[343] *Supra* note 45.
[344] Luboš Perek, *"Traffic Rules of Outer Space"* 82-IISL-09 (1982)

> We have had experience [mostly negative and from hindsight] with pollution of the earth, of rivers, of seas and even of the world's ocean. Do we have also to pollute circumterrestrial outer space or have we already learned the lesson? We also experience with road traffic, traffic at sea and air traffic. Although space travel is in many respects different from travel in the first three environments, we can profitably study general ideas underlying existing traffic regulation with a view to apply them to traffic in the fourth environment . . . Why are we talking about traffic rules already now? Because, as the old saying goes, prevention is better than cure.

[345] See e.g. Law of the Sea, *supra* note 25, art. 94 (flag of convenience).

18 U.S.C. § 207(a)(1) "LIFETIME REPRESENTATION BAN" OPINIONS: A LIFETIME'S WORK FOR AGENCY ETHICS OFFICIALS AND ADVISORS

MR. ALLEN B. COE

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I. INTRODUCTION

Recent legislation and regulations are likely to cause a substantial increase in the number of 18 U.S.C. § 207[1] opinions that agency ethics officials are requested to provide as well as the depth and breadth of those reviews. The vast majority of additional reviews will be targeted at 18 U.S.C. § 207(a)(1), otherwise known as the "lifetime representation ban," which applies to all officers and employees of the executive branch and certain other agencies. Accordingly, it is extremely valuable for ethics advisors to understand the new statutes and regulations as well as 18 U.S.C. § 207(a)(1).

This article will first review the elements of 18 U.S.C. §207(a)(1) and the interpretation of those elements as can be gleaned from Office of Government Ethics (OGE) regulations, OGE opinions, Department of Justice memoranda, court cases, and other sources. Second, the article will focus on recent legislation and rulemaking and the specific responsibilities of government ethics advisors to provide 18 U.S.C. § 207(a)(1) opinions. Finally, the article will offer practical suggestions for drafting 18 U.S.C. § 207(a)(1) opinions recognizing the limitations inherent in providing prospective 18 U.S.C. § 207(a)(1) advice. This article is focused primarily on ethics advice within the Department of Defense (DOD), although it may have broader applicability.

II. LIFETIME REPRESENTATION BAN—18 U.S.C. § 207(a)(1)

The text of 18 U.S.C. § 207(a)(1) is not extensive, but almost every word merits additional definition and interpretation. The statute reads as follows:

> Restrictions on former officers, employees, and elected officials of the executive and legislative branches
>
> (a) Restrictions on all officers and employees of the executive branch and certain other agencies.
>
> (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment

[1] 18 U.S.C. § 207 (2006).

> with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—
>
> (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
>
> (B) in which the person participated personally and substantially as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.[2]

A. "Former officers, employees and elected officials of the executive and legislative branches"

By its terms, 18 U.S.C. § 207(a)(1) applies to all "former" officers or employees of the Department of Defense for life (or at least for the life of the particular matters in which a person participated personally and substantially during his or her government employment) no matter how long they were an employee. The statute applies to all former employees, including employees hired "to perform temporary duties either on a full-time or intermittent basis, with or without compensation."[3] It includes employees under the Intergovernmental Personnel Act[4] and Information Technology Exchange Program[5]. However, it does not apply to enlisted military personnel.[6]

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[2] 18 U.S.C. § 207(a)(1) (2006).

[3] These are "Special Government Employees" as defined in Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36188 (June 25, 2008) (adding 5 C.F.R. § 2641.104).

[4] The Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376 (2006). *See* U.S. Office of Personnel Management, *Assignment of a Federal Employee to a Non-Federal Organization*, http://www.opm.gov/programs/ipa/AssignN.asp.

[5] The Information Technology Exchange Program, 5 U.S.C. §§ 3701-3707 (2006).

[6] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36187 (June 25, 2008) (adding 5 C.F.R. § 2641.104) ("Employee . . . does not include . . . an enlisted member of the Armed Forces . . .").

An individual will be considered a "former" employee after any completion of a period of service for the government.[7] While the statute uses the phrase "after the termination of his or her service or employment with the United States," there are some circumstances where the individual does not have to fully terminate his employment relationship in order to be considered a "former" employee. Accordingly, military reservists become "former" employees after each period on active duty orders for purposes of the statute.[8] Senior employees (general officers and Senior Executive Service (SES) or equivalent) become "former" employees at the end of each specific senior employee position they hold. National guardsmen would become "former" employees after each completion of a period of federal service.

B. "Knowingly makes"

The statute requires that prohibited conduct be done "knowingly." In particular, "knowingly makes" applies both to "communication to . . . any officer or employee . . ." and "appearance before . . . any officer or employee . . ."[9] Two examples illustrate the possible complexity.

First, suppose a former employee knowingly makes an appearance at a meeting with government employees without intent to influence, then during the meeting unknowingly makes a communication (suppose the person nodded his head to another contractor and it is perceived to be in response to what a government employee is saying) that is perceived to be made with intent to influence. Under those facts, there is no violation from the appearance, which was made "knowingly," but without "intent to influence;" and there is no violation from the communication because it was not "knowingly" made to a government employee.

Second, suppose a former employee unknowingly makes an appearance at a meeting with government employees (suppose the former employee thinks all participants are contractors), then knowingly makes a communication with intent to influence. Under those facts there is no violation from the appearance or communication since they were not made "knowingly" before or to a government employee.

It may be less clear the extent to which "knowingly makes" applies to other requirements of the statute, but the Office of Government Ethics (OGE) has opined that a former employee who in good faith does not remember prior personal and substantial

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[7] *Id.* ("Former employee means an individual who has completed a period of service as an employee.").
[8] See example 5 to the definition of "former employee" provided in *Id.* at 36188 (June 25, 2008) (adding 5 C.F.R. § 2641.104).
[9] 18 U.S.C. § 207(a)(1) (2006).

participation during government employment does not violate the statute when the former employee knowingly makes a communication regarding the same matter to the government, because the employee is not "knowingly" making a communication "in connection with a particular matter . . . in which the person participated personally and substantially as such officer or employee."[10] Taking this analysis one step further, a former employee might argue that although he knew he made a communication regarding a particular matter he previously participated in as a government employee, he cannot be found to have violated the statute if he did not know the particular matter involved specific parties at the time he participated in the matter as a government employee.

C. "With intent to influence"

The statute requires that the prohibited conduct have been done "with intent to influence." Accordingly, it is not enough that one knowingly appears before or communicates with government employees about a prohibited matter. It is not a violation of the statute unless it is done with specific "intent to influence." A communication is made with intent to influence when made for the purpose of "seeking a Government ruling, benefit, approval, or other discretionary Government action" or for the purpose of "affecting Government action in connection with an issue of aspect of a matter which involves an appreciable element of actual or potential dispute or controversy."[11] Most communications by a former employee on behalf of private interests to a government official in the course of official government business can be presumed to have some intent to influence government action.

OGE has not attempted to further define "intent to influence," but instead has provided some examples of communications that will not be considered to have been made with intent to influence. First, communications solely for the purpose of making a routine request not involving a potential controversy will not be considered communications with intent to influence.[12] Not every routine request will fall within this exception. Routine requests are made every day which involve no actual controversy, but still involve "potential" controversy. For example, a request for an extension of time might be a routine request and there may no government opposition (i.e., actual controversy), but it certainly involves "potential" controversy. Those

[10] U.S. Office of Gov't Ethics Adv. Op., 81x23 (July 22, 1981). Although this opinion was issued under a previous statute, the terms are essentially the same.
[11] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36190 (June 25, 2008) (adding 5 C.F.R. § 2641.201(e)(1)).
[12] *Id.* (adding 5 C.F.R. § 2641.201(e)(2)(i)).

routine requests would be made with intent to influence. On the other hand, the examples given in the OGE regulation of routine requests made without intent to influence (i.e., a request for publicly available documents or an inquiry as to the status of a matter) are routine requests without "potential" controversy, because there does not appear to be any reasonable basis for the government to refuse the request.

Second, communications solely for the purpose of making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary government action, such as conveying factual information that are not considered potentially controversial during the regular course of performance of a contract will not be considered communications made with intent to influence. While this exception may appear broad, OGE has been cautious about encouraging former employees to rely on it, because the exchange of factual information frequently involves issues of "potential" controversy. Further, although some agencies have sought latitude to allow former employees to make communications on behalf of contractors in connection with government contracts previously worked on by the employee, OGE has specifically rejected such attempts.[13] The limited scope of the exception is reflected in the OGE examples. In the one example provided by OGE where the communication is not made with intent to influence, the contractor is seeking factual information from the government.[14] Obviously, where the government is transferring information to the former employee there is less ability for the former employee to exercise influence. On the other hand, the two examples provided by OGE where the communication is with intent to influence both involve situations where the former employee is initiating the presentation of factual information to the government.[15] The examples recognize that where the former employee is presenting information to the government, even where it is just "factual information," there is frequently an "appreciable element of

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[13] *Id.* at 36173. In order to allow agency employees to transition to private employment and retain continuity of individual experience through government contracts, commenters from many agencies have broadly sought to have OGE exclude from the concept of intent to influence all communications required in order to perform a government contract. OGE declined to do so. *Id.* At 36174. OGE noted that related statutes, e.g., 18 U.S.C. § 203(e) and § 205(f), contained express exceptions for certain representational activity during the performance of a government contract, while 18 U.S.C. § 207 did not, indicating Congress did not intend for such a blanket exception.

[14] *Id.* at 36190 (adding example 3 to 5 C.F.R. § 2641.201(e)(2)), in which a former employee working on an "operator's manual for a radar device" asks a Department of Defense (DOD) official certain factual questions about the device and its properties).

[15] *Id.* (adding examples 4 and 5 to 5 C.F.R. § 2641.201(e)(2)), in which, respectively, a former employee seeks to provide the government with "certain data on safety and efficacy tests on a new drug" and "a tentative list of options developed by the contractor" for potential restructuring of certain government internal procedures).

dispute" or "an effort to seek discretionary government action," which will prevent this exception from applying.[16]

Third, communications solely for the purpose of

> [m]aking a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant

will not be considered a communication made with intent to influence.[17] This is a limited allowance recognized for "site visits" at contractor facilities.[18] Site visits are a limited occurrence, and the requirement that communication be "at the initiation of the Government" further mitigates the likelihood that communications will be made with intent to influence.

Fourth, additional communications not considered to be made with intent to influence include signing and filing another person's tax return, signing an assurance that one will be the principal investigator for the direction and conduct of research under a government grant, filing an SEC form 10-K, and purely social contacts.[19]

D. "Any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States"

Normally it is clear when there has been an "appearance before any officer or employee . . ." or a "communication to . . . any officer or employee . . ." However, an appearance does not necessarily have to be face-to-face. An appearance might be by video teleconference or even by telephonic participation. Further a communication can be in any form (e.g., oral, in writing, by gesture, by look, by touch, by video message, by audio message, etc.).

A communication to a government employee may also occur through a third party intermediary where the former employee knows

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[16] *Id.* at 36190.
[17] *Id.* (adding 5 C.F.R. § 2641.201(e)(2)(vi)).
[18] OGE has declined to extend this to "site visits" at government-owned contractor-operated facilities. *Id.* at 36173.
[19] *Id.* at 36190.

the communication will be attributed to him.[20] In 2001, the Department of Justice Office of Legal Counsel issued an opinion that if a former government employee established a consulting firm as a sole proprietorship, a partnership, or a corporation in which he would be one of a very few employees, or perhaps even the sole employee and if the consulting firm prepares a report on behalf of certain clients, which is submitted directly to his former agency by the consulting firm or, with the former official's knowledge, by his client with the report bearing the consulting firm's name, and if it is expected by the former official that his identity as the author of the report may be commonly known throughout the industry and at his former agency, he would be making a communication prohibited by 18 U.S.C. § 207(c). The bottom line is that if the former employee knows the communication is likely to be attributed to him it may be attributed to him for purposes of the statute, regardless of whether the communication was made by a third party. Although the memo specifically addresses § 207(c) it appears equally applicable to the use of "communication" under § 207(a)(1) as well.

E. "On behalf of any other person (except the United States or the District of Columbia)"

The requirement that the appearance or communication from a former government employee be made "on behalf of any other person (except the United States or District of Columbia)" seems pretty straightforward. "Any other person" apparently means any person other than (1) the former employee, (2) the United States, or (3) the District of Columbia. OGE has specifically opined that a former employee does not violate the statute by communicating with the government on his own behalf on a matter he previously participated in personally and substantially.[21] However, when the former employee is acting as an agent of another, an attorney of another, or with the consent of and pursuant to some degree of control or direction of another, he will not be considered to be acting on his own behalf.[22]

A former employee does not violate the prohibition if the communication occurs on behalf of the United States. Normally, contractor employees do not represent the United States and their communications are not made on behalf of the United States.

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[20] "Communications" under 18 U.S.C. § 207, Memorandum of Opinion, Department of Justice, Office of Legal Counsel (Jan. 19, 2001).

[21] U.S. Office of Gov't Ethics Adv. Op., 84x9 (June 11, 1984) (finding that discussions of matters previously worked on by a former employee during negotiations with the government for renewed employment were not in violation of the statute since the communications were solely on behalf of the former employee).

[22] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36192 (June 25, 2008) (adding 5 C.F.R. § 2641.201(g)(1)(i)).

Contractor employees always remain the agents of the contractor[23] and represent the contractor, not the United States. However, in limited circumstances, a former employee may represent the United States where: (1) the former employee has a specific agreement with the United States to provide representational services, or (2) as a witness called by the United States to testify at a congressional hearing.[24]

F. "In connection with a particular matter"

A "particular matter" is a broad defined term and includes "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding."[25] Some of these terms are broad, e.g. "controversy", "claim", "application," and could apply to potentially any interaction between the government and a private party. While the term "particular matter" is broad, not every matter is a "particular matter." A "particular matter" is limited to those matters "focused upon the interests of specific persons, or a discrete and identifiable class of persons."[26] Particular matter does not cover broad policy or regulatory action.[27]

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[23] One commenter to recent OGE regulation changes argued for a position recognizing that a contractor employee's communication would not be on behalf of the contractor if the contractor did not actively direct the employee's communications. OGE rejected this, noting the employee is always legally the agent of the contractor, regardless of how much supervision the contractor exercises over its employee. *Id.* at 36175. The current language clearly states "on behalf of any other person" includes any time a former employee acts as another's agent. *Id.* at 36192 (adding 5 C.F.R. § 2641.201(g)(1)(i)).

[24] *Id.* at 36202 (adding 5 C.F.R. § 2641.301(a)(2)(ii)).

[25] 18 U.S.C. § 207(i)(3) (2006).

[26] U.S. Office of Gov't Ethics Adv. Op., 06x9 (Oct. 4, 2006) (discussing differences between "matter", "particular matter", and "particular matter involving specific parties"). Particular matter means any matter that involves 'deliberation, decision, or action that is focused upon the interests of specific persons, *or* a discrete and identifiable class of persons.' 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is *not* 'limited to adversarial proceedings or formal legal relationships.' *Van Ee v. EPA*, 202 F.3d 296, 302 (D.C. Cir. 2000). Essentially, the term covers two categories of matters: (1) those that involve specific parties (described above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as 'particular matter of general applicability.' 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1) (example 3) and 2635.402(b)(3) (example 2).

[27] U.S. Office of Gov't Ethics Adv. Op., 06x9 (Oct. 4, 2006).

G. "In which the United States is a party or has a direct and substantial interest"

Normally, it will not be difficult to determine that the United States has a direct and substantial interest in a particular matter. If the United States did not have an interest, why would the person have worked on the matter as a government employee?

H. "In which the person has participated personally and substantially"

Personal and substantial participation is another defined term. Generally, an individual knows when he has personally participated in something. Nevertheless there may be differences of opinion regarding how much participation and what level of participation is necessary before an individual's participation becomes substantial. From a layman's perspective "substantial" may appear to be a high standard. However, the additional guidance in the OGE regulation[28] and OGE opinions suggest a lower standard. Differences in interpretation occur

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> It is important to emphasize that the term 'particular matter' is not so broad as to include every matter involving Government action. Particular matter does not cover the 'consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.' 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform.

Id.

[28] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36195 (June 25, 2008) (adding 5 C.F.R. § 2641.201(i)(3)).

> To participate 'substantially' means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

Id.

because substantial can mean both "consisting of or relating to substance" as well as "considerable in quantity; significantly great."[29] Under the first definition, anything that is substantive or meaningful is substantial. Under the second definition, only something that is quantitatively or qualitatively considerable is substantial.

OGE regulations require only that the participation be "of significance" to the matter in order to be substantial, and the examples of what is not substantial (i.e., mere knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue) are not merely examples of minor involvement, but rather involvement that is so minor that it is not substantive. OGE opinions also find "substantial" participation where the individual's participation is minor, but still substantive. For example, OGE reviewed the case of a former government employee who claimed his participation was a review "focused on one paragraph of the RFP in order to make whatever changes were necessary so that the document accurately reflected the role of [his] directorate" and where the individual "spent a limited amount of time on the review."[30] OGE opined the participation was substantial participation in the contract.

As indicated, OGE has not interpreted "substantial" participation to mean a "considerable amount" of participation, and OGE regulations and OGE opinions generally reject attempts to define "substantial" participation by weighing the individual's effort against the total government effort on the particular matter. "Provided an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter . . . may be minor in relation to the matter as a whole."[31] OGE has also rejected any attempts to set a dollar threshold for substantial participation.[32]

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[29] MERRIAM-WEBSTER ONLINE DICTIONARY AND THESAURUS. *available at* http://www.merriam-webster.com/.

[30] U.S. Office of Gov't Ethics Adv. Op., 86x13 (Sept. 11, 1986).

[31] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36195 (June 25, 2008) (adding 5 C.F.R. § 2641.201(i)(3)).

[32] U.S. Office of Gov't Ethics Adv. Op., 99x11 (Apr. 29, 1999). OGE rejected a dollar threshold for substantial participation, saying

> If an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. If an employee's actions as a Government official go to a substantive aspect of the matter in question, then his participation in the matter may be considered to be substantial.

Id.

Likewise, OGE has not interpreted "substantial" participation to mean participation of "considerable" impact, such as a final government decision on a matter. OGE has rejected attempts to limit substantial participation to decision makers.[33] Any participation; including review, evaluation or recommendation, may be substantial "provided an employee participates in the substantive merits of a matter."

While participation does not have to be "considerable" to be "substantial," significant peripheral activities may not be considered substantial participation in particular contracts. For example, OGE reviewed the GSA's role in auditing contract bills submitted by contractors. OGE found that auditing contract bills was not substantial participation in the contracts.[34] Nor is the fact the employee reviewed significant documents always considered substantial.[35] Other examples of substantial participation follow similar reasoning.[36]

The issue of substantial participation is particularly sensitive with senior employees who have a great deal of influence. With senior employees, even general guidance provided at "informational briefings" and status updates may rise to the level of substantial participation, and OGE may scrutinize such briefings.[37]

Substantial participation is normally based upon participation after the matter becomes a particular matter "between specific parties"; however, in at least one opinion OGE looked to the totality of the former employee's participation in the particular matter, both before and after the matter involved specific parties, to determine whether the employees participation was substantial.[38]

Note that while an ethics advisor will generally provide the same conservative advice as OGE, courts may be more likely to find

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[33] U.S. Office of Gov't Ethics Adv. Op., 99x11 (Apr. 29, 1999).

[34] U.S. Office of Gov't Ethics Adv. Op., 86x15 (Nov. 25, 1986).

[35] U.S. Office of Gov't Ethics Adv. Op., 87x14 (Nov. 25, 1987) (employee concurred on a staff summary regarding a proposal for restructuring a contract). Because the agency determined the staff summary was routed through the employee merely for informational purposes, OGE concurred that this was not substantial participation.

[36] *See, e.g.,* U.S. Office of Gov't Ethics Adv. Op., 80x1 (Feb. 4, 1980) (supplemented Oct. 21, 1980) (finding review of contract provisions and amendments to contract not ancillary); U.S. Office of Gov't Ethics Adv. Op. 83x8 (Apr. 25, 1983) (attorney who gave advice to other attorneys on filings, discovery, and strategy participated substantially in the matter); U.S. Office of Gov't Ethics Adv. Op., 86x13 (Sept. 11, 1986) (review of one provision in a solicitation found to be substantial).

[37] U.S. Office of Gov't Ethics Adv. Op., 99x16 (Sept. 10, 1999) ("Whenever a high-level official attends briefings, his involvement bears close scrutiny, to determine whether it was truly limited to the receipt of information. His participation in the discussion, or even his mere presence, could amount to a tacit acquiescence in any issues raised at the briefing.").

[38] U.S. Office of Gov't Ethics Adv. Op., 87x4 (Mar. 10, 1987) (employee worked on source selection both before and after it became a matter between specific parties). OGE opined that such participation could be considered in determining whether the employee's participation was substantial.

participation is not "substantial." In *CNA Corp. v. United States*,[39] an individual clearly participated in taking action through "decision, . . . recommendation, the rendering of advice, investigation, or other such action"[40] when she lead a study team to help develop a protocol to be used in a large NIH study. Although OGE opinions generally reject "substantiality" analyses that compare the employee's participation to the scope of the entire effort on a particular matter, the court in *CNA Corp.* placed significant weight on the fact that the employee was involved in only one of twenty-two groups developing protocols for the study and that ultimate the study would be a twenty-year study involving 105 study centers and 100,000 children.[41] Additionally, OGE opinions often point out that "participation" does not have to be through "decision" in order to be substantial. Frequently, rendering advice to other government decision makers is considered substantial participation. Nevertheless, the court in *CNA Corp.* also placed significant weight on the fact that the employee was merely making recommendations and not in charge of the ultimate decision regarding the contents of the protocol.[42]

I. "Which involved a specific party or specific parties at the time of such participation"

A "particular matter" involves specific parties if some specific parties that are likely to be affected are known and "typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties."[43] A particular matter may be between specific parties regardless of whether the government is in direct interaction with those parties.[44] General legislation, rulemaking, and government planning activities will not normally involve specific parties even though it may have an effect on private interests.[45] The matter need not involve the

[39] 81 Fed. Cl. 722 (Fed. Cl. 2008).
[40] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36195 (June 25, 2008) (adding 5 C.F.R. §2641.201(i)(1)) (defining "participate" in relation to "personal and substantial participation").
[41] *CNA Corp.*, 81 Fed. Cl. at 729.
[42] *Id.* at 730.
[43] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36193 (June 25, 2008) (adding 5 C.F.R. § 2641.201(h)(1)).
[44] U.S. Office of Gov't Ethics Adv. Op., 85x15 (Sept. 25, 1985) (concept of creating a private foundation to run a museum is a particular matter even prior to the creation of the foundation). *See also* U.S. Office of Gov't Ethics Adv. Op., 99x2 (Mar. 15, 1999) (particular corporate merger became a matter involving specific parties when agency heard about it in media and began planning, even though companies had not yet approached agency for approval).
[45] U.S. Office of Gov't Ethics Adv. Op., 83x17 (Nov. 9, 1983) (considering legislation not affecting specific parties). *See also* U.S. Office of Gov't Ethics Adv. Op., 88x1

same parties both at the time the employee is involved in the matter as a government employee and at the time the former employee is involved as the representative of a private party.[46]

III. REQUIREMENTS TO PROVIDE ADVICE REGARDING APPLICABILITY OF 18 U.S.C. § 207(a)(1)

Two recent actions have sharply focused responsibility for providing advisory opinions on agency ethics officials. While the exact effect is unknown, experience indicates that the breadth and depth of opinions sought will increase. Former employees who before would not have sought an opinion will likely be urged to do so now as a matter of precaution by their private employer.[47] Former employees who would have sought one overarching opinion upon leaving government employment will now be likely to seek frequent update opinions whenever they change employers or significant duties. In addition, given the asserted protective nature of such opinions, former employees are likely to press for more definitive opinions on the applicability of a very subjective statute.

(Jan. 6, 1988) (finding establishment of testing procedures companies will have to comply with is general legislation not involving specific parties).

[46] U.S. Office of Gov't Ethics Adv. Op., 83x12 (Aug. 3, 1983) (particular matter involving takeover of a company remained the same particular matter even though the party doing the takeover changed). *See also* U.S. Office of Gov't Ethics Adv. Op., 84x15 (Nov. 19, 1984) (same particular matter even though parties at the time of a draft request for proposal were different than parties after contract award). *But see* U.S. Office of Gov't Ethics Adv. Op., 80x2 (Feb. 26, 1980) (reaching a different result).

[47] DOD Standards of Conduct Office (SOCO), Advisory 08-03 (Apr. 28, 2008) (finding ethics opinions due to recent legislation may be requested even where it appears clear the individual is not affected by the legislation).

> [W]e anticipate that DOD contractors will not provide compensation to any DOD personnel who left DOD on or after January 28, 2008 unless they provide a letter that either states they are not covered officials or provides the required opinion. DOD ethics counselors should therefore expect an increase in the requests for written post-employment opinions. DOD SOCO recommends that DOD ethics counselors amend all their model written post-employment advisory letters to include a statement determining whether the requesting official is covered by Sec. 847.

Id.

A. New Act

On 28 January 2008, the President signed the 2008 National Defense Authorization Act (NDAA).[48] In addition to requiring senior employees (general officers and SES employees) to obtain ethics advice before seeking employment with a defense contractor, section 847 of the NDAA now requires any government employee who "serves *or served* as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team" for a contract award in an amount in excess of $10,000,000 to obtain a written opinion regarding the applicability of post-government employment restrictions to activities that the official or former official may undertake on behalf of a contractor from a DOD ethics official prior to being able to work for the defense contractor. Section 847 reads:

> REQUIREMENTS FOR SENIOR DEPARTMENT OF DEFENSE OFFICIALS SEEKING EMPLOYMENT WITH DEFENSE CONTRACTORS.
>
> (a) REQUIREMENT TO SEEK AND OBTAIN WRITTEN OPINION.—
>
> (1) REQUEST.—An official or former official of the Department of Defense described in subsection (c) who, within two years after leaving service in the Department of Defense, expects to receive compensation from a Department of Defense contractor, shall, prior to accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.
>
> . . .
>
> (3) WRITTEN OPINION.—Not later than 30 days after receiving a request by an official or former official of the Departmentof Defense described in subsection (c), the appropriate ethics counselor shall provide such official or former official a written opinion regarding the applicability or inapplicability of post-employment

[48] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

> restrictions to activities that the official or former official may undertake on behalf of a contractor."
>
> . . .
>
> (c) COVERED DEPARTMENT OF DEFENSE OFFICIALS.—An official or former official of the Department of Defense is covered by the requirements of this section if such official or former official—
>
> . . .
>
> (2) serves or served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10,000,000.
>
> (d) DEFINITION.—In this section, the term ''post-employment restrictions'' includes—
>
> (1) section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423);
>
> (2) section 207 of title 18, United States Code; and
>
> (3) any other statute or regulation restricting the employment or activities of individuals who leave government service in the Department of Defense.[49]

Section 847 appears to be targeted at those former employees who would normally be subject to 41 U.S.C. § 423[50] (the Procurement Integrity Act) provisions, which applies to the same defined category of former employees. The Procurement Integrity Act restrictions only apply to employees who served in those positions during their last year of government employment. However, section 847 does not appear so limited. A "covered Department of Defense official" under section 847 includes a former employee if such former employee "served as program manager, deputy program manager . . ." without any set time

[49] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 847, 122 Stat. 3, 243 (2008).
[50] 41 U.S.C. § 423 (2006).

limit. To the extent that section 847 requires a mandatory ethics advisory opinion for anyone who has served in these positions during his entire government career, it is sure to substantially increase the number of requested ethics opinions.

The DOD Standards of Conduct Office has issued guidance on section 847 for DOD ethics advisors.[51] The guidance is that only individuals who served in those positions at the time they left government service or are serving in those positions at the time they request an ethics opinion are "covered Department of Defense officials" for purposes of section 847.[52] Accordingly, DOD ethics advisors will generally advise former employees that they are not covered by section 847 unless they served as a program manager, deputy program manager, etc., during their last year of government employment. However, this doesn't preclude individual government employees from drawing different conclusions about whether the language of section 847 applies to prior positions and requesting an ethics opinion just in case.

The 2008 NDAA is specific that post-government employment advice will include advice on the applicability of 18 U.S.C. § 207, but it leaves the breadth and depth those opinions need to take open to judgment. While agency ethics officials have always provided general guidance on the application of 18 U.S.C. § 207, specific opinions regarding particular potential future work are rarely provided, and when provided, are usually heavily qualified. First, such opinions inherently require review of a statute that the ethics advisor has no ability to authoritatively interpret. Second, the value of case-specific prospective advice is highly fact dependent, and the facts may change on a daily basis.

Section 847 does state "the appropriate ethics counselor shall provide such official or former official a written opinion regarding the *applicability or inapplicability* of post-employment restrictions to activities that the official or former official *may undertake* on behalf of a contractor." (emphasis added). This language seems to encourage more specific reviews of applicability or inapplicability. It also suggests the review needs to consider specific potential future employment the former employee may undertake. A standard caveat in ethics opinions is that the reviewer does not attempt to guess as to what the former employee's future job might be. The reviewer often explains the application of the statute generally or with examples, but the opinion is

[51] DOD SOCO Advisory 08-03 (Apr. 28, 2008).

[52] While section 847 simply says "serves or served," the DOD SOCO guidance is "Currently serve, or served at the time they left DOD service." The meaning of "currently" is not entirely clear. A direct reading would be that "currently" means personnel holding those positions on April 28, 2008, the date of the SOCO advisory. However, there does not appear to be any rationale for a tie to that particular date. Instead, it appears "currently" must refer to the time the ethics opinion is requested.

not specific to any particular employer or job. Again, the 2008 NDAA seems to push for more tailored reviews, suggesting the reviewer should tailor post-government employment advice to account for specific activities that the official or former official may undertake on behalf of a contractor.

Section 847 further places ethics advisors under a time constraint that may lead to litigation to which the government had not previously been exposed. While there have been regulatory timelines for providing ethics opinions[53] there has been no statutory deadline. Section 847 now changes that by placing a thirty-day statutory deadline on the government when providing advice. This is significant because the government has been sued in the past for failure to provide post-government employment ethics opinions in a timely manner.

In particular, in the case of *Shapiro v. United States*,[54] an attorney formerly employed by the Department of Labor sued the U.S. for failure to issue a post-government employment ethics opinion in a timely manner. A request for an opinion made on 17 June 1981 stated the attorney's potential employer, a law firm, would only hold the position open for him until 15 July 1981. The agency did not provide an opinion saying there was no apparent restriction until 4 September 1981. The former employee was still able to start working for the law firm, but apparently his first case was to sue the government under the Federal Tort Claims Act (FTCA) for lost wages he claimed he would have received if the government's opinion had been timely (i.e., within 30 days). The court noted that one exception to waiver of sovereign immunity and allowing suit under the FTCA was for "discretionary acts." The court found that deadlines set by the executive branch in regulations were discretionary as opposed to statutory deadlines and held that the government could not be sued under the FTCA for failure to meet those deadlines. Section 847 now establishes a statutory deadline, and the defense against suit from *Shapiro* would appear to no longer apply.

Section 847 also provides an additional recordkeeping requirement. Each ethics opinion provided is to be maintained in a central database. Pending establishment of a central database, ethics advisors must maintain their own database, allowing them to quickly search and retrieve such opinions.

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[53] U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (Aug. 1, 1993) (incorporating Change 6, Mar. 23, 2006) (section 9-600(c)(3) requires 41 U.S.C. § 423 letters to be issued within 30 days).

[54] 556 F. Supp. 886 (E.D. Pa. 1983).

B. New Regulation

On 25 June 2008, OGE published substantial revisions to its post-government employment ethics regulations regarding application of 18 U.S.C. § 207. One of the new provisions, 5 CFR § 2642.105,[55] deals with the issuance of ethics opinions regarding 18 U.S.C. § 207. Under 5 CFR § 2642.105, OGE specifically directs former employees to seek advice regarding 18 U.S.C. § 207 from agency ethics officials in their former agency and advises former employees that good faith reliance on such an opinion may be viewed favorably by the Department of Justice when considering whether to prosecute the former employee for a violation.

Prior to 25 June 2008, the only specific regulatory guidance from OGE regarding seeking ethics opinions under 18 U.S.C. § 207 appeared in 5 CFR § 2637.102, which stated

> In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations.[56]

The focus of this language was on "complex factual cases" and the determination of whether a matter the employee had worked on in his government employment rose to the level of a "particular matter." Indeed, although the person in the best position to know what matters he worked on for the government is the former government employee, the determination of when a matter became a "particular" matter between specific parties often involves looking beyond the employees specific participation to what was occurring within the agency.

In the revisions, OGE has expanded this one paragraph to an entire section:

> § 2641.105 Advice.
>
> (a) Agency ethics officials. Current or former employees or others who have *questions about 18 U.S.C. 207* or about this part 2641 *should* seek advice

[55] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36193 (June 25, 2008) (adding 5 C.F.R. § 2641.105).
[56] 5 C.F.R. § 2637.102 (2008).

> from a designated agency ethics official or another agency ethics official. The agency in which an individual formerly served has the *primary responsibility* to provide oral or written advice concerning a former employee's postemployment activities
>
> . . .
>
> (c) Effect of advice. Reliance on the oral or written advice of an agency ethics official or the OGE cannot ensure that a former employee will not be prosecuted for a violation of 18 U.S.C. 207. However, *good faith reliance on such advice is a factor that may be taken into account* by the Department of Justice (DOJ) in the selection of cases for prosecution . . .[57]

The new regulatory guidance is significant in several respects. First, it pushes the former employee to seek out his agency ethics advisor frequently. The previous guidance merely raised the possibility that the employee may get more information from his former agency on whether what he worked on was a "particular" matter involving specific parties when the issue is a "complex factual" case. The new guidance states the employee "should" address "questions about 18 U.S.C. § 207" to the agency ethics counselor. Effectively, it directs employees to go to agency ethics counselors on any 18 U.S.C. § 207 question. And because many 18 U.S.C. § 207(a)(1) issues can be highly fact sensitive, it encourages employees to return to the agency ethics advisor on a continuing basis as facts change. Second, it emphasizes that the agency ethics official has the "primary responsibility" for issuing such opinions. It is likely that this provision will be used by corporate counsel to disclaim any responsibility for advising the company's employees as to what work they can do for the company. Third, it encourages former employees to attribute special value and authority to the agency ethics advisor's opinion by suggesting that the Department of Justice will not prosecute the employee if he violates the law in reliance on an ethics advisor's opinion. Given this direct advice from OGE, there is likely to be a substantial increase in requests from employees and former employees for opinions related to 18 U.S.C. §207.

[57] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36193 (June 25, 2008) (adding 5 C.F.R. § 2641.105) (emphasis added).

IV. 18 U.S.C. § 207(a)(1) OPINIONS

A. Generally

Given the increased emphasis on agency ethics advisors providing guidance to former employees and prospective former employees (i.e., current employees) on the violation of a criminal statute (usually prospectively, but in some cases with respect to conduct which has already occurred), how should the ethics advisor approach this daunting task? How can you provide meaningful prospective advice? How do you deal with repeated requests for revised opinions? How far must you go to investigate the particular matters the individual has been involved in on behalf of the agency? What are the limits in providing advice?

Usually the ethics advisor starts with general advice not tailored to the former employee's situation. In many cases this will be sufficient to address the former employee's concerns, especially where the former employee intends to pursue post-government interests unrelated to his former government employment. However, a significant number of former employees will indeed seek continued employment in a private capacity related to the work they have done in their government employment. Such former employees often wish to capitalize on their government experience to obtain the best employment possible. The employee is free to use his general expertise, but use of his specific experience and contacts developed while in government employment may violate 18 U.S.C. § 207(a)(1).

Nor is the former employee the only party interested in maximizing use of his specific experience and contacts. Companies also consider specific experience and contacts to be valuable and want to continue to exploit those when hiring the former government employee. The government organization in which the employee formerly worked is often equally happy to continue to exploit that specific experience and contacts in the form of a contractor employee. These are pressures that the ethics advisor must put aside when interpreting 18 U.S.C. § 207(a)(1).

Although all these parties frequently want the former employee to be able to do what 18 U.S.C. § 207(a)(1) prohibits, none of them want to violate this criminal statute. They feel the ethics advisor's opinion is a shield to protect them in case they are ever questioned. Even if the former employee is not concerned, the potential employer will usually demand an opinion. In fact, it is frequently the potential employer that seeks to have the government provide an ethics opinion regarding what the employee may be restricted from doing on behalf of the company.

Accordingly, these are situations where the ethics advisor is likely to be asked more detailed and specific questions and be faced with a myriad of interests (the former employee, the potential employer, and the government organization) with goals that are potentially at odds with 18 U.S.C. § 207(a)(1). Given the difficulties with rendering such opinions and recognizing the clear direction to ethics advisors to provide advice on 18 U.S.C. § 207(a)(1) issues, it is important to develop a strategy on how such opinions will be handled.

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B. Have a Template Ready

The majority of requests for ethics opinions, including those by individuals who do not really need an opinion but whom a defense contractor refuses to hire unless they get an opinion, can be satisfied with a simple explanation of what 18 U.S.C. § 107(a)(1) prohibits, without any analysis of any particular matters that the individual might have worked on as a government employee. Accordingly, a readily accessible explanation of 18 U.S.C. § 107(a)(1) that can be quickly inserted into a standard post-government employment restrictions ethics opinion is an essential part of the ethics advisor's toolkit. The ethics advisor can create a template or simply borrow from post-government employment advice provided on various ethics websites.[58] This is certainly sufficient for individuals who have worked for the government full time for some number of years who are preparing to retire or separate from government employment and have not worked in any contracting, program management, financial, technical, or other role where they were directly involved in acquisition planning, contract formation, or contract administration. This could include recruiters, mechanics, medical personnel, pilots, etc. A general explanation of the statute without reference to specific facts of the individual's particular situation will be sufficient in most cases to assure these former employees that the statute's affect on them is minimal.

C. Avoid Contractor-Specific Opinions

Some former employees will request an opinion specific to a particular contractor. Unless the former employee can clearly identify a specific particular matter he has worked on that might be an issue with his prospective employer, the ethics advisor should decline such a request. A general explanation of the elements of 18 U.S.C. § 207(a)(1), coupled with a statement that this applies to *any* employer is

[58] *See, e.g.,* DOD Standards of Conduct Office website, *available at* http://www.dod.mil/dodgc/defense_ethics/.

sufficient, and this avoids preparing a separate opinion for every company to which the former employee seeks to send a resume.

D. Have Caveats Ready

There are certain essential caveats that should appear in any written post-government employment ethics opinion. First, each opinion should make clear that there is no attorney client privilege. Of course, the employee or former employee should be advised of this when he seeks ethics advice in the first place, but it also should be repeated in the final advice. Second, the ethics advisor should clarify that his or her client is ultimately the agency. Third, the ethics advisor should note that he or she has no authority to issue a definitive opinion regarding the applicability of 18 U.S.C. § 107(a)(1), which is a criminal statute. Fourth, each ethics advisory opinion should note that it is based upon, and only as good as, information provided by the employee or former employee about the positions he has held, what he has worked on, and what he plans to work on. Fifth, each opinion should make clear that it is advice for the individual and not for any company the individual might seek employment with, and that it is not a government approval of any particular civilian employment.

E. Have Questions Ready and Limit Information Seeking

Before providing written post-government employment advice, the ethics advisor will normally request information from the former employee to determine, at a minimum, whether the former employee is subject to a compensation ban under 41 U.S.C. § 423 and whether the individual is a "covered Department of Defense official" under section 847. Generally, this is limited to whether he has held certain positions or made certain decisions while a government employee. A standard list of questions should be prepared to illicit the required information. Unless the former employee has already self-identified a specific issue, the initial ethics opinion provided to the former employee would simply contain a general statement of what 18 U.S.C. § 107(a)(1) prohibits. No additional information would be necessary.

The ethics advisor should resist the impulse to search for issues by asking for additional information. The ethics advisor can waste a lot of time searching through the former employee's government employment history. Instead, the former employee should be given sufficient understanding of the statute to self-indentify specific previous government positions or work that might raise an issue.

F. Oral Advice

Many former employees will simply want to stop by or telephone the ethics advisor to chat about ethics issues as they come to mind, and many ethics questions can be answered quickly in this manner. There are pros and cons to providing oral advice. Such advice is subject to being misquoted; however, refusing to provide any oral advice may engender a much greater workload. If the ethics advisor provides oral advice, it is important to point out to the former employee that such advice is not a substitute for the written ethics opinion required to satisfy section 847. Also, the former employee should periodically be reminded that there is no attorney-client privilege.

G. Getting Into Specifics

When requested by the former employee to evaluate the prospective applicability of 18 U.S.C. § 207(a)(1) to a specific situation, the ethics advisor will generally attempt to assist. However, it is frequently helpful to discuss with the employee what information is needed to render an opinion and what information is not sufficient. It should be emphasized to the employee that further analyzing the applicability of 18 U.S.C. § 207(a)(1) requires specific identification of the work he did on particular matters as a government employee that he reasonably believes he may be asked to work on as a contractor employee.

In particular, the ethics advisor should resist the endless hypothetical scenario where the employee wants to discuss in detail how 18 U.S.C. § 207(a)(1) applies to a large range of employment options the employee may pursue and the endless investigation scenario where the ethics advisor is asked to analyze the former employee's full government employment history (including performance reports, etc.) for particular matters that the former employee has participated in. Both the particular matters worked on the by the former employee during government employment and the particular matters the former employee is likely to work on during post-government employment should be solidified before the ethics advisor attempts to give targeted advice.

The former employee may start with a general statement of his connection with the prospective contractor during government employment, which may need to be focused on specific work by the ethics advisor. A former employee might ask, "Does my having worked *with* a particular contractor mean I have a representation ban under 18 U.S.C. § 207(a)(1)?" In this example, the employee has stated who he was working with rather than what he was working on. What he was working on and what he did are the questions to be answered. Another

example is a former employee who asks, "If I go to work for a particular contractor, will I be subject to a representation ban under 18 U.S.C. § 207(a)(1)?" In this example, the former employee has stated who he may be working for rather than what he worked on as a government employee that he might be asked to work on by the prospective employer.

Once the former employee has identified specific work he did for the government that he believes he might be asked to work on by a prospective employer, additional focusing may be necessary to identify what "particular matters"[59] to which the work relates. As suggested by the examples of particular matters provided in the statute, a particular matter is a particular effort that is limited in time and has a fairly specific, defined overall government objective. In some cases, an employee's question may be too broad to answer. For example, an employee might ask, "Does my involvement in the Global Positioning Satellite Program cause a representation ban under 18 U.S.C. § 207(a)(1)?" A program may involve many particular matters, some of which the former employee worked on and some which the former employee did not. The former employee must be more specific regarding work he did while working in the program that he believes he may work on again.

It is only by identifying the "particular matter(s)" the former employee was involved in that the ethics advisor can identify what restriction the former employee is under, because the restriction only applies to participation in the same "particular matter(s)." Nor is it necessarily easy to determine what "particular matter(s)" to which a former employee's prior work relates. For example, a former employee may ask what restrictions he would have as a result of reviewing environmental planning documents created by contractors in anticipation of doing new construction. The work of the former employee may touch upon several "particular matter(s)," such as design or construction contracts actually awarded for the work, contracts for support services personnel for the project, or permitting efforts that may come out as a result of the planning. The ethics advisor may have to explore how the former employee's efforts fit into the bigger picture. Another example would be a former employee who takes part in an inspection and testing of a particular satellite to determine if it was ready for launch. One particular matter might be the satellite inspection itself, but this work likely relates to larger matters, such as the government contract with the satellite vehicle provider. The ethics

[59] The term "particular matter" includes "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." 18 U.S.C. § 207(i)(3) (2006).

advisor must consider all "particular matter(s)" to which the work relates.

Assuming a particular matter is identified, additional focus may be necessary to determine whether the particular matter was or became, at the time the former employee worked on it, a "particular matter between specific parties." If the particular matter never involved specific parties, there is no restriction under 18 U.S.C. § 207(a)(1). On the other hand, if the particular matter falls within most of the enumerated examples of particular matters in 18 U.S.C. § 207(i)(3), the answer is easy since most are clearly matters between specific parties. The most common difficulty in determining whether a particular matter involves specific parties is where: (1) the action involves planning for a future action that may or does involve specific parties, and (2) the action involves decisions or rulemaking that may or does involve specific parties. In both of these cases, parties outside the government may have input into the planning and decision-making process.

Once a "particular matter involving specific parties" has been identified that the former employee worked on, the next question is whether there will be any further government action with respect that particular matter. If the particular matter is over, the former employee is no longer subject to any restriction under 18 U.S.C. § 207(a)(1), since the restriction is only against further participation in the matter (of course, if the particular matter is completed then there was no need for further analysis in the first place).

If a "particular matter involving specific parties" has been identified that the former employee worked on, and it is a continuing matter, the next question is whether the former employee's participation in the particular matter was "personal and substantial."[60] The ethics advisor may reiterate to the former employee what "personal and substantial" mean before asking about specific involvement the former employee had in the matter. In some cases, this may allow the former employee to make his own judgment regarding whether his participation was "personal and substantial" without any additional inquiry by the ethics advisor. In other cases, the former employee's participation will have been substantial and it will be obvious that no further inquiry is needed. Assuming the employee still wants an opinion, in particular a written opinion from the ethics advisor, the former employee will need to identify any significant specific tasks he did in connection with the "particular matter."

At this point, the ethics advisor should have sufficient information to assess whether the individual's participation was

[60] The reason ethics advisors look at "particular matter" before "personal and substantial" participation is to assess what the employee did and what the particular matter is before evaluating whether the participation was substantial.

"personal and substantial" and should be able to advise the former employee whether he believes 18 U.S.C. § 207(a)(1) would restrict future action on those "particular matters" involving specific parties. This is the extent of the ethics advisor's normal analysis, although this is clearly not the full analysis. A full analysis also involves looking at specific actions taken by the former employee after leaving the government on behalf of a new employer and determining if those actions involved the same particular matter, involved a communication or appearance before a government employee, etc.

H. Limitations on Ability to Discuss Certain Elements of Statute

As indicated above, the ethics advisor's advice is normally prospective and does not involve detailed knowledge of what the former employee is doing or will be doing day-to-day for his new or prospective employer. Accordingly, ethics advisors should recall that they cannot provide conclusions regarding certain statutory elements, such as "knowingly makes," "with intent to influence," and "any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States." As pointed out by OGE, little prospective guidance can be given concerning these elements.[61] The former employee may still wish to discuss hypothetical fact situations. Such exercises are frequently based upon limited facts seeking bright line distinctions, which are difficult to make.[62] The ethics advisor should resist spending extensive time on such potentially endless academic exercises, and reiterate to the former employee how the elements of the statute limit the scope of advice.

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[61] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36169 (June 25, 2008).

> [I]it is important to note that OGE has not attempted to provide comprehensive guidance as to the scope of the knowledge requirement in the various prohibitions in section 207. In OGE's experience, knowledge questions more typically arise after the post-employment conduct has already occurred, and legal analysis of such issues is not always well-suited to a regulation that provides general, prospective guidance.

Id.

[62] U.S. Office of Gov't Ethics Adv. Op., 03x06 (Aug. 28, 2003) ("However, we would caution, as we did in OGE 99x19, that it is not always easy to draw a clear line, especially in advance, between routine or ministerial communications and those that involve at least a subtle form of influence.").

I. After-the-Fact Advice

In rare circumstances, former employees may seek advice on whether an action they have already taken complies with 18 U.S.C. § 207(a)(1). It may not always be clear, since the former employee may phrase the question as a "hypothetical" ethics question. The ethics advisor's own agency or the Department of Justice may already be investigating the matter. Is the ethics advisor still required to provide advice? What if the ethics advisor's advice is contrary to the agency's advice or that of the Department of Justice? Is the ethics advisor being set up to be a witness in the defense case-in-chief? OGE regulations and the Joint Ethics Regulation generally direct the ethics advisor to provide advice, and they do not appear to create an exception for giving after-the-fact advice.

The ethics advisor should be wary any time he is asked to provide advice to a former employee who already has a job. Try to clarify whether a posed hypothetical may have already occurred. Second, the ethics advisor should, of course, advise the employee that there is no attorney-client relationship, that nothing the individual says is confidential, and that the attorney may be required to disclose information to others. This may encourage the former employee to seek advice from an alternate confidential source. Third, the ethics advisor should reiterate to the employee that 18 U.S.C. § 207(a)(1) is a criminal statute and while the advisor can explain the elements of the offense, no opinion regarding the application of the elements to the former employee's particular situation is binding on the government.

J. Conducting Your Own Investigation

Previous OGE regulations have suggested that the agency ethics advisor is in a better position to give advice, because the agency is likely to be in the best position to determine, in particular, "the identity or existence of a particular matter."[63] In connection with 18 U.S.C. §207(a)(1) reviews, this raises the question of how far an ethics advisor should go to research the factual background necessary to provide

[63] 5 C.F.R. § 2637.201(e) (2008).

> In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations.

Id.

definitive advice? Generally, the ethics advisor should be able to rely on the memory of the employee. On the other hand, the former employee may not recall exactly what work he performed a year or more before. Senior employees may have a particularly difficult time keeping track of all matters that have come before them. If the employee cannot remember working on a particular matter at all, then it should be sufficient for the ethics advisor to advise the former employee that at least one OGE opinion held that an employee who did not remember participation in a particular matter could not violate the statute, because the former employee would not be acting "knowingly."[64] If the former employee does remember working on a particular matter and can provide sufficient details from which to make a determination of whether the particular matter was between specific parties and whether the employee participated personally and substantially, then the ethics advisor need look no further. However, if the employee remembers working on a particular matter, but cannot provide details regarding whether the particular matter involved specific parties or his own participation, it may be necessary for the ethics advisor to conduct further investigation.

The scope of the investigation should be limited to these issues: (1) What is the particular matter between specific parties? (2) When did it become a particular matter between specific parties? (3) What was the former employee's participation? (4) Was it personal and substantial? and (4) Is it the same particular matter as the proposed future work? The ethics advisor should determine from the former employee who are the best individuals to answer these questions.

K. Understand Special Categories of Employees

1. *Enlisted Military Personnel*

As indicated above, 18 U.S.C. § 207(a)(1) does not apply to enlisted military personnel.

2. *Special Government Employees*

A special government employee (SGE) is "an officer or employee . . . who is retained, designated, appointed or employed" by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.[65] SGE's are distinguishable from "representatives"[66]

[64] U.S. Office of Gov't Ethics Adv. Op., 81x23 (July 22, 1981). Although this opinion was issued under a previous statute, the terms are essentially the same.
[65] 18 U.S.C. §202(a) (2006).
[66] U.S. Office of Gov't Ethics Adv. Op., 00x01 (Feb. 15, 2000).

and independent contractors.[67] 18 U.S.C. § 207(a)(1) applies to SGEs. OGE regulations make it clear that SGEs remain government employees at all times during their period of appointment or detail, regardless of how much time they actually spend working for the government.[68] Normal representation restrictions on government employees (18 U.S.C. §§ 203 and 205) are relaxed for SGE's to be similar to the post-government employment restriction under 18 U.S.C. § 207(a)(1).[69]

3. *Military Reserve Officers*

For each separate period on active duty orders, the reservist is an SGE[70], and at the end of that period the reservist becomes a "former" employee for purposes of 18 U.S.C. § 207(a)(1), even though he remains a member of the reserves.[71] However, the 18 U.S.C. §

> Representatives, as described more fully in OGE Informal Advisory Letter 82x22, typically serve on advisory bodies, and they represent specific interest groups, such as industry, consumers, labor, etc. Like SGEs, representatives can be appointed by the Government for a specified term on a Federal advisory committee, and they may make policy recommendations to the Government. *See* OGE Informal Advisory Letter 93x30. However, representatives can provide only advice. Moreover, unlike SGEs and other Federal employees, representatives are not expected to render disinterested advice to the Government. Rather, they are expected to 'represent a particular bias.' OGE Informal Advisory Letter 93x14.

Id.

[67] U.S. Office of Gov't Ethics Adv. Op., 00x01 (Feb. 15, 2000) ("True independent contractors are not employees because they are not subject to the supervision or operational control, described more fully above, that is necessary to create an 'employer-employee relationship' with the Government.").

[68] See example 4 to the definition of "former employee," 73 Fed. Reg. 36188 (June 25, 2008) (adding 5 C.F.R. § 2641.104).

[69] U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (Aug. 1, 1993) (incorporating Change 6, Mar. 23, 2006). Paragraph 5-403(b)(4) provides

> For special Government employees, the prohibitions apply only to covered matters in which they participated personally and substantially as a special Government employee. Absent such participation, the prohibitions apply only if he served more than a total of 60 days during the preceding 365 days and the covered matter was pending in the DOD Agency during that period.

Id.

[70] See example 5 to the definition of "former employee," 73 Fed. Reg. 36188 (June 25, 2008) (adding 5 C.F.R. § 2641.104).

[71] The effect of this is to impose post-government employment restrictions on reservists when they are not actively performing reserve duty, while relieving them of the more burdensome restrictions that would apply if they were still considered government employees during that time.

207(a)(1) post-government employment restriction does not appear to attach to any work done during periods of inactive duty training.[72] Because many reservists already have full time non-government employment prior to beginning reserve duty, unlike other government employees, reservists often seek ethics advice in anticipation of starting government employment (i.e. in anticipation of reserve duty) rather than in anticipation of terminating government employment. There is no difference in the application of 18 U.S.C. § 207(a)(1), but reservists may seek to structure their government employment, if consistent with government needs, to avoid working on particular matters on behalf of the government that they already know their private employer might assign to them.

4. *Intergovernmental Personnel Act and Information Technology Exchange Program Personnel*

The Intergovernmental Personnel Act (IPA)[73] allows for temporary assignment of employees between federal government, state government, local government, Indian tribal government, institutions of higher education, and other eligible nonprofit organizations. The Information Technology Exchange Program (ITEP)[74] allows for temporary detail of information technology personnel between the private sector and the federal government. All IPAs, detailed or assigned[75], to or from the federal government, are federal government

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[72] Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36188 (June 25, 2008).

> In the case of Reserve officers of the Armed Forces or officers of the National Guard of the United States who are not otherwise employees of the United States, Government service shall be considered to end upon the termination of a period of active duty or active duty for training during which they served as SGEs.

Id. Although not explicitly stated, the implication is that no period other than a period of active duty (e.g., inactive duty training) is considered a period of government service to which the post-government employment restriction of 18 U.S.C. § 207(a)(1) attaches.

[73] 5 U.S.C. §§ 3371-3376 (2006).

[74] 5 U.S.C. §§ 3701-3707 (2006).

[75] U.S. Office of Gov't Ethics Adv. Op., 06x10 (Oct. 9, 2006).

> A Federal employee, on an outgoing IPA assignment, may either be detailed, as a regular work assignment, or work for the receiving organization while on leave without pay from his agency. 5 U.S.C. § 3373(a). Similarly, an employee of a non-Federal entity may receive an IPA assignment to a Federal agency either through appointment or detail.

Id.

employees for purposes of 18 U.S.C. § 207(a)(1)[76] and after termination of their IPA assignment are prohibited from communicating with the government regarding particular matters they worked on personally and substantially during their IPA assignment. All detailed ITEP personnel, to or from the federal government are also federal government employees for purposes of 18 U.S.C. § 207(a)(1)[77].

Like SGEs, IPA and ITEP personnel are generally under an appointment or detail to government employment for a specific period, although they may work for the government one day during the period and then work for a private entity the next. IPA and ITEP personnel are not subject to 18 U.S.C. § 207(a)(1) until their detail to government employment ends, but unlike SGEs, IPA and ITEP personnel are subject to the full restrictions of 18 U.S.C. § 203 and § 205 during their government employment.

Like reservists, it may be of substantial significance for IPA and ITEP personnel to be advised of this prior to or during their assignment, because frequently there is a continuing relationship with the other employer, and individuals may desire to continue with the work they were doing after terminating their assignment.

5. *National Guard Officers*

Because 18 U.S.C. § 207(a)(1) applies only to former federal employees, it only applies after National Guard officers have been through a period of federal government service. Clearly, this applies to periods in which National Guard officers are on Title 10 orders. This does not apply to periods in which guardsmen are on Title 32 status.[78]

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[76] 5 U.S.C. § 3373(c)(2) (2006) (During the period of assignment, a State or local government employee on detail to a Federal agency . . . is deemed an employee of the agency for the purpose of . . . sections 203, 205, 207, 208, 209, 602, 603, 606, 607, 643, 654, 1905, and 1913 of title 18 . . .") Although this provision is directed to state or local government employees, 5 U.S.C. § 3372(e)(2) makes clear that it also applies to employees of other organizations that are detailed to federal agencies under the Intergovernmental Personnel Act:

> [A]n assignment of an employee of an other organization or an institution of higher education to a Federal agency, and an employee so assigned, shall be treated in the same way as an assignment of an employee of a State or local government to a Federal agency, and an employee so assigned, is treated under the provisions of this subchapter governing an assignment of an employee of a State or local government to a Federal agency.

5 U.S.C. § 3372(e)(2) (2006).

[77] 5 U.S.C. § 3704(b)(2)(B) (2006).

[78] No opinions apply 18 U.S.C. § 207(a)(1) to National Guard officers in Title 32 status; however, the federal government has taken an increasing role in funding and recognizing federal benefits for certain Title 32 National Guard efforts.

6. *Senior Employees*[79]

Senior employees are subject to 18 U.S.C. § 207(a)(1) just like everyone else; however, while most military and civilian employees only become "former employees" upon complete termination of government employment, senior employees may become "former senior employees" when they terminate senior employee status, even though they have not terminated government employment.[80] In addition, since senior employees may be more involved in setting policy than day-to-day management of government business, the analysis of whether they have personally and substantially participated in a particular matter involving specific parties may differ from non-senior employees.

V. CONCLUSION

Recent statutory and regulatory changes have emphasized the critical role of the agency ethics advisor in advising former employees of their restrictions under 18 U.S.C. § 207(a)(1). This article is intended to provide an in-depth review of the elements of 18 U.S.C. § 207(a)(1) and a useful guide for ethics advisors to provide ethics advice to former government employees.

[79] General officers and Senior Executive Service (or equivalent) personnel.
[80] See example 6 to 5 C.F.R. § 2641.104, Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36188 (June 25, 2008).

NEVER SAY DIE: THE CONTINUED EXISTENCE OF THE GOVERNMENT OFFICIALS' GOOD FAITH PRESUMPTION IN FEDERAL CONTRACTING LAW AND THE WELL-NIGH IRREFRAGABLE PROOF STANDARD AFTER *TECOM*

MAJOR BRYAN O. RAMOS

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The Government's long touted desideratum that "irrefragable proof" is needed to demonstrate the absence of good faith in the administration of government contracts has been given its last rites.[1]

I. INTRODUCTION

There is a long-standing presumption in federal contracting law that government officials act in "good faith."[2] This presumption in alleged government bad faith cases is so strong that a majority of federal courts and boards require a contractor to establish an elevated showing of "well-nigh irrefragable" proof, or as it is more modernly termed, "clear and convincing" evidence, to show the contrary.[3] This raised evidentiary standard that government contractors must meet is more demanding than the "preponderance of the evidence" standard applied to commercial contractors in breach cases.[4]

The long history of unanimity among the federal courts and boards to apply this enduring good faith presumption and its applicable evidentiary standard has become somewhat fractured by Judge Victor Wolski's written opinion in the 2005 United States Court of Federal Claims (COFC) decision *Tecom, Inc. v. United States*.[5] In the *Tecom* decision, Judge Wolski concludes that the good faith presumption given to government officials is not applicable in ordinary breach cases.[6] Therefore, according to Judge Wolski, only a preponderance of evidence, rather than the higher clear and convincing standard of proof, is necessary to prove government breach.[7] This easing of the evidentiary standard would make it far less difficult for contractors to prevail on allegations of bad faith and to obtain a judgment for breach of contract damages.

Lawyers in the private-contracting sector, who for the past several years called for a uniform evidentiary standard that would apply equally to both the government and contractors, have embraced *Tecom*

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[1] H & S Mfg., Inc. v. United States, 66 Fed. Cl. 301, 311 n.19 (2005) (forecasting the ruling in Tecom, Inc. v. United States, 66 Fed. Cl. 736, 771 (2005), would bring about the end of the irrefragable proof standard).
[2] Kalvar Corp., Inc. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976).
[3] Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002) (quoting Schaefer v. United States, 633 F.2d 945, 948–49 (1980)).
[4] *Tecom Inc.*, 66 Fed. Cl. at 771; s*ee* Addington v. Texas, 441 U.S. 418, 423–24 (1979) (ranking the three burdens of proof by level of difficulty).
[5] *See Tecom Inc.*, 66 Fed. Cl. 736 (ruling the presumption of good faith long held by prior courts to be particular to government officials, does not apply in ordinary breach of contract cases).
[6] *Id.* at 770 (defining ordinary as an act not of an official nature. Acts considered official include voting for legislation or enforcing laws).
[7] *Id.* at 770–72.

as the new standard to which all government contract cases involving bad faith should be judged.[8] In addition to the private sector, a handful of courts have also concluded that *Tecom* is the new standard.[9] In 2005, the COFC in *H & S Manufacturing, Inc. v. United States*, went so far as to state, "[T]he Government's long touted desideratum that irrefragable proof is needed to demonstrate the absence of good faith in the administration of government contracts has been given its last rites."[10]

This article proposes the last rites of the well-nigh irrefragable proof standard have been read too soon. To date, the limited exercise of the presumption of good faith and heightened standard of proof enunciated in *Tecom* has had little lasting impact on federal courts and boards.[11]

This article will address three main issues. First, it will describe the well-established presumption that government officials act in good faith, as well as the corresponding well-nigh irrefragable proof requirement, as they have each stood prior to the introduction of *Tecom. S*econd, it will examine the approach and analysis Judge Wolski used to develop his competing theory in *Tecom* and explain why this theory is incorrect. Third, it will analyze the limited impact of the *Tecom* ruling, demonstrating that contract tribunals have either disregarded *Tecom* or followed it only in cases in which its application had no bearing on the final outcome.

II. THE GOOD FAITH PRESUMPTION AND HEIGHTENED STANDARD OF PROOF PRIOR TO *TECOM, INC. V. UNITED STATES*

Prior to the June 2005 ruling in *Tecom*, federal courts and boards consistently recognized a presumption in government contracts that government officials exercise their duties in good faith and to prove

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[8] Proposal for Public Comment, from Marshall Doke to Commercial Practices Working Group, Acquisition Advisory Panel, Commercial Practices Legislation 4 (May 5, 2005); Dorn C. McGrath, III, *What's Good for the Goose and the Gander*, NAT'L DEF. MAG., July 2006, at 6.

[9] *See* H & S Mfg., Inc. v. United States, 66 Fed. Cl. 301, 311 n.19 (2005) (forecasting the ruling in *Tecom Inc.*, 66 Fed. Cl. 736, would bring about the end of the irrefragable proof standard); Helix Elec. v. United States, 68 Fed. Cl. 571, 587 n.30 (2005).

[10] *H & S Mfg, Inc.*, 66 Fed. Cl. at 311 n.19.

[11] *See* Chapman Law Firm Co. v. Greenleaf Const. Co., 490 F.3d 934, 940 (2007) (demonstrating that the Court of Appeals still requires well-nigh irrefragable proof be shown to persuade the court to abandon the presumption of good faith); Long Lane Ltd. P'ship v. Bibb, 159 Fed. Appx. 189, 192 (2005); Moreland Corp., Inc. v. United States, 76 Fed. Cl. 268 (2007) (continuing to rule whether or not clear and convincing evidence has been established); N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158 (2007); Greenlee Constr., Inc. v. Gen. Serv. Admin., 2007 CIVBCA LEXIS 158 (requiring a heightened evidentiary threshold of proof to counter the presumption of good faith).

otherwise requires well-nigh irrefragable proof.[12] The existence of the good faith presumption can be traced back to the early 1800s.[13] It first appeared, without attribution, in an 1816 Supreme Court case, *Ross v. Reed*.[14] *Ross* involved a dispute over a parcel of land in which both the plaintiff and defendant claimed ownership.[15] The Court ruled in favor of the defendant, who had been given a survey and grant to the land in question by officials with the state recorder's office.[16] Justice Todd, writing for the Court stated "[i]t is a general principle to presume that public officers act correctly until the contrary be shown."[17] The Court therefore presumed that the government officials would not have conducted the land survey or issued the land grant unless the defendant had produced evidence at the time, sufficient to convince them in their official capacities, that he was the rightful owner.[18]

This belief by the courts that government officials exercise their duties in good faith has since become a core tenet in public contract law.[19] In fact, a majority of contemporary courts have demonstrated in their rulings that "[a]ny analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties,'" and the courts are "loath to find to the contrary."[20]

This presumption of good faith granted to government officials is considered by a majority of federal courts to be so strong, that to overcome it the contractor must establish well-nigh irrefragable proof.[21] Well-nigh irrefragable proof is defined as evidence that is "necessary and almost irrefutable."[22] Some courts have even removed the qualifying term "almost," stating that the evidentiary standard cannot be "refuted or disproved."[23] Despite the stringent definition, the federal judiciary has made it clear that the evidentiary threshold is not intended to be so difficult as to "insulate government action from any review by

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[12] "In fact, for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'" Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002) (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (1980)) (alteration in original).
[13] *Tecom, Inc.*, 66 Fed. Cl. at 758 (citing Ross v. Reed, 14 U.S. 482, 486 (1816)).
[14] *Ross*, 14 U.S. 482.
[15] *Id.* at 484.
[16] *Id.*
[17] *Id.* at 486.
[18] *Id.* at 486–87.
[19] *See* Knotts v. United States, 128 Ct. Cl. 489, 492 (2005).
[20] Kalvar Corp., Inc. v. United States, 211 Ct. Cl. 192, 198 (1976).
[21] KSEND v. United States, 69 Fed. Cl. 103, 119 (2005).
[22] Franklin L. Haney v. United States, 230 Ct. Cl. 148, 152 (1982).
[23] Textron, Inc. v. United States, 74 Fed. Cl. 277, 293 (2006); Am-Pro Prot. Agency, Inc. v. United States, 281 F. 3d 1234, 1240 (2002).

courts . . . ."[24] In cases where the government officials' good faith performance is challenged, "the necessary 'irrefragable proof' has been equated with evidence of some specific intent [on the part of the government] to injure the plaintiff."[25] The actions of government officials that have been found to meet this specific intent includes those "motivated alone by malice" or "actuated by animus toward the plaintiff," and those in which the government enters into a commitment "with no intention of fulfilling its promises"[26]

The well-nigh irrefragable proof standard found its initial expression in the 1954 COFC decision of *Knotts v. United States*.[27] In *Knotts*, the court stated without attribution that it "start[s] out with the presumption that the official acted in good faith," and that "well-nigh irrefragable proof" is needed to prove the absence of good faith.[28] Although the court in *Knotts* does not explain its basis for requiring the heightened standard of well-nigh irrefragable proof, the findings of the case provide insight to the type of evidence required to meet the standard.[29] In *Knotts*, the plaintiff, an employee of a federal agency, was fired and her position was given to her supervisor's friend.[30] The evidence revealed that, in an effort to get the plaintiff to quit her position with the agency, her superiors refused to give her work, moved her to an office away from fellow coworkers, forbade coworkers from associating with her during and after work hours, and threatened to downgrade her work evaluations if she did not resign.[31] The court found the elevated evidentiary threshold of well-nigh irrefragable proof had been met; ruling the evidence presented by the plaintiff demonstrated a "conspiracy" on the part of the employee's superiors to unlawfully terminate her employment.[32]

Similarly, in the more recent case of *Libertatia Assoc., Inc. v. United States*, the COFC found evidence of a specific intent on the part of the government to injure the plaintiff, thus ruling that the government officials acted in bad faith.[33] Among the evidence that led to the court's ruling was testimony that on various occasions, the government contracting officer representative (COR) made condescending

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[24] Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702, 707 (2000).
[25] Kalvar Corp., Inc. v. United States, 211 Ct. Cl. 192, 198–99 (1976); *See also* Librach v. United States, 147 Ct. Cl. 605, 614 (1959) (determining no bad faith because officials implicated were not "actuated by animus").
[26] Gadsden v. United States, 111 Ct. Cl. 487, 489 (1948); Kalvar Corp., 211 Ct. Cl. at 199; Krygoski Construction Co. v. United States, 94 F.3d 1537, 1545 (1996).
[27] *See* Knotts v. United States, 128 Ct. Cl. 489 (1954).
[28] *Id.* at 492.
[29] *See id.*
[30] *Id.* at 495.
[31] *Id.* at 495–496.
[32] *Id.* at 499.
[33] *Libertatia Assoc. Inc.*, 46 Fed. Cl. at 711.

statements toward the plaintiff and its staff, as well as threats that he would cause the plaintiff financial harm.[34] Additionally, the COR forced employees of the plaintiff to work extra shifts so he could collect overtime pay for supervising them, which increased the labor costs incurred by the plaintiff.[35] Testimony of coworkers further revealed that the COR "expressed pleasure" when dismissing the plaintiff for default.[36] Based on extensive evidence of government conduct such as this, the COFC ruled that the COR acted in bad faith.[37]

Both *Knotts* and *Libertatia* demonstrate the extensive and convincing type of evidence needed to successfully meet the heightened well-nigh irrefragable proof standard.[38] Although the evidentiary threshold is not intended to be impossible to overcome, it is clear from these two cases that the evidence must be substantial.[39] Mere suspicion will not suffice.[40]

For many years, courts applying the heightened evidentiary standard would sometimes substitute the language "well nigh irrefragable proof" with "clear and convincing evidence."[41] Due to the existence of these "two different but nevertheless similar descriptions" of the same evidentiary standard, and its potential to cause confusion, the Court of Appeals for the Federal Circuit (Federal Circuit) in *Am-Pro Protective Agency, Inc. v. United States* set out to clarify the language of the standard.[42] The Federal Circuit's intent was to provide clarification while remaining consistent with the standard's "well-established precedent that a high burden must be carried to overcome" the presumption of good faith.[43] The court compared the burden of proof applicable to the government's good faith presumption with the three standards of proof most recognized by modern courts: "preponderance of the evidence," "clear and convincing," and "beyond a reasonable doubt."[44] From this comparison, the court determined the clear and convincing evidence standard was the best fit.[45] The court in *Am-Pro*

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[34] *Id.* at 710.
[35] *Id.* at 709.
[36] *Id.* at 710.
[37] *Id.* at 712.
[38] *See Libertatia Assoc. Inc.*, 46 Fed. Cl. 702; Knotts v. United States, 128 Ct. Cl. 489 (1954).
[39] *See Libertatia Assoc. Inc.*, 46 Fed. Cl. 702; *Knotts*, 128 Ct. Cl. 489.
[40] Long Lane Ltd. P'ship v. Bibb, 159 Fed. Appx. 189, 193 (2005).
[41] Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

expressed the clear and convincing standard of proof as follows:

> A requirement of proof by clear and convincing evidence imposes a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. "Clear and convincing" evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable."[46]

Despite this change in language, a handful of courts and boards still use the term well-nigh irrefragable proof when referencing the evidentiary standard needed to overcome the government official's good faith presumption.[47] However the standard is phrased, the high burden it places on the plaintiff contractor is the same.[48]

The government official's good faith presumption and the corresponding elevated evidentiary threshold have remained a constant in the federal legal system for more than fifty years.[49] Although scrutinized by legal practitioners in the past, this presumption had not been seriously challenged by the courts until the 2005 COFC ruling in *Tecom, Inc., v. United States*.[50] In *Tecom*, the court stated that under "ordinary" breach cases, the good faith presumption does not apply and thus no heightened evidentiary standard of proof is needed.[51] Under this theory of law, contractors alleging a breach of good faith would no longer be required to prove malicious intent on the part of the government to successfully argue their claim.

III. *TECOM, INC. V. UNITED STATES*

A. Factual Overview

In *Tecom*, the contractor Tecom, Inc. (Tecom) was awarded a contract by the government to service and maintain a fleet of vehicles at an Air Force base complex.[52] The fleet consisted of 563 vehicles

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[46] *Id.* at 1240.
[47] *See* Long Lane Ltd. P'ship v. Bibb, 159 Fed. Appx. 189, 192–93 (2005); Chapman Law Firm Co. v. Greenleaf Const. Co., 490 F.3d 934, 940 (2007); Wu & Assocs., Inc., 2007 DOL BCA LEXIS 1; IMS Eng'rs – Architects, P.C., 2006 ASBCA LEXIS 111.
[48] *Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1239.
[49] Shaefer v. United States, 224 Ct. Cl. 541, 633 (1980).
[50] Tecom, Inc. v. United States, 66 Fed. Cl. 736 (2005).
[51] *Id.* at 771.
[52] *Id.* at 738.

including fire trucks, ambulances and snow plows.[53] Under the terms of the contract, Tecom, through its subcontractor, Fleetpro, would provide regularly scheduled inspections and maintenance on each vehicle while maintaining these records in a computer tracking system designated by the Air Force.[54] Tecom was required to have a certain percentage of each type of vehicle operational at all times.[55] If the required percentage was not met, Tecom would have to provide any overtime hours or rental vehicles needed to resolve the issue at no expense to the government.[56] To account for the possible maintenance backlog Tecom might acquire from the previous contractor, the contract provided for representatives from the Air Force, the previous contractor, and Tecom to perform a joint inspection of all vehicles.[57] Any pre-existing maintenance issues exceeding 355 labor hours would be performed by Tecom at an increased cost to the Air Force.[58]

The joint assessment team inspected 213 of the fleet's 563 vehicles before the Air Force ordered an end to the inspections, claiming the assessment period had expired.[59] The assessment revealed numerous safety deficiencies that the previous contractor neglected to document.[60] Tecom estimated that "between 7,500 and 10,000 hours of maintenance" would be required for the fleet to meet "the Air Force's minimum serviceability standards" at an estimated cost of $676,000 in parts and labor.[61] Appearing unable to pay the increased costs, the Air Force ordered Fleetpro to place vehicles with non-safety-related issues back into service.[62] Additionally, the Air Force demanded that Fleetpro delete the joint assessment results from both the Air Force tracking system and Fleetpro's own internal system, and demanded that Fleetpro refrain from producing the contractually mandated monthly database reports.[63]

Initial resistance from Fleetpro drew complaints and alleged threats of termination by the Air Force.[64] Tecom officials claimed the Air Force contracting officer (CO) threatened to punish Fleetpro with contract discrepancy reports (CDRs) if Fleetpro continued to complain about the condition of the vehicle fleet.[65] Moreover, the CO imposed

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[53] *Id.* at 739.
[54] *Id.* at 740.
[55] *Id.* at 739.
[56] *Id.*
[57] *Id.* at 745.
[58] *Id.* at 740.
[59] *Id.* at 747.
[60] *Id.* at 745.
[61] *Id.* at 741.
[62] *Id.*
[63] *Id.* at 741–42.
[64] *Id.* at 741.
[65] *Id.*

new inspection requirements for every vehicle repaired by Fleetpro.[66] These requirements were far more stringent than any previously imposed by the Air Force.[67] Within several weeks, the CO began issuing contract discrepancy reports against Fleetpro for failing to meet operational quotas, which Tecom argued was due to the condition of the fleet when the company inherited it from the previous contractor.[68] Nonetheless, Fleetpro brought the fleet up to the required serviceability standards within the first five months of the contract.[69] Despite Fleetpro's success, the Air Force threatened to terminate Tecom for default if it did not end its association with Fleetpro.[70] Such a termination would end the lucrative contract Tecom had with the Air Force, plus it would prevent Tecom from collecting any of the costs it had already expended on uncompleted work.[71] Fearful of these threats, Tecom relented and terminated their contract with Fleetpro.[72]

Tecom filed suit against the Air Force on behalf of Fleetpro in the COFC.[73] Both parties then filed motions requesting summary judgment.[74] Tecom alleged that the Air Force breached certain implied duties among which was the duty of good faith.[75] The Air Force argued the presumption of good faith afforded government representatives applied. This application required Tecom to overcome an elevated evidentiary standard of clear and convincing proof to show that a breach occurred.[76]

B. Court of Federal Claims' Findings

The court, upon conducting an exhaustive historical examination of the presumption of good faith afforded government officials, concluded that it "poses no special obstacle to parties alleging" a breach of the implied covenant of good faith.[77] Instead, the court stated:

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[66] *Id.* at 745.
[67] *Id.* at 747.
[68] *Id.* at 772.
[69] *Id.*
[70] *Id.*
[71] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 49.402-2 (July 2007) [hereinafter FAR] (stating that under a termination for default, the contractor is not entitled to any uncompleted work or costs incurred as a result of termination).
[72] *Tecom Inc.*, 66 Fed. Cl. at 742.
[73] *Id.*
[74] *Id.*
[75] *Id*. at 757.
[76] *Id.* at 757.
[77] *Id.* at 771.

> [W]hen a government official acts under a duty to employ discretion . . . and a lack of good faith is alleged that does not sink to the level of fraud or quasi-criminal wrongdoing, clear and convincing evidence is not needed to rebut the presumption [of good faith]. Instead, this may be inferred from a lack of substantial evidence, gross error, or the like. And when the government actions that are alleged are not formal, discretionary decisions, but instead the actions that might be taken by any party to a contract, the presumption of good faith has no application.[78]

Due to the court's stance, Tecom was only required to prove breach by the lower preponderance of the evidence standard rather than the heightened clear and convincing evidence requirement.[79] Despite the court's recognition that the actions taken by the Air Force "might well demonstrate bad faith, and an actual intent to injure the contractor --perhaps even irrefragably," it ultimately denied Tecom's motion for summary judgment.[80] The court stated that it was a "close call, [but] there appear to be just enough reasonable inferences that can be drawn in the Air Force's favor to allow it to survive Tecom's motion for summary judgment on these claims."[81]

C. Judge Wolski's Analysis in Reaching the *Tecom* Decision

In order to rule on Tecom's motion that the Air Force breached its duty of good faith, the COFC judge, Victor J. Wolski, set out to identify the standard of proof needed to overcome this duty and whether bad faith or the absence of good faith was "a necessary element."[82] Judge Wolski dedicated over a third of his fifty-page decision to a comprehensive review of the presumption of good faith conduct, from its inception in English common law to its present day use by both the Supreme Court and Federal Circuit.[83] In analyzing the good faith presumption, Judge Wolski divided his analysis into two sections. The first section looked at the Supreme Court's creation and use of the good faith presumption, while the second section examined how this same presumption has been treated by the Court of Claims and more recently by its successor, the COFC.[84]

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[78] *Id.* at 769.
[79] *Id.* at 772.
[80] *Id.* at 773.
[81] *Id.*
[82] *Id.* at 757.
[83] *Id.* at 758–72.
[84] *Id.*

1. *The Supreme Court's Treatment of the Good Faith Presumption and Evidentiary Standard of Proof*

a. Application of the Good Faith Presumption

Judge Wolski traced the Supreme Court's early concept of the good faith presumption back to the early 1800s.[85] During this period, Judge Wolski noted the use of the presumption was not exclusive to government officials, but extended its application to private citizens and corporations as well.[86] To demonstrate this broad application, Judge Wolski cited to the Supreme Court's 1827 decision in *President, Directors & Co. of Bank v. Dandridge*, in which Justice Story, writing for the majority, stated:

> By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances . . . . The law . . . presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption . . . .[87]

Regarding the presumption of good faith as it applied to government officials, Judge Wolski noted that early Supreme Court cases referred to the presumption "in terms of doing one's 'duty,' or acting 'correctly.'"[88] Judge Wolski reasoned that the Court viewed the presumption more as a gap-filler than a means of determining a government official's intent.[89] The good faith presumption assumed certain missing facts in order to determine whether an official had performed his actions fully and lawfully.[90] In support of his point, Judge Wolski cited to *Rankin v. Hoyt*.[91] *Rankin* involved a customs agent whose task was to determine whether a commercial shipment of wool could be properly imported free from duty taxes.[92] A necessary requirement in making this determination was for the customs agent to

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[85] *Id.* at 758 (citing Ross v. Reed, 14 U.S. 482 (1816), the first known case in which the good faith presumption was discussed).
[86] *Tecom Inc.*, 66 Fed. Cl. at 758.
[87] *Id.* (citing Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 69-70 (1827)).
[88] *Tecom Inc.*, 66 Fed. Cl. at 758.
[89] *See id.*
[90] *Id.*
[91] *Id.* (citing to Rankin v. Hoyt, 45 U.S. 327 (1846)).
[92] *Rankin*, 45 U.S. at 327.

request the merchandise be appraised and that the appraiser then act upon the request.[93] Although witness testimony demonstrated the customs agent relied upon the appraisal in making his determination, nothing was noted in the record to show that a request for appraisal was made or that an appraisal was performed.[94] The Court in this instance ruled "in the absence of testimony to the contrary, the legal presumption is, that the appraisers and collector [or customs agent] both did their duty, he [the customs agent] requesting their action, as by law he might, and they [the appraisers] complying."[95] The presumption was used to assume that the official performed his required duties.[96] The Court did not appear concerned with the motivation behind the custom agent making the request for the appraisal, or the motivation for the appraiser conducting the appraisal. According to Judge Wolski, "[g]ood faith, in the sense of the proper motivation for these acts, was never really at issue; the judges were presuming that something happened, not why."[97]

b. Evidentiary Proof Required by the Supreme Court

According to Judge Wolski's analysis, the Supreme Court rarely required anything more than an "ordinary" showing of proof to overcome the presumption of good faith.[98] The only cases requiring a more substantive standard of proof were those dealing with the most "serious and sensational" of issues.[99] In the private sector this was limited to cases involving bigamy, which required "proof so clear, strong and unequivocal as to produce a moral conviction" to the contrary.[100] In government cases, a more substantive standard of proof was reserved for issues involving the performance of legislative powers presumed to have been performed in the public's interest.[101]

One such example cited by Judge Wolski was *Hadacheck v. Sebastian*.[102] In *Hadacheck*, a petitioner challenged a municipal order preventing him from establishing a brick yard within city limits.[103] The city stated the ordinance was a police measure issued to protect the

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[93] *Rankin*, 45 U.S. at 332.
[94] *Rankin*, 45 U.S. at 335.
[95] *Id.*
[96] *Id.*
[97] *Tecom Inc.*, 66 Fed. Cl. at 758. (inferring how the court in *Rankin* applied the good faith presumption).
[98] *Id.* at 761.
[99] *Id.*
[100] *Id.* at 761; *see* Gaines v. New Orleans, 73 U.S. 642, 707 (1867) ("The fact of marriage being proved, the presumptions of law are all in favor of good faith. To disprove the good faith in this case there should be full proof to the contrary . . . the proof must be irrefragable.").
[101] *Tecom Inc.*, 66 Fed. Cl. at 761.
[102] *Id.* (citing to Hadacheck v. Sebastian, 239 U.S. 394 (1915)).
[103] *Hadacheck,* 239 U.S at 402.

public health and safety of city residents.[104] The petitioner argued the ordinance amounted to an unlawful taking, "depriving him of his property without due process of law."[105] The Court, having already determined that a good faith presumption applied to the city's police power, stated that to overcome the presumption the petitioner would need a "clear showing to the contrary."[106]

Despite the Supreme Court's use of the modifier "clear" in its evidentiary proof requirement, Judge Wolski emphasized that it did not equate to the heightened clear and convincing standard required by a majority of today's COFC cases.[107] In fact, according to Judge Wolski's analysis, the Supreme Court has never required clear and convincing evidence to rebut the presumption of good faith.[108] In addition, he stated that in *Crawford-El v. Britton*, a case he saw as similar to *Tecom*, "the Supreme Court rejected judicial efforts to impose a heightened 'clear and convincing evidence' standard of proof."[109] In *Crawford-El*, an inmate claimed that prison officials deprived him of his personal belongings as punishment for expressing his First Amendment rights.[110] The lower appellate court established a rule that required the inmate to meet a heightened clear and convincing evidentiary threshold to prove improper motive.[111] The Supreme Court rejected the evidentiary threshold, stating there was no statutory precedent to support "chang[ing] the burden of proof for an entire category of claims."[112] Based upon the Supreme Court's opinion in *Crawford-El*, Judge Wolski boldly presumed the Supreme Court would reject any future attempt to require a heightened clear and convincing evidentiary threshold to rebut the presumption that a government official acted in good faith.[113]

2. *The Court of Claims and Federal Circuit's Treatment of the Good Faith Presumption and Corresponding Standard of Proof*

a. Application of the Good Faith Presumption

According to Judge Wolski, during the first one-hundred-years of the Court of Claims' existence, the good faith presumption was

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[104] *Id.*
[105] *Id.*
[106] *Id.* at 414.
[107] Tecom, Inc., 66 Fed. Cl. 762.
[108] *Id.*
[109] Tecom, Inc., v. 66 Fed. Cl. 762 *(citing to* Crawford-El, 523 U.S. 574).
[110] *Crawford-El*, 523 U.S. at 576.
[111] *Id.* at 595.
[112] *Id.* at 594.
[113] Tecom, Inc. v. United States, 66 Fed. Cl. 736, 762 (2005) ("The Supreme Court has not required clear and convincing evidence to rebut the presumption of good faith, and the *Crawford-El* opinion pretty clearly signals that it would reject this notion.")

seldom invoked.[114] In fact, when the good faith presumption was discussed it was usually done in passing.[115] Judge Wolski cited to *Pollen v. United States*, to demonstrate this point. In *Pollen,* two petitioners alleged that the United States, through the Department of the Navy, infringed upon several of their design patents.[116] An issue raised, but deemed by the court to be immaterial and therefore left unanswered, regarded a government official's ability to claim testimonial privilege when testifying.[117] In dictum, the Court of Claims briefly addressed the issue, stating "[t]he presumption obtains that in the exercise of the authority [to claim testimonial privilege] good faith will characterize the conduct of the Government officials in discharging their duties."[118] Judge Wolski believed that cases such as *Pollen* demonstrated what little influence the good faith presumption had on the Court of Claims.[119]

Judge Wolski contends that the good faith presumption as it is currently used by most courts and boards arose from two key statements made in the 1959 Court of Claims ruling in *Knotts v. United States*.[120] In *Knotts*, the court stated without attribution that it "starts out with the presumption that the official acted in good faith," and that "well-nigh irrefragable proof" is needed to prove the absence of good faith.[121] According to Judge Wolski, the line of cases the court relied upon in making these two statements did not support its claims.[122] More precisely, he stated the cases "almost never mentioned any presumption of good faith" and "contained no general requirement of a heightened standard of proof."[123]

Judge Wolski acknowledged the silence in these cases regarding the presumption of good faith may be the result of it being understood by all parties, and therefore, there was no need for it to be stated.[124] However, he thought it odd that the presumption did not figure more prominently in cases that dealt specifically with the issue of whether or not a government official properly exercised his duties in good faith.[125] According to Judge Wolski, the general practice of the cases relied upon by the court in *Knotts* were "either merely to state that bad faith is not

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[114] *Id.* at 764.
[115] *Id.*
[116] *Id.* (citing Pollen v. United States, 85 Ct. Cl. 673, 674 (1937)).
[117] *Pollen*, 85 Ct. Cl. at 682–83.
[118] *Id.* at 683.
[119] *Tecom Inc.*, 66 Fed. Cl. at 762.
[120] *Id.* at 765 (citing Knotts v. United States, 128 Ct. Cl. 489 (1954)).
[121] *Knotts*, 128 Ct. Cl. at 492.
[122] *Tecom Inc.*, 66 Fed. Cl. at 765 (stating the court in *Knotts* relied upon pre-Wunderlich cases).
[123] *Id.* at 767.
[124] *Id*. at 765.
[125] *Id.*

presumed… or, more usually, to make no reference to presumptions at all."[126] The point was demonstrated by the ruling in *Trumbell Steel Co. v. United States*, in which the Court of Claims held that "neither bad faith nor fraud are ever presumed and there is nothing in the record to show . . . bad faith."[127]

b. Evidentiary Proof Required by the Court of Claims and Federal Circuit

What concerned Judge Wolski more than the rare mention of good faith was the fact that no COFC case prior to *Knotts* made mention of an evidentiary standard requiring irrefragable or clear and convincing proof of an absence of good faith.[128] Instead, Judge Wolski determined that in COFC cases prior to *Knotts*, it was "the severity of an error or mistake, not the clear evidence of bad intentions, which was needed to prove implied bad faith."[129] In *Needles v. United States*, the court in its consideration as to whether the actions of the contracting officer constituted bad faith explained:

> When such a contention is made and the issue as to whether the finding or decision involved was or was not consistent with good faith, or that it should be found to have been arbitrary or so grossly erroneous as to imply bad faith, is present, no question of personal animosity or calculated bias, prejudice, or actual dishonesty is necessarily involved in an ultimate finding of bad faith.[130]

Unlike the ruling in *Knotts*, a contractor did not need "additional evidence of animus," nor was "personal bias or prejudice necessary to be proved in addition to proof of error so gross as to warrant the court in inferring the fact of bad faith, or the total absence of good faith."[131]

Having reviewed the line of cases *Knotts* relied upon, Judge Wolski determined that there was no previous requirement of a heightened standard of proof.[132] He pointed out that the Court of Claims knew perfectly well how to state a higher standard requirement when they wanted.[133] This was evidenced by the Court of Claims prior ruling

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[126] *Id.*
[127] *Id.* (citing Trumbull Steel Co. v. United States, 76 Ct. Cl. 391, 402 (1932)).
[128] *Tecom Inc.*, 66 Fed. Cl. 736, 765–66 (2005).
[129] *Id*. at 766.
[130] Needles v. United States, 101 Ct. Cl. 535, 602 (1944).
[131] *Id.* at 604.
[132] *Tecom Inc.*, 66 Fed. Cl. at 767.
[133] *Id.*

in *Dubois Constr. Corp. v. United States*, where the court held that an allegation of fraud must be proven "by clear and convincing proof."[134] Based upon this understanding, Judge Wolski concluded that the court's claim in *Knotts,* that it takes well-nigh irrefragable proof, was without support.[135]

Judge Wolski explained that after *Knotts*, the Court of Claims was elusive as to exactly what type of proof was required in order to rebut the good faith presumption.[136] Some opinions required the heightened well-nigh irrefragable proof introduced by *Knotts*, while other opinions still only required a "preponderance of the evidence."[137] One case cited by Judge Wolski recognized the open question and applied both evidentiary tests to determine whether the evidence produced in the case was sufficient to prove bad faith.[138] According to Judge Wolski, "clarity" as to the good faith presumption and the required standard of proof finally came in 2005 with the COFC's ruling in *Am-Pro Prot. Agency, Inc. v. United States*.[139] In Judge Wolski's opinion, the ruling not only made clear the standard of proof necessary to overcome the good faith presumption, it also limited the circumstances in which the presumption applied to government officials.[140]

D. *Am-Pro Protective Agency, Inc. v. United States* and Its Influence on Judge Wolski's Analysis

Although not introduced until the very end of his analysis, Judge Wolski relied heavily on *Am-Pro* in the formation of his ruling.[141] The Federal Circuit's assertion in *Am-Pro* that "the presumption of good faith . . . applies only in the situation where a government official allegedly engaged in 'fraud or in some other quasi-criminal wrongdoing,'" served as the foundation of Judge Wolski's ruling.[142] In addition to Judge Wolski's reliance on the legal principles set out in *Am-Pro*, both *Am-Pro* and *Tecom* share many similar facts. Yet despite

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[134] DuBois Construction Corp. v. United States, 120 Ct. Cl. 139, 175 (1951).
[135] *Tecom Inc.*, 66 Fed. Cl. at 767 (citing Knotts v. United States, 128 Ct. Cl. 489, 492 (2005)).
[136] *Tecom Inc.*, 66 Fed. Cl. at 768.
[137] *Id.*; *see* Harrington v. United States, 161 Ct. Cl. 432, 441–42 (1963) (requiring that the plaintiff alleging wrongful discharge prove using "preponderance of the evidence" standard that the governments actions in discharging him were arbitrary, capricious, or in bad faith).
[138] *Tecom Inc.*, 66 Fed. Cl. at 768 (citing Brooks v. United States, 213 Ct. Cl. 115, 121 (1977)).
[139] *Tecom Inc.*, 66 Fed. Cl. at 768.
[140] *Id.* at 768–69 (citing Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002)).
[141] *See id.*
[142] *Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1239; *see Tecom Inc.*, 66 Fed. Cl. at 769.

these connections, the final outcomes of each case could not be more different.

In 1989, the Federal Government awarded Am-Pro a services contract to provide guard services.[143] Two years later, a dispute arose over government mandated breaks required for all employees.[144] Am-Pro argued it should be compensated for the increased costs incurred as a result of these breaks.[145] The government contracting officer (CO) advised Am-Pro she would have to factor in their claim for additional compensation when deciding whether to renew future options on the contract.[146] Am-Pro alleged the CO's comments were a veiled threat, and that from this threat it was inferred the CO would turn down a formal claim if Am-Pro chose to file one.[147] Additionally, Am-Pro claimed that the CO threatened to "cancel and re-solicit the existing contract" if they appealed her decision.[148]

In November 1992, after receiving additional threats from the CO, Am-Pro notified the CO in a letter "its willingness to terminate all claims past and present" regarding additional compensation.[149] Am-Pro further conceded it would not appeal the final decision by the CO or make any other future claims for costs incurred due to the mandated employee breaks.[150]

In May 1998, almost six years after the alleged threats of cancellation by the government, Am-Pro presented a request for the additional costs created by the mandatory employee breaks.[151] Am-Pro argued that the letter it provided to the CO in 1992 was prepared under duress and was therefore invalid.[152] The CO denied payment and Am-Pro filed suit in the COFC.[153] In addition to seeking payment, Am-Pro alleged the government CO acted in bad faith.[154] In its claim of bad faith, Am-Pro argued the threats made by the CO regarding Am-Pro's future contracting opportunities caused undue pressure and prevented it from filing an earlier claim for compensation.[155] Despite Am-Pro's claim, the COFC dismissed the complaint on grounds of timeliness, and

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[143] *Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1236.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 1237.
[150] *Id.*
[151] *Id.* at 1238.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

Am-Pro appealed to the Court of Appeals for the Federal Circuit (Federal Circuit).[156]

The Federal Circuit affirmed the COFC's summary judgment and concluded that Am-Pro's allegation of duress was insufficient to overcome the presumption that the CO acted in good faith.[157] In arriving at its decision, the Federal Circuit determined that the presumption of a government official's good faith applied exclusively in situations where the "official allegedly engaged in 'fraud or in some other quasi-criminal wrongdoing.'"[158] To determine the proper standard of proof needed to overcome the presumption, the Federal Circuit cited to the Supreme Court's ruling in *Addington v. Texas*.[159] In *Addington*, the Court described the three commonly recognized standards of proof and when they applied.[160] From these descriptions the Federal Circuit determined the clear and convincing standard "most appropriately describe[d] the burden of proof applicable to the presumption of the government's good faith."[161]

In his attempt to follow the Federal Circuit's opinion in *Am-Pro*, Judge Wolski, in *Tecom*, concluded that the type of deference given to a government official depended upon the gravity of the allegations and the type of action involved.[162] Judge Wolski broke the different types of allegations into three separate categories and matched them with the three evidentiary standards discussed in *Am-Pro* and *Addington*.[163] The first category included government officials accused of "fraud or quasi-criminal wrongdoing in the exercise of official duties."[164] Under these circumstances, Judge Wolski determined the official should be granted a strong presumption of good faith that could only be rebutted by clear and convincing evidence.[165] The second category consisted of government officials who were accused of exhibiting a lack of good faith in the performance of their legally prescribed, discretionary duties.[166] According to Judge Wolski, lack of good faith allegations did not rise to the same serious level as "fraud or quasi-criminal wrongdoing."[167] These officials, Judge Wolski felt, should not be afforded the same burden of clear and convincing

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[156] *Id.*
[157] *Id.* at 1238–39.
[158] *Id.* at 1239.
[159] *Id.* (citing Addington v. Texas, 441 U.S. 418 (1979)).
[160] Addington v. Texas, 441 U.S. 418, 423–24 (1979).
[161] *Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1239.
[162] Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005).
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*

evidence because the allegations were less severe.[168] In such cases, a showing that a government official's actions were based on unsubstantiated evidence or gross error would suffice to infer a lack of good faith.[169] The third and final category involved government activities in which neither official duties nor discretionary policy decisions were involved.[170] These were instead activities that could be performed by any party to a contract.[171] Judge Wolski's ruling in *Tecom* suggests he viewed these activities to include all commercial activities in which the government placed itself into the open market by contracting with private vendors.[172] Whether they were an official acting on behalf of the government or an employee working for a commercial vendor, the means required to perform were the same.[173] Under these circumstances, Judge Wolski saw no need for the government to receive a special evidentiary standard different from that of a commercial vendor.[174] He therefore determined the presumption of good faith would not apply.[175]

E. Flaws in the *Tecom* Analysis

Judge Wolski's overly limiting use of the good faith presumption and its coinciding heightened standard of proof is in complete contrast with nearly fifty years of prior case precedent. This begs the question whether so many courts in the past have gotten it wrong or whether Judge Wolski's analysis is askew. The more plausible explanation is the latter. The problem with Judge Wolski's analysis is not in his detailed research of prior case precedent, but in the way he interprets and adapts the findings of these cases. This is evident in two areas of his analysis. The first and more problematic issue is his incorrect adaptation of *Am-Pro* and its treatment of the good faith presumption. The second issue is his over-analysis of the Supreme Court's ruling in *Crawford-El*, which he uses to incorrectly predict the Court's rejection of any future requirement of a heightened standard of proof to negate the presumption of good faith.[176]

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *See id.* at 762 (predicting the ruling in *Crawford-El* demonstrates the Court's unwillingness to require clear and convincing evidence to rebut the presumption of good faith).

1. *Incorrect Adaptation of the Limits* Am-Pro *Places on the Good Faith Presumption*

Much of Judge Wolski's analysis and resulting conclusions in *Tecom* are heavily based on his adaptation of the limits the Federal Circuit in *Am-Pro* placed on the use of the good faith presumption and corresponding standard of proof.[177] As Judge Wolski correctly stated, the *Am-Pro* decision limited the application of good faith to government officials in situations involving "fraud or some other quasi-criminal wrongdoing."[178] When such conditions were met, the Federal Circuit stated that evidence of a clear and convincing nature, a modernized version of well-nigh irrefragable proof, would be needed to overcome the good faith presumption.[179]

Looking at both the case law it drew upon as well as the factual circumstances involved, it is clear the Federal Circuit in *Am-Pro* considered all allegations of government bad faith to fall within the category of fraud and quasi-criminal wrongdoing.[180] However, when Judge Wolski adapted *Am-Pro's* limiting language of fraud or quasi-criminal wrongdoing, he added the words "in the exercise of his official duties."[181] Hence, he placed a greater limitation on when the good faith presumption could be applied. To Judge Wolski, these added words excluded situations that involved government officials contracting with private contractors.[182] He saw the contracting actions of government officials, not as "formal, discretionary decisions" or official duties, "but instead the actions that might be taken by any party to a contract," and therefore the presumption of good faith did not apply.[183] This meant that government officials alleged to have acted in bad faith during the performance of a contract would not be afforded the good faith presumption or the heightened standard of proof required to disprove it.[184]

Despite Judge Wolski's incorrect interpretation, there are two indicators that clearly demonstrate the Federal Circuit in *Am-Pro* intended allegations of government bad faith in contract disputes to fall within the category of fraud and quasi-criminal wrongdoing. These two indicators are: (1) the court's application of the three evidentiary standards of proof defined in *Addington*;[185] and (2) the court's ruling in *Am-Pro* that, despite limiting the use of the heightened clear and

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[177] *See* Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239–40 (2002).
[178] *Tecom Inc.*, 66 Fed. Cl. at 768; *see Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1239.
[179] *Am-Pro Prot. Agency*, *Inc.*, 281 F.3d at 1239.
[180] *See Am-Pro Prot. Agency*, *Inc.*, 281 F.3d 1234.
[181] *Tecom Inc.*, 66 Fed. Cl. at 769.
[182] *Id.*
[183] *Id.*
[184] *See id.*
[185] Addington v. Texas, 441 U.S. 418, 423–24 (1979).

convincing evidentiary standard, the court applied the standard to the allegation that the government CO acted in bad faith.[186]

a. First Indicator: Am-Pro's Adoption and Use of Evidentiary Standards

The first indication the Federal Circuit in *Am-Pro* intended all allegations of government bad faith to fall within the category of fraud or quasi-criminal wrongdoing is its application of the three common evidentiary standards of proof originally defined in *Addington*.[187] By applying these evidentiary standards and defining their meaning, the court demonstrates the only standard an allegation of government bad faith could fit into is the standard of clear and convincing evidence.

In *Addington*, the Supreme Court listed the three standards of proof as: "guilt beyond a reasonable doubt," "clear and convincing" and a "preponderance of the evidence."[188] The first standard, guilt beyond a reasonable doubt, was to be used in criminal matters to determine the guilt of the accused and was "designed to exclude as nearly as possible the likelihood of an erroneous judgment."[189] Such weighted issues required the highest of evidentiary standards.[190] The second standard, clear and convincing evidence, was considered the intermediate of the three.[191] This standard, reserved for situations not reaching the level of beyond a reasonable doubt but "more substantial than mere loss of money," is often used to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[192] The third and lowest evidentiary standard, preponderance of the evidence, was reserved for monetary disputes between private parties where the outcome has a negligible effect on society.[193]

Of the three standards, an allegation of bad faith best corresponds to the definition of clear and convincing evidence. As the intermediate of the three standards, clear and convincing serves as a broad catchall applying to all allegations of misconduct not serious enough to be considered criminal but significant enough to require more than a preponderance of the evidence.[194] An allegation of bad faith of a government official in a contractual action does not rise to the level of criminal activity and thus, the standard of beyond a reasonable doubt

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[186] *Am-Pro Prot. Agency*, *Inc.*, 281 F.3d at 1238–40.
[187] *Id.* at 1239–40 (referring to the three common standards of proof discussed by the Supreme Court in *Addington*, 441 U.S. at 423–24).
[188] *Addington*, 441 U.S. at 423–25.
[189] *Id.* at 423.
[190] *Id.*
[191] *Id.* at 424.
[192] *Id.*
[193] *Id.* at 423.
[194] *Id.* at 423–24.

does not apply.[195] A bad faith allegation fits within the standard of clear and convincing and not a preponderance of the evidence because the consequence is considered more substantial than a mere loss of money.[196] In these types of allegations, the government and its officials' reputation for honest performance are put into question. Additionally, since the government is not a private party, actions such as these are of great significance to society, both for taxpayers whose money goes to pay for goods and services the government contracts for, as well as any damages resulting from lawsuits and for citizens concerned with the honesty and transparency of its government. For these reasons, the clear and convincing evidentiary threshold best suits an allegation of bad faith on the part of a government official in a contractual action.

b. Second Indicator: Am-Pro's Ruling Required Clear and Convincing Evidence to Demonstrate Bad Faith

The second indication the Federal Circuit in *Am-Pro* intended for allegations of bad faith to fall within the category of fraud or quasi-criminal wrongdoing was the court's ruling.[197] Based on the facts of *Am-Pro,* this is a fairly straightforward argument. Similar to the court in *Tecom,* the Federal Circuit in *Am-Pro* was asked to rule on an allegation of bad faith made by a private contracting company against the government and its officials.[198] The facts suggested the officials overseeing the contract on behalf of the government acted improperly toward the contractor by making inappropriate threats.[199] Upon applying the three evidentiary standards of proof discussed in *Addington*, the court in *Am-Pro* determined that allegations of government bad faith best fit within the category of fraud and quasi-criminal conduct.[200] The court's reasoning was two-fold: First, the court stated the presumption of good faith applied "only in the situation where a government official allegedly engaged in 'fraud or in some other quasi-criminal wrongdoing;'" second, the court suggested the language of the clear and convincing standard was most similar to the language used to describe the well-nigh irrefragable proof standard.[201] In coming to this determination, the court made no differentiation between types or degrees of government bad faith, thus indicating that it viewed all allegations of government bad faith as falling within the category of fraud and quasi-criminal conduct. As such, the court in *Am-Pro*

[195] *See id.* at 423.
[196] *See id.*
[197] Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234 (2002).
[198] *Id.* at 1236.
[199] *Id.*
[200] *Id.* at 1239.
[201] *Id.*

determined that the government was entitled to the good faith presumption, and that evidence of a clear and convincing nature would be required by the contractor to overcome the presumption.[202] The court then stated that based upon previous case precedent, that "showing a government official acted in bad faith is intended to be very difficult."[203]

Without equivocation, the Federal Circuit in Am-Pro required that a clear and convincing evidentiary standard be applied to the allegations of government bad faith.[204] These allegations were virtually identical to those in Tecom. For this reason, it is unclear how Judge Wolski's ruling in Tecom, which relied heavily on Am-Pro, could be at such odds. The ruling made by the Federal Circuit in *Am-Pro* seems to clearly indicate that in order for a private contractor to succeed in any allegation of government bad faith, they must overcome the presumption that the government and its officials acted in good faith.[205] In contrast, Judge Wolski ruled in *Tecom* that the good faith presumption afforded government officials does not apply in ordinary breach cases and therefore only a preponderance of evidence (rather than the higher clear and convincing proof) is necessary to prove that a government official acted in bad faith.[206]

2. *Improper Over-Analysis of the Supreme Court's Ruling in Crawford-El v. Britton*

The second area of Judge Wolski's analysis in which he overreaches in his interpretation of court precedent occurred early on in his review of the Supreme Court's decision in *Crawford-El* and the evidentiary proof it required to counter the presumption of good faith. Judge Wolski correctly stated that, to date, the Supreme Court has yet to apply the clear and convincing proof requirement in a bad faith case.[207] In *Crawford-El*, the Court rejected judicial efforts to impose a heightened clear and convincing standard of proof.[208] Based on this decision, Judge Wolski made the bold presumption that the Supreme Court would reject any future attempt to require a heightened clear and convincing evidentiary threshold to rebut the presumption of good faith.[209]

While it is true the Supreme Court has yet to affix the evidentiary standard with the good faith presumption, Judge Wolski's

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[202] *Id.* at 1239–40.
[203] *Id.* at 1240.
[204] *Id.* at 1240-41.
[205] *Id.* at 1239-40.
[206] Tecom Inc. v. United States, 66 Fed. Cl. 736, 775 (2005).
[207] *Id.*
[208] Crawford-El v. Britton, 523 U.S. 574, 594–601 (1998).
[209] *Tecom Inc.*, 66 Fed. Cl. at 762.

prediction regarding the unlikely application in future Court decisions appears to be based on an overly generalized reading of the *Crawford-El* decision. In *Crawford-El*, an inmate claimed prison officials deprived him of his personal belongings as punishment for expressing his First Amendment rights.[210] The lower appellate court established a rule requiring the inmate to meet a heightened clear and convincing evidentiary threshold to prove improper motive.[211] The Court rejected the evidentiary threshold, holding there was no statutory precedent to support "changing the burden of proof for an entire category of claims."[212]

Two fundamental factors prevent the decision in *Crawford-El* from serving as a predictor for any future stance the Court may take on applying a heightened clear and convincing proof requirement to a government official's good faith presumption. First and foremost, unlike *Tecom*, the *Crawford-El* case involved an alleged deprivation of a complainant's First Amendment rights.[213] The Court has always given greater deference to constitutional issues. For this reason, it makes sense that the Court would be opposed to any evidentiary standard that would make it more difficult for an individual to present his or her constitutional claim. Using the clear and convincing standard in bad faith cases involving a termination or breach of contract would not likely draw the same concern from the Court. Second, in addressing the lack of statutory authority to oppose the clear and convincing standard, the Court noted that in previous cases they had considered consistent, repeated and historical usage.[214] Although the Supreme Court has yet to use the clear and convincing proof threshold when determining the existence of bad faith, the COFC has done so for more than fifty years, thus creating a consistent and repeated usage the Court could use in any future analysis.[215]

Judge Wolski's ruling in *Tecom* not only limits the use of the good faith presumption, it practically calls an all-out end to its use in contractual dealings between the government and private contractors.[216] This decision goes against fifty years of case precedent.[217] Ironically, the *Tecom* ruling is in complete contrast to the *Am-Pro* ruling, which appears to consider all allegations of bad faith against government

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[210] *Crawford-El*, 523 U.S. at 578–79.
[211] *Id.* at 595.
[212] *Id.* at 594.
[213] *Id.*
[214] *Id.*; s*ee* Imbler v. Pachtman, 424 U.S. 409, 421 (1976).
[215] Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002) ("In fact, for almost 50 years this court and its predecessor have repeated that we are 'loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.'").
[216] Tecom Inc. v. United States, 66 Fed. Cl. 736, 769 (2005).
[217] *Am-Pro Prot. Agency, Inc.*, 281 F.3d at 1239.

officials sufficient grounds to necessitate a heightened standard of clear and convincing proof.[218] This disparity of opinion has created a slight split of authority within the COFC, and threatens to spill over to other federal tribunals.

IV. IMPACT OF THE *TECOM* DECISION ON ALL CONTRACT TRIBUNALS

The *Tecom* decision has created strong debate among those in the legal community as to whether a good faith presumption should exist when the government is involved in a contractual agreement with a private contractor.[219] Although subtle, this debate has made its way from the legal community to the court system.[220] While the majority of contract tribunals still subscribe to the good faith presumption and heightened standard of proof, there have been a small handful of cases that have shown interest or outright support for the *Tecom* ruling.[221] To date, such cases have come solely from the COFC.[222]

The COFC case *H & S Manufacturing, Inc. v. United States*, decided in July 2005, was the first case to adopt the *Tecom* decision.[223] In *H & S*, the government terminated for default, a contract for specially manufactured survival vests.[224] The plaintiff contractor claimed the government acted in bad faith by breaching its duty to cooperate during the contractor's performance of the agreement.[225] Specifically, the contractor complained that the survival vest specifications they received from the government were incomplete regarding the detailed stitching requirements.[226] The contractor also argued that the government inspectors were inconsistent as to these requirements, accepting some vests while not accepting others of the same condition.[227] The COFC, noting the ruling in *Tecom*, stated that "a showing of bad faith or bad intent is not required to demonstrate a breach" of good faith.[228] This

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[218] *See id.* at 1239–40.
[219] Dorn C. McGrath, III, *What's Good for the Goose and the Gander*, NAT'L DEF. MAG., July 2006, at 6.
[220] *See* L-3 Commc'ns Integrated Sys., L.P. v. United States, 79 Fed. Cl. 453 (2007); *see* Moreland Corp. v. United States, 76 Fed. Cl. 268 (2007); *see also* N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158, 188 (2007) ("It is unclear whether *Tecom* may be squared either with Federal Circuit precedent or the jurisprudential underpinnings of the doctrine . . . ."); *see* Helix Elec., Inc. v. United States, 68 Fed. Cl. 571 (2005).
[221] S*ee L-3 Commc'ns Integrated Sys., L.P.*, 79 Fed. Cl. 453; *see Helix Elec., Inc.*, 68 Fed. Cl. 571; *see* H & S Mfg, Inc., v. United States, 66 Fed. Cl. 301 (2005).
[222] S*ee L-3 Commc'ns Integrated Sys., L.P.*, 79 Fed. Cl. 453; *see Helix Elec., Inc.*, 68 Fed. Cl. 571; *see H & S Mfg, Inc.*, 66 Fed. Cl. 301.
[223] H & S Mfg., Inc., v. United States, 66 Fed. Cl. 301 (2005).
[224] *Id.* at 301–02.
[225] *Id.* at 310.
[226] *Id.*
[227] *Id.* at 308.
[228] *Id.* at 311 (citing Abcon Assocs. V. United States, 49 Fed. Cl. 678, 688 (2001).

rule eliminated the contractor's obligation to provide clear and convincing evidence that the government intended to injure the plaintiff, and replaced it with a lower preponderance requirement.[229] Despite the lower evidentiary threshold, the court determined the government did not prevent the contractor from completing the contract and thus did not breach the standard of good faith.[230]

Four months after the *H & S* decision, the COFC again adopted *Tecom's* view regarding the limited use of the good faith presumption in *Helix Electric, Inc. v. United States*.[231] In *Helix*, the contractor alleged they had entered into a contract with the government to provide cable television service to a military installation.[232] The Plaintiff claimed the government breached its implied duty to cooperate and not to obstruct its effectiveness in completion of its contract obligations.[233] The court, quoting *Tecom*, stated:

> 'When the government actions that are alleged are not formal, discretionary decisions, but instead the actions that might be taken by any party to a contract, the presumption of good faith has no application.' The *Tecom* court further noted that 'the presumption of good faith conduct of government officials has no relevance' in a court's consideration of claims that the duties to cooperate and not hinder performance have been breached.[234]

Following *Tecom's* lead, the court refused to apply the presumption of good faith, and instead evaluated the government's actions using the less stringent breach of contract principles used when dealing with non-government actors.[235] However, once again despite the lower evidentiary threshold, the court determined there was insufficient evidence to show the government violated its duty of good faith.[236] The court ruled the contractor had misinterpreted the contract; therefore, there was no implied duty on the part of the government to cooperate with the plaintiff in performing tasks not stated or reasonably implied in the contract.[237]

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[229] *Id.* at 310 n.19.
[230] *Id.* at 314.
[231] Helix Elec., Inc., v. United States, 68 Fed. Cl. 571, 587 n.30 (2005) (citing Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005)).
[232] *Id.* at 572.
[233] *Id.*
[234] *Id.* at 587 (quoting *Tecom, Inc.*, 66 Fed. Cl. at 769).
[235] *Id.* at 587.
[236] *Id.* at 588.
[237] *Id. at* 587.

In both *H & S* and *Helix*, the COFC avoided assuming the good faith presumption and instead applied the lower evidentiary standard as prescribed by *Tecom*.[238] Despite lowering the evidentiary standard, neither plaintiff was able to provide sufficient evidence to meet their burden of proof. Thus, lowering the evidentiary standard had no impact on the outcome of either case.

Recently, the small number of COFC cases recognizing *Tecom,* have been reluctant to officially accept Judge Wolski's limited use of the good faith presumption as a binding principle of law. In *North Star Alaska Housing Corp. v. United States*, a COFC case decided in March 2007, the contractor was awarded a twenty-year contract to develop privatized housing for soldiers and their families at Fort Wainwright, Alaska.[239] Halfway through the contract, tension developed between the Army representatives and North Star.[240] North Star alleged the Army took conscious steps to hinder its performance and thus breached the terms of the contract and the Army's duty of good faith.[241] In its discussion, the court noted Judge Wolski's view that the presumption of good faith conduct of government officials did not apply in situations in which "the duties to cooperate and not hinder performance of a contract have been breached."[242] Further the court recognized Judge Wolski's finding that in such circumstances, evidentiary proof of a clear and convincing nature was not required.[243] Rather than applying Judge Wolski's analysis, the court determined the facts of the case warranted a finding of bad faith even under the heightened clear and convincing standard.[244] The court stated:

> "It is unclear whether *Tecom* may be squared either with Federal Circuit precedent or the jurisprudential underpinnings of the doctrine, in which performing in good faith and bad faith are often viewed as mutually exclusive . . . . Whatever may be the larger fate of the *Tecom* approach, this court finds it unnecessary to explore its application here for, as will be seen, plaintiff prevails under even the more rigorous standard, which requires a clear showing of animus."[245]

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[238] *See* Helix Elec., Inc., v. United States, 68 Fed. Cl. 571, 587 (2005); H & S Mfg., Inc., v. United States, 66 Fed. Cl. 301, 311 (2005).
[239] N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158, 160 (2007).
[240] *Id.* at 161.
[241] *Id.*
[242] *Id.* at 188.
[243] *Id.* (citing Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005)).
[244] *Id.*
[245] *Id.* at 188 n.34.

A few weeks after *N. Star* was decided, the COFC made a similar ruling in *Moreland Corp. v. United States*.[246] In *Moreland*, the Department of Veteran Affairs (VA) awarded a building contract to the plaintiff contractor to construct a medical clinic.[247] After construction was completed the VA moved into the clinic and began making monthly rental payments to the contractor.[248] Four years later the VA terminated the lease, alleging the contractor had failed to make repairs of the building in a timely manner.[249] The contractor filed an appeal with the COFC asserting wrongful termination and a breach of good faith.[250] Evidence provided in the appeal revealed the contractor attempted on several occasions to make the structural repairs to the clinic, but was prevented by VA staff from entering the building.[251] Additionally, the VA refused to pay the contractor $300,000 worth of construction related claims that the VA's contracting officer admitted were justified, but denied in order to "gain leverage" over the contractor.[252]

In its analysis, the COFC cited to both *Am-Pro* and *Tecom* and discussed the cases' opposing views regarding the good faith presumption, when and if it applied, and the relevant evidentiary standard of proof needed to overcome it.[253] However, rather than answer which standard was the correct one to apply, the court remained silent, arguing that the action on the part of the VA officials was "deplorable under any measure," and therefore a breach of the VA's duty of good faith could be proven using either the clear and convincing or preponderance of the evidence standard.[254]

The findings of both *N. Star* and *Moreland* demonstrate the COFC's reluctance to accept *Tecom's* ruling as binding law. Although the COFC refers to Judge Wolski's ruling that the good faith presumption does not apply to government officials in ordinary breach cases, it is quick to point out that evidence presented in each of the cases is sufficient to establish a good faith violation even when using a heightened clear and convincing standard. This assurance that the ruling would be the same under either evidentiary threshold demonstrates the courts' doubts as to the validity of *Tecom's* conclusions.

Of the few more recent COFC cases to discuss Tecom, L-*3 Communications Integrated Sys., L.P. v. United States*, is the only one to fully adopt Judge Wolski's limited use of the good faith

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[246] Moreland Corp. v. United States, 76 Fed. Cl. 268 (2007).
[247] *Id.* at 269.
[248] *Id.*
[249] *Id.* at 270.
[250] *Id.*
[251] *Id.* at 271.
[252] *Id.* at 270.
[253] *Id.*
[254] *Id.* at 291.

presumption.[255] In *Integrated*, the contractor filed a post-award bid protest against the government challenging two awards the government made to the opposing bidder, Lockeed Martin Aeronautics Company (Lockeed).[256] The protest was filed shortly after the arrest and conviction of Ms. Darleen Druyun, former Principal Deputy Secretary of the Air Force.[257] Ms. Druyun was convicted of conspiracy to commit an act affecting a personal financial interest while acting as a government official in violation of 18 U.S.C. § 371 and 18 U.S .C. § 208(a).[258] According to reports, Ms. Druyun used her official position to manipulate the Air Force's procurement system in order to assist Lockheed in winning the two contracts referenced in the protest.[259]

Among the issues raised by the contractor was Ms. Druyun's breach of good faith.[260] To determine whether the good faith presumption applied to Ms. Druyun's actions, the COFC adopted *Am-Pro's* requirement that the activity engaged in be characterized as either "fraud or some other quasi-criminal wrongdoing."[261] In addition, the COFC, following the ruling in *Tecom*, insisted that the actions of Ms. Druyun must be performed "in the exercise of [her] official duties."[262] Upon applying these two rules, the COFC determined that Ms. Druyun's actions rose to the level of quasi-criminal conduct and thus required that a clear and convincing evidentiary standard apply.[263]

Despite its clear adoption of the *Tecom* analysis, the COFC's ruling in *Integrated*, like that of *H&S* and *Helix*, did not change the outcome of the case. The COFC in *Integrated*, determined the good faith presumption applied to Ms. Druyun's conduct.[264] For this reason the contractor would need to establish an elevated showing of clear and convincing evidence to show the contrary.[265] This same result would have occurred had the court followed the majority of COFC courts in applying the good faith standard to all alleged government bad faith cases. Having no impact on the final outcome of the COFC's rulings, it is unlikely that *H&S*, *Helix*, or *Integrated* will have any true impact on whether future courts apply the same limited application of good faith. However, these cases, especially *Integrated*, as it is the most recent,

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[255] L-3 Commc'ns Integrated Sys., L.P. v. United States, 79 Fed. Cl. 453 (2007).
[256] *Id.* at 454.
[257] *Id.*
[258] *Id.* at 457.
[259] *Id.* at 457-58.
[260] *Id.* at 455.
[261] *Id.* at 464 (quoting Am-Pro Prot. Agency, Inc. v. United States, 281 F.3d 1234, 1239 (2002)).
[262] *Id.* at 464 (quoting Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005)).
[263] *Id.*
[264] *Id.*
[265] *Id.*

demonstrate that the debate as to the application of the good faith presumption and evidentiary standard continues.

V. CONCLUSION

The long-standing good faith presumption and corresponding well-nigh irrefragable proof standard is alive and well. Despite recent calls from private legal practitioners for the courts to adopt *Tecom* and create a more level playing field between the government and contractors, the majority of courts have stood their ground. To date, the COFC is the only court that has shown any type of support for *Tecom*. The few COFC cases that have followed *Tecom,* have done so cautiously. Each court applying Judge Wolski's analysis has made it clear that the outcome of their cases would be the same whether or not a good faith presumption and heightened standard of proof was applied.

Judge Wolski's ruling in *Tecom* is flawed and should not be followed by other courts. By adding the language "in the exercise of his additional duties," Judge Wolski incorrectly placed a greater limitation on when a good faith presumption could be applied to government officials in alleged bad faith cases. The court in *Am-Pro*, which Judge Wolski relied heavily on when preparing his ruling, never intended this additional limitation.

If the courts were to adopt a more limited good faith presumption as a legal principle, the government would be vulnerable to larger court costs and increased legal action. In addition to ordinary damages associated with charges of bad faith, the government can also be held liable for the contractor's attorney fees.[266] Further, with the potential for larger payouts and a lower evidentiary standard to meet, private contractors will be more inclined to file suit against the government alleging bad faith. Such increases in cost and effort will be an overwhelming burden on an already stressed organization.

What is most perplexing about *Tecom*, and those who argue for a more limited good faith presumption, is the fact that there is nothing wrong with the way the presumption is currently interpreted. As mentioned in the introduction of this paper, the well-nigh irrefragable proof standard is not intended to be impossible to overcome. In recent years, private contractors have successfully met this evidentiary standard and proven governmental bad faith. This fact is supported by recent COFC rulings in both *North Star* and *Moreland*.[267]

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[266] *See* In re Inslaw, 83 B.R. 89 and 88 B.R. 484 (Bkrptcy Ct. D.C. 1988)(Finding that the contractor was entitled to attorneys fees as a result of the government's bad faith in pressuring the trustee to repossess the contractor's property in violation of a court order).

[267] *See* N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158 (2007), Moreland Corp. v. United States, 76 Fed. Cl. 268 (2007).

In addition to the possibility of overcoming the well-nigh irrefragable proof or clear and convincing standard, there are other, easier ways for a contractor to dispute the performance of a government official. These include alleging ordinary theories of breach, abuse of discretion or arbitrary and capricious rationales.

The COFC in *Darwin Construction Co. v. United States* makes clear that bad faith is not needed to overturn a default termination.[268] In *Darwin*, the court held that a termination for default could be overturned if the contracting officer had failed to exercise discretion in making the decision to terminate, stating:

> [T]hese decisions of the Court of Claims and the Claims Court make it abundantly clear that when a contractor persuades a court to find that the contracting officer's default decision was arbitrary or capricious, or that it represents an abuse of his discretion, the decision will be set aside. There is nothing in these decisions to support the Government's contention that the aggrieved contractor must add another layer of proof by demonstrating that the decision was also made in bad faith.[269]

The concept of abuse of discretion was also addressed by the Comptroller General (CG) in *Safemasters Co., Inc.*[270] In *Safemasters*, after award had been made, an unsuccessful bidder challenged the bid process and asked that the solicitation be cancelled.[271] Acting on this protest, the procuring agency terminated the contract for "the convenience of the Government."[272] The CG concluded bad faith was not the only basis for challenging the termination for convenience, but that such a termination could also be attacked on the ground that it was an abuse of discretion.[273] In this case, the Government Accountability Office (GAO) determined that the termination was in fact an abuse of discretion, and recommended that the procuring agency reinstate the contract.[274] With all of the options available to a contractor, it seems misguided to challenge the current application of the good faith presumption that has stood for over fifty years.

What is surprising about the current state of the law as it relates to the application of the good faith presumption to government officials

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[268] *See* Darwin Constr. Co. v. United States 811 F.2d 593 (Fed. Cir. 1987).
[269] *Id.*
[270] *See* Safemasters Co., Inc., 58 Comp. Gen. 225 (1979).
[271] *Id.* at 228.
[272] *Id.*
[273] *Id.* at 229.
[274] *Id.*

is that although the majority of courts do not follow *Tecom*, no court has forcefully challenged Judge Wolski's ruling. Until the COFC decides to verbally challenge *Tecom* in one of its opinions, the division among them as to how to apply the good faith presumption to government officials accused of bad faith, although small, will not be resolved.

FEDERAL ASSET FORFEITURE AND THE MILITARY

STAFF SERGEANT STEVEN A. MORLEY

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I. INTRODUCTION

Prior to May 25, 2007,[1] the Department of Defense (DOD) and it subordinate branches could only seek forfeiture of pay and allowances from military members and select civilians subject to the Uniform Code of Military Justice who either received nonjudicial punishment under Article 15[2] or were convicted by a court-martial.[3] Military forfeiture of assets that were used to facilitate or were proceeds of certain federal crimes committed by military members or others was previously non-existent. Such seized assets would have to be returned to the service member or abandoned.

While it is still not possible for an Air Force commander, for example, to seek criminal forfeiture of seized property in a standard court-martial proceeding,[4] the ability to forfeit beyond pay and allowances in military and other DOD settings became a reality when the DOD announced that it had joined the ranks of the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF), and others to become a participating member of the Department of Justice's (DOJ) Asset Forfeiture Program.[5] This article discusses DOD's participation in DOJ's Asset Forfeiture Program. Section II gives a brief overview of federal asset forfeiture law and describes the several methods of accomplishing a successful federal forfeiture. Section III outlines DOD's designation of the Defense Criminal Investigation Service (DCIS) as the investigative agency used by DOD. A look at the DOD/DOJ forfeiture partnership will be discussed in Section IV. Section V will address the functionality and scope of the partnership paying particular attention to the unique aspects of forfeiture now available to DCIS and DOJ. And finally, Section VI will review the effectiveness of the partnership thus far.

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[1] Memorandum of Understanding (MOU) between the Department of Justice, Department of the Treasury, United States Postal Inspection Service, and the Department of Defense Criminal Investigation Service that was finalized on May 25, 2007. [hereinafter DCIS MOU] (on file with the author

[2] 10 U.S.C. § 815 (2008).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 1003(b)(2) [hereinafter MCM].

[4] *See* MCM, supra note 3, R.C.M. 201(a)(1) discussion ("a court-martial may not . . . order a criminal forfeiture of seized property")

[5] *See DCIS Joins the Department of Justice Asset Forfeiture Program*, Aug. 8, 2007, U.S. Department of Defense Office of Inspector General website, http://www.dodig.osd.mil/IGInformation/archives/2007/Aug07.htm (last visited Apr. 3, 2009).

II. FEDERAL ASSET FORFEITURE LAW

A. Overview

Federal asset forfeiture divests one who owns criminally obtained or facilitating property of all his or her right, title, and interest therein and vests such right, title, and interest in the government. In other words, because of the property's or its owner's involvement in criminal activity, forfeiture extinguishes all of the former owner's interests in that criminally derived or criminally involved asset, and vests title in the United States.[6] The United States, by way of the many law enforcement investigative agencies, forfeited more than $1 billion dollars each year for the past three years[7] from criminal assets that were proceeds of, facilitated, or used in connection with certain federal crimes. Not all federal crimes allow for forfeiture of assets, however. Understanding why some federal crimes allow for forfeiture and others do not can be a painstaking task.[8] Because forfeiture law is piecemeal and not all centrally located in one statute, it can be difficult to know what crimes allow for forfeiture of assets connected to those crimes. The most powerful forfeiture statute enacted by Congress is 18 U.S.C. § 981(a)(1)(G), which authorizes the forfeiture of all of a terrorists assets, foreign or domestic, whether the property was involved in the terrorism activity or not.[9] This statute attempts to incapacitate the terrorist completely by leaving him with no assets whatsoever to perpetrate further acts of violence against governments, their citizens, or their property.[10] Currently, forfeiture laws and statutes are such that the DOJ

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[6] DOJ ASSET FORFEITURE POLICY MANUAL (2008), Chapter 5, Section III.B; *See Also* United States v. A Parcel of Land, et al., 507 U.S. 111, 128-30 (1993); United States v. Grundy, 7 U.S. (3 Cranch) 337, 350-51 (1806); cf. Republic National Bank of Miami v. United States, 506 U.S. 80, 89-92 (1992); United States v. Real Property Located at 185 Hargraves Drive (In Re Newport Saving and Loan Association), 928 F.2d 472, 478 (1st Cir. 1991); 21 U.S.C. § 881(h) (2008); 21 U.S.C.§ 853(c) (2008); 18 U.S.C. § 1963(c) (2008).

[7] THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001-2009 33, *available at* http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf (last visited Apr. 3, 2009).

[8] *See, e.g.,* 31 U.S.C. § 5332 (2008) (forfeiture of bulk cash smuggling offenses). *But see* 18 U.S.C. § 1073 (2008) (flight to avoid prosecution, typically used to charge people on FBI's Most Wanted List, does not authorize forfeiture of anything from a fugitive from justice). *See also Fugitive Polygamist Sect Leader Arrested in Las Vegas*, Fox News Online http://www.foxnews.com/story/0,2933,210959,00.html (last visited Apr. 3, 2009.

[9] Stefan D. Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES 9 (2007).

[10] *Id*. *See also* Stephan D. Cassella, *Forfeiture of Terrorist Assets Under the USA Patriot Act of 2001*, 34 LAW & POL'Y INT'L BUS. 7 (2002).

allocates an entire section of its Criminal Division to asset forfeiture and money laundering.[11]

Among the many purposes for asset forfeiture, some more prominent reasons are: (1) to punish the criminal; (2) to help restore the victim,[12] if any; and (3) to send a message to society that crime really does not pay. If a crime is one for which forfeiture is authorized, then the criminals will feel the impact where it hurts the most: the pocketbook. Those engaged in criminal enterprises who have their assets forfeited will not be financially well off once they are released from prison. Once assets have been forfeited, be they cash proceeds, bank accounts, vehicles, real property, or anything else seized in connection with certain federal crimes, the Attorney General has the authority to transfer forfeited property to any federal agency, or to any state or local law enforcement agency that participated in the seizure or forfeiture of the property.[13] More commonly known as "equitable sharing," state, local, and even federal law enforcement agencies that substantially assisted in the investigation or seizure may receive a portion of the sale proceeds of those forfeited assets. While some have argued that equitable sharing is the motivating factor behind investigating and prosecuting certain crimes,[14] the reality is that many ill-equipped state and local law enforcement agencies receive badly needed funding that would not come to them otherwise. These agencies are then able to purchase needed equipment and supplies that allow for continued successful investigations and prosecutions.

There are essentially three methods available to the federal government to forfeit a criminal's assets, including: (1) administrative; (2) criminal judicial; and (3) civil judicial.

B. Administrative Forfeiture

Through means provided by statute and federal regulation, most federal forfeiture is administrative in nature. The term administrative forfeiture means the process by which property may be forfeited by an

[11] The DOJ division is called the Asset Forfeiture and Money Laundering Section (AFMLS).

[12] *See* 18 U.S.C. § 981(e)(6) (2008) and 21 U.S.C. § 853(i) (2008) (allowing the government to apply forfeited property toward restitution to victims of the crime in civil and criminal cases, respectively).

[13] DOJ ASSET FORFEITURE POLICY MANUAL (2008), Chapter 5, Section III.B. *See also* 18 U.S.C. § 981(e)(1) and (2) (2008) and 21 U.S.C. § 881(e)(1)(A) (2008).

[14] National Public Radio produced a four-part series on asset seizures and forfeitures from June 16, 2008 to June 18, 2008 that asserted that initial seizure and ultimate federal prosecution of drug cases by local law enforcement is for equitable sharing purposes only. John Burnett, *Seized Drug Assets Pad Police Budgets*, http://www.npr.org/templates/story/story.php?storyId=91490480 (last visited Apr 3, 2009).

investigative agency rather than through judicial proceedings.[15] What this means is if a federal investigative agency authorized by statute seizes assets that was used in connection with or that were proceeds of certain federal crimes, the agency may process those assets for forfeiture on their own without court involvement.

If a forfeiture case begins administratively, notice of the administrative forfeiture must be sent to all known potential claimants to the property and notice to the world must appear by way of newspaper publication.[16] A claimant then has the opportunity to file either a claim contesting the forfeiture or a petition for remission, which is essentially a request for leniency without making a challenge to the right of the agency to forfeit the property. Investigative agencies have discretion to grant a remission petition or mitigate the forfeiture, but there is no right to judicial review of the agency's decision. On the other hand, if a claim is filed, the agency must refer the entire forfeiture case to the United States Attorney's Office (USAO) for judicial processing in the district where the asset was seized. This judicial referral process affords the claimant his or her day in court to litigate the merits of the case.

If the investigative agency does not receive a timely claim or petition, then the assets are declared administratively forfeited. The assets are then liquidated via auction and the net proceeds from the sale are deposited into the appropriate fund designated for that agency.

C. Criminal and Civil Judicial Forfeiture

Once a judicial referral package arrives at the USAO, the USAO has several options: (1) The USAO may include a notice of intent to seek criminal judicial forfeiture of the assets in the indictment or information; [17] (2) The USAO may file a civil judicial forfeiture complaint against the property *in rem*, independent of any related pending criminal action; (3) The USAO may pursue parallel criminal and civil judicial forfeiture of the assets at the same time; or (4) The USAO may decline seeking forfeiture of the assets, at which time the assets will either be returned or abandoned. The USAO must pursue one of these options within 90 days of the receipt of the claim by the investigative agency.[18]

These options apply to cases that start out as administrative forfeiture proceedings. Not all asset forfeiture cases start out that way,

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[15] 28 C.F.R § 9.2(a) (2005).
[16] These due process requirements were strengthened with the passage of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. 106-185, 114 Stat. 202 (codified as amended at 18 U.S.C. § 983 (2000)).
[17] FED. R. CRIM. P. 32.2(a).
[18] *See* 18 U.S.C. § 983(a)(3) (2000).

however; if the property is not currency and is worth more than $500,000, or if the seizing agency lacks statutory authority to forfeit property administratively, then the case must start out as a civil or criminal forfeiture in the district court in the first instance. There is no statutory deadline for commencing a case in this situation, but as a matter of policy, the Department of Justice will seek to commence a forfeiture action in the district court within 90 days of receiving a written demand for the return or release of the property. [19] These deadlines are internal policy only, and they are not binding upon the government. Following them closely, however, should help avoid adverse findings by the courts.

There is a statute of limitations for commencing civil forfeiture actions. Under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA),[20] the government has five years to commence a forfeiture action from the time when the alleged offense was discovered, or within two years after the time when the involvement of the property in the alleged offense was discovered, whichever was later. [21]

III. DEPARTMENT OF DEFENSE – DEFENSE CRIMINAL INVESTIGATION SERVICE (DCIS)

The Defense Criminal Investigation Service (DCIS) was established by a 1982 amendment to the Inspector General Act of 1978.[22] DCIS has investigative agents with statutory federal law enforcement authority to prosecute federal crimes.[23] When DCIS was created, the DOD's Office of Inspector General's main purpose was to combat fraud, waste, and abuse in DOD programs and operations.[24] Since its inception, the mission of DCIS has essentially remained the same while adding a focus on combating terrorism.[25] Abuse of government contracts and procurements, inter alia, are investigated and prosecuted. DCIS has the main responsibility for criminal investigations within the DOD.[26] Throughout the course of an investigation, DCIS regularly furnishes the information it obtains in investigative interviews to other subdivisions within the DOD, such as Air Force Office of Special Investigations (AFOSI) and Security Forces, which might be affected by such information, though it is not required

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[19] DOJ ASSET FORFEITURE POLICY MANUAL (2008), Chapter 2, Section I.G.
[20] *See* CAFRA, *supra* note 16.
[21] *See* 19 U.S.C. § 1621 (2009).
[22] *See* 5 U.S.C. app. § 3 (2008).
[23] *See* 10 U.S.C. § 1585(a) (2008).
[24] DCIS v. NLRA, 855 F.2d 93, 95 (3d Cir., Aug. 8, 1988).
[25] *See DCIS Mission Video Trancript*, DCIS website, http://www.dodig.mil/INV/DCIS/dcis_video_transcript.htm (last visited Apr. 3, 2009).
[26] *DCIS*, 855 F.2d at 95.

to do so and does not make any recommendations as to appropriate use of the information.[27]

IV. DOD/DOJ ASSET FORFEITURE PARTNERSHIP

In order to gain sharper teeth in its investigations and prosecutions, DCIS added something more to its arsenal in 2007. A Memorandum of Understanding outlining basic functions and guidelines of DCIS's participation in the DOJ's Asset Forfeiture Program was formalized on May 25, 2007.[28] Before this MOU became official, DCIS could only seek civil judgments and settlements for large sums of money as some form of financial punishment.

Assets being sought for forfeiture by DCIS are entered into DOJ's Consolidated Asset Tracking System (CATS).[29] DOJ's CATS system, a controlled DOJ database, tracks assets through the forfeiture process and gives the Attorney General a good picture of what assets are being forfeited, in what amounts, from whom, and by what investigative agency. CATS, however, is only as accurate as the end user or data entry specialist who inputs the information at the local level. If assets are being forfeited but are not entered into CATS, DOJ has no other way to know what assets are being forfeited by each investigative agency.[30] As the forfeiture partnership progresses, CATS should provide an accurate reflection of the assets being forfeited by DCIS.

Another aspect of the DOD/DOJ MOU is that the United States Marshal's Service (USMS) will be the custodian of all assets seized when DCIS is the lead investigative agency.[31] This is common practice for other DOJ criminal investigative agencies such as the DEA, FBI, and some non-DOJ participating investigating agencies such as the United States Postal Inspection Service (USPIS).

Part of the rationale for establishing DCIS as a participating agency in the DOJ Asset Forfeiture Program, specifically the Assets Forfeiture Fund,[32] are the two DCIS capabilities that were not available before 2007. As previously described, DCIS now has the ability to take

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[27] *Id*.
[28] *See* DCIS MOU, *supra* note 1.
[29] *Id.* at paragraph II.
[30] *See* Press Release, U.S. Attorney's Office, Western District of Wisconsin Press Release (Apr. 24, 2008) *available at* http://www.usdoj.gov/usao/wiw/Press/April%2024,%202008%20-%20Health%20Visions%20Corporation%20Sentenced.pdf. (last visited Apr. 5, 2009)(announcing the sentencing of Health Visions Corporation, a Philippine Corporation, which was found guilty of mail fraud as part of its scheme and artifice to defraud TRICARE. DCIS was the lead investigative agency in this case. The court ordered the corporation to liquidate all of its assets, pay $99,915,131 in restitution, a $500,000 fine, and forfeit $910,910.60. However, the forfeiture is not presently listed in CATS and is not accounted for.)
[31] *See* DCIS MOU, *supra* note 1, at paragraph II.
[32] *See* 31 U.S.C. § 9703(n)(1) (2007).

the profit out of crime[33] affecting DOD and its sub-agencies. Additionally, the MOU gives DCIS the ability to receive equitable sharing funds directly from the DOJ Assets Forfeiture Fund. Equitable sharing is available to DCIS if it was not the lead investigative agency seeking forfeiture on a case but contributed to the investigation. The MOU establishes that DCIS can not only seek equitable sharing from DOJ criminal investigative agencies, but also investigative agencies that participate in the Treasury Fund and Postal Fund. An example of this would be when IRS Criminal Investigations is the lead agency on a forfeiture case that DCIS substantially assisted. Funds shared and received must be used in accordance with 28 U.S.C. § 524(c), the Attorney General's Guidelines on Seized and Forfeited Property (July 1990), and DOJ's policies.

V. HOW WILL THE PARTNERSHIP WORK?

A. From Whom Can DCIS Forfeit Assets?

Consider four scenarios that might result potential asset forfeiture opportunities for DCIS:

Scenario 1: Company X, which is currently contracted by the Air Force to supply aircraft parts, is bribing certain bidding officials.[34] Can DCIS seek forfeiture of the bribery monies received by the Air Force officials awarding these contracts to Company X?[35]

Scenario 2: Airman Money, who is very computer savvy, operates an automated online gambling company from his dorm room.[36] Airman Money is making a large profit from his online gambling activities. Can DCIS seek the forfeiture of the proceeds from Airman Money's online casino operation?[37]

Scenario 3: Airman Dirt is deployed to Southwest Asia, and he becomes good friends with a local Afghani man who secretly sells opium derivatives for a living. Airman Dirt buys bulk quantities of heroine from his Afghani friend and secretly sells heroine to other Airman and defense contractors in theater.[38] Airman Dirt forms a secret business with his friend Contractor Joe, also in theater, and they decide to open a joint bank account in Dubai for money from their illegal drug

[33] *See* DCIS MOU, *supra* note 1, at paragraph I.
[34] *See* 18 U.S.C. § 201 (2006).
[35] *See* 18 U.S.C. § 981(a)(1)(C) (2009).
[36] *See* 18 U.S.C. § 1084 (2008) and 18 U.S.C. § 1955 (2008).
[37] *See* 18 U.S.C. § 981(a)(1)(C) and 18 U.S.C. § 1955(d) (2008).
[38] *See* 21 U.S.C. § 841(a)(1) (2009).

operation. They intend to filter these monies through several bank accounts before the money is deposited in their bank accounts in the United States.[39] Airman Dirt returns home from his deployment and completes his enlistment, while Contractor Joe continues on with the drug operations in theater. Airman Dirt buys an expensive house, luxury vehicles, and a yacht with money obtained from the drug business. Can DCIS seek forfeiture of Airman Dirt's house, vehicles, and yacht? Can DCIS seek forfeiture of Airman Dirt's bank accounts? Can DCIS seek forfeiture of Contractor Joe's bank accounts?[40]

Scenario 4: Commander Filth just purchased the most expensive laptop computer on the market for his personal use. While off duty and at home, Commander Filth downloads thousands of pictures and videos of child pornography onto his laptop computer.[41] Can DCIS forfeit Commander Filth's personal laptop computer?[42]

The answer to whether forfeiture is available in these hypothetical scenarios is a resounding yes. DCIS can seek forfeiture, be it criminal, civil, or both, in all of the above scenarios. While a majority of forfeiture cases brought by DCIS will come from crimes like terrorism, procurement fraud, computer crimes, illegal technology transfers, and public corruption,[43] DCIS is not prohibited from seizing and forfeiting assets that are used in connection with or are proceeds of "non-DCIS-traditional" crimes, such as those mentioned in these hypothetical scenarios.

B. Can DOD Bring UCMJ Charges While DOJ Brings an Independent Civil Forfeiture Case?

By joining DOJ's Asset Forfeiture Program, DCIS has many more prosecutorial options at its disposal. DCIS can recommend military prosecution of UCMJ offenses of uniformed personnel and civilian personnel overseas.[44] DCIS can also recommend deferral of UCMJ prosecution and seek federal criminal prosecution of all

[39] *See* 18 U.S.C. §§ 1956 and 1957 (2009).
[40] *See* 18 U.S.C. § 981(a)(1)(C) (2009) and 21 U.S.C. §§ 853 and 881 (2008).
[41] *See* 18 U.S.C. § 2252 (2009).
[42] *See* 18 U.S.C. §§ 2253(a)(3) and 2254 (2009).
[43] *See* http://www.dodig.mil/INV/DCIS/programs.htm (last visited Apr. 5, 2009).
[44] *See* Memorandum from Secretary of Defense, March 10, 2008, *available at* http://www.dtic.mil/whs/directives/corres/pdf/sec080310ucmj.pdf. (last visited Apr. 5, 2009); *See Also* 10 U.S.C. § 802(a)(10); *See Also* 18 U.S.C. § 3261; *See Also* Brigadier General David G. Ehrhart, *Closing the Gap: The Continuing Search for Accountability of Civilians Accompanying the Force*, THE REPORTER, Winter 2007-2008, at 10 (referencing implementation of the Military Extraterritorial Jurisdiction Act (MEJA) of 2007).

individuals irrespective of UCMJ status[45] and attach forfeiture allegations to a criminal indictment or information.[46] Or, DCIS can seek forfeiture of assets related to certain crimes in a federal civil forfeiture case, whether UCMJ charges are pending or not. In addition to the hypothetical scenarios presented above, there are many crimes that are violations of the UCMJ that also have independent federal forfeiture provisions attached to them under the United States Code.[47] Now, DCIS can utilize these federal forfeiture statutes to their full capacity. There is no double jeopardy attached to DCIS's authority to bring federal asset forfeiture cases in conjunction with UCMJ prosecutions, nor has the legality of something of this kind been tested before now. One question does stand out, however: Will this new forfeiture authority over military and civilian personnel who are subject to the UCMJ undermine or have undue pressure or influence on a commander's decision to exercise authority to maintain good order and discipline of his or her troops?

C. Can DCIS Seek Administrative Forfeiture?

Unlike most other federal investigative agencies, DCIS does not possess administrative forfeiture authority of assets it seizes. Therefore, all assets seized by DCIS must either proceed through the criminal or civil channels in a federal district court. If DCIS had administrative forfeiture authority similar to most other federal criminal investigative agencies, it would be bound by the notification time limits as proscribed by CAFRA.[48] Furthermore, DCIS would have to appear and report periodically before members of Congress to explain any requests for

[45] However, DOJ must consult with DoD before criminal action is to be taken by DOJ. *See* U.S. DEP'T OF DEFENSE, INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES encl. 2, para. E(3) (June 18, 2007) ("The Department of Justice Prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice."). *See also* Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 127 (2007) (citing the same Department of Justice and Department of Defense Memorandum of Understanding from 1984 that "specifically gave the Department of Defense primary jurisdiction over offenses committed by offenders subject to the Uniform Code of Military Justice.").

[46] *See supra* note 17.

[47] For example, espionage is a crime under the UCMJ at 10 U.S.C. § 906(a) (2008) and a federal crime under 18 U.S.C. §§ 793, 794, 798 (2008), with corresponding forfeiture statutes at 18 U.S.C. §§ 793(h), 794(d)(1)(A), 798(d)(1)(A), and 981(a)(1)(C)) (2008). Destruction of government property is a UCMJ violation under 10 U.S.C. § 908 (2008) and a federal; crime under 18 U.S.C. § 1361 (2008) with corresponding forfeiture statutes at 18 U.S.C. § 981(a)(1)(C) and (G) (2008) and 28 U.S.C. § 2461 (2008).

[48] *See* 18 U.S.C. § 983(a)(1)(A) (2000).

extensions of time to send out administrative forfeiture notices.[49] By not having administrative forfeiture authority, DCIS is exempt from these time restrictions and reporting requirements. This leaves every DCIS seizure of assets on the shoulders of the USAO. DCIS will be required to act quickly in commencing a forfeiture action[50] and so will the U.S. Attorney's Office.[51]

D. Civil Forfeitures and the Servicemembers Civil Relief Act

Unique problems may exist when the federal government seeks to civilly forfeit assets from active duty personnel and national guardsman or reservists called to active duty under Title 10 of the United States Code. Under the Servicemembers' Civil Relief Act of 2003 (SCRA),[52] service members have certain protections against default judgments being entered against them. While the language of the statute states that the act "applies to any civil action or proceeding in which the defendant does not make an appearance,"[53] it is unclear if this protection applies specifically to civil forfeiture actions. In order to comply with the statute, a plaintiff must provide an affidavit to the court stating whether or not the defendant is in military service or showing that the plaintiff is unable to determine whether or not the defendant is in military service.[54] Due to the *in rem* nature of civil forfeiture actions, the defendant is the asset itself, and thus will never be in military service within the meaning of the SCRA. Any property subject to a civil forfeiture action cannot defend itself against a default judgment unless a third party intervenes and files a claim to the property. Therefore, in the case that a service member is the owner of assets being sought in civil forfeiture, the service member is not the defendant in the action, but rather the claimant if he or she files a timely claim to the subject property. No precedent exists on the SCRA's prevention of default judgment in federal civil judicial forfeiture actions.[55] Historically, the SCRA's language was intended to prevent the entry of default judgments against service members who were named parties to common place civil actions such as tort actions, small claims lawsuits, copyright

[49] *See* 18 U.S.C. § 983(a)(1)(E) (2000).
[50] For example, there is a 120-day window to commence any kind of forfeiture action from the date of seizure of firearms. *See* 18 U.S.C. § 924(d) (2009).
[51] *See supra* note 19.
[52] *See* Servicemembers' Civil Relief Act of 2003 (SCRA), Pub. L. No. 108-189, 117 Stat. 2835 (codified as amended at 50 U.S.C. app. §§ 501-596 (2008).
[53] 50 U.S.C. app. § 521(a) (2008).
[54] 50 U.S.C. app. § 521(b) (2008).
[55] As of Jan. 28, 2009.

infringement, civil rights lawsuits,[56] bankruptcies,[57] debt and foreclosure actions,[58] divorces,[59] or any child custody proceeding.[60]

Cases that have considered whether the SCRA's predecessor, the Soldiers' and Sailors' Civil Relief Act of 1940, should apply to *in rem* proceedings have held that they should not. In the case of *In re Baltimore & O.R. Co.*,[61] the court, in a railroad adjustment proceeding, stated:

> It was also suggested by counsel for two small bondholders that this court should under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix 520, appoint counsel to represent holders of securities affected by the plan who may be at present in the Armed Services of the country, the fee to be paid by the petitioner. It is possible, of course, that there may be such security holders but there is no definite evidence in the record with regard thereto. However that may be, we do not think the Act referred to applies to a case of this nature. *The wording of the Act comprehends cases where soldiers and sailors are sued as defendants; while this proceeding is in the nature of an 'in rem' and not against named defendants.*[62]

Similarly, in the case of *Borough of East Rutherford v. Sisselman*,[63] the court, in a foreclosure proceeding under a tax act, stated:

> Section 520 [of the Soldiers' and Sailors' Civil Relief Act] provides that if there has been a default of any appearance by the defendant, the plaintiff before entering judgment shall file in the court an affidavit as

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[56] *See* Kee v. Hasty, Civ No. 01-2423, 2004 U.S. Dist. LEXIS 6385, at *21 (S.D.N.Y. Apr. 14, 2004).
[57] *See* In re Templehoff, 339 B.R. 49, 2005 Bankr. LEXIS 2808 (Bankr. S.D.N.Y. 2005); *See also* In re Berke, 2004 Bankr. LEXIS 605, at *5-6 (Bankr. N.D. Ga. Apr. 27, 2004).
[58] *See* Bank of N.S. v. George, Civ No. 2004-105, 2008 U.S. Dist. LEXIS 11786 (D.V.I. Feb. 15, 2008).
[59] *See* Swartz v. Swartz, 412 So. 2d 461, 1982 Fla. App. LEXIS 19790 (Fla. Dist. Ct. 2d Dist. 1982).
[60] Sections 201(a) and 202(a) of the SCRA were amended on Jan. 28, 2008, as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (2008), to include protections to service members against default judgment and allow for a stay in "any child custody proceeding."
[61] In re Baltimore & O.R. Co., 63 F.Supp. 542 (D.C. Md. 1945).
[62] *Id*. at 569 (emphasis added).
[63] Borough of East Rutherford v. Sisselman, 97 A.2d 431 (N.J. Super. Ct. 1953).

> to the military service of the defendant. *From the very words of this section it is clear that it relates only to actions inter parties. It speaks of the military status of the defendant. As stated above, the foreclosure proceeding in question was one strictly in rem. While persons having an interest in the lands were named in the complaint, they were not parties defendant.* The action was one by the municipality against the lands in question. Therefore the filing of an affidavit as to military service was not required.[64]

The prevention of default judgment and the affidavit requirement originating from the Soldiers' and Sailors' Civil Relief Act of 1940 was not changed when the act was amended to become the Servicemembers' Civil Relief Act of 2003. While these cases were not civil forfeiture actions, they share a commonality with civil forfeiture cases in that they are all *in rem* proceedings and were all found to be excluded from the SCRA's protections and provisions.

If a default judgment is entered in a civil forfeiture case against property owned by a service member, the likelihood the service member will not be able to defend his property rights is increased if that member is deployed. If the scope of the SCRA is interpreted broadly enough to include civil forfeiture actions, future court decisions could adversely impact DCIS's ability to forfeit criminally obtained or ill-gotten property from military members.

Additionally, bringing civil forfeiture actions under the umbrella of the SCRA will severely encumber and burden the federal government if the government is required to file an affidavit with the court regarding the military status of the defendant. Again, the defendant in all civil forfeiture cases is the property itself and such property will never be in military service. The affidavit requirements of Section 521(b) would be superfluous if applied this way. To remedy this, an amendment would need to be made to Section 521(a) clarifying that the act applies to any civil action or proceeding in which the defendant [*and claimant in a federal forfeiture action*] does not make an appearance. Furthermore, if the statute is not changed to unequivocally include claimants in civil forfeiture actions, judges who are personally opposed to asset forfeiture may still require that the United States post bonds in forfeiture cases to satisfy the SCRA affidavit requirement. The posting of bonds by the United States is completely unorthodox and not otherwise found in federal forfeiture law.

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[64] *Id.* at 451 (emphasis added).

VI. EFFECTIVENESS OF THE PARTNERSHIP THUS FAR

As previously discussed, assets are entered into the DOJ CATS system for tracking purposes by the lead investigative agency in a forfeiture case. In 2008, DCIS judicially forfeited over $238,000 in assets coming from Virginia, Texas, and Pennsylvania. Currently in CATS,[65] DCIS is seeking forfeiture of over $10.5 million in assets ranging from televisions, jewelry, gold coins, computer equipment, cash, bank accounts, vehicles, watercraft, real property, stock shares, and other items. Because federal asset forfeiture is still new for DCIS, not all states have active DCIS judicial forfeiture cases pending. But many states and districts are quickly joining with DCIS as a viable and strategic partner in combating crime and punishing criminal activities within the DOD.

VII. CONCLUSION

While DCIS is still the newest member of DOJ's Asset Forfeiture Program, its participation is already proving beneficial. Coordinating support from U.S. Attorney's Offices to have them take DCIS criminal and forfeiture cases may take time, but the success of DCIS's participation thus far in the program has proven effective. DCIS can become a leader in seizing and forfeiting assets from those who steal from or defraud the military side of the government, who bribe contract-awarding officials, or who commit federal crimes for which forfeiture is available from uniformed personnel. DCIS's participation in DOJ's Asset Forfeiture Program will take the profit out of crimes against the DOD and will help preserve the integrity of the world's greatest military power. Additionally, the program can help to strengthen faith in the DOD and its programs among the American people.

[65] As of Jan. 28, 2009.

CIVILIAN SOLDIERS: EXPANDING THE GOVERNMENT CONTRACTOR DEFENSE TO REFLECT THE NEW CORPORATE ROLE IN WARFARE

CAPTAIN AARON L. JACKSON

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I. INTRODUCTION

Wars are no longer fought on the battlefield but in the shadows. The guerrilla-style tactics currently utilized by terrorist organizations forced the United States Armed Forces to re-think its approach to warfare in the 21st Century. Change was not limited to the military. With the War on Terror emerged a new industry that re-defined the corporate role in war. Businesses no longer simply manufacture the products of war; they also provide the warriors, representing a large shift from products-based to services-based government contracts. Corporations engaging in products-based government contracts flock to the government contractor defense (GCD) for protection. Arising from the doctrine of sovereign immunity, the GCD provides absolute immunity to contractors facing negligence, warranty, or strict liability claims due to incidents caused by defective designs. But what protection is currently provided to contractors employed by the government to perform service-based contracts? Simply put, nothing. This evolution in modern-day warfare sparks a wave of fresh legal issues requiring a re-examination of the past, present, and possible future expansion of the government contractor defense.

II. THE PAST: SOVEREIGN IMMUNITY, THE F.T.C.A., AND THE *FERES-STENCEL* DOCTRINE

A. Sovereign Immunity

Sovereign immunity is a legal concept arising from Old-English law that precludes an individual from filing suit against the government without its consent.[1] The Supreme Court of the United States confirmed the doctrine's transatlantic migration in 1821 through its ruling in *Cohens v. Virginia*.[2] As the federal government expanded in size, so did the number of incidents resulting in death or injury to civilians based on the negligent acts of federal agents.[3] However, due to the Court's adoption of the sovereign immunity doctrine, victims of such incidents were left without remedy.

Suggestion of a possible GCD first emerged in 1940 through the Supreme Court's expansion of sovereign immunity to a government contractor in *Yearsley v. W.A. Ross Construction Co.*[4] In *Yearsley*, Ross Construction received a government contract to build several dikes on

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[1] George E. Hurley, Jr., *Government Contractor Liability in Military Design Defect Cases: The Need For Judicial Intervention*, 117 MIL. L. REV. 219, 220 (1987).
[2] 19 U.S. 264 (1821). *See also* Hurley, *supra* note 1, at 221.
[3] Hurley, *supra* note 1, at 220.
[4] *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18 (1940).

the Missouri River.[5] In the process of performing this contract, a portion of Petitioner's land was allegedly washed away at the hands of Ross, prompting swift legal action for damages.[6] The Court denied Petitioner's claim, reasoning that "the action of the agent is 'the act of the government.'"[7] The Court elaborated by stating, "if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[8] As if to foreshadow the eventual GCD, *Yearsley* provided sovereign immunity to public-works contractors while properly performing government contracts, basing its decision on a government agency defense.[9] In doing so, however, the Court failed to delineate the extent to which such a defense could be applied.[10]

B. The Federal Tort Claims Act of 1946

In 1946, Congress finally responded to the growing number of incidents arising out of acts of the government by enacting the Federal Tort Claims Act (FTCA). Under the FTCA, the government waived a small portion of its vast sovereign immunity power for incidents arising from:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[11]

The FTCA provided once powerless victims of government negligence an avenue for redress. Unfortunately, the road to litigation was small, allowing the government to retain its immunity in all cases not specifically falling under these particular conditions. In doing so, Congress failed to extend immunity to contractors acting within the proper scope of government contracts, leaving honest government contractors susceptible to litigation.

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[5] *Id.* at 19.
[6] *Id.*
[7] *Id.* at 22 (internal citation omitted).
[8] *Id.* at 20-21.
[9] Hurley, *supra* note 1, at 244.
[10] Brian Shipp, *Torts: Boyle v. United Technologies Corp.: The United States Supreme Court Accepts the Government Contractor Defense*, 42 OKLA. L. REV. 359, 362 (1989).
[11] 28 U.S.C. § 1346(b)(1) (1997).

C. The *Feres-Stencel* Doctrine

One issue left open was whether military personnel injured in the line of duty could file suit against the government through the FTCA. The Supreme Court addressed this problem several years later in *Feres v. U.S.*[12] In *Feres*, the Court considered three separate actions, each involving either death or injury to military personnel caused by the negligence of other military members.[13] The Court ultimately rejected each petitioner's claim, ruling that the government's sovereign immunity was not waived by the FTCA for "injuries to servicemen where the injuries arise out of activity incident to military service."[14] Therefore, *Feres* precluded military members from filing suit against the government for service-related injuries.[15]

The Court ruled differently the following year when approached with the same issue in reference to injuries sustained by private parties. In *U.S. v. Yellow Cab Co.*, the Court found that the FTCA does not preclude the government from litigation as a third-party defendant for injuries sustained by a private citizen as a result of, at least, partial negligence by the government.[16] The difference between *Feres* and *Yellow Cab* hinges on the status of the injured party and their ability to recover for damages against the government. Since servicepersons have additional means of recovery, the Court concluded that the FTCA should not pertain to them. On the contrary, the FTCA provides the sole avenue of recovery for civilian citizens.

Nearly two decades later, the Court broadened the scope of *Feres* in its decision in *Stencel Aero Engineering Corp. v. U.S.*[17] In *Stencel*, a National Guard pilot was permanently injured when the ejection system of his F-100 fighter aircraft malfunctioned during an in-flight emergency.[18] The pilot brought suit against the defendant manufacturer of the ejection system.[19] In response, Plaintiff filed a cross-claim against the United States for indemnity, asserting that the system's failure was a result of inaccurate design specifications provided by the government.[20] Similar to *Feres*, the Court concluded that the FTCA prevented government contractors from filing indemnity actions against the government for damages paid for injuries sustained by servicemen in the course of military service.[21] The Court made three

[12] *Feres v. U.S.*, 340 U.S. 135 (1950).
[13] *Id.* at 136-137.
[14] *Id.* at 146.
[15] Hurley, *supra* note 1, at 222.
[16] 340 U.S. 543, 556-57 (1951).
[17] *Stencel Aero Engineering Corp. v. U.S.*, 431 U.S. 666 (1977).
[18] *Id.* at 667.
[19] *Id.*
[20] *Id.* at 668.
[21] *Id.* at 673-674.

points in supporting its conclusion, the first two points being factors first raised in *Feres*. First, the relationship between the government and members of the Armed Forces is "distinctively federal in character" to warrant a federal claim.[22] Second, the Veteran's Benefit Act established the proper mode of redress for servicemen and servicewomen, mitigating the need for the FTCA.[23] Third, allowing redress for incidents arising out of service would hamper the "peculiar and special relationship" between service-members and their superiors.[24] As *Feres* precluded servicemen from filing suit against the government, *Stencel* extended the government's sovereign immunity to third party indemnity claims.[25] This principle decision, along with its rationale, completes what is now commonly referred to as the *Feres*-*Stencel* Doctrine, which essentially immunizes the government from products liability cases arising out of government contracts. Unfortunately, while providing greater protection to the government, the Court's decision left manufacturers of military products entirely vulnerable to attack.

III. THE PRESENT: THE GOVERNMENT CONTRACTOR DEFENSE

Products-based litigation against government contractors exploded in the wake of the Vietnam War. Several high-profile cases stirred the pot that ultimately led to the Supreme Court's creation of the government contractor defense. The first major case to gain public attention was *In re "Agent Orange" Product Liability Litigation*.[26] In *Agent Orange*, multiple Vietnam veterans filed suit in the United States District Court for the Eastern District of New York against the chemical companies that manufactured the chemical compound known as Agent Orange.[27] "Approximately 20 million gallons of [Agent Orange and other] herbicides were used in Vietnam between 1962 and 1971 to remove unwanted plant life and leaves which otherwise provided cover for enemy forces during the Vietnam Conflict."[28] Many veterans have reported medical concerns allegedly caused by exposure to Agent

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[22] *Id.* at 671 (quoting *Feres*, 340 U.S. at 143).
[23] *Id*. at 673 ("To permit (petitioner) to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the (Federal Tort Claims) Act permits such a result." (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972))).
[24] *Id.* (*quoting U.S. v. Brown*, 348 U.S. 110, 112 (1954)).
[25] Hurley, *supra* note 1, at 222.
[26] *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046 (E.D.N.Y. 1982).
[27] *Id*.
[28] United States Department of Veterans Affairs, Information for Veterans, Their Families and Others About VA Health Care Programs Related to Agent Orange, http://www1.va.gov/Agentorange/ (last visited Jan. 7, 2009).

Orange.[29] As in *Stencel*, the chemical companies responded by filing third-party indemnity suits against the government for their dominant role in compelling such contracts.[30]

The court immediately dismissed the third-party claims against the government based on the doctrine of sovereign immunity as ruled in *Stencel*.[31] In looking to the manufacturers of Agent Orange, however, the court provided the first large step toward the creation of the GCD. The court in *Agent Orange* concluded that the manufacturer of products supplied through a government contract would be immune to lawsuit for damages arising thereof provided that the defendant prove three essential elements: (1) the government created the specifications for the Agent Orange chemical compound; (2) the Agent Orange manufactured by the chemical companies met the government's specifications in all respects; and (3) the government knew as much as or more than the defendant about the hazards to people that accompanied use of Agent Orange.[32] In other words, manufacturers of products gained through government contracts could receive sovereign immunity if they proved adherence to the specific design standards mandated by the government. Although only an Eastern District of New York decision, this court's ruling became extremely influential in looking to future disputes.

One year later, in *McKay v. Rockwell International Corp.*, the U.S. Court of Appeals for the Ninth Circuit provided the next critical step to this budding legal doctrine by further expanding contractor immunity in products liability cases.[33] In *Rockwell*, the widows of two Navy pilots brought suit against an aircraft manufacturer for installing the faulty ejection systems that caused their husbands' untimely deaths.[34] The Ninth Circuit adopted the analysis earlier provided in *Agent Orange*, concluding that under the *Feres-Stencel* Doctrine, the government was immune from legal action filed by a military service-member.[35] Additionally, the aircraft manufacturer would be provided immunity if they proved the three-prong test originally created by the court in *Agent Orange*.[36]

In looking specifically to the *Agent Orange* test, the court in *Rockwell* went one step further by expanding the first prong of the test. The court determined that the government need not actually create the product specifications in order to satisfy this portion of the test. Rather,

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[29] *Id.*
[30] *Agent Orange*, 534 F.Supp. at 1046.
[31] *Id.* at 1050.
[32] *Id.* at 1055.
[33] 704 F.2d 444 (9th Cir. 1983).
[34] *Id.* at 446.
[35] *Id.* at 451.
[36] *Id.*

the defendant need only show that the government *approved* the particular product specifications utilized by the manufacturer in order to pass this requirement.[37] Expansion of the first prong provided government contractors with an enormous amount of discretion in developing products for the government. No longer must the government approach its corporate counterpart with a list of required specifications. Corporations were now free to develop and execute their own specifications within the design process. The first prong in *Rockwell* only required the government to provide its stamp of approval prior to production.

The *Rockwell* decision highlights the benefits that come with corporate design and development. Military programs often do not match the advances in science and technology found in the outside world. In order to ensure state-of-the-art products and designs, military contracts must rely on the increased knowledge of external parties. This essential characteristic is currently reflected in the military procurement process. Officials often only provide competing businesses with the government's desired end goal or need, allowing corporations to approach creatively the government's needs and provide within their overall bid the corporation's best design solution for meeting those objectives. A large portion of the selection process involves weighing the costs and benefits of differing designs. Under a *Rockwell* analysis, mere government ratification of performance specifications for a product provides the requisite approval and satisfies the first prong of the test.[38]

Although *Rockwell* essentially makes it easier for government contractors to gain immunity, it does so with a heavy hand concerning the product's specifications. The court warned contractors that the GCD will not apply in cases "[w]hen only minimal or very general requirements are set for the contractor by the United States."[39] This protects the GCD from abuse by contractors who would seek to circumvent the formality of the doctrine by merely providing vague specifications within the contract. Requiring comprehensive details provides additional incentives for contractors to approach meticulously government design. Doing so not only protects the contractor but the population as a whole, as increased attention to design likely decreases the risk of future incidents.

The Ninth Circuit justified its decision by providing several reasons why strict liability does not apply to government contractors. First, the court addressed the "enterprise liability rationale" of strict liability, which provides that the price of a product reflects its inherent

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[37] *Id.*
[38] *Id.* at 448-449.
[39] *Id.* at 450.

risk by distributing the cost of accidents throughout its consumer base.[40] The court ultimately rejected this general principle as applied to government contracts because the principle underlying the rationale does not apply when one entity acts as the entire consumer base. In regards to government contracts, the government is already aware of most, if not all, risks associated with military products.[41] In addition, as the sole consumer base for the product, a decrease in the number of products purchased will not affect the overall purchase price.[42] Therefore, the enterprise liability rationale does not apply to such situations. Second, the court concluded that strict liability does not deter manufacturers from marketing unsafe products in a government setting because the demand for such equipment is highly inelastic.[43] Third, as discussed in the *Feres-Stencel* doctrine, the Veteran's Benefit Act provides victims of military-related incidents an appropriate avenue for compensation normally provided by strict liability.[44] Finally, members of the armed forces have much lower "reasonable expectations of safety" than ordinary consumers based on the inherent danger of their occupation.[45] For these reasons, the court rejected strict liability in cases arising out of government military contracts.

Despite the vast amount of media and legal attention surrounding the government contractor defense, the Supreme Court of the United States remained silent for five more years following the *Rockwell* decision. However, the 1988 case of *Boyle v. United Technologies Corp*. demanded the Court finally open its doors to the issue. [46] *Boyle* involved the wrongful death of a Marine helicopter pilot who, due to an outward-moving emergency hatch, was unable to escape from his aircraft after going down in the Atlantic Ocean.[47] The family of the deceased pilot sued the manufacturer of the hatch in federal district court, claiming a defective design of the helicopter's safety device.[48] At trial, the jury returned a verdict for the plaintiff.[49] However, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case with directions to enter a judgment for the defendant manufacturer on appeal.[50] The Supreme

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[40] *Id.* at 451-452.
[41] *Id.* at 452.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 453.
[46] *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).
[47] *Id.* at 502.
[48] *Id.* at 503.
[49] *Id.*
[50] *Id*

Court granted certiorari in 1987 and Justice Scalia delivered the opinion the following year.

The Court's opinion in *Boyle* was multi-faceted. First, the Court identified two "uniquely federal interests" found in the case that justified pre-emption of state law: (1) the "obligations to and rights of the United States under its contracts;" and, (2) "the civil liability of federal officials for actions taken in the course of their duty."[51] In reference to the second point, the Court addressed the *Feres-Stencil* doctrine, eventually rejecting it as both too broad and too narrow.[52] The doctrine was found too broad because it protects contractors from liability for products offered in the regular marketplace as well as those that are specifically related to government interests.[53] The doctrine was held too narrow because it only covered service-related injuries and not those "injuries caused by the military to civilians."[54]

After establishing the federal nature of the suit, the Court moved to the issue of immunity, officially adopting the government contractor defense established in *Rockwell*. As stated by the Court:

> Liability for design defects in military equipment cannot be imposed . . . when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[55]

The Court's decision in *Boyle* provides an enormous amount of protection to manufacturers of military products. Both civilians and military members are barred from filing suit based on defective products,[56] thus illustrating an integration of the Court's previously distinguished decisions of *Feres* and *Yellow Cab*. Despite the opinion's clarity, the Court left several questions unanswered. Namely, the Court failed to address whether the GCD applies to services-based government contracts as well as its products-based counterpart. Perhaps the Court simply could not foresee the role that corporations would play in war in the 21st Century.

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[51] *Id.* at 504-505.
[52] *Id.* at 510.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 512.
[56] Shipp, *supra* note 10, at 379.

IV. THE FUTURE: CORPORATE WARFIGHTERS AND EXPANDING THE GOVERNMENT CONTRACTOR DEFENSE

In a fall 2007 hearing with the Senate Appropriations Committee, Secretary of Defense Robert Gates confirmed there were approximately 137,000 civilians employed by the United States military and currently working in Iraq.[57] Subcontractors employed and also operating in the country were not included in this figure. By early 2008, the number increased to 190,000, representing a 1 to 1 ratio of military and civilian personnel working in Iraq,[58] not to mention those working in other countries such as Afghanistan and Kuwait. These numbers represent nearly a ten-fold increase in outsourced contractors since the 1991 Gulf War. Contracted positions run the gamut in the War on Terror, providing services ranging from simple contracts such as food services, linguistics, and construction to complex, "tip-of-the-spear" actions like private security services, logistics support, combat/strategic planning, and training the Iraqi police. The Congressional Budget Office "estimates the total cost of these military contractor operations from 2003 through 2008 to be $100 billion."[59] Suffice it to say, government services contracts are a major market in the War on Terror, and business is booming.

Incidents are bound to arise with such a major presence in this highly volatile area. On September 16, 2007, headlines across the globe highlighted the dangers of such contracts when civilians representing Blackwater USA, a private security firm operating under a number of government contracts in Iraq, engaged a crowd of Iraqi civilians, killing 17 and wounding 24.[60] Blackwater officials claim the engagement was necessary, as the hostile crowd initiated the attack.[61] Nonetheless, an Iraqi panel sought $8 million in compensatory damages.[62]

To date, corporate warfighters have avoided such suits in the Iraqi court system by operating under the protection of United Nations Security Council Resolution 1790.[63] This resolution, which reaffirmed Security Council Resolution 1546, allowed the United States to retain

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[57] Jamie McIntyre, *Defense Secretary Sends Team to Review Iraq Contractors*, CNN, Sept. 26, 2007, http://www.cnn.com/2007/POLITICS/09/26/contractor.review.
[58] Peter Grier, *Record Number of US Contractors in Iraq*, Christian Science Monitor, Aug. 18, 2008, http://www.csmonitor.com/2008/0818/p02s01-usmi.html.
[59] *Id.*
[60] James Glanz & Alissa Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3 2007, *available at* http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html.
[61] *Id.*
[62] Steven R. Hurst, *Iraqi Government Seeks Ways to Overturn U.S. Decree Exempting Security Firms from Prosecution*, Associated Press, Oct. 24, 2007, http://www.nctimes.com/articles/2007/10/25/news/nation/13_37_0510_24_07.txt.
[63] S.C. Res. 1790, ¶ 17, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

sole "responsibility for exercising jurisdiction over their personnel,"[64] to include its corporate agents. As a result, legal action against such corporations has been barred by those acting outside the United States. Throughout this time, however, corporations have remained vulnerable to attack within American borders. In addition, the United Nations' corporate security blanket was recently pulled off the bed when the controversial resolution expired on December 31, 2008 without any diplomatic extension. As a result, the last thread of legal protection provided to corporate warfighters has now been officially severed.

Incidents such as what occurred in September of 2007 are not new to war or the law. However, the sensitive nature of the current mission, the loss of corporate legal protection, and the sustained number of private contractors operating in Iraq create the "perfect storm" for a massive increase in litigation in the near future. The significant potential for legal conflict begs the question: should the GCD be expanded to provide corporate warfighters immunity for services-based government contracts? The answer: absolutely yes.

At first glance, this response might generate a heated reaction. Undoubtedly, encouraging an expansion of absolute protection in times of war is one viewpoint especially prone to criticism. However, one should not be quick to judge. Providing immunity to corporations engaged in sensitive government service contracts actually results in a greater level of protection for all individuals. A systematic approach to this issue is extremely important, first requiring a look to the policy considerations embedded within the current GCD. Next, analyzing whether the GCD should take command of services-based contracts is best approached by discussing the same two questions that any new officer asks before taking command: (1) under what *authority* do I command and (2) to what *extent* do I command? Such analysis yields the conclusion that a limited expansion of the GCD should be afforded to sensitive services-based government contractors engaged in the War on Terror.

A. The Policy behind Expansion

The original policy concerns giving rise to the GCD mirror those inherent in this new realm of services-based contracts. The GCD was originally created to resolve several fundamental interests within the products-based arena. First, providing the GCD encourages product-based corporations to work with the government in developing and producing state-of-the-art equipment.[65] Without this affirmative defense, there would likely be a decrease in contractor participation with

[64] S.C. Res. 1546, ¶ 14, U.N. Doc. S/RES/1546 (Jun. 8, 2004).
[65] 63A AM. JUR. 2d *Products Liability* § 1478 (2007).

the government as well as diminished efforts toward new and innovative research and development.[66] Second, failing to provide legal protection when incidents arise requires that corporations provide additional liability insurance to protect themselves, causing a large increase in overall cost to the government.[67] Third, the GCD illustrates the overall need for military leadership to provide the appropriate risk versus utility analysis in military-specific scenarios without any fear of judicial interference.[68]

Applying these policy considerations to services-based government contracts produces an identical result. First, by failing to provide immunity to government contractors fulfilling services-based military needs, contractors are not encouraged to work with the government to their fullest capacity in performing specific missions. By leaving corporations open to litigation for incidents arising out of the performance of government contracts, individual contracted actors might fail to commit fully to particular military engagements. This danger increases when considering the threat posed to military members facing hostile fire alongside civilian counterparts—a common event in the War on Terror. During combat, all parties must operate as a single unit. Contractors, fearing potential liability for actions taken during the fog of war, might fail to engage fully in enemy combat. Doing so presents life-threatening dangers to the military components relying on them for support.

Second, as the inherent risk within a contract rises, so does the potential for litigation. Contractors are compelled to increase drastically the overall contract price in order to offset the likely cost of litigation. This presents a possible explanation as to the incredible price tag that often comes with risk-filled service contracts. The total cost of contracted paramilitary forces such as Blackwater from 2003 through 2008 is estimated to be approximately $12 billion.[69] Providing contractors with protection through the GCD could potentially decrease the overall cost of such valuable services.

Third, as in products-based contracts, the Department of Defense must also feel free to perform the appropriate risk versus utility analysis in determining the value these services provide to the military. This decision cannot be adequately made by an outside party. The threat of external retribution for inherently military tasks decreases the overall effectiveness of the military decision-making process. Therefore, as seen above, the policy concerns embedded within the current GCD are equally applicable in the service-based arena.

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[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Grier, *supra* note 58.

Policy considerations beyond those addressed in the products-based realm further suggest that services-based contracts deserve additional protection. To begin with, government-contracted services allow individuals to receive much higher compensation than the average soldier. Many of these employees are prior military servicepersons, often receiving a ten-fold increase in salary for performance as government contractors. Additionally, government contractors ensure the continuation of an all-volunteer service. Hiring outside sources for tasks of a military nature allows contractors to "fill in the gaps," decreasing the overall burden of military recruitment. Finally, and perhaps most importantly, these contracts decrease the government's overall burden in times of war. Acting alone, the military simply cannot perform all aspects of the War on Terror. Such a widespread mission requires efforts beyond that of the traditional military role. Government-contracted services alleviate an enormous amount of logistical concerns required for such operations, further promoting expansion of the GCD.

B. The Authority to Expand

Several legal doctrines provide the appropriate level of authority in expanding the GCD. The first option comes from a simple modification to the existing GCD under the "discretionary function exception" expressed by the Court in *Boyle*.[70] The United States District Court for the Southern District of Texas recognized the potential to expand *Boyle* in its analysis in *Fisher v. Halliburton*.[71] In *Fisher*, several contractors employed by Halliburton sued the corporation on grounds that their role within a military convoy intentionally made them vulnerable to attack in order to lure enemy forces away from a military fuel truck, allowing the truck uninhibited access to Baghdad International Airport. Enemy forces engaged the decoy, resulting in injury to the contractors. In dictum, the court in *Fisher* discussed the potential judicial authority to expand immunity to private government contractors through the "uniquely federal interest" inherent in government contracts.[72] The court looked to *Boyle*, noting that the Supreme Court utilized its discretionary function and concluded that military products were of a "uniquely federal interest" to warrant the government's protection.[73] This determination provided the appropriate parameters in creating the original GCD. According to the district court's interpretation of *Boyle*, "the FTCA contains an exception to the government's waiver of sovereign immunity for claims based on the

[70] *Boyle v. United Technologies Corporation*, 487 U.S. at 526.
[71] 390 F.Supp.2d 610 (S.D.Tex. 2005).
[72] *Id.* at 614-615.
[73] *Id.* at 615.

performance of discretionary functions or duties on the part of a government employee."[74] As the Supreme Court in *Boyle* utilized their discretionary function to originally create the GCD for products-based government contracts, they could do so again in this case.

Despite its applicability to the services-based contract in *Halliburton*, the court refused to take this leap, focusing rather on the lack of a specific product that would justify use of the current defense. The court concluded that the "extension of the government contractor defense beyond its current boundaries is unwarranted and the FTCA does not bar Plaintiffs' claims."[75] Despite the result, the court in *Halliburton* recognized the potential for modifying the GCD through the discretionary function exception identified by the Supreme Court in *Boyle*, illustrating the first possible avenue of authority for expanding the GCD.

Use of the "agency defense" provides a second possibility for expansion. *Yearsley* opened the door to this approach by providing immunity to public works contractors while performing government contracts.[76] *Yearsley* remains intact today and has been applied several times in the past to provide an absolute defense to contractors employed by the government. The U.S. Court of Appeals for the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.* provided the appropriate three-prong test for determining when to apply the agency defense to military contractors.[77] In order to be considered an agent of the government, circumstances must show that: (1) the government is open to suit in light of the *Feres* doctrine; (2) the contractor acted as an agent for the government; and (3) the contractor acted within the scope of his duties.[78] Similar to the three-prong analysis set forth in *Boyle*, this test has been applied in the past to determine agency relationships within government contracts.

Utilization of the *Shaw* test indicates that services-based government contractors could find protection through the agency defense. First, as seen earlier, *Feres* only applies to military individuals acting within the scope of military service. The government retains liability for all other individuals and/or situations arising from negligence of a government actor. Because the government is open to suit in most situations, the first prong of the test is almost always satisfied.

Second, employees executing government contracts should be considered agents of the government. Such was the status of Ross Construction in the Supreme Court's *Yearsley* decision, where the

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[74] *Id.* at 614.
[75] *Id.* at 616.
[76] *Yearsley*, 309 U.S. at 20-21.
[77] *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985).
[78] *Id.*

notion that a contractor was liable for actions taken under the authority of the federal government was found by the Court to be "untenable."[79] Corporate actors employed under national decree should apply to this standard as well, as contractors currently engaged in operations overseas are employed solely on behalf of important governmental interests.

The agency relationship between the United States and its contracted employees is best illustrated through the public response to incidents arising from the negligence of government contractors. When a contracted employee's actions generate public attention, the response focuses as much criticism on the nation's leaders as the corporation itself, illustrating a national recognition of the close affiliation between the government and its contracted agents. Simply put by one court, "to insulate the United States from its discretionary decisions, but not to do likewise when the United States enters into contracts with others to execute the will of the United States 'makes little sense.'"[80] Because government contractors act on behalf of the United States, they should be deemed agents of the government, satisfying the second prong of *Shaw*.

The third prong remains satisfied as long as contractors act within the scope of their duties. This provides additional assurance that the defense will not be abused by overzealous government contractors. Instances that fall outside the scope of the contract eliminate the potential for the agency defense, requiring constant diligence by contractors in performing the specifications of their contract. Therefore, through satisfaction of all three prongs of the *Shaw* test, the agency defense provides the necessary authority for future expansion of the GCD.

While either legal doctrine provides adequate authority to expand the GCD, the optimal solution comes from a combination of both defenses, a legal doctrine commonly referred to as "derivative sovereign immunity." When private contractors act in tandem with federal agencies, derivative sovereign immunity "arises where the government: (a) approves in its discretion reasonably precise specifications, (b) supervises and controls the implementation of those specifications, and (c) the contractor is not aware of reasons not known to the government why the application is unsafe or unreasonable."[81] Derivative sovereign immunity, therefore, reflects the *Boyle* test in light of commanding agency principles originated by the Court in *Yearsley*, thus providing the best avenue for expanding the GCD.

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[79] *Yearsley,* 309 U.S. at 23.
[80] *Richland-Lexington Airport Dist. v. Atlas Properties*, 854 F.Supp. 400, 420 (D.S.C. 1994) (*quoting Boyle*, 487 U.S. at 512).
[81] *In re World Trade Center Disaster Site Litigation*, 456 F.Supp.2d 520, 563 (S.D.N.Y. 2006).

Courts have already begun linking the GCD to services-based contracts through use of the derivative sovereign immunity defense. The U.S. District Court for the District of South Carolina concluded in *Richland-Lexington Airport Dist. v. Atlas Properties* that the GCD applied not only to military and non-military contracts but also to performance-based contracts.[82] The court reasoned that, according to *Boyle*, "[t]he dispositive issue [was] not one of performance versus procurement, but whether there [was] a uniquely federal interest in the subject matter of the contract. Performance therefore is on an equal footing with procurement."[83] The U.S. District Court for the Southern District of New York adopted a like analysis in *Askir v. Brown & Root Services Corp.* when it determined that the GCD should include performance-based contracts engaged with the United Nations.[84] *In re World Trade Center Disaster Site Litigation* provides additional use of the derivative sovereign immunity defense. In *World Trade Center*, individuals employed as the clean-up crew in the aftermath of 9-11 filed suit against the City of New York as well as their employers for injuries resulting from working in the health-hazardous conditions found at "Ground Zero."[85] On appeal, the United States Court of Appeals for the Second Circuit concluded that "[i]f Defendants show that the applicable agencies were entitled to discretionary function immunity . . . they may be entitled to derivative immunity."[86] Although merely based on a motion for summary judgment, this case provides yet another example of how this unresolved issue is emerging in numerous services-based government contracts cases.

McMahon v. Presidential Airways, Inc. serves as the preeminent case on expanding the GCD through the derivative sovereign immunity doctrine.[87] In *McMahon*, several U.S. soldiers were killed in Afghanistan when their aircraft, piloted by a civilian contractor, went down in enemy territory.[88] Survivors of the fallen soldiers filed suit against Presidential Airways, Inc., the corporation employed by the Department of Defense to provide air transportation and support in the war-torn region. Presidential Airways' defense relied solely on the derivative immunity doctrine in light of *Feres*, arguing that, since Presidential Airways acted as an agent of the government while performing this contract, the corporation should be immune from claims by servicemen under the *Feres* decision.[89]

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[82] *Richland-Lexington Airport Dist.*, 854 F.Supp. at 422-23.
[83] *Id.* at 422. *See also Boyle*, 487 U.S. at 505-07.
[84] No. 95 Civ. 11008, 1997 U.S. Dist. LEXIS 14494, at *17-18 (S.D.N.Y. Sept. 23, 1997).
[85] *World Trade Center*, 456 F.Supp.2d at 536.
[86] *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169, 196 (2d Cir. 2008).
[87] 502 F.3d 1331 (11th Cir. 2007).
[88] *Id.* at 1336.
[89] *Id.* at 1337.

The Eleventh Circuit formulated its decision by analyzing the doctrine of derivative immunity against the backdrop of *Feres* and held, inter alia, that derivative *Feres* immunity did not apply to government contractors.[90] The court of appeals identified three policy considerations originally utilized by the Supreme Court in its *Feres* decision to determine that *Feres* immunity is not extended to government contractors: (1) the need to have uniform rules does not apply to private contractors;[91] (2) the compensation cap generally provided to servicemen under the Veteran's Benefit Act does not apply to government contractors since the corporation has not invested its funds into any like compensation program;[92] and (3) the need for military justice through discipline does not apply to government contractors.[93] As a result, government contractors could not rely on derivative *Feres* immunity as a defense.

In limiting their analysis to *Feres*, Presidential Airways failed to recognize the full scope of the *Boyle* decision and, in turn, greatly limited their case for providing immunity. After all, the Court in *Boyle* held that *Feres* was an inexact and often inappropriate doctrine and, therefore, declined to approach its decision through the lens of *Feres.*[94] Instead, the Supreme Court in *Boyle* employed its discretionary function by finding a question of "uniquely federal interest."[95] "[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest."[96] By approaching its defense solely through *Feres*, the defendant missed a great opportunity. Had they more closely aligned their argument with *Boyle*, perhaps the outcome would have been different.

Despite Presidential Airways' ineffective approach, the court in *McMahon* still could have ruled in its favor through an alternative analysis of the *Feres* doctrine. First, in considering the need for a uniform law, the Eleventh Circuit concluded that the uniformity requirement was not satisfied within the contractor realm since even federal agencies, let alone contractors, often do not have uniform laws.[97] However, in reaching this conclusion, the court in *McMahon* mistakenly focused narrowly on the contractor rather than the government's interest in maintaining uniformity. As a result, the court failed to recognize two large areas that potentially satisfied the first prong of *Feres*. First, the

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[90] *Id.* at 1352-53.
[91] *Id.* at 1346.
[92] *Id.* at 1347.
[93] *Id.* at 1348.
[94] *Boyle*, 487 U.S. at 510.
[95] *Id.* at 505-506.
[96] *Id.* at 505 n.1.
[97] *Id.* at 1346.

"uniquely federal interest" required by the *Feres* test may be found through the government's need to execute federal contracts in a uniform manner. This position becomes clearer in light of the second uniquely federal interest: the federal procurement process. The Federal Acquisition Regulations provides government sources with the appropriate procedural guidelines for acquiring goods and services on behalf of federal interests.[98] All federal agencies must strictly adhere to the procurement procedures outlined within this collection of statutes. Because the government contract was directly at issue in *McMahon*, the uniformity of the procurement process links federal agencies with government contractors. Therefore, either approach to the issue of uniformity overcomes the court's first rationale for prohibiting immunity in *McMahon*.

Second, although corporations do not currently invest in the Veteran's Benefit Act, there are many ways to satisfy this requirement. Procurement officials have the ability to include such consideration within the verbiage of government contracts. Fulfilling this support requirement may come/arise in several forms: through decreasing contract price, requiring financial investment within a government funds cites, or establishing private contingency funds for such situations. None of these occurred in *McMahon*, making satisfaction of this prong difficult to accomplish without further information concerning potential additional financial support offered by the company. Future corporations might achieve this more easily through innovative support of military services and its employees in case of incident. Corporations undoubtedly would be willing to invest a portion of their funds toward compensation programs if doing so would provide them with a larger degree of immunity. Therefore, the second rationale offered by the court in *McMahon* could be fulfilled in future cases if not already satisfied by independent corporate expenditures.

Third, although the Eleventh Circuit recognized the need to consider discipline within this case, it failed to provide an adequate depth to its analysis. There are vast numbers of combined military-civilian operations currently underway in anti-terrorism campaigns across the globe. Government contractors often play a vital role in the decision-making process of such operations. It has become increasingly common to work with and for government contractors in fulfillment of daily missions. Often, it is difficult to determine where the input of one agency ends and another begins, and the consequences of failed operations rarely fall solely on one particular source. As a result, the need for discipline remains equally as strong when government contractors are in action. Had the court in *McMahon* truly considered

[98] 48 C.F.R. § 1.101 (2005).

the magnitude of this particular rationale, perhaps their decision would have been different.

Although there are several avenues that provide adequate authority to expand the GCD, each with its own merit, the best approach emerges from a combination of all legal doctrines. Derivative sovereign immunity adheres to the principles set forth by the Court in *Boyle* while recognizing the agency role that contractors play when performing government contracts. Such authority provides a commonsense approach to expanding the GCD.

C. The Extent of Expansion

Although the court in *McMahon* found it inappropriate to provide derivative immunity based on its analysis of *Feres*, it did recognize the general need for increased immunity to government contractors beyond the current limits. How much expansion is appropriate? The court explicitly declined to provide that answer. Instead, the Eleventh Circuit provided a detailed analysis of three possible options: (1) "incident to service;" (2) "political question defense;" and (3) "sensitive military judgments." By declining to answer the question, the court essentially threw up a softball, hoping the Supreme Court would finally take a swing as they did in *Boyle*.

The court in *McMahon* first addressed the possibility of extending the GCD to all government contracts "incident to service."[99] The "incident to service" defense originated from the "combatant activities" exception, where earlier courts ruled that the FTCA did not apply to "claim[s] arising out of combatant activities . . . during time[s] of war."[100] Despite its seemingly broad scope, the "combatant activities" exception still required a products liability claim.[101] The *McMahon* court acknowledged the potential to expand immunity beyond a products line of cases through contracts deemed "incident to service." However, the broad application of this doctrine hinders its overall ability to provide an appropriate level of immunity to government contractors. As recognized in *McMahon*, "[A] number of 'incident to service' suit—probably a substantial number—do not implicate sensitive military judgments, because they can be brought by civilians."[102] This option is rejected because immunity under such a broad category invites abuse from contractors seeking unnecessary protection.

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[99] *McMahon*, 502 F.3d at 1346-47.
[100] *Johnson et al v. United States*, 170 F.2d 767, 769 (9th Cir. 1948) (*quoting* Tort Claims Act, 28 U.S.C.A. § 2680(j) (1948)). *See also Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).
[101] *Fisher*, 390 F.Supp.2d at 615.
[102] *McMahon*, 502 F.3d at 1352.

The court then rejected expansion through the "political question doctrine." The "political question doctrine" requires the judicial branch to remain silent on issues that pose a distinct political question, enforcing the separation of powers between the military decision-making process inherent in the executive branch and the judicial decision-making power afforded the courts. Several courts have recently been disinclined to approach such sensitive questions by relying on this defense for support. The court in *Blackwater Security Consulting, LLC. v. Nordan* noted that, "in the past five months, five tort lawsuits against battlefield contractors have been dismissed as nonjusticiable by federal district courts based on the political-question doctrine."[103] Doing so ensures that the two branches remain separate; however, it also leaves many important questions unanswered. Because many cases deserving protection pass based on a lack of a political question, this narrowly defined doctrine misses the mark.

The United States Court of Appeals for the Fifth Circuit recently rejected the political question. *Lane v. Halliburton* represented a combination several cases, including *Fisher v. Halliburton* mentioned earlier, all of which alleged that Kellogg Brown & Root, Inc., a subsidiary of Halliburton, Inc., engaged in fraudulent misrepresentation and negligence in exercising reasonable care of its contracted employees operating in Iraq.[104] The district court granted Defendant's motion for summary judgment based on the political question presented when analyzing the appropriateness of the military's actions.[105] The United States Court of Appeals for the Fifth Circuit reversed, holding that "it may be possible to resolve the claims without needing to make a constitutionally impermissible review of wartime decision-making."[106] Although further discovery might reintroduce the political question defense, the current facts did not warrant summary judgment in favor of Defendant.[107] This holding denotes the potential for courts to begin transitioning away from military discretion and the political question defense, and thus, away from the Supreme Court's *Boyle* decision. In addition, it further highlights the problems with expanding the GCD through the political question defense.

After dismissing two potential avenues for expanding the GCD, the court in *McMahon* seemed to reach the proper balance in its analysis of the "sensitive military judgments" doctrine, finding this approach narrower than *Feres* and broader than the political question doctrine.[108]

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[103] Brief for Petitioner at 25, *Blackwater Sec. Consulting, LLC. v. Nordan*, No. 06-857 (U.S. Dec. 20, 2006).
[104] 529 F.3d 548, 548 (5th Cir. 2008).
[105] *Id.*
[106] *Id.* at 568.
[107] *Id.*
[108] *McMahon*, 502 F.3d at 1352.

Despite its convincing content, the Eleventh Circuit expressly declined to determine whether (1) a sensitive military judgment defense existed and (2) to what extent it did exist, based on Presidential Airways' flawed decision to argue solely within the *Feres* doctrine.[109] Although the court failed to expand the current GCD, its analysis of the sensitive military judgment doctrine provides the appropriate expansion of the GCD in light of the current War on Terror.

The "sensitive military judgment" approach provides derivative sovereign immunity solely to contractors providing judgments described by the court in *McMahon* as "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force."[110] Such judgments could be seen as those considered on the front lines of battle or those arising from actions engaged in at the "tip of the spear." Military officials are not the only ones protected from such judgments. "When a private contractor agent is entrusted with making or executing such sensitive military judgments, courts would be similarly powerless to determine whether the agent appropriately balanced military effectiveness and the safety of the soldiers."[111] The Supreme Court in *Boyle* also recognized the protection due to government contractors engaging in sensitive military judgments by noting the difficult position the Court would face in "balancing [the] many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."[112] Although *Boyle* did not include services-based contracts, the fundamental principle behind the comment remains the same with either form of contract, making it equally applicable in the current context.

There are several benefits to adopting this approach considering the current extent to which government contractors are engaged in military operations. The first several points focus on ensuring a proper risk versus utility analysis. To begin with, the sensitive military judgment approach provides an adequate level of contract inclusion, affording immunity to particular contractors engaged in highly sensitive military activity while refusing protection to contractors assuming lesser amounts of risk. As the number and scope of employment of government contractors performing in hostile territory continues to rise, so must the protection afforded such actors by the federal government. Additionally, the added risk-protection could mitigate corporate fear of litigation, potentially decreasing the overall government price for obtaining such services. Moreover, expanding the GCD to sensitive

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[109] *Id.* at 1356.
[110] *Id.* at 1349 (*citing* Chappell v. Wallace, 462 U.S. 296, 302 (1983) (*quoting Gilligan v. Morgan,* 413 U.S. 1, 10 (1973)).
[111] *Id.* at 1350.
[112] *Boyle*, 487 U.S. at 511.

service-based contracts ensures the risk versus utility analyses inherent in such decisions remain within the appropriate hands and protected from the condemnation of outside parties. Military commanders must feel free to make difficult judgments in times of war. Under this method, such decisions would be protected from unnecessary reproach. Limiting expansion to within this area also protects parties with legitimate claims from being rejected in court through potential abuse of the political question defense. Providing a well-defined scope of protection prevents courts, and corporations, from abusing the GCD.

The second line of reasoning revolves around the contractual issues protected through the expansion of the GCD. To begin with, broadening the GCD to service-based contracts involved in sensitive military judgments highlights the need to create well-defined contracts between parties within the government procurement process by utilizing a performance-based approach. Similar to including technical design parameters in products-based contracts, performance specifications within services-based contracts include particular actions ranging from training requirements of contractors to specific operating procedures within zones of conflict. Protection under the GCD is lost when contracts fail to include such precise specifications within the contract or when contractors deviate from those specific parameters during performance of the contract. Detailed specifications within performance-based contracts also highlight the importance of including periodic review requirements within the particular contract, ensuring an appropriate level of government oversight. Including government inspection requirements allows the government continuous control over performance of the contract.

The legislative branch is best suited to determine what specific requirements must be included within the contract specifications, highlighting an additional need for modification of the existing Federal Acquisition Regulations to include a "sensitive military contract" category for performance-based contracts. As in products-based cases, extension of the GCD to services-based contracts ensures performance specifications are meticulously defined and strictly obeyed. Failure to adhere to the standards set forth in the contract results in detriment to the corporation, increasing in severity as the magnitude of the violation increases. Penalties in current services-based contracts typically range from negative reports to withholding payments to contract termination. Requiring provisions for these details within the contract specifications could mitigate the potential vulnerabilities inherent during the development stage of such contracts.

As originally noted in *Rockwell*, this approach creates further incentive for the government and contractor to clearly define the scope

of the contract.[113] In addition, providing immunity to contractors engaging in sensitive military judgments increases the level of competition for such contracts. Corporations will be more likely to compete for high-risk contracts if they can approach such projects with assurances that they will receive a certain level of legal protection. Increased competition results in lower contract prices and enhanced contract performance, therefore decreasing risk, increasing utility, and enhancing overall effectiveness.

V. CONCLUSION

Modern warfare is not conducted by the soldier alone. Rather, military contractors, the media, and the federal government also play vital roles. Inclusion of these actors reflects the "remarkable trinity" noted by the famous military strategist Carl von Clausewitz, who defined the principle actors in war as "the people, the army, and the government." [114] Therefore, the question becomes: *who* must be flexible in a time of war?

Most likely, Clausewitz would have responded that success requires flexibility from all entities contributing to the war effort. Our armed forces must constantly adapt to changing events and circumstances in order to remain one step ahead of the enemy. The judicial branch must also exercise a certain level of flexibility; in this case, through expansion of the government contractor defense to include sensitive services-based government contracts.

The doctrine of derivative sovereign immunity provides the necessary authority for such expansion. Limiting the government's immunity solely to contracted services requiring sensitive military judgments prevents the extension of this doctrine beyond the necessary scope. Expansion of the GCD in this capacity serves to provide clear and concise contractual boundaries, protecting those who adhere to government contracts while leaving those who violate their contractual obligations open to litigation. Therefore, while expansion of sovereign immunity might generally be seen as guarding the blameworthy, doing so here actually results in a greater level of protection for the innocent. Despite the range of opinions throughout the United States surrounding the current war, everyone should agree that this is something worth fighting for.

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[113] *McKay*, 704 F.2d at 450.

[114] HARRY G. SUMMERS, JR., ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR, 26-27 (Presidio Press 1982).