

# THE AIR FORCE LAW REVIEW



## ARTICLES

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BEHIND THE U.S. MOBILITY AIR FORCES' MISSION

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DEBATE

*Major Matthew D. Burris, USAF*

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VOL. 66

2010

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THE LAW OF AIR MOBILITY—THE INTERNATIONAL LEGAL  
PRINCIPLES  
BEHIND THE U.S. MOBILITY AIR FORCES’ MISSION

LIEUTENANT COLONEL CHRISTOPHER M. PETRAS\*

With a Foreword

by

Major General Steven J. Lepper\*  
The Deputy Judge Advocate General,  
Headquarters U.S. Air Force

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## *Foreword*

Most Airmen familiar with the Air Force's practice of operations law know that it has traditionally focused on the kinetic application of air power in armed conflict. The development and distribution of Rules of Engagement (ROE); the routine, required briefing of Airmen of their rights and obligations under the Law of Armed Conflict (LOAC); and, the role of judge advocates in the air commander's targeting decisions are perhaps the best known examples of Air Force operations law practice and the duties of Air Force operations lawyers. While it is important for all Airmen to understand the impact of the law on the conduct of combat air operations or on their individual duties as Airmen serving in combat or combat support, it is equally important to understand that law also impacts the conduct of other Air Force operations in air, space, and cyberspace.

In this article, Lieutenant Colonel Chris Petras describes a class of operations not typically addressed in our traditional approach to operations law: air mobility operations. Where the "combat air force" (CAF) is concerned about targeting, LOAC, and ROE, the "mobility air force" (MAF) is engaged in airlift, aeromedical evacuation, and air refueling. None of these mobility missions requires in-depth knowledge of international law applicable to kinetic (the delivery of "steel on targets") air operations. Rather, mobility Airmen are more concerned about the domestic and international law governing the relationship between military and civil aviation, rights and responsibilities associated with the operation of "state aircraft" that enjoy sovereign immunity, and the authority of Air Force aircraft commanders over US aircraft and aircrews that often overfly and land in countries where there may be no or a very limited US military presence.

When I talk to Airmen about the differences between CAF and MAF operations law, I like to use an example that illustrates how different CAF and MAF operations are from an international legal perspective: When a CAF aircraft involved in combat operations – generally a fighter or bomber – takes off from a runway outside the US, it usually lands at the same place it took off. That place is typically an airbase where the US military is located in large numbers. Finally, the combat operations generally involve the destruction of a military target in a non-permissive environment – that is, in a geographic area over which the US neither needs nor seeks permission to fly. In contrast, MAF aircraft are cargo or tanker aircraft that may take off from anywhere in the world, to include the US, and land anywhere in the world. The takeoff and landing locations may or may not be places where US forces are otherwise present (often, they are foreign civil airports). MAF combat operations don't directly involve target destruction; rather, they are engaged in the logistical support of combat forces. Finally, while MAF aircraft may ultimately land in places where we do not need permission to fly or land, especially if they are bases in territory

occupied by US forces, it's likely that in getting there, they must overfly other countries whose permission is necessary. I conclude my talks by pointing out that each of these differences requires the application of very different aspects of international law. This article defines and describes those aspects as a MAF-centric subset of international law we've named "The Law of Air Mobility" (LOAM).

In addition to defining LOAM, this article is one piece of an overall effort by Air Mobility Command to establish an operations law practice that provides mobility Airmen the same "real time" legal advice and support that CAF operations lawyers provide CAF commanders and Airmen. JAG contributions to Operations IRAQI FREEDOM and ENDURING FREEDOM (OIF/OEF) have reinforced the role of law in numerous aspects of US combat operations. The role perhaps most relevant to this discussion is performed by the JAGs who provide legal advice in the OIF/OEF Combined Air Operations Center (CAOC) at Al Udeid AB, Qatar. In the CAOC, JAGs provide the Joint Force Air Component Commander (JFACC) advice on targeting, intelligence collection, LOAC, and myriad other ops law issues. The MAF counterpart to the CAOC is the Tanker Airlift Control Center (TACC). Until recently, the TACC had no organic legal support; the AMC and 18<sup>th</sup> Air Force headquarters legal staffs provided whatever advice the TACC required. That changed recently as a result of another initiative in our overall mobility ops law program that established a JAG position for the TACC.

In the following pages, Lt Col Petras' discussion of LOAM principles and applications reinforces the need for legal support to air mobility operations. Our desired results are, first, to develop a greater appreciation among Air Force ops lawyers and paralegals for the facts that ops law comes in a variety of forms and, to be effective, must be tailored to the mission. Second, we hope this discussion of the legal environment in which our MAF operates will help mobility Airmen to understand the legal rights and responsibilities that impact their missions. Third, this discussion of the Law of Air Mobility is the substantive legal foundation upon which our vision for a comprehensive mobility ops law practice in AMC, in the MAF, and across the Air Force will be based. Finally, we seek to inspire confidence in our AMC JAGs and paralegals by equipping them with the tools they need to provide the advice our MAF commanders and Airmen need but have lived without for a very long time.

\*At the time he wrote this foreword, then-Brigadier General Steven J. Lepper was the Staff Judge Advocate, Headquarters, Air Mobility Command. He is now a major general and The Deputy Judge Advocate General of the Air Force.



## I. INTRODUCTION

Professional militaries have long recognized the tactical, operational, and strategic importance of mobility. However, in the 1990s, U.S. military strategy underwent a significant shift away from “forward basing,” whereby U.S. national interests were protected by large military forces based overseas, and towards “foreign presence,” which relies on forces based inside the continental United States (or CONUS) that rapidly deploy to overseas locations during crises.<sup>1</sup> This development so elevated “global mobility”<sup>2</sup> to the forefront of U.S. military strategy that it is now recognized not only as a critical enabler for American forces to operate effectively but as essential to national and international security.<sup>3</sup> The U.S. military generally achieves global mobility through prepositioning supplies and equipment at critical points around the world and the combined efforts of its land-lift, sealift, and airlift assets in transporting personnel and materiel.<sup>4</sup> But in the aerial domain in particular, global mobility is embodied in the airlift,<sup>5</sup> air refueling,<sup>6</sup> and air mobility support capabilities<sup>7</sup> that the “Mobility Air Forces” (MAF)<sup>8</sup> provide.

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<sup>1</sup> U.S. DEP’T OF THE AIR FORCE, AIR FORCE DOCTRINE DOCUMENT 2-6.3, AIR MOBILITY SUPPORT 1 (1999) [hereinafter AFDD 2-6.3].

<sup>2</sup> See David F. Todd & Philip A. Bossert, *Viewing Rapid Air Mobility as a Revolution in Military Affairs*, 55 DEF. TRANSP. J. 10 (1999), available at [http://www.airpower.maxwell.af.mil/archives/cc\\_archives/cc\\_archives1995-98.htm](http://www.airpower.maxwell.af.mil/archives/cc_archives/cc_archives1995-98.htm); see also JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 390 (12 Apr. 2001) (as amended through Apr. 2010) [hereinafter DoD DICTIONARY] (defining “rapid global mobility” as the “timely movement, positioning, and sustainment of military forces and capabilities across the range of military operations”), available at [http://www.dtic.mil/doctrine/dod\\_dictionary](http://www.dtic.mil/doctrine/dod_dictionary).

<sup>3</sup> Todd & Bossert, *supra* note 2, at 10; Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 840-841 (2006):

Global mobility is a predicate of the international security system as it exists at present and for the foreseeable future. Both collective self-defense and collective security under the United Nations Charter, including enforcement, peacekeeping, and humanitarian operations, continue to rest on the presumption of global mobility. . . .

See also U.S. DEP’T OF THE AIR FORCE, GLOBAL ENGAGEMENT: A VISION FOR THE 21ST CENTURY AIR FORCE 11 (1996), <http://www.au.af.mil/au/awc/awcgate/global/global.pdf>; JOINT CHIEFS OF STAFF, JOINT VISION 2010 (AMERICA’S MILITARY: PREPARING FOR TOMORROW) *passim* (1996), <http://www.dtic.mil/jv2010/jv2010.pdf>.

<sup>4</sup> See Major Michael W. Cummings, *The Evolution of Military Airlift and the C-17: How Unique Capabilities Fall Short of Filling the Airlift Gap* 3 (2006) (unpublished research paper, Air Command and Staff College, Air University, Maxwell Air Force Base, Alabama), <https://www.afresearch.org/skins/RIMS/home.aspx>.

<sup>5</sup> “Airlift forces conduct operations through the air to transport personnel and materiel in support of strategic, operational, and tactical objectives and to deliver these personnel and materiel via airland or airdrop methods.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-17: JOINT DOCTRINE AND JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR AIR MOBILITY OPERATIONS I-3 (2 Oct. 2009) (emphasis in original) [hereinafter JOINT PUB. 3-17].

The focus of the “Law of Air Mobility” (LOAM) construct advanced here is the distinct body of law associated with global air mobility operations *vis-à-vis* the law of armed conflict (LOAC) issues – *e.g.*, military necessity, discrimination, proportionality – commonly associated with air combat operations. This dichotomy is, in part, attributable to the fact that unlike most “combat air forces,”<sup>9</sup> which function as instrumentalities of armed conflict and, in this role, exercise the combat rights of a belligerent (*e.g.*, overflying territory of an opposing belligerent, attacking military targets, etc.),<sup>10</sup> mobility air forces operate across the full spectrum of national, strategic, and theater objectives.<sup>11</sup> For example, in addition to providing wartime combat support and aeromedical evacuation,<sup>12</sup> mobility air forces aircraft provide, *inter alia*, peacetime sustainment and aeromedical evacuation of U.S. forces worldwide, as well as support to civil authorities and humanitarian relief. Also, while combat air forces operate mainly intra-theater and tend to be based at U.S. or allied-controlled air bases,<sup>13</sup> global mobility demands that mobility air forces operate intra- and

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<sup>6</sup> “Air refueling forces conduct operations through the air to transport and transfer fuel to designated receivers in support of strategic, operational, and tactical objectives.” *Id.* (emphasis in original).

<sup>7</sup> Air mobility support is provided through the Global Air Mobility Support System (GAMSS) (also referred to as the “En Route System”), a set of permanent support locations at key CONUS and overseas bases and deployable units capable of augmenting the permanent en route locations or creating support locations where none exists. The GAMSS is designed to provide responsive, worldwide support to airlift and air refueling operations and permit continuous, global command and control over most of the Mobility Air Forces regardless of location. See JOINT PUB. 3-17, *supra* note 5, at 1-3; see also AFDD 2-6.3, *supra* note 1, at 2, 13-21 (providing an overview of the GAMSS En Route Support System and its organizational structure).

<sup>8</sup> “The mobility air forces are comprised of those air components and Service components that are assigned air mobility forces and/or that routinely exercise command authority over their operations. Also called MAF.” DoD DICTIONARY, *supra* note 2, at 308.

<sup>9</sup> Combat Air Forces (CAF) are “[a]ir forces that are directly engaged in combat operations. Examples include fighters; bombers; command and control; combat search and rescue; and intelligence, surveillance, and reconnaissance aircraft.” U.S. DEP’T OF THE AIR FORCE, INSTR. 10-420, COMBAT AIR FORCES AVIATION SCHEDULING 19 (9 Jul. 2010) [hereinafter AFI 10-420].

<sup>10</sup> See, *e.g.*, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Feb. 17, 1923, art. 13, 16, and 22, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 317 (Dietrich Schindler & Jiri Toman eds., 4th ed.) (2004); see generally Richard H. Wyman, *The First Rules of Air Warfare*, AIR U. REV. 94 (1984).

<sup>11</sup> JOINT PUB. 3-17, *supra* note 5, at VII-1.

<sup>12</sup> Aeromedical Evacuation is defined as the “movement of patients under medical supervision to and between medical treatment facilities by air transportation. Also called AE.” DoD DICTIONARY, *supra* note 2, at 7.

<sup>13</sup> See, *e.g.*, AFI 10-420, *supra* note 9, at 5-6 (noting how proper force management is needed to make the most efficient use of MAF air refueling aircraft when sending squadrons of CAF aircraft into a Combatant Command Area of Responsibility (AOR) (*i.e.*, theater of operations)).

inter-theater and regularly utilize foreign military and/or civilian airports, sometimes in countries with no U.S. military presence at all.

In further contrast to the combat air forces, global air mobility is not exclusively a function of military aircraft. The Civil Reserve Air Fleet (CRAF), which consists of passenger and cargo aircraft that commercial carriers have agreed to allow the Department of Defense (DoD) to use in times of crisis, represents more than 40 percent of the United States' strategic airlift capability.<sup>14</sup> As an incentive for civilian carriers to provide aircraft to the CRAF, the DoD makes day-to-day airlift business available to participating airlines through the International Airlift Service Contract. In fiscal year 2008, the DoD purchased more than \$3 billion of international airlift services from CRAF carriers.<sup>15</sup> Congress has also recently directed the Air Force to explore the possibility of utilizing commercial air refueling (or tanker) aircraft as well.<sup>16</sup>

Thus, mobility air forces fundamentally differ from combat air forces, with the MAF's sizeable, far-reaching peacetime airlift mission, the truly global nature of its operations, and its extensive use of civil aircraft. As a result, the rights and freedoms of air navigation recognized in international law and the legal privileges and immunities of State aircraft, as opposed to civil aircraft, (and vice versa) are considerably more pertinent to day-to-day MAF operations than are the LOAC targeting rules that are the main focus of operations law for the combat air forces. Building upon General Lepper's vision, this article provides an overview of the principles of international law upon which global air mobility depends. The intent is to further distinguish and expound the "Law of Air Mobility" concept and provide practitioners a useful guide to understanding the international legal underpinnings of air mobility operations.

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<sup>14</sup> U.S. DEP'T OF DEFENSE, OFFICE OF THE EXECUTIVE SECRETARY, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS, ch. 21 (1996), at <http://www.dod.mil/execsec/adr96/index.html>.

<sup>15</sup> U.S. DEP'T OF THE AIR FORCE, FACTSHEET: CIVIL RESERVE AIR FLEET (2007), <http://www.af.mil/factsheets/factsheet.asp?id=173> [hereinafter CRAF FACT SHEET]; *The US Military's International Airlift Contracts*, DEFENSE INDUSTRY DAILY, Sep. 11, 2008, at <http://www.defenseindustrydaily.com/The-US-Militarys-International-Airlift-Contracts-05066>; see also Peter A. Buxbaum, *A Lift for CRAF?*, MILITARY LOGISTICS FORUM, Jan.-Feb. 2008, at 2 (noting that from 1996 to 2000, DoD spent more than \$700 million per year for military airlift requirements with CRAF carriers), available at <http://www.kmimediagroup.com/mlf-archives/41-mlf-2008-volume-2-issue-1.html>.

<sup>16</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1081, 122 Stat. 3, 335-36 (2008) (directing the Secretary of the Air Force to assess the feasibility and advisability of using commercial fee-for-service air refueling tanker aircraft for Air Force operations).

## II. CONVENTION ON INTERNATIONAL CIVIL AVIATION OF 1944<sup>17</sup>

Concluded in the unanimity that accompanied the Allied side towards the end of the Second World War,<sup>18</sup> the Convention on International Civil Aviation (Chicago Convention) has been hailed as a “monumental drafting achievement.”<sup>19</sup> Participants agreed on the convention’s 96 articles in a span of just 37 calendar days at the 1944 International Civil Aviation Conference, with virtually no consultation or circulation of proposed texts before the Conference opened.<sup>20</sup> The treaty subsequently entered into force on 4 April 1947 – 30 days after the United States became the requisite twenty-sixth nation to submit notice of ratification<sup>21</sup> – and today has a remarkable 190 State parties.<sup>22</sup> Still, the agreement is most noteworthy for two principal accomplishments: (1) it recognized and codified certain principles of substantive public international law; and (2) it established the International Civil Aviation Organization (ICAO)—a U.N. Specialized Agency responsible for ensuring “safe, regular, efficient and economical air transport.”<sup>23</sup>

The Chicago Convention, by its terms, does not apply to “state aircraft,” which though not defined by the treaty, is deemed to include military aircraft. Specifically, Article 3 states “[t]his Convention shall be applicable to civil aircraft, and shall not be applicable to state aircraft. ... Aircraft used in military, customs and police services shall be deemed to be state aircraft.”<sup>24</sup> Paradoxically, however, several treaty provisions expressly

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<sup>17</sup> Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

<sup>18</sup> Julian Thomka-Gazdik, *The Right to Fly – Review at Random*, in *ESSAYS IN AIR LAW* 287 (1982).

<sup>19</sup> Michael Milde, *The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later?*, 19 *ANNALS OF AIR & SPACE L.* 401-02 (1994).

<sup>20</sup> The International Civil Aviation Conference was held in Chicago from November 1 to December 7, 1944.

<sup>21</sup> Chicago Convention, *supra* note 17, art. 91, 61 Stat. at 1206 (“[T]his Convention ... shall come into force ... after deposit of the twenty-sixth [ratification in the archives of the Government of the United States of America].”).

<sup>22</sup> An official list of states parties to the Chicago Convention is available at <http://www.icao.int/cgi/statesDB4.pl?en>.

<sup>23</sup> PAUL S. DEMPSEY, *PUBLIC INTERNATIONAL AIR LAW* 43 (2008); *see also* Chicago Convention, *supra* note 17, art. 44, 61 Stat. at 1193.

<sup>24</sup> Chicago Convention, *supra* note 17, art. 3(a)-(b), 61 Stat. at 1181. *Compare Secretariat Study on “Civil/State Aircraft,” Report of the Secretariat*, ICAO Legal Committee, 29th Sess., Agenda Item 2, at 5, ICAO Doc. LC/29-WP/2-1 (1994) (“Currently, there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law.”) [hereinafter *ICAO Study on Civil/State Aircraft*]; Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 *J. AIR L. & COM.* 885, 896 (2001) (“Article 3 does not establish a definition of either the concept of state or civil aircraft ... [but] edicts that ‘aircraft used in military, customs and police services shall be deemed to be state aircraft.’ This is not a definition, but only a presumption since the word ‘deemed’ is used.”); *and* NICOLAS M. MATTE, *TREATISE ON AIR-AERONAUTICAL LAW* 139 (1981) (“There is no

apply to state aircraft.<sup>25</sup> For example, Article 3(c) of the treaty circumscribes traffic rights for state aircraft,<sup>26</sup> and Article 3(d) provides that contracting States “will have due regard for the safety of navigation of civil aircraft” when issuing regulations for state aircraft.<sup>27</sup>

On top of these provisions, U.S. policy requires DoD aircraft operating in international airspace on routine point-to-point and navigation flights to follow ICAO flight procedures whenever practical and compatible with mission requirements.<sup>28</sup> It further requires that DoD operations not conducted under ICAO procedures meet certain express conditions deemed necessary to fulfill the United States’ obligation of “due regard” for the safety of civil aviation under Article 3(d) of the treaty.<sup>29</sup> What’s more, like aviation generally, the MAF’s global air mobility mission has an acutely international character, which derives from the ability of military airlift and air refueling to cross political boundaries, negate geographic frontiers, and rapidly transit the world.<sup>30</sup> Its success thus hinges on the air navigational rights and freedoms recognized in international law. So, the fact that military aircraft are excluded from the Chicago regulatory structure notwithstanding, the treaty is germane to MAF operations as both a comprehensive codification of public international air law and a constitutional instrument for ICAO.<sup>31</sup>

John Cobb Cooper, a prominent American jurist, scholar, and air law pioneer, was President Franklin D. Roosevelt’s aviation advisor and represented the United States at the 1944 Chicago Conference. Cooper identified four basic principles of public international law set down by the Convention: (1) territorial sovereignty; (2) national airspace; (3) freedom of

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definition of the term ‘civil aircraft’ and ‘state aircraft’ given in the Convention. However, art. 3(b) stipulates that ‘aircraft used in military, customs and police services shall be deemed to be state aircraft.’ This paragraph is regarded as exhaustive.”)

<sup>25</sup> DEMPSEY, *supra* note 23, at 48.

<sup>26</sup> *Id.*; see *infra* notes 44-45 and accompanying text.

<sup>27</sup> Chicago Convention, *supra* note 17, art. 3(d), 61 Stat. at 1181.

<sup>28</sup> See U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE INSTR. 4540.01, USE OF INTERNATIONAL AIRSPACE BY U.S. MILITARY AIRCRAFT AND FOR MISSILE/PROJECTILE FIRINGS, para. 6.3.2 (28 Mar. 2007) [hereinafter DoDI 4540.01]; see also U.S. DEP’T OF DEFENSE, NAT’L GEOSPATIAL-INTELLIGENCE AGENCY, DoD FLIGHT INFORMATION PUBLICATION, GENERAL PLANNING, para. 8-7 (2009) [hereinafter FLIP]; U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE MANUAL 4500.54, FOREIGN CLEARANCE MANUAL, para. C2.2 (2009) [hereinafter FOREIGN CLEARANCE MANUAL].

<sup>29</sup> For flights conducted under the “due regard” prerogative, aircraft must be operated in visual meteorological conditions; within range of a surface or airborne surveillance or communications facility; equipped with airborne radar capable of providing aircraft separation; and/or outside of controlled airspace. DoDI 4540.01, *supra* note 28, para. 6.3.2; see also FLIP, *supra* note 28, para. 8-8; FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.

<sup>30</sup> Cf. MATTE, *supra* note 24, at 31-32 (describing aviation’s international character).

<sup>31</sup> Cf. Milde, *supra* note 19, at 402 (describing the legal and historical significance of the 1944 Chicago Convention).

the seas; and (4) nationality of aircraft.<sup>32</sup> Because of the importance of aerial navigation rights and freedoms and other aeronautical legal principles recognized in international law to the ability of mobility air forces to successfully conduct their operations, each of these principles has a prominent place in the Law of Air Mobility construct. Professor Cooper's enumeration of these principles therefore provides a useful framework to discuss their relevance to MAF operations.

### III. TERRITORIAL SOVEREIGNTY & NATIONAL AIRSPACE

The principle of territorial sovereignty stands for the unilateral and absolute right of each nation to permit or deny entry into its territory and to control all movements therein.<sup>33</sup> Not coincidentally, this precept of public law sovereignty originated with the rise of the modern sovereign State in the 18th century; however, the related concept of sovereignty over "national airspace" – *i.e.*, the airspace above a State's national lands and internal and territorial waters<sup>34</sup> – arguably did not take hold in international law until the early part of the 20th century, when heavier-than-air aircraft became a reality.<sup>35</sup>

In 1910, the French government called an international conference to address the status of airspace in international law, where proponents of freedom of the air contended that airspace ought to be like the high seas (free for all), while proponents of sovereignty in national airspace maintained that airspace was the sovereign territory of the subjacent State, yet no definitive conclusion was reached.<sup>36</sup> But the First World War, which was fought in the name of the independence of States, together with the great and rapid advances in military aviation technology that it witnessed, thrust the "State imperium" to the forefront of the public international air law agenda.<sup>37</sup> So it was that the Paris Conference of 1919 produced the Convention Relating to the Regulation of Aerial Navigation (the Paris

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<sup>32</sup> DEMPSEY, *supra* note 23, at 43 (quoting John Cobb Cooper, *Backgrounds of International Public Air Law*, 1 Y.B. AIR & SPACE L. 3 (1967)).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> PETER P.C. HAANAPPEL, *THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPARATIVE APPROACH* 2-3 (2003); *but see* John Cobb Cooper, *Roman Law and the Maxim "Cujus est solum" in International Air Law*, in *EXPLORATIONS IN AEROSPACE LAW* 54, 54-102 (Ivan A. Vlasic ed., 1968) (arguing that States have asserted sovereignty in national airspace since Roman times by legislating with respect to the private rights of landowners in airspace; hence the Latin maxim *cujus est solum, ejus est usque ad coelum* (he who owns the land, owns it up to heaven)).

<sup>36</sup> John Cobb Cooper, *The International Air Navigation Conference, Paris 1910*, 19 J. AIR L. & COM. 127 (1952).

<sup>37</sup> MATTE, *supra* note 24, at 79, 96; HAANAPPEL, *supra* note 35, at 3.

Convention),<sup>38</sup> which abruptly ended the almost two decades old debate over whether airspace was “free” like the high seas or formed part of the sovereign territory of the subjacent State: “In the shadow of the wartime experience, States firmly and unequivocally confirmed the complete and exclusive sovereignty of States over their airspace. This principle has become an axiom and a cornerstone of international air law ever since.”<sup>39</sup>

#### A. Transit Through Territorial (National) Airspace

The 1919 Paris Convention cemented the prevailing customary principle of State sovereignty over air space in international law.<sup>40</sup> Article 1 of the 1944 Chicago Convention thus recognized what had by then become the pre-existing rule of customary international law, that “every State has complete sovereignty over the airspace above its territory.”<sup>41</sup> So, with no international legal principle in national airspace analogous to the customary freedom of the high seas,<sup>42</sup> the Chicago Convention instituted a three-tiered conventional law regime to effectuate the exchange of over-flight (or air traffic) rights.<sup>43</sup> First, under Article 3(c), State aircraft (including military aircraft) are prohibited from overflying or landing in another State’s territory without special authorization from the over-flown State (e.g.,

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<sup>38</sup> Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. 1, 11 L.N.T.S. 173, reprinted in Maria Buzdugan, ed., “Chicago” Acts and Related Protocols, 30-1 ANNALS OF AIR & SPACE LAW 5 (2005) [hereinafter Paris Convention].

<sup>39</sup> MICHAEL MILDE, INTERNATIONAL LAW AND ICAO 11 (2008). Article I of the Paris Convention categorically stated: “Every Power has complete and exclusive sovereignty over the air space above its territory.” Professor Milde notes that “the Convention does not create the principle of air sovereignty but recognizes it” and concludes:

[I]n the light of the practice of States protecting their air space and in the light of the war time experience as belligerents or as neutrals[,] the Paris Conference considered the principle to be a firm part of the customary international law that was to be only formally recognized by a codified instrument.

However, Milde proffers that it is doubtful this formulation of the sovereignty principle, an observable practice of States for less than two decades, constituted “*usus longaevus*” (a long observed rule), as required for it to have gained the status of customary international law. *Id.*; see also DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW 56 (2008) (“The legal status of air space was thus bound up with national sovereignty (especially during wartime), and the prevailing idiom of regulation for air transport was *aer clausum*, or ‘closed skies.’”).

<sup>40</sup> MILDE, *supra* note 39, at 11; see also MATTE, *supra* note 24, at 96; DEMPSEY, *supra* note 23, at 15-17.

<sup>41</sup> DEMPSEY, *supra* note 23, at 44; Chicago Convention, *supra* note 17, art. 1, 61 Stat. at 1180.

<sup>42</sup> “Freedom of the high seas” equates to complete freedom of movement and operation for all ships and aircraft over the high seas. U.S. DEP’T OF THE NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 2.6.3 (2007) [hereinafter NAVAL WARFARE PUB. 1-14M].

<sup>43</sup> See BEDERMAN, *supra* note 39, at 56; DEMPSEY, *supra* note 23, at 30.

diplomatic clearance<sup>44</sup>) and then only in accordance with the terms of that authorization.<sup>45</sup> Secondly, Article 5, paragraph 1, of the treaty grants “nonscheduled flights” (e.g., charter flights) of other States the first two of the so-called “five freedoms” of the air: (1) the freedom to fly into or across the territory of another State (transit), and (2) the freedom to make stops for non-traffic purposes, such as refueling or maintenance (technical stops) – both of which may be exercised without prior permission, subject only to the right of the over-flown State to require a landing.<sup>46</sup> Lastly, Article 6 establishes traffic rights for “scheduled” air services—it provides that, like State aircraft, the scheduled flights of one State may not enter the airspace of another State without “special permission or other authorization.”<sup>47</sup>

Though expansive on their face, the first and second “freedoms” granted to nonscheduled flights under Article 5 of the Chicago Convention are in reality markedly limited. The over-flown State can, in the interest of safety, require that nonscheduled aircraft obtain special (prior) permission for such flights or follow prescribed routes over areas deemed inaccessible or without adequate air navigation facilities.<sup>48</sup> This effectively means the aircraft operator can also be required to inform the over-flown State of their flight plan, intended flight path and technical stopover sites, and furnish

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<sup>44</sup> See, e.g., FOREIGN CLEARANCE MANUAL, *supra* note 28, para. DL.1.3. The manual defines “aircraft diplomatic clearance” as:

Permission by a foreign government for a United States aircraft to overfly or land in its territory. An aircraft diplomatic clearance permits the movement into or through the territory of a foreign country of military aircraft, cargo, equipment, and aircrew members performing aircrew duties only, including the related activities necessarily involved in such entry or transit, subject to whatever restrictions the clearance specifies. Acceptance of a flight plan and the issuance of a flight clearance by a foreign air traffic control (ATC) unit does not constitute official approval to enter the airspace of any country that requires either prior permission or aircraft diplomatic clearance.

<sup>45</sup> Chicago Convention, *supra* note 17, art. 3(c), 61 Stat. at 1181.

<sup>46</sup> *Id.* The “Five Freedoms of the Air” were spelled out in the International Air Transport Agreement, December 7, 1944, art. 1, § 1, 59 Stat. 1701, 171 U.N.T.S. 387 [hereinafter Transport Agreement], as follows:

(1) The privilege to fly across territory without landing; (2) The privilege to land for non-traffic purposes; (3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; (5) The privilege to take on passengers, mail and cargo destined for the territory of any other Contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

*See generally* DEMPSEY, *supra* note 23, at 18-31 (discussing the “five freedoms” of the air which the U.S. delegation advanced at the 1944 Chicago Conference, as well as other freedoms of the air that have since been identified).

<sup>47</sup> Chicago Convention, *supra* note 17, art. 6, 61 Stat. at 1182.

<sup>48</sup> *Id.*, art. 5, 61 Stat. at 1181.



other information before entering foreign airspace as well.<sup>49</sup> In spite of this, the first paragraph of Article 5 is still viewed by some as significant for establishing a degree of freedom of flight through foreign airspace for nonscheduled flights<sup>50</sup> that is “comparable to the maritime right of innocent passage.”<sup>51</sup>

Furthermore, while Article 6 serves to highlight the absence of a multilateral exchange of traffic rights for scheduled flights within the four corners of the treaty, the Chicago Convention was actually successful in drawing up a “side” agreement known as the International Air Services Transit Agreement (or “Two Freedoms Agreement”) that was open to all signatories to the Convention and granted the first two freedoms of the air on a multilateral basis.<sup>52</sup> Read together, Article 5 of the Chicago Convention and the Transit Agreement thus essentially afford nonscheduled and scheduled flights the same basic traffic rights.<sup>53</sup> Still, only 123 of ICAO’s 190 member nations have actually ratified the Transit Agreement; conspicuously absent are some of the States with the largest territories, including Russia, China, Canada, Brazil, and Indonesia (with its vast archipelagic sea).<sup>54</sup> Consequently, first and second freedom rights extended

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<sup>49</sup> MATTE, *supra* note 24, at 148 n.86 (citing H.A. WASSENBERGH, POST-WAR INTERNATIONAL CIVIL AVIATION POLICY AND THE LAW OF THE AIR (1962)).

<sup>50</sup> *E.g.*, Nonscheduled air transport and private, non-commercial traffic. MARTIN BARTLIK, THE IMPACT OF EU LAW ON THE REGULATION OF INTERNATIONAL AIR TRANSPORTATION 6 (2007).

<sup>51</sup> MATTE, *supra* note 24, at 148-149; *but see* DEMPSEY, *supra* note 23, at 44 (“There is no corresponding right in Air Law to the Maritime Law concept of ‘freedom of the seas’ or the right of innocent passage”); *cf.* MATTE, *supra* note 24, at 149-150 (noting that Article 5, paragraph 2, also grants “third, fourth and fifth freedom rights” for commercial nonscheduled services subject to “such ‘regulations, conditions or limitations’ as [the State] may consider desirable,” (emphasis in original) but that, despite pleas from the ICAO Secretariat to the contrary, most States have imposed a prior permission requirement, thus rendering this provision “non-effective.”); *see also* HAANAPPEL, *supra* note 35, at 110 (noting that because most States require prior permission for all commercial nonscheduled air services, Article 5, paragraph 2, is “a virtually dead provision in international air law”).

<sup>52</sup> International Air Services Transit Agreement, Dec. 7, 1944, art. 1, § 1, 59 Stat. 1693, 84 U.N.T.S. 389 [hereinafter Transit Agreement]. Under Article 1, Section 1, of the Transit Agreement “[e]ach contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services: 1. The privilege to fly across its territory without landing; 2. The privilege to land for non-traffic purposes.” The Transit Agreement, *supra* note 46, which was also concluded at the Chicago Convention, provided for a multilateral exchange of all five freedoms of the air for international air services. As Professor Dempsey notes, however, “in the ensuing half century, fewer than a dozen nations ratified this agreement, and even the United States – its principal proponent – withdrew after ratification.” DEMPSEY, *supra* note 23, at 29.

<sup>53</sup> *See* MATTE, *supra* note 24, at 148; HAANAPPEL, *supra* note 35, at 110.

<sup>54</sup> MILDE, *supra* note 39, at 104. Dr. Milde distinguishes the “special case” of Canada, the second largest land territory in the world, which withdrew from the Transit Agreement in 1988 because of a dispute with the United Kingdom over traffic rights to and slots at London-Heathrow airport. Milde argues that Canada remains an active supporter of liberalized attitudes in international aviation and continues to offer to the United Kingdom and any other State the “two freedoms” on a bilateral reciprocal basis, whereas Russia, in contrast,

to scheduled air services under the Transit Agreement have only limited geographic application.

In practice, however, the “special permission or other authorization” required for scheduled air services under Article 6 has taken the form of the reciprocal exchange of traffic rights between States through bilateral treaties known as “air transport” or “air services” agreements.<sup>55</sup> In 1946, the United States and the United Kingdom concluded one of the earliest post-Convention air transport agreements, commonly referred to as *Bermuda I*.<sup>56</sup> It introduced a formula for exchanging air traffic rights on a *quid pro quo* basis that for four decades was not only the template by which all U.S. bilateral agreements were negotiated but also a model for agreements of other nations as well.<sup>57</sup>

More recently, the paradigm for dealing with scheduled traffic rights has shifted from *Bermuda I* to the U.S. “open skies” framework, which allows contracting parties’ airlines to fly between any point in the territory of one party and any point in the territory of the other party with no restrictions on routes, flights, aircraft, or prices charged.<sup>58</sup> In fact, “open skies” is now the rule in the exchange of traffic rights between the United States and all 27 European Union member States—an estimated 60 percent of global commercial air traffic.<sup>59</sup> Thus, all told, Article 6 serves as the

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“unlawfully” requires cash payments from foreign countries for using Russian air space. *Id.* at 104 n.9.

<sup>55</sup> *Id.* at 43; *see generally id.* at 107-113 (discussing bilateral agreements on air services).

<sup>56</sup> Agreement between the Government of the United Kingdom and the Government of the United States relating to Air Services between their Respective Territories, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 253. Over time, the United Kingdom became disenchanted with *Bermuda I*, which it viewed as unfairly favoring U.S. carriers, and so, on June 22, 1976, denounced the accord and sought a more restrictive arrangement. Despite derisive cries of “protectionism” and calls for deregulation of the air transport industry from the United States, the two sides concluded a new agreement about a year later. It increased restrictions on routes, capacity, frequency, and designation, and virtually abolished fifth-freedom opportunities enjoyed by U.S. carriers under *Bermuda I*; consequently, it contributed little to the development of international air transport or aeronautical law. *See* ISABELLA H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 63 (2006). This latter agreement, known as the Agreement between the Government of the United States of America and Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services, Jul. 23, 1977, U.S.-U.K., 28 U.S.T. 5367, is commonly referred to as *Bermuda II*.

<sup>57</sup> DEMPSEY, *supra* note 23, at 80-81; *see also* DIEDERIKS-VERSCHOOR, *supra* note 56, at 60-61.

<sup>58</sup> *E.g.*, Multilateral Agreement on the Liberalization of International Air Transportation, May 1, 2001, 2001 U.S.T. LEXIS 69; *see also* HAANAPPEL, *supra* note 35, at 281 (“U.S. Model Open Skies Agreement”); U.S. DEP’T OF STATE, OFFICE OF THE SPOKESMAN, FACT SHEET: U.S.-EUROPEAN UNION AIR TRANSPORT AGREEMENT (2007), at [http://useu.usmission.gov/Dossiers/Open\\_Skies/default.asp](http://useu.usmission.gov/Dossiers/Open_Skies/default.asp).

<sup>59</sup> Air Transport Agreement, Apr. 30, 2007, 2007 U.S.T. LEXIS 85; U.S. DEP’T OF STATE, OFFICE OF THE SPOKESMAN, MEDIA NOTE: U.S.-EU AIR TRANSPORT AGREEMENT BECOMES EFFECTIVE MARCH 30 (2008), at [http://useu.usmission.gov/Dossiers/Open\\_Skies/default.asp](http://useu.usmission.gov/Dossiers/Open_Skies/default.asp).

basis for a vast web of as many as 3,000 agreements between nearly 200 States for the operation of scheduled air services.<sup>60</sup>

Notably, the Convention defines neither “nonscheduled flight” nor “scheduled air services,” nor is there a unanimously or even widely accepted definition of either term; rather, “nonscheduled flight” is only negatively described as not being scheduled air transportation, which again is also undefined.<sup>61</sup> In 1952, the ICAO Council<sup>62</sup> sought to resolve this dilemma by adopting the following definition of “scheduled international air service”:

A scheduled international air service is a series of flights that possesses all of the following characteristics: (a) it passes through the airspace over the territory of more than one state; (b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public; (c) it is operated, so as to serve traffic between the same two or more points; either, (i) according to a published time-table, or (ii) with flights so regular or frequent that they constitute a recognizable systemic series.<sup>63</sup>

This definition was intended to be applied cumulatively, “spelling out what scheduled services are, thereby delimiting nonscheduled services in a negative manner”—in other words, if any one element of “scheduled international air service” is not met, the service is classified as “nonscheduled.”<sup>64</sup> However, the Council’s proposal failed to find

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<sup>60</sup> MILDE, *supra* note 39, at 110.

<sup>61</sup> Chicago Convention, *supra* note 17, art. 5, 61 Stat. at 1181 (defining “nonscheduled flight” as “aircraft not engaged in scheduled air services”); *cf. id.*, at 1206 (Article 92 defines “air services” as “any scheduled air service performed by aircraft for the public transport of passengers, mail and cargo,” and “international air services” as “an air service which passes through the airspace over the territory of more than one State”); *See also* MATTE, *supra* note 24, at 148-166 (discussing Article 5 of the Chicago Convention and the distinction between scheduled and nonscheduled services); *and* BARTLIK, *supra* note 50, at 6 (noting that the difference between scheduled and nonscheduled services arises from characteristics of “planned” and “public” inherent in the definition of scheduled services).

<sup>62</sup> The Council is the 36-member governing body of ICAO, chosen by the representatives of all member nations that make up the ICAO Assembly. INTERNATIONAL CIVIL AVIATION ORGANIZATION, HOW IT WORKS [hereinafter ICAO: HOW IT WORKS], at <http://www.icao.int/icao/en/howworks.htm>.

<sup>63</sup> *Definition of Scheduled International Air Service*, ICAO Doc. 7278-C/841 (1952) (adopted pursuant to ICAO Assembly Resolution A2-18).

<sup>64</sup> MATTE, *supra* note 24, at 151 n.98, 162; *but see* MILDE, *supra* note 39, at 101 (“This definition is just an interpretation ... and need not be taken as rigid or definitive.”); *see also* BARTLIK, *supra* note 50, at 6 (stating that a nonscheduled flight includes “taxi flights, sightseeing flights, medical flights, advertisement flights or flights as part of holiday packages”); Prasert Pompongsuk, *Transit Rights over Territorial Airspace: Reflection on the Practice of Thailand*, THAILAND L. FORUM (2002), available at

acceptance with the majority of member-States, as many instead adopted their own national regulations that contained positive definitions for “scheduled” and “nonscheduled” air transport services.<sup>65</sup> For example, the U.S. Department of Transportation (DoT) regulations define “scheduled service” quite simply as “[t]ransport service operated pursuant to published flight schedules.”<sup>66</sup> In contrast, “nonscheduled service” is broken down more extensively as including

transport service between points not covered by Certificates of Public Convenience and Necessity issued by the Department of Transportation to the air carrier; service pursuant to the charter or hiring of an aircraft; other revenue services not constituting an integral part of the services performed pursuant to published schedules; and related nonrevenue flights.<sup>67</sup>

DoT regulations further delineate “charter service” as follows:

Nonscheduled air transport service in which the party receiving transportation obtains exclusive use of an agreed upon portion of the total capacity of an aircraft with the remuneration paid by the party receiving transportation accruing directly to, and the responsibility for providing transportation is that of, the accounting carrier.<sup>68</sup>

In reality, however, the technical distinction between scheduled and nonscheduled air services has only limited practical application to traffic rights for U.S. carriers, since U.S. bilateral air transport agreements

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<http://www.thailawforum.com/articles/transit2.html#7> (noting that nonscheduled flights may include, for example, “charter flights, maintenance flights or positioning flights”).

<sup>65</sup> MATTE, *supra* note 24, at 162-163 & 163 n.157.

<sup>66</sup> Uniform System of Accounts and Reports for Large Certified Air Carriers, 14 C.F.R. § 241 (2009) (includes “extra sections and related nonrevenue flights”); *see also* 14 C.F.R. § 170.3 (“Scheduled commercial service means the carriage by aircraft in air commerce under parts 121 and 135 of persons or property for compensation or hire based on published flight schedules”).

<sup>67</sup> 14 C.F.R. § 241 (2009). U.S. air carriers desiring to provide foreign air transportation must hold a Certificate of Public Convenience and Necessity issued by the DoT pursuant to 49 U.S.C. § 41102. The certificate must specify, to the extent practicable, the places between which the air carrier is authorized to provide the transportation; otherwise it identifies only the general routes to be followed. 49 U.S.C. §§ 41101-41113 (2007); *see also* 14 C.F.R. § 298.61 (2009) (“Nonscheduled services include all traffic and capacity elements applicable to the performance of nonscheduled aircraft charters, and other air transportation services not constituting an integral part of the services performed pursuant to published flight schedules.”); 14 C.F.R. § 170.3 (“Nonscheduled commercial service means the carriage by aircraft in air commerce of persons or property for compensation or hire that are not operated in regularly scheduled service such as charter flights.”).

<sup>68</sup> 14 C.F.R. § 241 (2009).

generally provide for air service rights for both scheduled and *charter* – as opposed to nonscheduled – air services.<sup>69</sup>

#### B. “State Aircraft” versus “Civil Aircraft”

The legal distinctions between State and civil aircraft, which are borne out by virtue of States’ exercise of sovereignty over their national airspace, are intrinsic and particularly significant to MAF operations, especially in comparison to the CAF. As a case in point, access to foreign territory and airspace is generally important with any military force projection capability,<sup>70</sup> to include land-based fighters and support aircraft alike.<sup>71</sup> However, combat air forces are, for the most part, equipped and configured to fight most effectively from “in theater,” as evidenced by the fact that aircraft such as the A-10, F-15, F-16, and F-117 have unrefueled combat radii of only 300 to 500 nautical miles.<sup>72</sup> Plus, as instrumentalities of armed conflict, the *raison d’être* of combat aircraft is to intentionally penetrate a belligerent’s airspace without authorization.

Mobility air forces, on the other hand, represent a military capability that is more global in character and, even during wartime, fulfill a wide variety of international engagement missions and other mobility needs in addition to combat missions within or in support of the theater of operations.<sup>73</sup> In fact, the U.S. Air Force’s Air Mobility Command (AMC), the organization responsible for providing the U.S. military’s airlift, air refueling, air mobility support, and aeromedical evacuation capabilities, conducts an estimated 700 to 900 operational sorties per day worldwide<sup>74</sup> — by comparison, in 2005 the CAF flew around 100 to 200 combat sorties per day in the Southwest Asian theater.<sup>75</sup> The day-to-day constraints of

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<sup>69</sup> See *supra* note 63.

<sup>70</sup> See DoD DICTIONARY, *supra* note 2, at 185 (defining “force projection” as “[t]he ability to project the military instrument of national power from the United States or another theater, in response to requirements for military operations”).

<sup>71</sup> See generally DAVID A. SHLAPAK ET AL., A GLOBAL ACCESS STRATEGY FOR THE U.S. AIR FORCE (2002) (on the importance to the U.S. Air Force of access to overseas installations, foreign territory, and foreign airspace).

<sup>72</sup> *Id.* at 6.

<sup>73</sup> MAF “engagement” missions include, for example, special assignment air missions (SAAMs), the delivery of peacekeeping forces and humanitarian relief (HUMRO), transportation of the President and other senior U.S. officials (BANNER missions), support of military operations in small-scale contingencies (SSCs), and participation in a myriad of small and large regional exercises with other militaries. TIMOTHY M. BONDS, ET AL., MEASURING THE TEMPO OF THE MOBILITY AIR FORCES 3 (2005).

<sup>74</sup> See e.g., Justin Brockhoff, *Air Mobility Command Officials Set All-Time Sortie Record*, A.F. PRINT NEWS TODAY (Dec. 3, 2008), [http://www.618tacc.amc.af.mil/news/story\\_print.asp?id=123130466](http://www.618tacc.amc.af.mil/news/story_print.asp?id=123130466).

<sup>75</sup> See *Current and Future Department of Defense Aircraft Programs (TACAIR): Hearing before the H. Subcomm. on Air and Land Forces*, 110th Cong. 2 (2007) (combined statement of Lieutenant General Donald J. Hoffman, Military Deputy, Office of the Assistant Secretary of the Air Force for Acquisition (SAF/AQ) and Lieutenant General Carrol H. Chandler,

territorial airspace and diplomatic clearances relative to state aircraft thus have a discernibly greater impact on global air mobility than they do on combat air operations. Moreover, in contrast with most CAF aircraft, which are, by their nature, quintessential military aircraft,<sup>76</sup> the MAF transport cargo and passengers interchangeably on both military and chartered commercial aircraft, oftentimes “on a reimbursable basis for other agencies, international organizations, other nations, and sometimes individuals.”<sup>77</sup> The State versus civil aircraft delineation therefore directly controls what legal regime governs a given MAF mission, not only in terms of overflight rights but also with respect to the ICAO regulatory scheme.

As noted previously, military aircraft are one of three categories of state aircraft enumerated in Article 3(b) of the Chicago Convention and, as such, are excluded from the treaty’s regulatory system,<sup>78</sup> yet international law lacks a formalized definition of military aircraft.<sup>79</sup> Some commentators have argued that the concept of military aircraft as “instrumentalities of nations performing *noncommercial* sovereign functions” was crystallized as a norm of customary international law beginning with the Paris Convention of 1919.<sup>80</sup> However, the DoD has rejected the commercial versus noncommercial distinction as “too vague” and “[jeopardizing] the sovereign immunity of military aircraft conducting international operations.”<sup>81</sup> Instead, the DoD advances a definition of military aircraft that parallels the definition of “warships” in the 1982 Convention on the Law of the Sea.<sup>82</sup> This definition, which has emerged under international law, classifies as military aircraft “all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the military forces, and manned by a crew subject to regular armed forces discipline.”<sup>83</sup>

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Deputy Chief of Staff, Air and Space Operations (AF/A3/5)); *see also* Cheyenne A. Griffin, *Total Force, Joint, Coalition Team Create New Synergy in CAOC*, A. F. PRINT NEWS TODAY (Aug. 2, 2005), [http://www.af.mil/news/story\\_print.asp?id=123011211](http://www.af.mil/news/story_print.asp?id=123011211).

<sup>76</sup> *See* HAANAPPEL, *supra* note 35, at 44 (stating that fighter planes, even when being flown for training or demonstration purposes (e.g., air shows), are nonetheless military aircraft); *but see* MILDE, *supra* note 39, at 71 (proposing that an unarmed F-18 fighter plane piloted by a military officer cleared for a civil flight plan for a flight to another countries’ civil airport to deliver serum to a critically ill person could claim civil status).

<sup>77</sup> Memorandum from Williams J. Haynes, General Counsel of the Department of Defense, to Richard B. Cheney, President of the Senate, and J. Dennis Hastert, Speaker of the House of Representatives 7 (Jul. 11, 2001), *available at* <http://www.dod.mil/dodgc/olc/docs/July12-Second.pdf> [hereinafter DOD/GC Memo].

<sup>78</sup> *See supra* note 24 and accompanying text.

<sup>79</sup> *See ICAO Study on Civil/State Aircraft, supra* note 24, at 6-8.

<sup>80</sup> Bourbonniere & Haeck, *supra* note 24, at 891 (emphasis added); *see also supra* note 38.

<sup>81</sup> DoD/GC Memo, *supra* note 77, at 7.

<sup>82</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 29, 21 I.L.M. 1261, 1833 U.N.T.S. 397 (1982) [hereinafter UNCLOS].

<sup>83</sup> DoD/GC Memo, *supra* note 77, at 8; LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 174 (2008); *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.1; U.S. AIR FORCE JUDGE ADVOCATE GENERAL’S DEP’T, AIR FORCE OPERATIONS & THE

By analogy, U.S. domestic law buttresses the DoD position, rejecting the “noncommercial purposes” criterion in the context of whether military aircraft are “public aircraft” and therefore exempt from the provisions of U.S. civil air regulations. Rather, these statutes straightforwardly defined military aircraft as any “aircraft owned or operated by the armed forces.”<sup>84</sup> Thus, from the U.S. perspective, military aircraft operating under the direction of the DoD are “Chicago-type” state aircraft – with the attached sovereign immunity and other rights and privileges<sup>85</sup> – regardless of why the aircraft are flown or whether the military service receives reimbursement.<sup>86</sup>

The state versus civil aircraft distinction also holds special significance for mobility air forces because of the CRAF contributions they receive.<sup>87</sup> The CRAF has three main segments – international, national, and aeromedical – as well as three stages of incremental activation, used to augment airlift as needed to meet a given contingency: Stage I is for minor crisis; Stage II is for major theater war; and Stage III is for periods of national mobilization.<sup>88</sup> Additionally, the U.S. government incentivizes airlines to participate in the program by guaranteeing CRAF carriers access

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LAW 6 (2002) [hereinafter USAF OPS LAW HANDBOOK] (“As a general rule military aircraft include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.”).

<sup>84</sup> 49 U.S.C. § 40102(a)(41) (2009), *see also* 49 U.S.C. § 40125(c)(1)(A) (2009) (“an aircraft described in section 40102(a)(41)(E) qualifies as a public aircraft if ... the aircraft is operated in accordance with title 10”).

<sup>85</sup> *See* Bourbonniere & Haeck, *supra* note 24, at 901-902.

<sup>86</sup> *See* DoD/GC Memo, *supra* note 77, at 7; *compare* 49 U.S.C. § 40102(a)(41)(A)-(D) with 49 U.S.C. § 40125(b). The latter states that an aircraft used only for the U.S. Government; owned and operated by the Government for crew training, equipment development, or demonstration; owned and operated by the government of a State, the District of Columbia, or a U.S. territory or possession or a political subdivision thereof; *or* exclusively leased for at least 90 continuous days by government of a State, the District of Columbia, or a U.S. territory or possession or a political subdivision thereof “does not qualify as a public aircraft ... when the aircraft is used for commercial purposes.”

<sup>87</sup> As of May 2007, 37 carriers and 13,764 aircraft were enrolled in the CRAF. CRAF FACT SHEET, *supra* note 15; *see generally* ROBERT M. KANE, AIR TRANSPORTATION 14-26 (2002) (describing the CRAF program).

<sup>88</sup> Aircraft are assigned to a segment based on the nature of the requirement and the performance characteristics required. CRAF FACT SHEET, *supra* note 15; *see also* CHRISTOPHER BOLKOM, CIVIL RESERVE AIR FLEET (CRAF), U.S. CONGRESSIONAL RESEARCH SERVICE REPORT RL33692, at 3 (2006):

CRAF has been formally activated on two separate occasions over the program’s 54 year history. The first activation was during Operations Desert Shield/Desert Storm from August 18, 1990 through May 24, 1991. The level of activation included long range international passenger and cargo up to Stage II. The second activation was during Iraqi Freedom from February 8, 2003 through June 18, 2003. The level of activation included long range international passenger up to Stage 1; long cargo was not required.

to billions of dollars of DoD steady-state passenger and cargo airlift business.<sup>89</sup>

Here again, jurists and legal scholars have proposed a “functional test” for civil aircraft along the lines of the “noncommercial purposes” test for military aircraft, whereby civil aircraft involved in military activities, such as a commercial carrier’s Boeing 747 transporting military personnel and/or equipment under the International Airlift Service Contract or CRAF program, would be classified as a state (military) aircraft.<sup>90</sup> Nevertheless, the United States has consistently taken the position that aircraft under contract to the DoD and other government agencies do not qualify as state aircraft unless the U.S. Government specifically designates them as such.<sup>91</sup> U.S. domestic law likewise specifies that civil aircraft chartered to provide transportation or other commercial air services to the armed forces retain their civil character unless the Secretary of Defense designates the operation as being required in the national interest.<sup>92</sup>

As a matter of policy, the United States will not normally designate DoD contract aircraft as state aircraft.<sup>93</sup> A major reason for the U.S. stance in this regard is the absence of any statutory authority to allow the U.S. Government to routinely assume liability for tort claims arising from the activities of contract aircraft.<sup>94</sup> Under international law, “[a] state must

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<sup>89</sup> See *supra* note 15. CRAF participants must be U.S. carriers fully certified by the Federal Aviation Administration (FAA) and meet the stringent standards of Federal Aviation Regulations pertaining to commercial airlines, 14 C.F.R. § 121, and all aircraft committed must be U.S. registered. BOLKOM, *supra* note 88, at 1.

<sup>90</sup> E.g., Milde, *supra* note 19, at 418 (arguing for a functional approach to the determination of whether an aircraft is civil or State whereby a commercial airliner ferrying troops might be classified as a military aircraft and a fighter plane carrying emergency vaccine to arrest an outbreak of disease might be considered a civil aircraft); MILDE, *supra* note 39, at 71-74; HAANAPPEL, *supra* note 35, at 44 (asserting that state aircraft should include aircraft “normally used for the commercial carriage of passengers, baggage, mail and/or cargo, but that are sometimes used exclusively for state purposes”); Bourbonniere & Haeck, *supra* note 24, at 887-888 (“[W]ithin the corpus of international public air law, the rights and duties, which affect the flight of an aircraft, are contingent upon its function”). See also Message from the Secretary of State, U.S. Government Policy on Aviation-Related Fees 2 (Aug. 1, 2007) (on file with author) [hereinafter Secretary of State Message (Aug 07)].

<sup>91</sup> Secretary of State Message (Aug 07), *supra* note 90, at 2; USAF OPS LAW HANDBOOK, *supra* note 83, at 6; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.3.

<sup>92</sup> 49 U.S.C. § 40125(c)(1)(C).

<sup>93</sup> Secretary of State Message (Aug 07), *supra* note 90, at 2; USAF OPS LAW HANDBOOK, *supra* note 83, at 6; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.3; see, e.g., Agreement Between the Government of the United States and the Government of the Republic of Korea Concerning Mutual Airlift Support Utilizing Aircraft Operated by/for the Military Forces of the Parties in Case of Military Hostilities in the Republic of Korea, Jul. 6, 2004, U.S.-S. Korea, Jul. 6, 2004, T.I.A.S., art. 8, available at <http://www.state.gov/documents/organization/96202.pdf>.

<sup>94</sup> Performance Work Statement for International Airlift Services in Support of DoD and the Civil Reserve Air Fleet, app. 4 para. 2.0 (Aug. 27, 2008), (on file with author) [hereinafter PWS for Int’l Airlift]; see *Roditis v. United States*, 122 F.3d 108, 111 (2d Cir. 1997):

Consent of the United States to be sued “cannot be implied, but must be unequivocally expressed.” *United States v. Testan*, 424 U.S. 392, 399, 96



accept full responsibility for the operation of its state aircraft”<sup>95</sup>—however, when it comes to contract airlift, the “U.S. Government has neither the operational control nor the legal authority to meet this responsibility.”<sup>96</sup> U.S. policy also clarifies the status of DoD contractor aircraft flying AMC missions so that, for example, an AMC charter, operating on the assumption that it is a civil aircraft entitled to exercise the right of overflight and to make technical stops under Article 5 of the Chicago Convention, is less likely to be erroneously classified as a state aircraft operating in the overflown State’s airspace without the requisite authorization.<sup>97</sup>

Notably, many of the agreements for the basing of American military forces in foreign countries actually “grant DoD contract aircraft the same rights of access, exit, and freedom from landing fees and similar charges enjoyed by U.S. military aircraft under the agreements[;]” however, “such agreements do not have the effect of declaring DoD contract aircraft to be state aircraft.”<sup>98</sup> Instead, commercial aircraft flying AMC missions typically function as nonscheduled civil aircraft.<sup>99</sup> Contractors are therefore responsible for complying with foreign countries’ domestic law requirements for nonscheduled commercial aircraft and obtaining overflight and landing clearances for their aircraft.<sup>100</sup> Because of the significant number of commercial aircraft flying AMC missions,<sup>101</sup> this obligation

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S.Ct. 948, 953, 47 L.Ed.2d 114 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969)). In the FTCA, Congress waived the United States’ sovereign immunity for suits arising from any injury “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.” 28 U.S.C. § 1346(b)(1). “Employee” under the FTCA, however, specifically excludes “any contractor with the United States.” 28 U.S.C. § 2671; *United States v. Orleans*, 425 U.S. 807, 813-14, 96 S.Ct. 1971, 1975-76, 48 L.Ed.2d 390 (1976); *Logue v. United States*, 412 U.S. 521, 526-27, 93 S.Ct. 2215, 2218-19, 37 L.Ed.2d 121 (1973). Thus, as a general rule, sovereign immunity precludes suits against the United States for injuries caused by its independent contractors.

<sup>95</sup> See U.N. INT’L LAW COMM’N, THE INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON STATE RESPONSIBILITY 329-330 (Shabtai Rosenne ed., 1991); see also Margaret K. Lewis, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404 (2002).

<sup>96</sup> PWS for Int’l Airlift, *supra* note 94, app. 4, para. 2.0.

<sup>97</sup> ICAO Study on Civil/State Aircraft, *supra* note 24, at 8; see Chicago Convention, *supra* note 17, art. 3(c), 61 Stat. at 1181; PWS for Int’l Airlift, *supra* note 94, app. 4, para. 2.1.

<sup>98</sup> Secretary of State Message (Aug 07), *supra* note 90, at 2.

<sup>99</sup> See PWS for Int’l Airlift, *supra* note 94, app. 4, para. 2.0; see also *supra* note 68.

<sup>100</sup> PWS for Int’l Airlift, *supra* note 94, app. 4, para. 3.0. The FAA publishes the International Flight Information Manual (IFIM) (at [http://www.faa.gov/air\\_traffic/publications/ifim/](http://www.faa.gov/air_traffic/publications/ifim/)) as a preflight and planning guide for use by U.S. nonscheduled operators, business, and private aviators flying outside the United States; it outlines appropriate civil aviation responsibilities and points of contacts for diplomatic clearance via civilian channels to assist DoD contractors in obtaining their own clearances.

<sup>101</sup> As of May 2007, 37 carriers and 1364 aircraft were enrolled in the CRAF. This includes 1273 aircraft in the international segment (990 in the long-range international section and 283

places the Chicago Convention's commercial traffic rights regime on par with the state aircraft diplomatic clearance process as a catalyst for MAF mission accomplishment.

The applicability of the Chicago Convention to commercial aircraft flying AMC missions also means that contractors must take into account the cargo restrictions imposed by Article 35 of the treaty. Specifically, Article 35 prohibits civil aircraft from carrying munitions and implements of war over the territory of another State without that State's permission.<sup>102</sup> What's more, the treaty leaves it to each State to individually define through its own regulations what constitutes war materials.<sup>103</sup> So to avoid allegations that the United States is violating or circumventing Article 35, DoD airlift contractors are further expected to find out whether any State that their aircraft will overfly or land in imposes "special clearance" requirements based on the military nature of the aircraft's cargo.<sup>104</sup>

### C. Aerial Intrusions

As discussed earlier, consistent with the principles of sovereignty and national airspace confirmed by the Chicago Convention, a foreign aircraft may lawfully enter another country's airspace only with that State's authorization.<sup>105</sup> Any unauthorized incursion into national airspace by a foreign aircraft – or "aerial intrusion" – would thus violate customary sovereignty and the Chicago Convention.<sup>106</sup> The affected State would then have the legal right to respond by intercepting the offending aircraft and turning it away; forcing it to land at a designated airfield; impounding the aircraft if it lands; or even shooting it down.<sup>107</sup>

After the 1983 downing of Korean Air Lines Flight 007 by Soviet fighter aircraft, the ICAO Assembly<sup>108</sup> amended the Chicago Convention,

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in the short-range international section), and 37 and 50 aircraft, respectively, in the national and aeromedical evacuation segments and 4 aircraft in the Alaskan segment. CRAF FACT SHEET, *supra* note 15.

<sup>102</sup> Chicago Convention, *supra* note 17, art. 35, 61 Stat. at 1190.

<sup>103</sup> *Id.*

<sup>104</sup> PWS for Int'l Airlift, *supra* note 94, app. 4, para. 2.1.

<sup>105</sup> Chicago Convention, *supra* note 17, arts. 1, 3, 6, 61 Stat. at 1180-82; *see supra* notes 40-47 and accompanying text; BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 203 (2005).

<sup>106</sup> MATTE, *supra* note 24, at 175.

<sup>107</sup> *See* BOCZEK, *supra* note 105, at 203 (discussing States' responses to airspace incursions by foreign aircraft); *see also* Bourbonniere & Haeck, *supra* note 24, at 946; CATHAL J. NOLAN, 2 GREENWOOD ENCYCLOPEDIA OF INTERNATIONAL RELATIONS: F-L 814 (2002).

<sup>108</sup> "The Assembly, composed of representatives from all Contracting States, is the sovereign body of ICAO. It meets every three years, reviewing in detail the work of the Organization and setting policy for the coming years. It also votes a triennial budget." ICAO: HOW IT WORKS, *supra* note 62.

adding Article 3 *bis*<sup>109</sup> which, *inter alia*, provided that States “must refrain from resorting to weapons against *civil* aircraft in flight” or, in the case of interception, endangering the safety of the aircraft and those on board<sup>110</sup> –a rule that can today be regarded as part of customary international law.<sup>111</sup> But because of the potential security threat that trespassing *military* aircraft represent to the territorial sovereign, international legal standards for State responses to aerial intrusions treat civil and military aircraft differently, imposing a much lower threshold for the use of force without warning against military aircraft that intrude into the territory of another State.<sup>112</sup>

Yet, while invoking the right of self-defense by the territorial State logically begets a lower burden of proof for using force against intrusion by a military aircraft,<sup>113</sup> international rules on the resort to armed force and, in particular, the principles of necessity and proportionality, offer at least some *pro forma* protection to trespassing military aircraft in peacetime.<sup>114</sup> For example, inasmuch as the overflowed State may not resort to disproportionate force against an intruder, the State should arguably give foreign military aircraft that do not present an immediate and serious threat a reasonable opportunity to change course or land before being attacked.<sup>115</sup> The United States has further advanced the view that international law supports normative standards similar to those applicable to civil aircraft with respect to interception of military aircraft that trespass national airspace due to error, distress, or *force majeure*.<sup>116</sup>

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<sup>109</sup> “Under Article 94(b) of the Convention, the amendment came into force on 1 October 1998 in respect of those States which have ratified it.” Maria Buzdugan, ed., “Chicago” *Acts and Related Protocols*, 30-1 ANNALS OF AIR & SPACE LAW 20 n.1 (2005).

<sup>110</sup> *Id.* (emphasis added). Article 3 *bis* explicitly states that it should “not be interpreted as modifying in any way the rights and obligation of States” under the U.N. Charter. By implication, therefore, States may still lawfully use weapons in self-defense against civilian aircraft clearly involved in an act of aggression or terrorism. BOCZEK, *supra* note 105, at 203-04.

<sup>111</sup> See BOCZEK, *supra* note 105, at 204; see also generally Marco Gestri, *The Chicago Convention and Civilian Aircraft in Time of War*, in THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES 129, 143-49 (Natalino Ronzitti & Gabriella Venturini eds., 2006) (discussing the impact of the Chicago Convention on the status of civilian aircraft in time of armed conflict).

<sup>112</sup> See John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 291-94 (1985); see also Bourbonniere & Haeck, *supra* note 24, at 946; BOCZEK, *supra* note 105, at 204.

<sup>113</sup> BOCZEK, *supra* note 105, at 204; see also Scott R. Morris, *America’s Most Recent Prisoners of War: The Warrant Officer Bobby Hall Incident*, ARMY LAW., at 3, 15 (Sep. 1996).

<sup>114</sup> BOCZEK, *supra* note 105, at 203; Bourbonniere & Haeck, *supra* note 24, at 947; see also Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 114 (2007).

<sup>115</sup> BOCZEK, *supra* note 105, at 203; Phelps, *supra* note 112, at 276; Morris, *supra* note 113, at 15.

<sup>116</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.1, cited with approval in Bourbonniere & Haeck, *supra* note 24, at 947-48 (“The overflight of sovereign territory by a

Besides the standard *jus ad bellum* protections that extend to all trespassing military aircraft, two additional international principles, to varying degrees, offer legal safeguards specifically for mobility air forces. First, in cases of intrusion by unarmed military transport aircraft, custom and State practice offer an exception to the traditional approach that calls for using force against trespassing military aircraft that fail to respond to orders to change course or land. This exception grew out of two separate attacks on U.S. C-47 transport aircraft over Yugoslavia in 1946.<sup>117</sup> In both instances, there was no question that the U.S. aircraft had intruded into Yugoslav airspace (though the United States maintained the intrusions were unintentional and the result of bad weather); rather, the main point of contention between the parties was the nature of the attacks, specifically whether the C-47s had been attacked without warning.<sup>118</sup>

Following the second incursion, which saw Yugoslav fighters shoot down the C-47, killing all on board, Yugoslavia declared that it would no longer fire on the transports, even if their intrusion into Yugoslav airspace was intentional.<sup>119</sup> Furthermore, while Yugoslavia would continue to intercept and invite such intruders to land, noncompliant aircraft would simply be identified and the matter addressed through diplomatic channels.<sup>120</sup> Since its pronouncement, the Yugoslav approach has gained some traction as a prescriptive norm by which (1) use of force against an unarmed military transport aircraft is prohibited in peacetime absent manifest hostile intent, and (2) failure of an intruding military transport to land at a designated airfield is to be treated as a diplomatic incident and handled through proper channels.<sup>121</sup> However, given the persistence of contrary positions on the treatment of aerial intruders,<sup>122</sup> it is doubtful that

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state aircraft can be justified by reasons of distress or force majeure as an exception to the principle edicted in Article 3 of the Chicago Convention.”).

<sup>117</sup> See Phelps, *supra* note 112, at 275-76.

<sup>118</sup> Compare Facts Relating to Flights of American Planes over Yugoslav Territory (Reply from Acting Secretary Clayton to the Yugoslav Chargé D’Affaires), Sep. 3, 1946, DEP’T ST. BULL., Sep. 1946, 501-05 [hereinafter Flights of American Planes over Yugoslav Territory] (William L. Clayton served as U.S. Undersecretary of State for Economic Affairs from 1945 to 1947); with Protest Against Yugoslav Attack on American Plane and Detention of American Personnel, Aug. 22, 1946, DEP’T ST. BULL., Sep. 1946, 418 (quoting a letter from Yugoslav President Josip Broz Tito to the U.S. Ambassador to Yugoslavia).

<sup>119</sup> Flights of American Planes over Yugoslav Territory, *supra* note 118, at 505.

<sup>120</sup> *Id.*

<sup>121</sup> See Phelps, *supra* note 112, at 292; *cf. supra* note 112 and accompanying text; *see also generally* Andrew Hurrell, *Norms and Ethics in International Relations*, in HANDBOOK OF INT’L RELATIONS 143-44 (Walter Carlsnaes et al. eds., 2002) (discussing the meaning and legal significance of international norms).

<sup>122</sup> See, e.g., Phelps, *supra* note 115, at 287-88. During a U.N. Security Council debate on one of several Soviet attacks on American military aircraft in the 1960s, a Soviet representative stated: “[T]he Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and any other aircraft, forthwith in the event [of] their violation of the airspace of the Soviet Union . . . .” *Id.* at 88. Phelps further notes, “it was clear that the Soviet Union [would] meet all aerial intruders with force.”

this practice has satisfied the “*opinio juris*” requirement,<sup>123</sup> such that it can be considered legally binding.<sup>124</sup>

A second category of legal protection for military aircraft with special relevance to mobility air forces is the conventional regime relating to medical aircraft set down in the 1949 Geneva Conventions and its Protocols.<sup>125</sup> Article 36 of the first Geneva Convention,<sup>126</sup> 39 of the second Convention,<sup>127</sup> and 22 of the fourth Convention,<sup>128</sup> prohibit attacks on aircraft used exclusively for medical transport<sup>129</sup> during both peacetime and armed conflict.<sup>130</sup> However, to be immune from attack in the midst of an armed conflict, medical aircraft must fly along routes and altitudes agreed to by adverse parties whenever they are flying over enemy-controlled territory or close to enemy lines.<sup>131</sup> Plus, although no agreement with adverse parties is necessary for medical flights over friendly territory or seas not under enemy control, notifying adverse parties of such flights is nonetheless also advised, especially if the aircraft will fly within range of enemy anti-aircraft

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*Id.* See also BOCZEK, *supra* note 105, at 203 (“[F]oreign military aircraft disobeying orders to change course or land may ultimately be attacked.”).

<sup>123</sup> Short for “*opinio juris sive necessitates*,” or “the belief that a particular practice is obligatory.” See Dispute Concerning Navigational and Related Rights (Costa Rica v. Nicar.), 2007 I.C.J. LEXIS 4, 293-94; Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, 228-29; North Sea Continental Shelf (F.R.G. v. Den. & F.R.G. v. Neth.), 1969 I.C.J. 3, 44.

<sup>124</sup> See 37 REIN A. MÜLLERSON, DEVELOPMENTS IN INTERNATIONAL LAW: ORDERING ANARCHY (INTERNATIONAL LAW IN INTERNATIONAL SOCIETY) 217-29 (2000) (discussing the significance of *opinio juris* as an element of state practice).

<sup>125</sup> Texts of the 1949 Geneva Conventions and Additional Protocols are available on the International Committee of the Red Cross (ICRC) website at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

<sup>126</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (ratified by the U.S. on Aug. 2, 1955) [hereinafter Geneva I].

<sup>127</sup> Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, (ratified by the U.S. on Aug. 2, 1955) [hereinafter Geneva II].

<sup>128</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (ratified by the U.S. on Aug. 2, 1955) [hereinafter Geneva IV].

<sup>129</sup> Natalino Ronzitti, *The Codification of the Law of Warfare*, in THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES 3, 10 (Natalino Ronzitti & Gabriella Venturini eds., 2006); see Geneva I, *supra* note 126, art. 36 (“Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked . . . .”); Geneva II, *supra* note 127, art. 39 (“Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack . . . .”); Geneva IV, *supra* note 128, art. 22 (“Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment, shall not be attacked . . . .”).

<sup>130</sup> Geneva I, *supra* note 126, art. 2; Geneva II, *supra* note 127, art. 2; Geneva IV, *supra* note 128, art. 2.

<sup>131</sup> Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39; Geneva IV, *supra* note 128, art. 22.

systems.<sup>132</sup> Still, the Conventions require that belligerents issue warnings or order offending medical aircraft to land before they resort to force.<sup>133</sup>

Because the Geneva protections depend on the State's ability to recognize medical aircraft, the identification of medical aircraft is a key aspect of the regime. The 1949 Geneva Conventions required that medical aircraft be clearly marked with a distinctive emblem—*e.g.*, the red cross (or red crescent) on a white background.<sup>134</sup> For more than 30 years, the Air Force flew the C-9 “Nightingale” aeromedical aircraft, with its distinctive white tail flash adorned with a red cross.<sup>135</sup> But in 2005, the Air Force retired the C-9 in favor of a new aeromedical technology in the form of the patient support pallet (PSP) system, which allows patients to be transported aboard aircraft not always used for aeromedical evacuation.<sup>136</sup>

Even in 1949, however, the Diplomatic Conference recognized that advancing military technologies would increasingly enable attacks on aircraft from ever-greater distances without any visual contact, thereby

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<sup>132</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun 8, 1977, arts. 25, 29, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The U.S. is not a party to Additional Protocol I but views much of it as reflecting customary international law. See Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419-31 (1987); see also Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 818 (2005).

<sup>133</sup> 1 JEAN S. PICTET ET AL., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949—GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 291-92 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1952) [hereinafter 1 COMMENTARY]; 2 JEAN S. PICTET ET AL., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949—GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 220 (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter 2 COMMENTARY]; 4 OSCAR M. UHLER ET AL., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949—GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 176 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter 4 COMMENTARY].

<sup>134</sup> Geneva I, *supra* note 126, arts. 36, 38; Geneva II, *supra* note 127, art. 39, 41; Geneva IV, *supra* note 128, art. 22. Protocol III to the Geneva Conventions recognized a third distinctive emblem: “a red frame in the shape of a square on edge with a white background,” commonly referred to as the “red crystal.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, S. TREATY DOC. NO. 109-10 (2006), 2005 WL 4701955, at 14 (ratified by the U.S. on Mar. 8, 2007) [hereinafter Additional Protocol III].

<sup>135</sup> The Nightingale, “a modified DC-9 that entered service in 1971 as an aeromedical aircraft,” had been in line for retirement since 2003 and was finally retired in 2005, due, in part, to its short range and inability to meet modern standards for noise restriction at many airports. *Historic C-9 Heads to Andrews for Retirement*, AIR FORCE PRINT NEWS TODAY (Sep. 24, 2005), [http://www.af.mil/news/story\\_print.asp?id=123011872](http://www.af.mil/news/story_print.asp?id=123011872).

<sup>136</sup> The PSP is built on a standard cargo pallet and provides support for six litters or a combination of three airline seats and three stretchers. It is employed on KC-135 Stratotanker and KC-10 Extender air refueling aircraft, as well as on the C-17 Globemaster III transport aircraft. *Id.*

eroding the protection that was afforded medical aircraft by virtue of their markings.<sup>137</sup> The Conventions were thus eventually supplemented to expand the internationally recognized means of identifying medical aircraft beyond distinctive emblems, to include flashing blue lights (to permit identification of medical aircraft in reduced visibility, from a distance, or at night).<sup>138</sup> The supplements also included identification measures that do not depend on visual contact, such as flight-plan notifications; two-way radio communications; radio signals; international codes established by ICAO, the International Telecommunications Union, or the International Maritime Organization; and electronic identification using radar transponders.<sup>139</sup>

Additionally, per the Geneva Conventions, aircraft need not be specially equipped or permanently detailed for medical transport to be protected by the regime.<sup>140</sup> Subsequent Protocols likewise make it clear that conventional protections for medical aircraft derive from their protected status under international law and the use of distinctive emblems, signs, or signals simply facilitates protection by giving this status a concrete form of expression.<sup>141</sup> Aircraft temporarily detailed for medical transport that bear no medical markings, such as Air Force air refueling and military transport aircraft evacuating wounded and sick via the PSP system,<sup>142</sup> are therefore legally shielded from attack provided that during a relief mission the aircraft are used exclusively for that purpose and are completely unarmed.<sup>143</sup> Consequently, a belligerent who knowingly attacks a medical aircraft based solely on the absence of a distinctive emblem, sign, or signal could be deemed to be guilty of a war crime.<sup>144</sup>

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<sup>137</sup> See 1 COMMENTARY, *supra* note 133, at 290 (on the need to improve methods for identifying medical aircraft); 2 COMMENTARY, *supra* note 133, at 218-19.

<sup>138</sup> Additional Protocol I, *supra* note 132, Annex I, art. 6.

<sup>139</sup> *Id.*, arts. 7-12.

<sup>140</sup> 1 COMMENTARY, *supra* note 133, at 288-89; 2 COMMENTARY, *supra* note 133, at 217; 4 COMMENTARY, *supra* note 133, at 174.

<sup>141</sup> Additional Protocol III, *supra* note 134, Preambula, para. 4. “[T]he red cross and red crescent are simply a useful tool, a practical means of seeking to ensure respect for a pre-existing international legal right of protection.” Jean-François Quéguiner, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 89 INT’L REV. RED CROSS 175, 181 (2007) (citing Michael Meyer, *The Proposed New Neutral Protective Emblem: A Long-Term Solution to a Longstanding Problem*, in INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILAIRE MCCOUBREY 88 (Richard Burchill et al. eds., 2005)).

<sup>142</sup> See *supra* note 136.

<sup>143</sup> 1 COMMENTARY, *supra* note 133, at 289; 2 COMMENTARY, *supra* note 133, at 217; 4 COMMENTARY, *supra* note 133, at 174.

<sup>144</sup> Quéguiner, *supra* note 141, at 181.



**C-9 “Nightingale” (Photo by Waite Weible, [www.defenseimagery.mil](http://www.defenseimagery.mil)).**

To prevent abuse of medical aircraft protections, a belligerent has the right to issue a “summons to land” to medical aircraft flying over enemy controlled territory or contact areas, which medical aircraft are duty bound to obey,<sup>145</sup> otherwise they lose their protected status.<sup>146</sup> If upon landing and inspection, the status of the medical aircraft is confirmed, it should be allowed to promptly resume its flight to ensure the wounded and sick do not suffer because of the delay.<sup>147</sup> If, however, the examination reveals actions harmful to the belligerent, such as, for example, the transport of munitions or intelligence collection, the aircraft once again loses the benefit of the Geneva protections.<sup>148</sup> The belligerent may then seize the aircraft, take the wounded prisoner,<sup>149</sup> and treat any medical personnel or material according

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<sup>145</sup> Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39; Geneva IV, *supra* note 128, art. 22.

<sup>146</sup> See 1 COMMENTARY, *supra* note 133, at 292; 2 COMMENTARY, *supra* note 133, at 220; 4 COMMENTARY, *supra* note 133, at 176.

<sup>147</sup> Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39; Geneva IV, *supra* note 128, art. 22; see also 1 COMMENTARY, *supra* note 133, at 292-93; 2 COMMENTARY, *supra* note 133, at 221; 4 COMMENTARY, *supra* note 133, at 177.

<sup>148</sup> Geneva I, *supra* note 126, art. 21 (“The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”); Geneva IV, *supra* note 128, art. 22.

<sup>149</sup> “[W]ounded and sick who are being carried in the aircraft, will not lose their right under the Convention to the respect and medical care they need, subject to any punitive measures which may be taken in their case if they are personally guilty or guilty as accessories.” 4 COMMENTARY, *supra* note 133, at 177.



to the Conventions' general rules.<sup>150</sup> Under such circumstances, crew members and passengers may similarly be regarded as having forfeited their rights under the Geneva Conventions and therefore interned and even put on trial for espionage, sabotage, or other activities hostile to the security of the belligerent concerned.<sup>151</sup>

In contrast, a belligerent has no obligation to allow a medical aircraft to resume its flight when it is forced to land or otherwise comes down in enemy-controlled territory involuntarily.<sup>152</sup> Instead, the medical aircraft may be seized as war booty,<sup>153</sup> and its crew, as well as any wounded and sick on board, treated as prisoners of war.<sup>154</sup> However, medical personnel must still be afforded special protection and allowed to administer to those taken prisoner,<sup>155</sup> and any medical equipment or supplies on board the aircraft must be reserved for this purpose.<sup>156</sup>

Finally, the Geneva Conventions further give medical aircraft license to overfly as well as land in *neutral* territory – whether by necessity or as a port of call – subject to three express provisos comparable to the

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<sup>150</sup> 1 COMMENTARY, *supra* note 133, at 293; 2 COMMENTARY, *supra* note 133, at 221; 4 COMMENTARY, *supra* note 133, at 177.

<sup>151</sup> Geneva IV, *supra* note 128, art. 5; 4 COMMENTARY, *supra* note 133, at 177.

<sup>152</sup> “An involuntary or forced landing occurs when a medical aircraft, without receiving a summons, is obliged by weather conditions, engine trouble or any other cause to land in enemy or enemy-controlled territory.” 1 COMMENTARY, *supra* note 133, at 293; 2 COMMENTARY, *supra* note 133, at 222.

<sup>153</sup> 1 COMMENTARY, *supra* note 133, at 293; 2 COMMENTARY, *supra* note 133, at 222. “If, however, [the aircraft] belongs to a relief society protected by the Convention, it will be regarded as private property.” Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39; *see also* Additional Protocol I, *supra* note 132, art. 30 (“Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.”); CLAUDE PILLOUD ET AL., COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) 322 (Yves Sandoz et al.eds., 1987) (stating that an aircraft is “assigned as a permanent medical aircraft” if it is “assigned exclusively to medical purposes for an indeterminate period.”).

<sup>154</sup> Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (ratified by the U.S. on Aug. 2, 1955) [hereinafter Geneva III]; *see also* 3 JEAN DE PREUX ET AL., COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A.P. de Heney trans., 1960).

<sup>155</sup> Geneva I, *supra* note 126, art. 36; Geneva II, *supra* note 127, art. 39; *see* 1 COMMENTARY, *supra* note 133, at 293; 2 COMMENTARY, *supra* note 133, at 222; *see also* Geneva I, *supra* note 126, arts. 24-32; Geneva II, *supra* note 127, arts. 36-37; Geneva III, *supra* note 154, art. 33.

<sup>156</sup> “Even though Article 39 does not actually say so, the equipment will be governed by the provisions of Articles 33 and 34” of Geneva I. 1 COMMENTARY, *supra* note 133, at 293; 2 COMMENTARY, *supra* note 133, at 222; *see also* Geneva I, *supra* note 126, art. 33; 1 COMMENTARY, *supra* note 133, at 272-76 (stating that the medical equipment of captured “mobile units” is to be “used for the care of the wounded and the sick—in the first instance, those cared for in the captured unit”).

rights of belligerents.<sup>157</sup> Specifically, to be “immune from attack” when flying over neutral territory,<sup>158</sup> a medical aircraft must (1) give advance notice of its passage; (2) fly along routes and altitudes agreed to by the neutral State concerned; and (3) obey any summons to land.<sup>159</sup> For their part, neutral powers may put conditions on the passage or landing of medical aircraft within their territory, provided such conditions apply equally to all belligerents.<sup>160</sup> A medical aircraft that violates neutral airspace by failing to follow any of these conditions may be compelled to land – whereupon the aircraft may be seized and interned, along with all personnel on board<sup>161</sup> – or, after defying an order to land, shot down by the neutral State.<sup>162</sup> At its discretion, the neutral state may inspect a compliant medical aircraft that lands in neutral territory, whether of its own accord or in response to a summons.<sup>163</sup> Once the plane’s status as a medical aircraft is

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<sup>157</sup> 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224; *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9 (“Medical aircraft... may land [in neutral territory] in case of necessity, and may use neutral airfield facilities as ports of call...”).

<sup>158</sup> Geneva I, *supra* note 126, art. 37; Geneva II, *supra* note 127, art. 40; *cf.* 1 COMMENTARY, *supra* note 133, at 295 n.1:

This formula is based on the one which appears in [Article 36]. Here the word “attack” is surely inappropriate; such attacks could only be made by the armed forces of the neutral country. Belligerents have obviously no right to pursue or attack over neutral territory.

*But see* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9 (“Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent military aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.”).

<sup>159</sup> Geneva I, *supra* note 126, art. 37; Geneva II, *supra* note 127, art. 40; *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9 (“Medical aircraft may, with prior notice, overfly neutral territory.”); *but see* Additional Protocol I, *supra* note 132, art. 31 (“Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict.”); PILLOUD ET AL., *supra* note 153, at 327:

[W]hether they merely want to fly over the States not a Party to the conflict or whether they wish to land or alight on water in its territory, medical aircraft can lawfully do so only if there is prior agreement, as in the case of flights over areas under the control of the adverse Party.

*Cf.* 2 COMMENTARY, *supra* note 133, at 223 n.2 (“In time of war, a neutral State has absolute sovereignty over its airspace.” (citing 2 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 725 (Hersch Lauterpacht ed., 7th ed. 1952))).

<sup>160</sup> Geneva I, *supra* note 126, art. 37; Geneva II, *supra* note 127, art. 40; *see also* 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9 (noting that the neutral nation may “subject [medical aircraft] to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents”).

<sup>161</sup> *See* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9 (“Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both offending aircraft and crew.”); *see also* Bourbonniere & Haeck, *supra* note 24, at 968.

<sup>162</sup> Geneva I, *supra* note 126, art. 37; Geneva II, *supra* note 127, art. 40.

<sup>163</sup> 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 7.3.9; *cf.* Additional Protocol I, *supra* note 132,

confirmed, it must be allowed to resume its flight.<sup>164</sup> Before doing so, however, the aircraft commander (or pilot-in-command) of a medical aircraft may, with the consent of local authorities, lawfully off-load wounded and sick needing immediate treatment. The neutral State must then intern the off-loaded patients and furnish them medical treatment at least as favorable as that owed to prisoners of war.<sup>165</sup> If the neutral State determines that the aircraft engaged in activities inconsistent with protected status, the aircraft and all persons on board may be interned for the duration of the conflict.<sup>166</sup>

#### IV. FREEDOM OF THE SEAS

The principle of freedom of the seas, which recognizes that the surface of the high seas and the superjacent airspace are free for use by all,<sup>167</sup> is both a corollary to and limited by the principles of territorial sovereignty and national airspace. The Chicago Convention reaffirms the right of every State to complete sovereignty over its national airspace—*i.e.*, the airspace above its land areas and adjacent territorial waters.<sup>168</sup> It thus follows that international airspace, which encompasses, *inter alia*, airspace over the high seas, is open to aircraft of all States, including military aircraft.<sup>169</sup>

At the same time, the freedom of the seas is delimited by territorial seas, which in the decades since World War II have expanded from the age-old three-mile limit to twelve miles in response to States' increasing demands and capacity to control the oceans with an eye on enhanced security, environmental protection, and natural resource exploitation.<sup>170</sup> The

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art. 31 ("If a medical aircraft...lands...in the territory of a neutral or other State not Party to the conflict...it shall be subject to inspection for purposes of determining whether it is in fact a medical aircraft.").

<sup>164</sup> "[Medical aircraft] may be retained only if it is discovered that acts incompatible with the humane role of such an aircraft have been committed." 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224.

<sup>165</sup> "The cost of their accommodation and internment is to be borne by the Power on which they depend." 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224.

<sup>166</sup> "Although these considerations have not been mentioned explicitly in the Convention, they follow from the text of [Article 37] and from the general principles of international law." 1 COMMENTARY, *supra* note 133, at 295; 2 COMMENTARY, *supra* note 133, at 224; *cf.* Additional Protocol I, *supra* note 132, art. 31 (stating that if "inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants" detained in such a manner that they cannot again take part in hostilities).

<sup>167</sup> *See supra* note 42.

<sup>168</sup> Chicago Convention, *supra* note 17, arts. 1, 2, 61 Stat. at 1180-81.

<sup>169</sup> UNCLOS, *supra* note 82, art. 29, 21 I.L.M. at 1275.

<sup>170</sup> BOCZEK, *supra* note 105, at 315-316; Williams, *supra* note 114, at 95; *compare* Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, art. 6, 516 U.N.T.S. 205; *with* UNCLOS, *supra* note 82, art. 3, 21 I.L.M. at 1272. The concept of territorial seas originated in the 16th century and was expounded by Dutch scholars Grotius and

freedom of the seas is further constrained by the rights and authorities ceded coastal nations within jurisdictional zones established by the 1982 United Nations Convention on Law of the Sea (UNCLOS), also referred to as the Law of the Sea Convention, which span international waters from the twelve mile territorial sea limit seaward to the high seas. See Figure 1.<sup>171</sup>

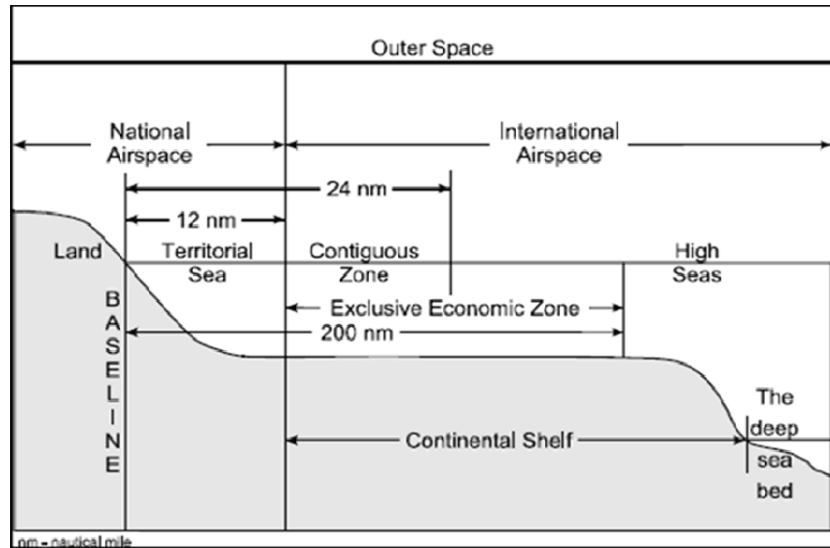


Figure 1. Legal Boundaries of the Oceans and Airspace.

Although the United States is not a party to the Law of the Sea Convention, according to former Assistant Secretary of State for Oceans, Environment, and Science, David B. Sandalow,<sup>172</sup> its provisions embody “longstanding U.S. negotiating objectives,” including recognition of customary international law freedoms of navigation and overflight; a precise maximum territorial sea limit of twelve miles; establishment of a 200-mile

Bynkershoek. See HUGO GROTIUS, *THE FREEDOM OF THE SEAS* (Ralph Magoffin trans., James Scott ed., 1916); CORNELIUS VAN BYNKERSHOEK, *DE DOMINIO MARIS [ON THE RULE OF THE SEAS]*, (Ralph Magoffin trans., 1923). In Grotius’ 1609 work *Mare Liberum* (Freedom of the Seas), he argued that a coastal nation could not claim sovereignty over seas beyond the range of its control from shore). In the early 1700s, Bynkershoek proposed that the width of the territorial sea that could be claimed by a coastal state should be limited to the effective range of a canon fired from shore (or about three miles); this view was adopted and developed into the customary three-mile limit). ROBIN R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 65 (2d ed. 1988).

<sup>171</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.3, Figure 1.1.

<sup>172</sup> In May 2009, Sandalow, a Brookings Institute senior fellow (2004 to 2009), was confirmed as Assistant Secretary of Energy for Policy and International Affairs. Press Release, U.S. Department of Energy, Senate Confirms DOE Nominees Daniel Poneman, David Sandalow, Kristina Johnson, Steve Koonin, Scott Harris, and Ines Triay (May 21, 2009), available at <http://www.energy.gov/news/7418.htm>.

exclusive economic zone (EEZ); and recognition of coastal State sovereignty and jurisdiction over the continental shelf for purposes of exploration and natural resource exploitation.<sup>173</sup> Thus, since 1983, the United States has accepted and complied with nearly all the Convention's provisions,<sup>174</sup> as both reflecting customary international law and fulfilling U.S. interest in "a comprehensive legal framework relating to competing uses of the world's oceans."<sup>175</sup> Excepted from this policy – and the basis advanced by President Ronald Reagan for not acceding to the Convention – were the provisions in Part XI and Annexes III and IV relating to deep seabed mining.<sup>176</sup> Yet despite the negotiation of a 1994 agreement to eliminate or modify the deep sea provisions to address objections made by the United States and other industrialized countries,<sup>177</sup> both the Law of the Sea Convention and the so-called "Part XI Agreement" are still pending U.S. ratification.<sup>178</sup> Nevertheless, by virtue of Reagan's 1983 Oceans Policy Statement, most provisions of the Convention are tantamount to U.S. policy, particularly those related to freedom of navigation and overflight of international waters.<sup>179</sup>

Much like airspace, sea space is legally bifurcated, with *national waters* on the one hand and *international waters* on the other.<sup>180</sup> The legal

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<sup>173</sup> David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?* 2 (The Brookings Inst., Policy Brief No. 137, 2004), available at <http://www.brookings.edu/papers/2004/08energy-sandalow.apx>.

<sup>174</sup> See President Ronald W. Reagan, Statement on United States Oceans Policy (Mar. 10, 1983), available at <http://www.reagan.utexas.edu/archives/speeches/publicpapers.html> [hereinafter U.S. Oceans Policy Statement].

<sup>175</sup> MARJORIE ANN BROWNE, THE LAW OF THE SEA CONVENTION AND U.S. POLICY, U.S. CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF IB95010, at 2 (2001) (updated Feb. 10, 2005), available at <http://www.fas.org/sgp/crs/row/IB95010.pdf>

<sup>176</sup> U.S. Oceans Policy Statement, *supra* note 174, at 1.

<sup>177</sup> Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, Jul. 28, 1994, 33 I.L.M. 1309 [hereinafter Part XI Agreement].

<sup>178</sup> On October 7, 1994, President William J. Clinton signed and submitted the Law of the Sea Convention and the Part XI Agreement reforming its deep seabed mining provisions to the U.S. Senate for advice and consent to accession. NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.1. More than a decade later, on May 15, 2007, President George W. Bush issued a statement urging the Senate to act favorably on U.S. accession to the Convention. Shortly thereafter, on October 31, 2007, the Senate Committee on Foreign Relations voted in favor of Senate advice and consent; however, consideration of the matter by the full Senate was denied. MARJORIE ANN BROWNE, THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003, U.S. CONGRESSIONAL RESEARCH SERVICE REPORT RS21890 (2007). More recently, then Secretary of State-designate Hillary Clinton identified the Law of the Sea Convention as a priority during Senate Confirmation Hearings, *Transcript of the Senate Confirmation Hearing Nominating Senator Hillary Clinton as Secretary of State*, N.Y. TIMES, Jan. 13, 2009, at 32. And, since taking office, Secretary Clinton has continued to tout the Obama Administration's commitment to U.S. ratification. Secretary of State Hillary Rodham Clinton, Remarks at The Joint Session of the Antarctic Treaty Consultative Meeting and the Arctic Council 50th Anniversary of the Antarctic Treaty (Apr. 6, 2009), available at <http://www.state.gov/secretary/rm/2009a/04/121314.htm>.

<sup>179</sup> U.S. Oceans Policy Statement, *supra* note 174, at 1.

<sup>180</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.5.

regime for national waters is relatively straightforward since these regions are subject to the territorial sovereignty of the coastal nation, albeit with certain navigation and overflight rights reserved to the international community.<sup>181</sup> Conversely, international waters are beyond the limits of territorial seas, where all States enjoy the high seas freedoms of navigation and overflight.<sup>182</sup> However, controversy persists over the degree of control coastal States can exercise over ships and aircraft operating in the zones of functional jurisdiction adjacent to the territorial sea and overlapping international waters recognized by the Law of the Sea Convention.<sup>183</sup> Given that 60 percent of AMC's daily missions entail transoceanic flight,<sup>184</sup> these maritime principles have particular relevance for the MAF in comparison to the CAF.

#### A. National Waters

National waters consist of internal waters, territorial seas, and archipelagic waters.<sup>185</sup> Internal waters are those waters landward of the baseline from which the breadth of the territorial sea is measured, while territorial seas are a belt of ocean that is measured seaward up to 12 nautical miles from the baseline of the coastal State (see Table 1, *supra*). Both areas are subject to the absolute territorial sovereignty of the coastal State, as is the appurtenant (national) airspace.<sup>186</sup> Significantly, although Article 5 of the Chicago Convention grants nonscheduled flights certain overflight rights akin to innocent passage,<sup>187</sup> the customary right of innocent passage through territorial seas *does not* include the right of overflight.<sup>188</sup> Thus, for purposes of overflight, the airspace above internal waters and territorial seas is equivalent to the airspace above territorial land areas.<sup>189</sup> In other words,

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See DOUGLAS M. JOHNSTON, THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING 59 (1988) (“Fundamental confusion arises not just from the multiplicity of zones, but from their diversity.”); see also Oxman, *supra* note 3, at 836.

<sup>184</sup> U.S. DEP'T OF THE AIR FORCE, FACTSHEET: 618TH TANKER AIRLIFT CONTROL CENTER (2008), at <http://www.amc.af.mil/library/factsheets/factsheet.asp?fsID=239>; see also BRIAN G. CHOW, THE PEACETIME TEMPO OF AIR MOBILITY OPERATIONS: MEETING DEMAND AND MAINTAINING READINESS (2003), available at [http://www.rand.org/pubs/monograph\\_reports/MR1506/](http://www.rand.org/pubs/monograph_reports/MR1506/).

<sup>185</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.5; see also UNCLOS, *supra* note 82, art. 2, 21 I.L.M. at 1272.

<sup>186</sup> Chicago Convention, *supra* note 17, art. 1, 61 Stat. at 1180.

<sup>187</sup> See sources cited *supra* note 51.

<sup>188</sup> “The right of innocent passage is the right of ships of all states, whether coastal or landlocked, to pass through another state’s territorial sea.” BOCZEK, *supra* note 105, at 287 (citations omitted).

<sup>189</sup> UNCLOS, *supra* note 82, arts. 2, 3, 21 I.L.M. at 1272; see also Chicago Convention, *supra* note 17, art. 2, 61 Stat. at 1181 (“[T]he territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under sovereignty, suzerainty, protection or mandate of such State.”).

state aircraft may transit this airspace only with special authorization from the over-flown State;<sup>190</sup> likewise, civil aircraft may transit only in compliance with the Chicago Convention regime for the exchange of overflight or air traffic rights.<sup>191</sup>

### 1. *International Straits*

In the special case of international straits overlapped by territorial seas,<sup>192</sup> the Law of the Sea Convention strikes a compromise between the freedom of navigation and overflight that all ships and aircraft enjoy on the high seas and the maritime right of innocent passage, with its “transit passage” regime.<sup>193</sup> Codification of the transit passage regime is considered one of the Convention’s most important achievements and is particularly important to aircraft, which, again, have no right of innocent passage over territorial seas.<sup>194</sup> The unequivocal position of the United States is that transit passage is customary international law,<sup>195</sup> and though this view is not

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<sup>190</sup> Chicago Convention, *supra* note 17, art. 2, 61 Stat. at 1181.

<sup>191</sup> *See supra* notes 40-63 and accompanying text.

<sup>192</sup> International straights are those international waterways capable of use by international maritime navigation, which join bodies of international waters. *See* Rear Admiral William L. Schachte, Jr., Judge Advocate General’s Corps, U.S. Navy, Remarks to the 26th Law of the Sea Institute Annual Conference, Genoa, Italy 13 (Jun. 22-26, 1992) [hereinafter Remarks of Rear Admiral Schachte] (transcript available at <http://www.state.gov/documents/organization/65946.pdf>); Sam Bateman, *The Regime of Straits Transit Passage in the Asia Pacific: Political and Strategic Issues*, in NAVIGATIONAL RIGHTS AND FREEDOMS, AND THE NEW LAW OF THE SEA 94, 97 (Donald R. Rothwell & Sam Bateman eds., 2000) (“While some nations have taken the view that substantial international use over an appreciable period of time is required to meet the functional criterion that the right of passage applies to a strait, the US has placed less emphasis on this historical view and considered simply ‘the susceptibility of the strait to international navigation.’”). Ships and aircraft transiting through or above international straits that are not completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.3.2; Remarks of Rear Admiral Schachte, *supra*, at 15; *see also* UNCLOS, *supra* note 82, art. 35, 21 I.L.M. at 1276 (“Nothing in this part affects...the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas”).

<sup>193</sup> MILDE, *supra* note 39, at 39; W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, 74 AM J. INT’L L. 48, 68-69 (1980) (discussing the negotiating text of the Law of the Sea Convention); *see generally* 4 SCOTT C. TRUVER, THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN, INTERNATIONAL STRAITS OF THE WORLD SERIES 185-189 (Gerard J. Mangone ed., 1980) (on international negotiations to establish the right of free transit through straits).

<sup>194</sup> Remarks of Rear Admiral Schachte, *supra* note 192, at 13; CHURCHILL & LOWE, *supra* note 170, at 93.

<sup>195</sup> Remarks of Rear Admiral Schachte, *supra* note 192, at 16-17; Bateman, *supra* note 192, at 102; CHURCHILL & LOWE, *supra* note 170, at 93; *see also* TRUVER, *supra* note 193, at 187 (“Washington regarded the right of free transit as ‘an inseparable adjunct of the freedoms of

universally shared,<sup>196</sup> the concept of transit passage for ships and aircraft through and over international straits is fairly uncontroversial.<sup>197</sup>

Transit passage offers all ships and aircraft, both military and commercial, the right of unimpeded, continuous, and expeditious transit through international straits and the superjacent airspace, which cannot be suspended by the coastal State for any reason during peacetime.<sup>198</sup> For ships and aircraft exercising the right of transit passage, the criterion of “innocence” has been replaced by the obligation to

[1] proceed without delay through or over the strait ... [2] refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait and ... [3] refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.<sup>199</sup>

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navigation and overflight of the high seas themselves.”); *see also* USAF OPS LAW HANDBOOK, *supra* note 83, at 11.

<sup>196</sup> *See, e.g.*, Kim Young Koo, *Transit Passage Regime Controversy Revisited: An Appraisal and Analysis on the Legal Ambiguities and Recent Trends*, 37 KOREAN J. INT’L L. 79, 79-80 (1992) (“[T]his U.S. view still does not seem to have been shared by all nations.” (citing Satya N. Nandan, U.N. Under-Secretary-General for the Law of the Sea, Remarks at the 13th Annual Virginia Law of the Sea Conference: Contemporary Issues in the U.S. Law of the Sea Policy (Mar. 31, 1989))); *and* CHURCHILL & LOWE, *supra* note 170, at 93-94 (“[A] general right of transit passage has not yet become established in international law.”).

<sup>197</sup> “The regime of transit passage has been widely accepted in general terms by the international community and has become part of the practice of States, both of States boarding straits as well as of shipping States.” *Progress made in the implementation of the comprehensive legal regime embodied in the United Nations Convention on the Law of the Sea, Report of the Secretary General*, U.N. General Assembly, 47th Sess., Agenda Item 32, at 8, U.N. Doc. A/47/512 (1992) [hereinafter *UNCLOS Implementation*]; *see also* WILLIAM V. DUNLAP, TRANSIT PASSAGE IN THE RUSSIAN ARCTIC STRAITS 53-55 (Int’l Boundaries Research Unit, Maritime Briefing, Vol. 1, No. 7, 1996) (noting that “the vast majority of the world’s straits have enjoyed a reasonably stable regime for years,” and questions about the application of transit passage to foreign warships, submarines, and aircraft “are largely irrelevant”); Bateman, *supra* note 192, at 98 (asserting that the U.S. view of transit passage as allowing submarines to pass through straits submerged, naval task forces to conduct formation streaming, aircraft carriers to conduct flight operations, and military aircraft to transit unannounced and unchallenged, has not been controversial in the Asia Pacific).

<sup>198</sup> UNCLOS, *supra* note 82, arts. 25, 38, 42, 44, 21 I.L.M. at 1275, 1277-78. However, the right of transit passage does not preclude coastal State action based on the right of self-defense. CHURCHILL & LOWE, *supra* note 170, at 91; Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT’L L. 490, 500 (1983) (“Sovereignty over international straits and their airspace implies enforcement rights with respect to a coastal State’s vital security interests.”); *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.2.1 & 2.5.3.1; BOCZEK, *supra* note 105, at 313.

<sup>199</sup> UNCLOS, *supra* note 82, art. 39, 21 I.L.M. at 1277; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.3.1; CHURCHILL & LOWE, *supra* note 170, at 91; *see also* JOSÉ ANTONIO DE YTURRIAGA, STRAITS USED FOR INTERNATIONAL NAVIGATION: A SPANISH PERSPECTIVE 226 (1991).



The treaty also prescribes additional aircraft-specific duties, requiring that aircraft observe “rules of the air” established by ICAO<sup>200</sup> and monitor appropriate radio frequencies.<sup>201</sup>

The transit passage regime has considerable implications for military aircraft inasmuch as it not only prohibits the threat or use of force but also restricts operations in international straits to those that are “incident to their normal modes of continuous and expeditious transit.”<sup>202</sup> For aircraft in general, “normal mode” is commonly understood to mean flight at normal or usual cruising altitude and speed for the particular type of aircraft making the passage in a given circumstance.<sup>203</sup> But because of the disparity in the respective formulations of transit passage and innocent passage – which, in addition to barring the threat or use of force, prohibits specific activities of warships crossing territorial seas<sup>204</sup> – debate continues over the extent to which certain tactical activities might be considered permissible in transit passage as *incident* to the normal mode of transit for a particular military aircraft.<sup>205</sup>

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<sup>200</sup> “[S]tate aircraft will normally comply with such procedures and will at all times operate with due regard for the safety of navigation.” UNCLOS, *supra* note 82, art. 39, 21 I.L.M. at 1277; *see also* FOREIGN CLEARANCE MANUAL, *supra* note 28, para. DL.1.31:

As a matter of U.S. policy, aircrews flying due regard shall not provide any prior notification to coastal states when exercising the right of transit. If flying in accordance with ICAO rules and procedures when exercising the right of transit, U.S. aircrews may file an ICAO flight plan with coastal state CAAs. Whether flying due regard or ICAO rules and procedures, DoD aircrews and mission planners shall not obtain diplomatic clearance from a coastal state to transit an international strait.

<sup>201</sup> “[Aircraft shall] at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.” *Id.* *See also* MILDE, *supra* note 39, at 39 (“The ‘international distress radio frequency’ is the VHF emergency frequency 121.5 MHz referred to in Annex 10 – Aeronautical Communications – to the Chicago Convention and also in other Annexes.”).

<sup>202</sup> UNCLOS, *supra* note 82, art. 39, 21 I.L.M. at 1277.

<sup>203</sup> 2 MYRON H. NORDQUIST ET AL., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 342 (1985); DE YTURRIAGA, *supra* note 199, at 224.

<sup>204</sup> Activities expressly prohibited during innocent passage include:

[A]ny exercise or practice with weapons of any kind; ... any act aimed at collecting information to the prejudice of the defense or security of the coastal state; ... any act of propaganda aimed at affecting the defense or security of the coastal state; ... the launching, landing or taking on board of any aircraft; ... the launching, landing or taking on board of any military device; ... any act aimed at interfering with the any systems of communication or any other facilities or installations of the coastal State; ... [or] any other act not having a direct bearing on passage.

UNCLOS, *supra* note 82, art. 19, 21 I.L.M. at 1274.

<sup>205</sup> *See* COUNCIL FOR SECURITY COOPERATION IN THE ASIA-PACIFIC, WORKING GROUP ON MARITIME COOPERATION, MEMORANDUM 6 – THE PRACTICE OF THE LAW OF THE SEA IN THE ASIA PACIFIC 2 (2002), at <http://www.cscap.org/index.php?page=cscap-memoranda>; *see also* DE YTURRIAGA, *supra* note 199, at 226 (“Activities such as practicing [sic] with weapons, collection information or making propaganda or launching or landing aircraft and military

Although transit passage is more inclusive than innocent passage (in that it extends to aircraft and imparts less coastal State control such that it cannot be suspended),<sup>206</sup> it encapsulates an exception to State sovereignty over territorial seas carved out solely for the limited purpose of transit.<sup>207</sup> Accordingly, the absence of a list of prohibited activities for aircraft exercising the right of transit passage should not be viewed overly expansively;<sup>208</sup> to the contrary, the scope of permissible activities for military aircraft engaged in transit passage must be viewed restrictively as limited to those which are part-and-parcel of normal navigation for a particular aircraft under the circumstances.<sup>209</sup> So, for example, the employment of radar, sonar, or depth finders is considered permissible in transit passage insofar as these devices are normally used in navigation through constricted waters or necessary for safety reasons, as are variations in course and speed to account for tides, currents, weather and navigational

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device not only are not expressly prohibited here, but they might even be permitted by implication.”); NORDQUIST ET AL., *supra* note 203, at 342 (“[The Law of the Sea Convention] does not specify what activities are incidental to the normal mode of transit.”).

<sup>206</sup> BOCZEK, *supra* note 105, at 313; CHURCHILL & LOWE, *supra* note 170, at 90.

<sup>207</sup> TRUVER, *supra* note 193, at 187 (quoting *Law of the Sea and the Peaceful Uses of Seabeds: Hearings before a Subcommittee of the Committee on Foreign Affairs*, 92nd Cong. 11 (1971) (statement of John R. Stevenson, Legal Advisor of the State Department):

[W]e are urging a more limited right of transit through the straits where previously there was a right of freedom of navigation which would have permitted activities other than just transiting.... We are talking about freedom solely for the limited purpose of transit....

*See also* U.S. President’s Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Related to Implementation of Part XI to the U.S. Senate with Commentary, 6 DEP’T ST. DISPATCH (Supp. 1, Feb. 1995); 34 I.L.M. 1393, 1407-08 (1995) [hereinafter President’s Transmittal]; Bateman, *supra* note 192, at 94-95; Erik J. Molenaar, *Navigational Rights and Freedoms in a European Regional Context*, in *NAVIGATIONAL RIGHTS AND FREEDOMS, AND THE NEW LAW OF THE SEA* 22, 33 (Donald R. Rothwell & Sam Bateman eds., 2000).

<sup>208</sup> *See* Dispute Concerning Navigational and Related Rights (Costa Rica v. Nicar.), 2007 I.C.J. LEXUS 4, at 203-204 (May 2007) (recognizing sovereign rights as a basis for restrictive interpretation of a State’s right of passage through the territorial sea of another State); *see also* Case of S.S. Wimbledon, 1923 P.C.I.J. (ser A) No. 1, at 24-25 (Aug. 1923); Case of the Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J. (ser. A/B) No. 24, at 167 (June 7); IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289-290 (7th ed. 2008).

<sup>209</sup> Compare DE YTURRIAGA, *supra* note 199, at 223-224 (arguing that the Conference’s refusal to accept Morocco’s proposals to expand the list of prohibited activities “may be interpreted *contrario sensu* as allowing such activities in straits”); and Hailbronner, *supra* note 198, at 496 (proposing that Article 39 may embrace even more duties than those proposed by Morocco, as the concept of transit passage provided for by subparagraph (1)(c) excludes any activity that is not “a constituent part of the transit flight.”) (emphasis added); *see also* Reisman, *supra* note 193, at 70, 72 (“[T]he word ‘solely’ in Article 38(2) ... add[s] conditions [to transit passage] that never burdened ‘freedom of navigation. ... That qualification was apparently introduced in order to deny ships transiting straits all other components of freedom of navigation, such as overt military exercises and weapons testing, surveillance and intelligence gathering and refueling.”).

hazards, etc.<sup>210</sup> Alternatively, things such as weapons testing and firing, intelligence collection, propaganda, and communications jamming are commonly viewed as falling outside the realm of activities incident to continuous and expeditious transit of international straits.<sup>211</sup>

Certain military activities are not necessarily precluded from transit passage, but their status is less obvious and, as a result, they are controversial; for example, the launching and recovery of aircraft by aircraft carriers<sup>212</sup> or aircraft flying in combat formation.<sup>213</sup> Another such activity that is particularly noteworthy for present purposes is aerial refueling. The drafting history of the Law of the Sea Convention itself offers contradictory evidence with respect to whether aerial refueling is considered to be within the scope of transit passage. As proof it is permissible, proponents can point to the fact that during treaty negotiations an amendment to UNCLOS Article 39, which would have explicitly prohibited in-flight refueling, was rejected.<sup>214</sup> On the other hand, opponents can single out refueling as one of a broader set of high seas freedoms deliberately withheld under the qualified “freedom of navigation and overflight” extended to ships and aircraft in

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<sup>210</sup> NORDQUIST ET AL., *supra* note 203, at 343; *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.3.1.

<sup>211</sup> *See* Hailbronner, *supra* note 198, at 496; Reisman, *supra* note 193, at 70; *see also* CHURCHILL & LOWE, *supra* note 170, at 91 (“Any activity threatening a coastal State would bring the ship or aircraft under the general regime of innocent passage, in which case passage could be denied for want of innocence.”); DE YTURRIAGA, *supra* note 199, at 226 (“[Such] activities imply threat or use of force, which is forbidden under paragraph 1(b) of article 39. In addition they cannot be considered as activities incident to the ‘normal modes of continuous and expeditious transit’ by aircraft ... .”); *but cf.* notes 217-226 and accompanying text.

<sup>212</sup> *Compare* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.3.1 (noting that the launch and recovery of aircraft and formation steaming are consistent with sound navigational practices and the secure transit of surface warships through straits); *and* DE YTURRIAGA, *supra* note 199, at 224 (arguing that despite the Law of the Sea Convention Conference’s rejection of a proposal to include the innocent passage prohibition on the “launching, landing, and taking on board any aircraft” (Article 19, subparagraph 2(e)) in the transit passage regime, such activities should still be considered forbidden pursuant to prohibition on the threat or use of force (Article 39, subparagraph 1(b)).

<sup>213</sup> *See* Bourbonniere & Haeck, *supra* note 24, at 961:

Flight in combat formation is not necessarily, or even by itself, a threat of the use of force as articulated within article 39[1](b). ... It must be remembered that a threat has several composite elements, not only in capacity. Intention to use force is a necessary component of a threat. The illegitimacy of a threat lies in its attempt to use force to effect the sovereignty, territorial integrity, or political independence of a coastal state. Nonetheless, a threat used as deterrence in conformity to Article 51 of the U.N. Charter is certainly legitimate. Furthermore, combat flight formation can be seen as incidental to the normal mode of flight permitted in article 39[1](c) ... .

<sup>214</sup> DE YTURRIAGA, *supra* note 199, at 224; Hailbronner, *supra* note 198, at 495.

international straits *solely* for the purpose of continuous and expeditious transit.<sup>215</sup>

However, based on the wording and the negotiating context of the treaty, the permissibility of aerial refueling during transit passage can be reasonably inferred.<sup>216</sup> Again, Article 39 of the Law of the Sea Convention sets out the standard for assessing the permissibility of activities, providing that ships and aircraft may engage in activities that are incidental to their normal modes of continuous and expeditious transit.<sup>217</sup> In other words, subject to the prohibition on the threat or use of force,<sup>218</sup> a ship or aircraft transiting a strait need not suspend an activity that “is normal or usual for navigation by the particular type of ship or aircraft making the passage in given circumstances,”<sup>219</sup> *even if* the activity would ostensibly be inconsistent with transit passage under UNCLOS Article 38 (*i.e.*, navigation or overflight for the sole purpose of transit).<sup>220</sup> Thus, for example, a vessel that normally employs sonar in constricted waters or otherwise for safety reasons in

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<sup>215</sup> See Reisman, *supra* note 193, at 72; and Hugo Caminos, *The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea*, in 5 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1987, at 9, 144 (Academie de Droit International de la Haye ed., 1989):

This phrase effectively qualifies the freedoms of navigation associated with the high seas by allowing ships and aircraft to navigate an international straight for no purpose other than as a link between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone.

See also Ruth Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 AM. J. INT’L L. 84, 100 (1983) (noting that “freedom of navigation” on the high seas includes, *inter alia*, “refueling operations” (quoting William T. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 201 n.28 (1977))); NATALIE S. KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 302 (2005) (characterizing transit passage as “somewhere between ‘freedom of navigation,’ on the one hand, and ‘innocent passage’ on the other”; that is, “a compromise” imposed to prevent the exercise of high seas freedoms such as “military exercises and weapons testing, surveillance and intelligence gathering, and refueling in international straits” (citing Reisman, *supra* note 193, at 72)).

<sup>216</sup> See DE YTURRIAGA, *supra* note 199, at 224; see also ROYAL AUSTRALIAN AIR FORCE, AUSTRALIAN AIR PUBLICATION (AAP) 1003, OPERATIONS LAW FOR RAAF COMMANDERS 17 (2004) (“Any transit must be continuous and expeditious, though aircraft are able to conduct air-to-air refueling.”) [hereinafter RAAF PUB. 1003].

<sup>217</sup> *Id.*; NORDQUIST ET AL., *supra* note 203, at 342; sources cited *supra* note 199.

<sup>218</sup> UNCLOS, *supra* note 82, art. 39, 21 I.L.M. at 1277; see also *supra* note 213 and accompanying text.

<sup>219</sup> “An appropriate test [is] one of reasonableness under the circumstances.” NORDQUIST ET AL., *supra* note 203, at 342; see also DE YTURRIAGA, *supra* note 199, at 224 (“[Normal mode]” was intended to mean that mode which is normal or usual for navigation by the particular type of aircraft making passage.... [T]he appropriate interpretation would be one of “reasonableness” under the circumstances.)

<sup>220</sup> Reisman, *supra* note 193, at 73-74; NORDQUIST ET AL., *supra* note 203, at 343; TRUVER, *supra* note 193, at 187; see also, *e.g.*, President’s Transmittal, *supra* note 207, at 1408 (interpreting “transit passage” as including the right of military aircraft to overfly straits “in combat formation and with normal equipment operation”).

navigation on the high seas may likewise do so in international straits, even though sonar may yield information of intelligence value.<sup>221</sup>

In the case of aerial refueling, the “normal mode” of continuous and expeditious transit for U.S. fighter aircraft deploying from one theater of operations to another is via “Coronet” missions.<sup>222</sup> A Coronet (commonly referred to as a “fighter drag”) is a mission wherein an aerial refueling (or tanker) aircraft “escorts fighter aircraft as they deploy between bases[,]... eliminating the need for the fighters to make numerous fuel stopovers...[,]” while providing “aid in weather avoidance, oceanic navigation and communication, and command and control of the mission[,]” in addition to air refueling support.<sup>223</sup> Aerial refueling operations conducted as part of a Coronet-type mission are thus incidental to the normal or usual modes of transoceanic transit of both the tankers and the escorted fighter aircraft.<sup>224</sup> Moreover, such activities would surely not in and of themselves constitute a threat of the use of force as contemplated by UNCLOS Article 39.<sup>225</sup> Accordingly, the conduct of aerial refueling operations by aircraft flying Coronet-type missions would logically qualify as permissible during transit passage even though “refueling” in the context of the traditional freedom of navigation on the high seas is prohibited.<sup>226</sup>

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<sup>221</sup> Reisman, *supra* note 193, at 74.

<sup>222</sup> Captain Mike Butler, *Coronet Planning*, FLYING SAFETY, Mar. 1, 2001, at 16, available at <http://www.afsc.af.mil/shared/media/document/AFD-071016-093.PDF>.

<sup>223</sup> Coronets are typically conducted “in support of Air Expeditionary Force (AEF) swapouts, exercises, and wartime deployments. A single Coronet mission ... can involve several tankers escorting anywhere from two to six fighters each.” *Id.*

<sup>224</sup> “An appropriate test [is] one of reasonableness under the circumstances.” NORDQUIST ET AL., *supra* note 203, at 342; see also DE YTURRIAGA, *supra* note 199, at 224 (“[Normal mode] was intended to mean that mode which is normal or usual for navigation by the particular type of aircraft making passage. ... [T]he appropriate interpretation would be one of ‘reasonableness’ under the circumstances.”)

<sup>225</sup> Cf. *supra* note 213 (explaining how flight in combat formation is not a threat of the use of force as articulated in Article 39(b) of the Law of the Sea Convention).

<sup>226</sup> Compare *supra* note 215; with *supra* notes 218-220.

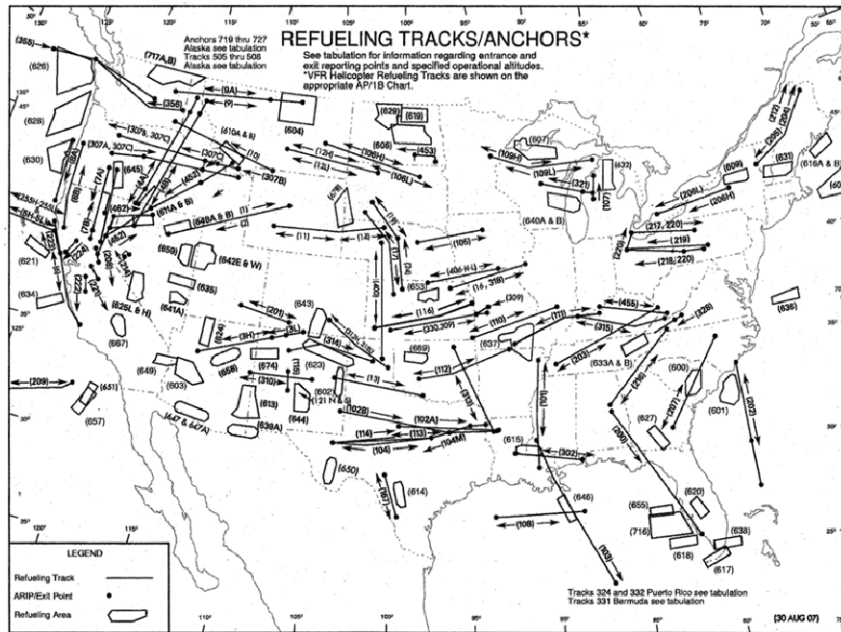


Figure 2. CONUS Refueling Tracks and Anchors (July 19 thru July 27, 2009).

The continuous and expeditious transit of fighters or other military aircraft within a given theater of operations will also oftentimes necessitate aerial refueling activity. These intra-theater aerial refueling operations are typically conducted by tankers flying either along designated tracks or in anchor areas<sup>227</sup> (see, e.g., Figure 2).<sup>228</sup> With air refueling tracks, operations generally occur along a straight path – with a designated air refueling initial point, air refueling contact point, and a designated air refueling exit point – so both the tanker and the receiver aircraft are able to proceed in transit throughout the refueling.<sup>229</sup> In anchor areas, however, the tanker flies in an elliptical pattern within a defined airspace while awaiting its rendezvous with the receiver aircraft, and after being joined, continues to circle in a “racetrack” pattern while the refueling occurs.<sup>230</sup> So in assessing whether an intra-theater aerial refueling is incidental to continuous and expeditious transit for purposes of transit passage, a distinction could be made based upon the method of aerial refueling being employed.<sup>231</sup> In other words, an

<sup>227</sup> See U.S. DEP’T OF THE AIR FORCE, AIR FORCE DOCTRINE DOCUMENT 2-6: AIR MOBILITY OPERATIONS 53 (2008) [hereinafter AFDD 2-6].

<sup>228</sup> U.S. DEP’T OF DEFENSE, NAT’L GEOSPATIAL-INTELLIGENCE AGENCY, DoD FLIGHT INFORMATION PUBLICATION AP/1B, AREA PLANNING: MILITARY TRAINING ROUTES (NORTH AND SOUTH AMERICA) at 5-3 (May 7, 2009).

<sup>229</sup> AFDD 2-6, *supra* note 227, at 53 (Refueling track is the preferred method for inter-theater refueling).

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* at 53:

aerial refueling track forms a constituent part of the transit flight of both the tanker and the receiving aircraft, such that the refueling is ancillary to continuous and expeditious transit and, hence, consistent with transit passage.<sup>232</sup> Conversely, the loitering of aircraft in fixed orbits characteristic of anchor refueling is facially at odds with the obligation of aircraft transiting straits to do so without delay<sup>233</sup> and, as a result, could be deemed “non-transit” passage by States bordering the strait.<sup>234</sup> Such nonconforming passage would violate U.S. international obligations and render it responsible to the coastal States for any resulting loss or damage.<sup>235</sup>

Notably, DoD aircraft are, as a rule, required to secure an approved altitude reservation (ALTRV) prior to conducting air refueling operations.<sup>236</sup> An ALTRV is a temporary airspace reservation, either stationary or mobile, established through coordination between the user and the appropriate air traffic services (ATS) authority for use by large formation flights or other military air operations that necessitate non-compliance with normal air

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The choice of track or anchor depends on several factors such as number of tankers, offload required, receiver number/type, weather, time available to accomplish rendezvous and refueling, and availability of air space.... For example, pre-strike refueling may be accomplished in an anchor to facilitate package formation, and post strike refueling may be accomplished along a track to facilitate recovery of receiver aircraft.

<sup>232</sup> Hailbronner, *supra* note 198, at 496; DE YTURRIAGA, *supra* note 199, at 224.

<sup>233</sup> See UNCLOS, *supra* note 82, art. 38, 21 I.L.M. at 1277.

<sup>234</sup> See Caminos, *supra* note 215, at 144-46; *see also* DE YTURRIAGA, *supra* note 199, at 222, 227.

<sup>235</sup> See UNCLOS, *supra* note 82, arts. 38, 42, 21 I.L.M. at 1277; *see also* NORDQUIST ET AL., *supra* note 203, at 378 (“[The treaty] confirms that the normal principle of state responsibility applies to such situations.”); CHURCHILL & LOWE, *supra* note 170, at 91 (asserting that absent a threat of force, “the only remedy” available to coastal States for non-transit passage would be “to pursue the matter as a breach of international law through diplomatic channels and dispute settlement procedures”); Caminos, *supra* note 215, at 147 (arguing that the treaty’s provisions “corroborate the proposition that in the absence of an express norm, passage through international straits which does not comply with the definition of transit passage, cannot be prevented, hampered, or suspended”); BING BING JIA, *THE REGIME OF STRAIGHTS IN INTERNATIONAL LAW* 149 n.171, 156 (1998) (noting that activities other than transit do not fall within the scope of the Convention apart from application of Article 42(5)); Kim Young Koo, *supra* note 196, at 79 (stating that no explicit provision gives coastal States a right to take steps to prevent “non-transit” passage in straits); *but see* DE YTURRIAGA, *supra* note 199, at 222, 227:

If the transit of an aircraft does not fall under the conditions of transit passage pursuant to article 38 ... [t]he coastal State may resort by analogy to article 25(1) in order to justify interfering with the aircraft’s non-transit passage ... when an aircraft engages in any activity that is not transit passage, the right of innocent passage ... would not automatically apply; such “non-transit” passage ... would require the prior consent of the State overflown.

CHURCHILL & LOWE, *supra* note 170, at 91 (“Of course, in extreme cases coastal State action might be justifiable on the basis of the right of self defense.”).

<sup>236</sup> See AFDD 2-6, *supra* note 227, at 53.

traffic procedures.<sup>237</sup> The U.S. Air Force's Pacific Military Altitude Reservation Function (PACMARF), located at Hickam Air Force Base, Hawaii, serves as the DoD's single point of contact for coordination of ALTRV requests with civil aviation authorities in the Pacific region.<sup>238</sup> The PACMARF's counterpart in Europe is the European Central Altitude Reservation Facility, located at Ramstein Air Base, Germany, which is responsible for coordinating all ALTRVs over the Atlantic, as well as for Europe and Africa. Within the United States, this function is performed by the Federal Aviation Administration (FAA) Central Altitude Reservation Function.<sup>239</sup> Because ALTRVs are issued for use of airspace under prescribed conditions and can, therefore, be presumptively revoked if an aircraft deviates from its approved routing or altitude,<sup>240</sup> ALTRVs effectively afford coastal States a degree of control over military aircraft engaged in air refueling activities in straits that is otherwise unavailable to them under the transit passage regime.<sup>241</sup>

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<sup>237</sup> Thirteenth Meeting of the ICAO Asia Pacific Air Navigation Planning and Implementation Regional Group, Bangkok, Thailand, Jun. 23-27, 2003, *Altitude Reservations: Working Paper presented by the United States of America to encourage States to consider the need for developing an Altitude Reservation Memorandum of Understanding with the Pacific Military Altitude Reservation Function (PACMARF)*, at 1, available at [http://www.icao.int/icao/en/ro/apac/ats\\_ais\\_sar\\_sg13/wp29.pdf](http://www.icao.int/icao/en/ro/apac/ats_ais_sar_sg13/wp29.pdf) [hereinafter *U.S. Working Paper on Altitude Reservations*]. The FAA defines "Altitude Reservation" as an "airspace utilization under prescribed conditions normally employed for the mass movement of aircraft which cannot otherwise be accomplished within the normal air traffic control framework." U.S. DEP'T OF TRANS., FED. AVIATION ADMIN., PILOT/CONTROLLER GLOSSARY at A-10 (2009), available at [http://www.faa.gov/air\\_traffic/publications](http://www.faa.gov/air_traffic/publications).

<sup>238</sup> *U.S. Working Paper on Altitude Reservations*, *supra* note 237, at 1.

<sup>239</sup> *Id.*

<sup>240</sup> *See, e.g.*, U.S. DEP'T OF TRANS., FED. AVIATION ADMIN., ORDER 7610.4K: SPECIAL MILITARY OPERATIONS at 3-1-1 (2004).

<sup>241</sup> *See infra* note 251.



## 2. Archipelagic Waters

In addition to codifying the special regime for transit through straits, the Law of the Sea Convention also creates a new legal regime for archipelagic waters and adjacent territorial seas.<sup>242</sup> Under this new archipelagic regime, States “constituted wholly by one or more archipelagos” can draw straight archipelagic baselines encompassing the outermost islands of the archipelagos and the interconnecting waters,<sup>243</sup> which then serve as the baseline from which the breadth of the archipelagic State’s territorial sea is measured.<sup>244</sup> The waters enclosed within the archipelagic baseline constitute archipelagic waters, over which the archipelagic State exercises sovereignty subject to a number of rights enjoyed by third States,<sup>245</sup> the most important of which, for present purposes, is the right of archipelagic sea lanes passage.

The Convention’s regime of passage through archipelagic waters is actually twofold.<sup>246</sup> First, under Article 52 of the treaty, all ships enjoy the right of innocent passage through archipelagic waters.<sup>247</sup> Additionally, however, UNCLOS Article 53 allows archipelagic States to designate sea lanes and corresponding air routes through archipelagic waters and the adjacent territorial sea for the continuous and expeditious passage of foreign ships and aircraft. Within these routes, said ships and aircraft enjoy the “right of archipelagic sea lanes passage.”<sup>248</sup> Article 53 further provides that if an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through routes normally used for international navigation.<sup>249</sup> This latter provision is especially important to aircraft, “for without it aircraft would have no guaranteed right to overfly archipelagos, since aircraft, unlike ships, enjoy no right of innocent passage.”<sup>250</sup>

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<sup>242</sup> See generally CHURCHILL & LOWE, *supra* note 170, at 98-111 (on the development of a special legal regime for archipelagos).

<sup>243</sup> UNCLOS, *supra* note 82, arts. 46, 47, 21 I.L.M. at 1278. Article 46 defines “archipelago” as

a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

<sup>244</sup> *Id.*, art. 48, 21 I.L.M. at 1279.

<sup>245</sup> *Id.*, art. 49, 21 I.L.M. at 1279; *but see id.*, art. 50, 21 I.L.M. at 1279 (“Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters [e.g., across river mouths, bays and ports on individual islands], in accordance with articles 9, 10 and 11.”); *see also* CHURCHILL & LOWE, *supra* note 170, at 103.

<sup>246</sup> NORDQUIST ET AL., *supra* note 203, at 401.

<sup>247</sup> UNCLOS, *supra* note 82, art. 52, 21 I.L.M. at 1279.

<sup>248</sup> *Id.*, art. 53, 21 I.L.M. at 1279.

<sup>249</sup> *Id.*

<sup>250</sup> CHURCHILL & LOWE, *supra* note 170, at 105.

Beyond affording archipelagic States the right to designate air routes—a power not expressly available to littoral States under the transit passage regime<sup>251</sup>—the regime for archipelagic sea lanes passage also delineates the specific aspect of flight for aircraft during archipelagic sea lanes passage in relation to defined sea lane axes and/or the coastlines of islands bordering the route.<sup>252</sup> Otherwise, however, the concept of archipelagic sea lanes passage is essentially the same as transit passage through international straits as set down in Articles 39, 40, 42, and 44 of the Law of the Sea Convention (and discussed above), in terms of both navigation rights of ships and aircraft and the respective rights and duties of foreign and coastal States.<sup>253</sup> Moreover, as in the case of transit passage, the United States views the right of all nations to engage in archipelagic sea lanes passage as reflecting customary international law and recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters, provided the State does so in conformity with the Convention’s provisions.<sup>254</sup>

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<sup>251</sup> Compare UNCLOS, *supra* note 82, art. 41, 21 I.L.M. at 1277; *and id.*, art. 53, 21 I.L.M. at 1279; *see also* Hailbronner, *supra* note 198, at 496-97 (arguing that both the wording and negotiating context of the treaty support the conclusion that the authority of the coastal state to regulate transit passage is limited to the powers expressly granted with respect to the transit passage of ships in Article 42); DE YTURRIAGA, *supra* note 199, at 221, 222 (noting that the Law of the Sea Convention does *not* grant States bordering straits the competence to adopt laws and regulations in respect of air navigation); *but see* CHURCHILL & LOWE, *supra* note 170, at 92 (proposing that in accordance with Article 42, coastal States may regulate aircraft exercising their right of overflight, but may only apply internationally agreed standards).

<sup>252</sup> UNCLOS, *supra* note 82, art. 53, 21 I.L.M. at 1279; *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.4.1, Figure 2-1.

<sup>253</sup> *See* UNCLOS, *supra* note 82, art. 54, 21 I.L.M. at 1279; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.4.1 (The right of archipelagic sea lanes passage, through designated sea lanes as well as through all normal routes, “is substantially identical to the right of transit passage through international straits” and “cannot be hampered or suspended by the archipelagic nation for any purpose.”); NORDQUIST ET AL., *supra* note 203, at 404; CHURCHILL & LOWE, *supra* note 170, at 105; *see also* discussion *supra* notes 192-205; FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.1.2.2:

U.S. military aircrews flying due regard shall not provide prior notification to archipelagic states through the U.S. Embassy or appropriate DoD delegates when exercising the right of archipelagic sea lane passage. If flying in accordance with ICAO rules and procedures when exercising the right of archipelagic sea lane passage, they may file an ICAO flight plan with archipelagic nation civil aviation authorities. However, whether flying due regard or ICAO rules and procedures, they shall not obtain diplomatic clearance from an archipelagic nation to transit archipelagic sea lanes.

<sup>254</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.5.2.5.

## B. International Waters

As noted previously, international waters comprise those waters beyond the internationally recognized twelve-mile territorial sea limit wherein all States enjoy the high seas freedoms of navigation and overflight, *i.e.*, complete freedom of movement and operation for all ships and aircraft.<sup>255</sup> However, the Law of the Sea Convention recognizes three new maritime regimes or “quasi-regimes”<sup>256</sup> in the form of functional zones measured from the territorial sea baseline and extending seaward out from the twelve-mile limit and into international waters: the contiguous zone (UNCLOS Article 33), the exclusive economic zone (UNCLOS Articles 55-57), and the continental shelf (UNCLOS Article 76) (see Figure 1).<sup>257</sup> Each of these overlapping zones extends the coastal State’s functional jurisdiction with new rights and responsibilities over matters such as customs, immigration, environmental and natural resource management, etc., such that they ostensibly chip away at the traditional juridical division of the oceans and superjacent airspace into the unshared national areas and the universally shared expanse beyond.<sup>258</sup> Nevertheless, as the following discussion makes clear, with respect to navigation, overflight, and related activities, “freedom of the high seas” remains the dominant regime outside the twelve-mile territorial sea.<sup>259</sup>

### 1. Contiguous Zone

The contiguous zone dates back to the “Hovering Acts” enacted by Great Britain in the eighteenth century against foreign smuggling ships “hovering” within eight leagues (twenty-four miles) from the shore.<sup>260</sup> Contiguous to the twelve-mile territorial sea, this zone is similarly bounded with an outer limit of not more than twenty-four nautical miles from the territorial sea baseline.<sup>261</sup> Within the contiguous zone itself, the coastal State has the right to exercise jurisdiction and enforcement authority over violations by vessels of its customs, fiscal, immigration, or sanitary laws that occur within its territorial sea.<sup>262</sup> Plus, if violations occur, the coastal

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<sup>255</sup> *Id.* para. 2.6.3.

<sup>256</sup> JOHNSTON, *supra* note 183, at 59.

<sup>257</sup> Oxman, *supra* note 3, at 836.

<sup>258</sup> See JOHNSTON, *supra* note 183, at 59.

<sup>259</sup> Bernard H. Oxman, *Law of the Sea*, in THE UNITED NATIONS AND INTERNATIONAL LAW 309, 326 (Christopher C. Joyner ed., 2d ed. 1997).

<sup>260</sup> CHURCHILL & LOWE, *supra* note 170, at 112; see also JAMES C. F. WANG, HANDBOOK ON OCEANS POLITICS AND LAW 52 (1992); and BOCZEK, *supra* note 105, at 264 (noting that Great Britain repealed the hovering acts legislation in 1876, after the three-mile-wide territorial sea under the coastal state’s sovereignty became established).

<sup>261</sup> UNCLOS, *supra* note 82, art. 33, 21 I.L.M. at 1276; see also *id.*, arts. 5, 7, 21 I.L.M. at 1272.

<sup>262</sup> UNCLOS, *supra* note 82, art. 33, 21 I.L.M. at 1276. See also U.S. COMM’N ON OCEANS POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY, FINAL REPORT 72 (2004) (noting that in

State may commence pursuit of an offending vessel within and has the right of “hot pursuit” outside the contiguous zone, provided pursuit is uninterrupted.<sup>263</sup>

International confusion about the contiguous zone has led to widely divergent state practices and, as a result, it is of dubious significance.<sup>264</sup> Indeed, with the establishment and propagation of the exclusive economic zone, which extends up to 200 nautical miles from territorial sea baseline and thereby subsumes the waters of the contiguous zone,<sup>265</sup> the continued legal relevance of the regime has come into question.<sup>266</sup> Yet the rights exercisable by the coastal State in the contiguous zone, though limited, are nonetheless distinct from the sovereign rights or jurisdiction in the exclusive economic zone relating to natural resources.<sup>267</sup> The contiguous zone is also arguably relevant as both the precursor to the exclusive economic zone and as a framework for coastal State pollution controls and environmental protections for the high seas.<sup>268</sup>

Once more, however, the contiguous zone is contiguous to but not part of the territorial sea,<sup>269</sup> and the enforcement jurisdiction ascribed coastal States under UNCLOS Article 33 is limited to offenses committed within their territory or territorial sea. It does not include security rights or otherwise allow interference with the freedom of overflight enjoyed by aircraft of other nations in the airspace above the zone.<sup>270</sup> So, while the Law of the Sea Convention’s formulation of the contiguous zone may not rule out law enforcement action against a hydroplane on the water’s surface or even interception of an aircraft seeking to land within the territory of the coastal State, the contiguous zone has little application to aviation generally and perhaps even less specifically for military aircraft operations.<sup>271</sup>

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1999 the United States proclaimed a contiguous zone from twelve to twenty-four miles offshore), available at <http://oceancommission.gov/documents/welcome.html> [hereinafter U.S. OCEANS POL’Y RPT].

<sup>263</sup> UNCLOS, *supra* note 82, art. 111, 21 I.L.M. at 1290; see NORDQUIST ET AL., *supra* note 203, at 275; see also NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 158-167 (2d. ed. 2002).

<sup>264</sup> See WANG, *supra* note 260, at 53-54; BOCZEK, *supra* note 105, at 264-65; see also MILDE, *supra* note 39, at 38 (noting that the practical meaning of the contiguous zone provisions has not been addressed in theory or practice).

<sup>265</sup> UNCLOS, *supra* note 82, art. 57, 21 I.L.M. at 1279.

<sup>266</sup> WANG, *supra* note 260, at 56; see also 1 A HANDBOOK ON THE NEW LAW OF THE SEA 269 (René-Jean Dupuy & Daniel Vignes eds., 1991) (noting that the contiguous zone is of interest only in certain geographical circumstances; e.g., “in semi-enclosed seas, where various characteristics, relating in particular to the presence of islands under different sovereignties, make the existence of an [EEZ] impossible”) [hereinafter LAW OF THE SEA HANDBOOK].

<sup>267</sup> NORDQUIST ET AL., *supra* note 203, at 275; LAW OF THE SEA HANDBOOK, *supra* note 266, at 269.

<sup>268</sup> WANG, *supra* note 260, at 56.

<sup>269</sup> NORDQUIST ET AL., *supra* note 203, at 267.

<sup>270</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.9; CHURCHILL & LOWE, *supra* note 170, at 116.

<sup>271</sup> See MILDE, *supra* note 39, at 38.

## 2. Exclusive Economic Zone (EEZ)

The exclusive economic zone (EEZ) was born in the latter half of the twentieth century out of a compromise between States seeking to extend their jurisdiction beyond the limits of the traditional territorial sea, mainly to protect fisheries and other natural resources, and States interested in safeguarding the freedom of navigation and overflight and other traditional freedoms of the high seas.<sup>272</sup> As a consequence, the Law of the Sea Convention established a specific legal regime for the EEZ, defined as an area beyond and adjacent to the territorial sea that can extend up to 200 nautical miles from the territorial sea baseline<sup>273</sup> (see, e.g., Figure 3).<sup>274</sup> Within this zone, the coastal State is granted sovereign rights for exploring, exploiting, conserving and managing the natural resources in waters, seabed, and seabed subsoil within the EEZ; and other economic activities within the zone (e.g., energy production).<sup>275</sup> The coastal State further has jurisdiction over establishing and using artificial islands, installations and structures; marine scientific research; and protecting and preserving the marine environment.<sup>276</sup>

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<sup>272</sup> *Id.* at 40; see also Hailbronner, *supra* note 198, at 504-05; LAW OF THE SEA HANDBOOK, *supra* note 266, at 276.

<sup>273</sup> UNCLOS, *supra* note 82, arts. 55, 57, 21 I.L.M. at 1279; see also CHURCHILL & LOWE, *supra* note 170, at 137 (“[T]he EEZ must be regarded as a separate functional zone of a *sui generis* character, situated between the territorial sea and the high seas.”); EDWARD L. MILES, GLOBAL OCEAN POLITICS: THE DECISION-PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 373-374 (1998) (on the status of the EEZ) (asserting that Article 55 of the Law of the Sea Convention “is the ‘*sui generis*’ solution, though those words are never used”); but see WANG, *supra* note 260, at 70 (“[T]he EEZ is still part of the high seas.”).

<sup>274</sup> U.S. OCEANS POL’Y RPT, *supra* note 262, at iii.

<sup>275</sup> UNCLOS, *supra* note 82, art. 56, 21 I.L.M. at 1279.

<sup>276</sup> *Id.*



**Figure 3. The U.S. exclusive economic zone (EEZ).**

As in the case of the contiguous zone, the Law of the Sea Convention’s framing of the EEZ makes clear that it is not part of the territorial sea<sup>277</sup> and that historic high seas freedoms are retained,<sup>278</sup> to include “[m]ilitary activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys.”<sup>279</sup> Furthermore, although States conducting military activities within the EEZ must show due regard for coastal State resource and other specific rights enumerated in Article 56

<sup>277</sup> *Id.*, art. 55, 21 I.L.M. at 1279.

<sup>278</sup> *Id.*, art. 58, 21 I.L.M. at 1279; see also J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 163, 407 (2d ed. 1996); 2 RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 514(2) (1987) (discussing the rights of other States in the exclusive economic zone) [hereinafter RESTATEMENT 3D, FOREIGN RELATIONS LAW]:

All states enjoy, as on the high seas, the freedoms of navigation and overflight, freedom to lay submarine cables and pipelines, and the right to engage in other internationally lawful uses of the sea related to these freedoms, such as those associated with the operations of ships and aircraft.

<sup>279</sup> President’s Transmittal, *supra* note 207, at 1411, quoted in ROACH & SMITH, *supra* note 278, at 407.

of the Convention,<sup>280</sup> Article 58 makes it “the duty of the flag State, not the right of the coastal State, to enforce this ‘due regard’ obligation.”<sup>281</sup> Yet despite the treaty’s unequivocal rejection of territorialism in the EEZ,<sup>282</sup> its legal status has been a continuing source of controversy due to excessive claims of jurisdiction and sovereignty by several States.<sup>283</sup> These include, most notably, China, whose assertions of sovereignty in the EEZ were at the center of a highly publicized diplomatic dispute with the United States, after a U.S. Navy EP-3 surveillance aircraft and a Chinese F-8 fighter plane collided over the South China Sea in April 2001.<sup>284</sup>

According to a U.S. Navy report on the “EP-3 incident,” the mid-air collision occurred when a Chinese pilot, engaging in overly aggressive interception tactics and harassment maneuvers, lost control of his F-8 fighter and flew into one of the EP-3’s propellers.<sup>285</sup> The impact ripped the F-8 fighter in half – causing it to crash into the ocean and leading to the pilot’s death – and forced the EP-3 to make an emergency landing on the Chinese island of Hainan, where the aircraft was seized and the twenty-four aircrew members were taken into custody.<sup>286</sup> Perhaps not surprisingly, the U.S. version of events stood in stark contrast to China’s claim that the EP-3, though renowned as a “lumbering and slow moving propeller plane,”<sup>287</sup> had suddenly veered and crashed into the Chinese jet, which was purportedly following and monitoring the EP-3 from about 1300 feet away when the U.S. plane allegedly swerved.<sup>288</sup>

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<sup>280</sup> UNCLOS, *supra* note 82, art. 58, 21 I.L.M. at 1279; *see also* President’s Transmittal, *supra* note 207, at 1411.

<sup>281</sup> President’s Transmittal, *supra* note 207, at 1411; *see also* Lewis, *supra* note 95, at 1422 (“This language does not grant coastal State exclusive rights but rather demands reciprocity.”).

<sup>282</sup> LAW OF THE SEA HANDBOOK, *supra* note 266, at 278.

<sup>283</sup> *See, e.g., UNCLOS Implementation, supra* note 197, at 10 (noting that several States, including India, Mauritius, Myanmar, and Pakistan, have asserted “exclusive jurisdiction” or “exclusive rights” with respect to non-resource activities); *see also, e.g.,* John M. Van Dyke, *Military Ships and Planes Operating in the EEZ of Another Country*, 28 MARINE POLICY 29, 30 (2004) (noting that Brazil issued a declaration upon signing UNCLOS on December 10, 1982, stating that it “understands the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or maneuvers... without consent of the coastal State,” and since then similar declarations have been filed by Cape Verde, India, Malaysia, Pakistan, and Uruguay); Lewis, *supra* note 95, at 1418-19 (Bangladesh, Brazil, India, Malaysia, Pakistan, and Uruguay have all made statements asserting that UNCLOS does not permit other States to carry out military maneuvers in an EEZ without coastal State consent.).

<sup>284</sup> *See* Lewis, *supra* note 95, at 1412.

<sup>285</sup> *See* Robert Karniol, *Chinese Pilot to Blame for Mid-Air Collision, US Report Says*, JANE’S DEFENCE WEEKLY, Sep. 15, 2003, at [http://www.janes.com/defence/air\\_force/news/jdw/jdw030915\\_1\\_n.shtml](http://www.janes.com/defence/air_force/news/jdw/jdw030915_1_n.shtml).

<sup>286</sup> China detained the aircrew for 11 days, releasing them only after Washington issued the formal “apology” demanded by Beijing. This face-saving gesture saw the US express “sincere regret” over the missing pilot and aircraft, without acknowledging responsibility. *Id.*

<sup>287</sup> Lewis, *supra* note 95, at 1426 n.132.

<sup>288</sup> *Id.* at 1424 nn.120-21.

In the aftermath of the EP-3 incident, the Chinese government maintained that the United States was legally responsible for the mishap, in part, because the United States violated China's rights by conducting surveillance against China from within its EEZ.<sup>289</sup> While acknowledging that general international law and the Law of the Sea Convention recognized the freedom of "overflight" above the EEZ, the Chinese government averred that the EP-3's surveillance activities were threatening and inconsistent with the requirement to show due regard for the rights of the coastal State (Article 58) and, therefore, outside the scope and an abuse of the overflight freedom.<sup>290</sup> In effect, China has espoused a limited freedom of overflight for the EEZ, whereby military reconnaissance activities are prohibited without permission of the coastal State, based on the *sui generis* concept of the EEZ—*i.e.*, a zone outside the territorial sea, but yet not subsumed by the high seas, such that the high seas freedoms do not *ipso facto* apply.<sup>291</sup>

However, the Law of the Sea Convention, as a whole, makes clear that use of the adjective "exclusive" and the concepts of "sovereign rights" and "jurisdiction" with respect to the EEZ do not impart sovereignty,<sup>292</sup> rather, these terms merely signify that only the coastal State may exercise authority within the zone for *economic* purposes.<sup>293</sup> In other words, the rights and competences granted the coastal State by Article 56 relate to

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<sup>289</sup> Press Release, Ministry of Foreign Affairs of the People's Republic of China, Spokesman Zhu Bangzao Gives Full Account of the Collision between US and Chinese Military Planes (Apr. 4, 2001), available at <http://www.fmprc.gov.cn/eng/topics/3755/3756/3778/t19301.htm> [hereinafter P.R.C. Press Release].

<sup>290</sup> *Id.*; see also Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123, 133 (2005):

China appears to interpret Article 58 to require foreign users of the EEZ to refrain from any activities "which endanger the sovereignty, security and national interests of the coastal states".... Thus, according to China, the 'due regard' rule of Article 58 involves not only rights of the coastal State under Article 56 but also its interest relating to security.

<sup>291</sup> See CHURCHILL & LOWE, *supra* note 170, at 137; Hailbronner, *supra* note 198, at 503-04 (noting that the *sui generis* status of the EEZ has mostly been used to "de-link" freedoms granted to third States in the EEZ from the concept of freedom of the high seas); see also Ren Xiaofeng, *A Chinese Perspective*, 29 MARINE POLICY 139 (2005) (explaining China's view that freedoms of navigation and overflight in the EEZ are not freedoms of the high seas in the traditional sense).

<sup>292</sup> President's Transmittal, *supra* note 207, at 1411 ("A claim of sovereignty in the EEZ would be contradicted by the language of articles 55 and 56 and precluded by article 58 and the provisions it incorporates by reference."); see also LAW OF THE SEA HANDBOOK, *supra* note 266, at 277 ("[I]n order to win acceptance of the 200-mile [EEZ] limit, the area it enclosed was 'deterritorialized.'").

<sup>293</sup> LAW OF THE SEA HANDBOOK, *supra* note 266, at 279-80, 290-91; see also NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.6.2; Lewis, *supra* note 95, at 1421 ("[T]he EEZ is by name an *economic* zone: The article setting forth the rights, jurisdiction, and duties of the coastal State in its EEZ does not mention military or security interests.") (emphasis in original).



resources in the EEZ, not to the zone as a space.<sup>294</sup> Additionally, from the negotiating context of the treaty it is equally clear that the freedom of high seas referred to in Article 58 is not limited to passage rights.<sup>295</sup> To the contrary, the full freedoms are preserved, so that the freedoms of navigation, overflight, etc., under Article 58 are qualitatively and quantitatively the same as the traditional high seas freedoms beyond the EEZ, to include, *inter alia*, overflight of the superjacent airspace by military aircraft, along with the right to engage in other internationally lawful uses of the sea related to the freedom of overflight.<sup>296</sup> Activities of aircraft overflying the EEZ are thus subject to the sovereignty of the coastal State only insofar as those activities relate to “exploring and exploiting, conserving and managing natural resources...” or otherwise affect “the economic exploitation and exploration of the zone.”<sup>297</sup>

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<sup>294</sup> LAW OF THE SEA HANDBOOK, *supra* note 266, at 279, 281; Hailbronner, *supra* note 198, at 506; *see also* MILDE, *supra* note 39, at 41 (“The ‘sovereign rights’ of the coastal state relate only to the natural resources of the sea and the coastal state cannot interfere with the traditional freedoms of the high seas, in particular the right of navigation and overflight.”); MILES, *supra* note 273, at 374 (“[Article 56] define[s] the rights, jurisdictions and duties of the coastal states in the EEZ in relation to specific activities... [and Article 58] protects the high seas freedoms of other states in the EEZ.”) (emphasis in original).

<sup>295</sup> *See* Hailbronner, *supra* note 198, at 506 (quoting Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT’L L. 57, 72 (1978)).

<sup>296</sup> *Id.*; ROACH & SMITH, *supra* note 278, at 408 (citing RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 278, § 514 cmt. d); *see also* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 1.6.2; MILES, *supra* note 273, at 374.

<sup>297</sup> Hailbronner, *supra* note 198, at 505; *see also* LAW OF THE SEA HANDBOOK, *supra* note 266, at 285; NORDQUIST ET AL., *supra* note 203, at 503 (noting that the high seas freedoms enjoyed by States other than the coastal State in the EEZ in respect of activities which are not resource related remain unabridged); Mark J. Valencia & Kazumine Akimoto, *Report of the Tokyo Meeting and Progress to Date*, 29 MARINE POLICY 101 (2005):

[T]here is agreement that the exercise of the freedom of navigation and overflight in and above EEZs should not interfere with or endanger the rights of the coastal State to protect and manage its own resources and its environment, and should not be for the purpose of marine scientific research. And the exercise of such freedoms of navigation and overflight should not interfere with the rights of the coastal States with regard to their establishment and use of artificial islands, installations and structures in the EEZ.

*Cf.* CHURCHILL & LOWE, *supra* note 170, at 141-42:

Article 58 provides that all States enjoy freedom of overflight in the EEZ, and “other internationally lawful uses of the sea related to” this freedom compatible with the provisions of the Convention. This freedom is subject to the two explicit limitations to which the freedom of navigation is subject, namely due regard for other States and articles 88-115, etc. ... In addition, the freedom is implicitly subject to two possible limitations. First, the coastal State’s right to construct artificial islands and installations might effectively prevent low flying in the vicinity of such structures. Secondly, aircraft are subject to the coastal State’s competence to regulate the dumping of waste.

Article 58's legislative history also conclusively rebuts China's claims that the EP-3's surveillance activities were an unlawful threat to China's security and thus contrary to Article 58's "due regard" requirement. It establishes that even potentially provocative military activities associated with the operation of ships and aircraft, such as naval maneuvers, weapons practice, placing sensor arrays, aerial reconnaissance or intelligence collection, are nevertheless permissible as internationally lawful uses of the sea related to the high seas freedoms of navigation and overflight that all States enjoy in the EEZ.<sup>298</sup> The overwhelming weight of legal authority has also consistently upheld this view.<sup>299</sup> Furthermore, neither Article 301 of the Law of the Sea Convention, entitled "peaceful uses of the seas," nor Article 88 of the treaty, which reserves the high seas for "peaceful purposes," is generally understood to forbid anything other than aggressive actions—*i.e.*, the threat or use of force in a manner at odds the U.N. Charter.<sup>300</sup> China's challenge to the lawfulness of the EP-3's intelligence-gathering activities, which involved neither force nor the threat thereof, is therefore untenable in light of current international norms.<sup>301</sup> Still, it remains emblematic of the current controversy over the right to engage in

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<sup>298</sup> Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* 203 (Publications on Ocean Dev., Vol. 14, 1989); *see also Hayashi, supra* note 290, at 128 ("Traditionally, intelligence gathering activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58(1), lawful in the EEZ as well."); *supra* notes 278-279, 295-296 and accompanying text.

<sup>299</sup> *Hayashi, supra* note 290, at 128 nn.27, 28 (noting that a comprehensive study of the subject found that the vast weight of authority confirmed that the freedom referred to in Article 87 includes high seas freedoms of navigation and overflight, and internationally lawful uses of the sea related to such high seas freedoms and historically included military operations (citing George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflicts*, 32 CAL. W. INT'L L.J. 272 (2002))); *see also Lewis, supra* note 95, at 1420-23 (discussing the legal authorities favoring the view that the U.S. Navy EP-3's flight over China's EEZ was permitted under international law); Hailbronner, *supra* note 198, at 506:

Article 58 freedoms include, *inter alia*, use of the airspace above the high seas for military and civil purposes.... [Article 58's "due regard" provision] neither enlarges the regulatory authority of the coastal state under the Convention nor limits the other states' freedoms. Its sole purpose is to make clear that the freedoms under Article 58(1), just like any other right, must not be exercised without taking into account the rights of the coastal state.

<sup>300</sup> CHURCHILL & LOWE, *supra* note 170, at 314; LAW OF THE SEA HANDBOOK, *supra* note 266, at 904; *Hayashi, supra* note 290, at 125.

<sup>301</sup> *See The Implications of China's Naval Modernization for the United States: Hearing Before the United States-China Economic and Security Review Comm'n*, 111th Cong. 25-28 (2009) (statement of Peter Dutton, Associate Professor, U.S. Naval War College) (noting that China's "unique legal interpretations of UNCLOS" regarding foreign military activities in its EEZ "are outside widely accepted international law and norms"), *available at* <http://www.uscc.gov/hearings/hearingsarchive.php>; *see also Lewis, supra* note 95, at 1423; *Hayashi, supra* note 290, at 125-26.

military and intelligence gathering activities in the EEZs of other States; a dispute likely to continue.<sup>302</sup>

### 3. *Continental Shelf*

As evidenced by the ten explanatory paragraphs of UNCLOS Article 76, the continental shelf does not easily lend itself to simple description.<sup>303</sup> For present purposes, however, the continental shelf of a coastal State can be roughly defined as the sea-bed and subsoil extending either from the baseline from which the territorial sea is measured to the outer edge of “the continental margin” (up to 350 miles) or from the baseline from which the territorial sea is measured up to 200 miles, whichever is greater.<sup>304</sup> Pursuant to the Law of the Sea Convention’s continental shelf regime, coastal States have exclusive rights to natural resources of the continental shelf, such as fisheries, oil, gas, and minerals.<sup>305</sup> So when paired with the EEZ (UNCLOS Article 56), the continental shelf provides a second legal basis for coastal State rights in relation to the sea bed.<sup>306</sup> The doctrine of the continental shelf actually preceded the concept of the EEZ and is considered to be firmly established in customary international law. Thus, it stands as an independent doctrinal basis for coastal States’ rights over their continental shelves for States that do not accept the EEZ as customary international law or recognize claims based on the concept.<sup>307</sup> However, the inception of the continental shelf doctrine extended jurisdiction and property rights over marine resources in an area that under the classical doctrine was to remain part of the high seas.<sup>308</sup> Therefore, coastal State rights over the continental shelf are strictly limited and do not affect the legal status of the superjacent waters or of the airspace above those waters.<sup>309</sup> Consequently, the airspace above the continental shelf beyond the territorial sea has the same legal status as the airspace above the high seas, in which all aircraft enjoy freedom of overflight to operate without interference by other nations.<sup>310</sup>

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<sup>302</sup> Mark J. Valencia, *Conclusions and the Way Forward*, 29 *MARINE POLICY* 185 (2005).

<sup>303</sup> For a detailed analysis of the Law of the Sea Convention’s continental shelf definitional provisions, including a flowchart detailing the procedure for a coastal State to establish the outer limits of its continental shelf, see Robert W. Smith & George Taft, *Legal Aspects of the Continental Shelf*, in *CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE* 17, 17-24 (Peter J. Cook & Chris M. Carleton eds., 2000).

<sup>304</sup> UNCLOS, *supra* note 82, art. 76, 21 I.L.M. at 1305.

<sup>305</sup> *Id.*, art. 76, 21 I.L.M. at 1305.

<sup>306</sup> CHURCHILL & LOWE, *supra* note 170, at 123.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 127-28 (“This position has been modified by the establishment of the EEZ as an area of maritime jurisdiction.”).

<sup>309</sup> UNCLOS, *supra* note 82, art. 78, 21 I.L.M. at 1305.

<sup>310</sup> MILDE, *supra* note 39, at 41.

## V. NATIONALITY OF AIRCRAFT

The last of the basic international law principles espoused by Professor Cooper as being embodied in the Chicago Convention is “nationality of aircraft.”<sup>311</sup> This concept recognizes that aircraft have characteristics of nationality similar to those that exist under maritime law with respect to the “flagging” of ships.<sup>312</sup> As with ships, nationality of aircraft is synonymous with State of registry,<sup>313</sup> and aircraft engaged in international air navigation must similarly display markings indicating nationality and registration.<sup>314</sup> Notably, however, contracting parties to air transport agreements concluded pursuant to Article 6 of the Chicago Convention have historically imposed ownership restrictions on the carriers designated to receive traffic rights and/or access to routes, requiring these airlines be owned and controlled by citizens of a contracting party, thus ensuring airlines from non-contracting States do not benefit from the bilateral exchange of traffic rights.<sup>315</sup> This has effectively prevented international aviation from adopting the maritime concept of “flags of convenience,”<sup>316</sup> whereby an owner may register a ship in a foreign country (e.g., in order to profit from less restrictive regulations), such that the nationality of the vessel’s owner and vessel’s State of registry are different.<sup>317</sup>

Nevertheless, because States have traditionally exchanged air traffic rights on the basis of bilateral agreements, aircraft nationality and air traffic rights are inextricably linked.<sup>318</sup> Aircraft nationality is also the basis for the reciprocal duties and responsibilities borne by States with respect to aircraft that they register and by aircraft *vis-à-vis* their State of registry.<sup>319</sup> Having

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<sup>311</sup> Sources cited *supra* note 32.

<sup>312</sup> DEMPSEY, *supra* note 23, at 43.

<sup>313</sup> Chicago Convention, *supra* note 17, art. 17, 61 Stat. at 1185; *see also* DEMPSEY, *supra* note 23, at 45; Gestri, *supra* note 111, at 141 (“Even in wartime, the nationality of an aircraft is determined by the State of registry.”).

<sup>314</sup> Chicago Convention, *supra* note 17, art. 20, 61 Stat. at 1185.

<sup>315</sup> *See generally* ISABELLE LELIEUR, LAW AND POLICY OF SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF AIRLINES: PROSPECTS FOR CHANGE (2003).

<sup>316</sup> DEMPSEY, *supra* note 23, at 47.

<sup>317</sup> *See* Merriam-Webster’s Collegiate Dictionary 441 (10th ed. 1997); Black’s Law Dictionary 652 (7th ed. 1999) (defining “flag of convenience” as “[a] national flag flown by a ship not because the ship or its crew has an affiliation with the nation, but because the lax controls and modest fees and taxes imposed by that nation have attracted the owner to register it there.”); *see also* SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 126-27 (discussing the definition of “flags of convenience” as it relates to civil aviation and the question of jurisdiction); SONNY R. TOLOFARI, OPEN REGISTRY SHIPPING: A COMPARATIVE STUDY OF COSTS AND FREIGHT RATES 14-15 (1989) (discussing the origins of the term “flag of convenience” and attempts to define it).

<sup>318</sup> *See* discussion *supra* Part III.A.

<sup>319</sup> *See, e.g.*, Chicago Convention, *supra* note 17, arts. 20 (display of marks), 21 (report of registrations), 29 (documents carried in aircraft), 30 (aircraft radio equipment requirements),

said this, nationality-related issues like ownership, identification, and air traffic rights have only limited relevance for military aircraft, which (a) are not obliged to be registered; (b) are, by definition, operated by and marked with the military ensign of the State's armed forces;<sup>320</sup> and (c) cannot overfly another State's territory without that State's authorization.<sup>321</sup> Furthermore, States generally have exclusive competence in the area of military aircraft operations, albeit subject to international legal limitations like the law of war prohibition of perfidy,<sup>322</sup> or the Chicago Convention's mandate to operate with "due regard" for the safety of civil aviation.<sup>323</sup> But owing to the distinctly global nature of MAF operations, the concept of aircraft nationality continues to hold significance for mobility aircraft in certain respects.

Once again, MAF peacetime and contingency support missions oftentimes involve transoceanic, international flights and landings at outlying foreign military and/or civilian airports where there may be no other U.S. military presence. These aspects of MAF operations can make mobility aircraft especially susceptible to interference from foreign nations based on nationality, both in the air and on the ground. A case in point is States' administration of air space management and security zones, sometimes used by States to justify excessive claims of sovereignty or to otherwise impose restrictions on the freedom of overflight of military aircraft in international airspace based on their nationality. Aircraft nationality is also fundamental to the question of the sovereign immunity of state aircraft from foreign enforcement jurisdiction. These are the topics of discussion in this final section.

#### A. Airspace Management & Security Zones

Airspace management and security zones comprise assorted airspace control measures with a variety of legal bases. In the present context, "airspace management zone" is simply a generic term for a delimitation of airspace based on responsibility for and/or authority over the airspace and the provision of air traffic control (ATC) services. "Security zone," on the other hand, generally describes a volume of airspace in which air navigation is restricted to further national or, in some cases, international

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31 (certificates of airworthiness), 32 (licenses of personnel), 33 (recognition of certificates and licenses), 61 Stat. at 1185, 1188-89.

<sup>320</sup> See sources cited *supra* note 83; *but cf.* NORTH ATLANTIC TREATY ORGANIZATION, NATO AIRBORNE EARLY WARNING & CONTROL FORCE, FREQUENTLY ASKED QUESTIONS, A14 (discussing the difficulty NATO officials had determining which flag E-3A AWACS aircraft would operate under and the decision to register them in Luxembourg).

<sup>321</sup> Chicago Convention, *supra* note 17, art. 3(c), 61 Stat. at 1181.

<sup>322</sup> See, e.g., USAF OPS LAW HANDBOOK, *supra* note 83, at 34 (noting that military aircraft may not bear enemy or neutral markings while engaged in combat activities); see also Additional Protocol I, *supra* note 132, art. 37, 1125 U.N.T.S. at 21.

<sup>323</sup> Chicago Convention, *supra* note 17, art. 3(d), 61 Stat. at 1181.

security interests. Both types of zones can encompass national as well as international airspace and can be established pursuant to either States' domestic laws or international regimes.

The right of a State to restrict or prohibit overflight of designated areas, or of its entire national territory for that matter, is a natural consequence of the complete and exclusive sovereignty of the State articulated in Article 1 of the Chicago Convention and further confirmed by Articles 3, 9 and 12 of the treaty.<sup>324</sup> Yet simultaneously, these provisions also place some conditions and limitations on its exercise.<sup>325</sup> For example, Article 3 requires that States issuing guidelines for use of navigable airspace by military aviation show due regard for the safety of civil aviation.<sup>326</sup> Next, Article 9 requires that any restrictions on overflight of certain territorial land or sea areas by foreign aircraft that States impose in the interest of military necessity or public safety be (1) nondiscriminatory (*i.e.*, applied "uniformly" without regard to nationality of aircraft) and (2) "of reasonable extent and location so as not to interfere unnecessarily with air navigation."<sup>327</sup> Finally, Article 12 requires State parties to ensure not only that aircraft overflying their territory comply with all of their applicable rules and regulations, but also that their own regulations conform to ICAO standards and recommended practices (SARPs) "to the greatest possible extent."<sup>328</sup>

These principles are the underlying rationale for the FAA's "National Airspace System" (NAS) within the jurisdiction of the United States. The NAS establishes two categories of airspace: regulatory and nonregulatory.<sup>329</sup> Regulatory airspace includes Class A, B, C, D, and E airspace areas, along with "prohibited" and "restricted" areas, while nonregulatory airspace consists of "warning areas," "military operations areas" (MOAs), "alert areas," and "controlled firing areas."<sup>330</sup> The Class A through E airspace areas represent classifications of "controlled" airspace wherein the classification corresponds with the type of ATC services provided<sup>331</sup> (see Figure 4).<sup>332</sup> According to FAA regulations, these

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<sup>324</sup> MILDE, *supra* note 39, at 44-45.

<sup>325</sup> *See id.* at 45.

<sup>326</sup> *See* Chicago Convention, *supra* note 17, art. 3(d), 61 Stat. at 1181.

<sup>327</sup> *Id.*, art. 9, 61 Stat. at 1182.

<sup>328</sup> *Id.*, art. 12, 61 Stat. at 1183; *see also* DEMPSEY, *supra* note 23, at 52 (noting that ICAO standards are binding on states parties to the Chicago Convention absent notification to the ICAO Council of the State's inability to comply in accordance with Article 38, while recommended practices are merely desirable and do not trigger mandatory ICAO council notification of noncompliance).

<sup>329</sup> U.S. DEP'T OF TRANSP., FED. AVIATION ADMIN., AERONAUTICAL INFORMATION MANUAL, para. 3-1-1 (2009), at [http://www.faa.gov/air\\_traffic/publications/ATpubs/AIM](http://www.faa.gov/air_traffic/publications/ATpubs/AIM) [hereinafter AERONAUTICAL INFORMATION MANUAL].

<sup>330</sup> *Id.*

<sup>331</sup> U.S. DEP'T OF TRANSP., FED. AVIATION ADMIN., PILOT'S HANDBOOK OF AERONAUTICAL KNOWLEDGE 14-2 to 14-3 (2009), at [http://www.faa.gov/library/manuals/aviation/pilot\\_handbook](http://www.faa.gov/library/manuals/aviation/pilot_handbook) [hereinafter PILOT'S HANDBOOK]. The FAA generally describes each airspace category as follows:

classifications apply within the airspace above the forty-eight contiguous U.S. states and Alaska – including the airspace overlying territorial waters<sup>333</sup> – and correlate to ICAO airspace classifications.<sup>334</sup>

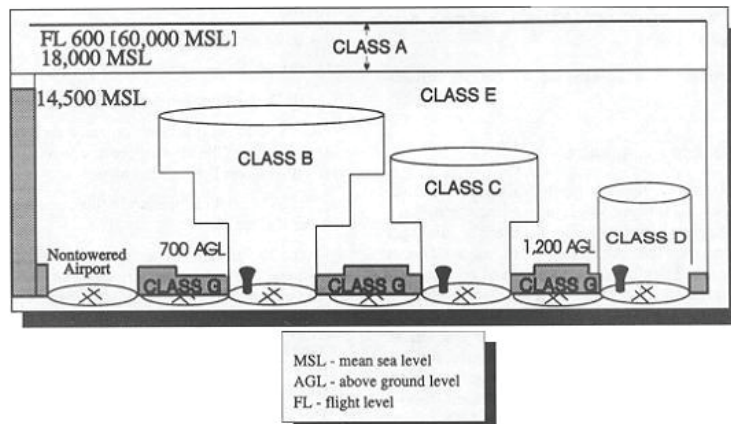


Figure 4. “Controlled airspace” profile.

- Class A airspace is airspace from 18,000 feet mean sea level (MSL) up to 60,000 feet MSL, wherein all aircraft operations are conducted under instrument flight rules (IFR).
- Class B airspace is airspace around the nation’s busiest airports from the surface up to 10,000 feet MSL, wherein aircraft must have an ATC clearance to operate and all aircraft so cleared receive “separation services” (*i.e.*, ATC facilitates separation of aircraft “*vertically* by assigning different altitudes; *longitudinally* by providing an interval expressed in time or distance between aircraft on the same, converging, or crossing courses, and *laterally* by assigning different flight paths.” AERONAUTICAL INFORMATION MANUAL, *supra* note 329, para. 4-4-11 (emphasis added)).
- Class C airspace is airspace around airports with an operational control tower, radar approach control, and IFR operations capability, from the surface up to 4,000 feet above ground level (AGL), wherein aircraft must establish two-way radio communications with ATC before entry and maintain those communications while within the airspace.
- Class D airspace is airspace around airports with an operational control tower from the surface up to 2,500 feet MSL, wherein aircraft must establish two-way radio communications with ATC before entry and maintain those communications while within the airspace.
- Class E airspace is controlled airspace that is not Class A, B, C, or D airspace from 14,500 feet MSL (unless designated at a lower altitude) up to 18,000 feet MSL (may be lowered to start at 700 or 1,200 feet AGL).
- Airspace that has not been designated as Class A, B, C, D, or E airspace is designated “uncontrolled” (or Class G) airspace.

<sup>332</sup> AERONAUTICAL INFORMATION MANUAL, *supra* note 329, para. 3-2-1, Figure 3-2-1.

<sup>333</sup> PILOT’S HANDBOOK, *supra* note 331, at 14-2.

<sup>334</sup> ICAO Class F (“Air traffic advisory service”) airspace is not used in the United States. See INT’L CIVIL AVIATION ORG., AIR TRAFFIC SERVICES, ANNEX 11 TO THE CONVENTION ON INT’L CIVIL AVIATION at 2-3, ICAO Doc. ICAO/ANX/11, Order No. AN 11 (13th ed. 2001) [hereinafter CHICAGO CONVENTION, ANNEX 11]; see also *id.* at App. 4 (setting forth the requirements for flights within each class of airspace).

The two remaining areas of regulatory airspace together with the four areas of nonregulatory airspace make up the six FAA “special use airspace” (SUA) areas where certain (mainly military-related) activities must be confined, or “where limitations may be imposed on aircraft operations that are not part of those activities.”<sup>335</sup>

- Prohibited area: Airspace above a prescribed surface area “...within which the flight of aircraft is prohibited... for security or other reasons associated with the national welfare.”<sup>336</sup>

- Restricted area: Airspace above a prescribed surface area “...within which the flight of aircraft, while not wholly prohibited, is subject to restrictions [due to]... the existence of unusual, often invisible hazards to aircraft such as artillery firing, aerial gunnery, or guided missiles.”<sup>337</sup>

- Warning area: “[A]irspace of defined dimensions, extending from three nautical miles outward from the coast of the [United States] that contains activity that may be hazardous to nonparticipating aircraft.”<sup>338</sup>

- Military operations area (MOA): “[A]irspace of defined vertical and lateral limits established for the purpose of separating certain military training activities [e.g., air combat tactics, air interceptions, aerobatics, formation training, and low-altitude tactics] from IFR traffic.”<sup>339</sup>

- Alert area: Airspace areas depicted on aeronautical charts “that may contain a high volume of pilot training or an unusual type of aerial activity.”<sup>340</sup>

- Controlled firing area (CFA): Airspace areas that “contain activities which, if not conducted in a controlled environment, could be hazardous to nonparticipating aircraft.” In contrast with activities in other special use areas, CFA activities will be immediately suspended if a nonparticipating aircraft approaches the area.<sup>341</sup>

By definition, FAA SUAs only apply within U.S. territorial airspace, except “warning areas,” which may be located over national waters (three to twelve nautical miles from the U.S. coast) or international waters (beyond twelve nautical miles) or both, and may therefore occupy international airspace.<sup>342</sup> Again, warning areas are zones designated to warn

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<sup>335</sup> PILOT’S HANDBOOK, *supra* note 331, at 14-3.

<sup>336</sup> AERONAUTICAL INFORMATION MANUAL, *supra* note 329, para. 3-4-2.

<sup>337</sup> *Id.* at para. 3-4-3.

<sup>338</sup> *Id.* at para. 3-4-4.

<sup>339</sup> *Id.* at para. 3-4-5.

<sup>340</sup> *Id.* at para. 3-4-6.

<sup>341</sup> *Id.* at para. 3-4-7.

<sup>342</sup> *Id.* at para. 3-4-4; *see also* Definition of Special Use Airspace, 61 Fed. Reg. 2080 (Jan. 24, 1996) (to be codified at 14 C.F.R. pt. 1); and U.S. DEP’T OF TRANSP., FED. AVIATION ADMIN., AIR TRAFFIC BULLETIN, ISSUE 99-3, at 5-12 (1999), *available at*



nonparticipating pilots of the potential danger and unusual hazards posed by military activities within the airspace, such as live-fire exercises with artillery firing, aerial gunnery, or guided missiles, aircraft carrier operations, air-to-air refueling, and radio jamming.<sup>343</sup> While warning areas are similar to restricted areas, only warning areas can extend into international airspace where the United States does not have sole jurisdiction.<sup>344</sup>

Notably, both restricted and prohibited airspace areas are explicitly prescribed by ICAO standards and recommended practices (SARPs) in Annex 2 to the Chicago Convention (Rules of the Air)<sup>345</sup>—one of eighteen annexes to the treaty adopted pursuant to ICAO’s quasi-legislative authority,<sup>346</sup> each of which contains SARPs on a specific substantive area.<sup>347</sup> Annex 2 further expressly prohibits aircraft from flying in a duly published restricted or prohibited area, except in accordance with the conditions of the restrictions or by permission of the States over whose territory the areas are established.<sup>348</sup> The remaining FAA special use areas (*i.e.*, warning areas, MOAs, alert areas, and controlled firing areas) fall into the category of “danger areas,” which are defined in Annex 2 as “airspace of defined dimensions within which activities dangerous to flight exist at specified times,” and which, unlike restricted and prohibited areas, are not expressly limited to the confines of territorial airspace.<sup>349</sup>

Where States have established airspace management and security zones above their land areas and/or territorial waters, overflying aircraft are bound by all-encompassing State sovereignty, as well as by the Chicago Convention, to comply with associated limitations that may be imposed on their operations.<sup>350</sup> The same, however, cannot be said for zones that extend beyond territorial limits, since States lack the legal capacity to prevent flights through international airspace where all aircraft enjoy freedom of overflight.<sup>351</sup> So, for example, in the case of U.S. warning areas, FAA guidance makes clear the fact that these zones only serve as a warning of

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[http://www.faa.gov/air\\_traffic/publications/atpubs/atbhc/atbhme.HTM](http://www.faa.gov/air_traffic/publications/atpubs/atbhc/atbhme.HTM) [hereinafter AIR TRAFFIC BULLETIN 99-3].

<sup>343</sup> PILOT’S HANDBOOK, *supra* note 331, at 14-3 to 14-4.

<sup>344</sup> *Id.* at 14-4.

<sup>345</sup> Annex 2 defines “restricted area” as “[a]n airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is restricted in accordance with certain specified conditions,” and “prohibited area” as “[a]n airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is prohibited.” INT’L CIVIL AVIATION ORG., RULES OF THE AIR, ANNEX 2 TO THE CONVENTION ON INT’L CIVIL AVIATION at 4-5, ICAO Doc. ICAO/ANX/2, Order No. AN 2 (10th ed. 2005) [hereinafter CHICAGO CONVENTION, ANNEX 2].

<sup>346</sup> *See* CHICAGO CONVENTION, *supra* note 17, art. 54, 61 Stat. at 1197.

<sup>347</sup> *See* DEMPSEY, *supra* note 23, at 51-53 (listing the Chicago Convention Annexes).

<sup>348</sup> CHICAGO CONVENTION, ANNEX 2, *supra* note 345, at 7-8.

<sup>349</sup> *Id.* at 3; *see also supra* notes 345, 347.

<sup>350</sup> *See* MILDE, *supra* note 39, at 43; sources cited *supra* notes 345, 348.

<sup>351</sup> *See* AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8; *see also* Bourbonniere & Haeck, *supra* note 24, at 891.

potential danger and that nonparticipating pilots are not prevented from entering them.<sup>352</sup> Nevertheless, the ICAO regulatory regime does require that aircraft operating under the direction of air traffic control precisely maintain their assigned route and altitude<sup>353</sup> and comply with ICAO ATC procedures designed to ensure aircraft avoid active danger areas.<sup>354</sup> What's more, Annex 2 also authorizes military interception of civil aircraft if necessary to guide them away from a prohibited, restricted or danger area.<sup>355</sup>

Military aircraft are considered to be state aircraft and, as such, are not bound by ICAO rules and procedures.<sup>356</sup> So when operating in international airspace, they are not legally subject to the jurisdiction or control of the ATC authorities of a foreign country.<sup>357</sup> As noted before, however, DoD policy is that routine point-to-point and navigation flights shall normally follow ICAO procedures.<sup>358</sup> Therefore, to the extent it is practical and compatible with mission requirements, U.S. military aircraft, including MAF aircraft will generally accede to ATC routing around active danger areas established and operated by foreign countries in international airspace in accordance with ICAO SARPs.<sup>359</sup> At the same time, DoD regulations dictate that operations that do not lend themselves to ICAO flight procedures be conducted under the "due regard" prerogative of state aircraft.<sup>360</sup> In such cases, regulations require that DoD aircraft satisfy specific operational and technical criteria necessary for the United States to fulfill its obligations under Article 3(d) of the Chicago Convention.<sup>361</sup>

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<sup>352</sup> AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8-9.

<sup>353</sup> See INT'L CIVIL AVIATION ORG., BOOKLET ON THE ANNEXES TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, *Annex 2 – Rules of the Air* (undated) [hereinafter ICAO, BOOKLET ON THE ANNEXES], at [http://www.icao.int/icao/net/anx/info/annexes\\_booklet\\_en.pdf](http://www.icao.int/icao/net/anx/info/annexes_booklet_en.pdf); see also, e.g., 14 C.F.R. § 99.27 (2003).

<sup>354</sup> CHICAGO CONVENTION, ANNEX 2, *supra* note 345, at 6; see, e.g., PILOT'S HANDBOOK, *supra* note 331, at 14-3 ("If the [warning] area is active and has not been released to the FAA, the ATC issues a clearance which ensures the aircraft avoids the restricted airspace."); and AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 9-10:

It is FAA policy that all SUA, including warning areas, should be made available for use by nonparticipating aircraft when all or part of the airspace is not needed by the using agency[.]... [however], the FAA will not route nonparticipating IFR aircraft through an active warning area.

<sup>355</sup> CHICAGO CONVENTION, ANNEX 2, *supra* note 345, App. 2, at 30.

<sup>356</sup> Chicago Convention, *supra* note 17, art. 3, 61 Stat. at 1181; see also AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 6.

<sup>357</sup> FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.1.1; AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8. DoD policies regarding the use of ICAO procedures and military operations in international airspace are stated in Chapter 7 (International Civil Aviation Organization) and Chapter 8 (Operations and Firings Over the High Seas) of DoD Flight Information Publication, General Planning. See *supra* note 28.

<sup>358</sup> DoDI 4540.01, *supra* note 28, para. 6.3.1; FLIP, *supra* note 28, para. 8-14.

<sup>359</sup> FLIP, *supra* note 28, para. 8-4; see also AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8.

<sup>360</sup> This includes, for example, military contingencies, classified missions, politically sensitive missions, routine aircraft carrier operations, and some training activities. DoDI 4540.01, *supra* note 28, para. 6.3.2; see also FLIP, *supra* note 28, para. 8-8.

<sup>361</sup> DoDI 4540.01, *supra* note 28, para. 6.3.2; FLIP, *supra* note 28, para. 8-8.

These criteria essentially obligate the military aircraft pilot-in-command to act as his or her own air traffic controller and to separate his or her aircraft from all other air traffic.<sup>362</sup>

### 1. *Air Defense Identification Zones (ADIZ)*

The airspace management and security zones expressly sanctioned by the Chicago Convention and ICAO SARPs notwithstanding, some States, including the United States, have unilaterally established “air defense identification zones” (ADIZ)<sup>363</sup> that can extend hundreds of miles into international airspace (see, e.g., Figure 5).<sup>364</sup> An ADIZ is generally set up to facilitate identification of approaching aircraft for national security purposes and so requires that aircraft entering territorial airspace from points outside satisfy certain identification requirements as a condition of entry.<sup>365</sup> These may include mandates for filing a flight plan, two-way radios and transponders, and position reporting.<sup>366</sup> Aircraft failing to comply with ADIZ requirements will typically be identified through military intercept.<sup>367</sup>

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<sup>362</sup> DoDI 4540.01, *supra* note 28, para. 6.3.2; FLIP, *supra* note 28, para. 8-8.

<sup>363</sup> The U.S. has four designated ADIZ: the Contiguous U.S. ADIZ, Alaska ADIZ; Guam ADIZ; and Hawaii ADIZ. 14 C.F.R. §§ 99.41–99.47 (2003). All airspace above the contiguous U.S. not within the ADIZ is designated a “Defense Area.” *Id.* § 99.48; *see also id.* § 99.3 (“*Defense area* means any airspace over the contiguous United States that is not an ADIZ in which control of aircraft is required for reasons of national security.”) (emphasis in original). Other States with standing ADIZ include Canada, France, Indonesia, and Japan. RAAF PUB. 1003, *supra* note 216, at 19; *cf.* Bourbonniere & Haeck, *supra* note 24, at 954 n.253 (noting that twelve States presently maintain ADIZ (citing BARRY E CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1028 (3d ed. 1999))).

<sup>364</sup> AERONAUTICAL INFORMATION MANUAL, *supra* note 329, Figure 5-6-2.

<sup>365</sup> *Id.* para. 5-6-1; *see also* 14 C.F.R. § 99.3 (2003) (“*Air defense identification zone* (ADIZ) means an area of airspace over land or water in which ready identification, location, and control of civil aircraft is required in the interest of national security.”) (emphasis in original).

<sup>366</sup> *See* AERONAUTICAL INFORMATION MANUAL, *supra* note 329, para. 5-6-1.

<sup>367</sup> *Id.* para. 5-6-2.

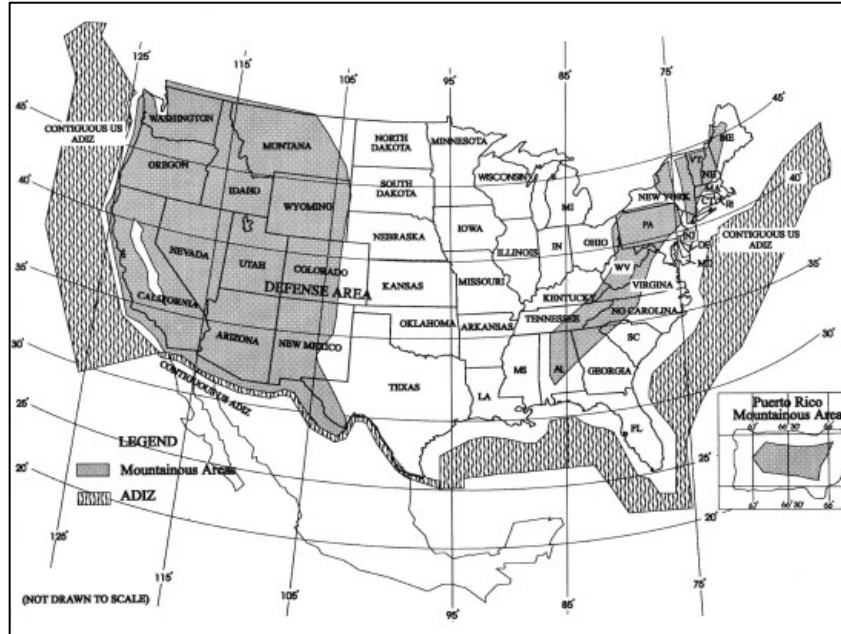


Figure 5. Contiguous U.S. Air Defense Identification Zone (ADIZ).

Whether ADIZ can be justified on the basis of specific provisions in the Chicago Convention is subject to debate.<sup>368</sup> However, a State’s right to establish an ADIZ as a means of placing reasonable conditions for entry into its territory is generally accepted, whether as a manifestation of the right of self-defense or a customary right born out of State practice.<sup>369</sup> Then again, it

<sup>368</sup> HAANAPPEL, *supra* note 35, at 18-19; *see also* Bourbonniere & Haeck, *supra* note 24, at 954 (arguing that ADIZ “are not based upon any specific treaty dispositions, [but] ... are nonetheless consistent with the Chicago Convention” (citing JOHN T. MURCHISON, *THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW* 12-18 (1955))); Williams, *supra* note 114, at 96 (“International law permits states to establish reasonable conditions of entry into their territorial airspace, ... [provided] the conditions are applied to the aircraft of all contracting states ‘without distinction’ as to their nationality.”); NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.3 (“The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory.”); DIEDERIKS-VERSCHOOR, *supra* note 56, at 38 (noting that while air law jurisdiction above the high seas is governed by Article 12 of the Chicago Convention, “[d]isputes concerning the use of airspace above the high seas may ... occur in respect of Air Defense Identification Zones”). *Cf.* Chicago Convention, *supra* note 17, arts. 3, 8, 11, 61 Stat. at 1181-83 (absent a prior agreement to the contrary, civil aircraft of contracting States are required to submit to rules for admission to or departure from the territory of another State).

<sup>369</sup> *See* MYRES S. MCDUGAL, ET AL., *LAW AND PUBLIC ORDER IN OUTER SPACE*, 306-11 (1963) (noting that establishment of the U.S. ADIZ in 1950 was dictated by security concerns and that other States promulgated similar regulations—“[a]ll of these claims by states, as long as they are reasonable, are commonly regarded as being in accord with international law”); *see also* RESTATEMENT 3D, *FOREIGN RELATIONS LAW*, *supra* note 278, § 521 n.2 (noting that the United States and other states have established ADIZ and similar zones and

is equally well recognized that an ADIZ does not give States sovereignty over international airspace and therefore cannot interfere with other States' exercise of their high seas freedoms of navigation and overflight.<sup>370</sup> Thus, while States can lawfully require an aircraft approaching national airspace to identify itself while in international airspace as a condition for entry into the States' territory, States have no right to apply ADIZ procedures to transiting foreign aircraft that do not intend to enter their national airspace.<sup>371</sup>

U.S. policy both reflects and supports the dichotomy between the right of States to establish an ADIZ as a means of identifying aircraft entering into their territory on the one hand, and the right of States to unencumbered use of international airspace on the other. So while the United States has established an ADIZ,<sup>372</sup> it does not apply its ADIZ

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“[t]hese zones have been generally accepted”); DEMPSEY, *supra* note 23, at 35 (noting that States have claimed authority to impose ADIZ “relying upon the customary international law principle of self defense, and Article 51 of the U.N. Charter”); HAANAPPEL, *supra* note 35, at 18-19 (arguing that ADIZ “can be legally based upon the general right of self-defense under Article 51 of the Charter of the United Nations”); Bourbonniere & Haeck, *supra* note 24, at 954 (arguing that ADIZ have been legitimized by State practice); *see also, e.g.*, MCDUGAL, ET AL., *supra*, at 310 (“[A]fter over a decade of the enforcement of the ADIZ and CADIZ, as far as is known, no protests [were] made to the governments of the United States and Canada.”); Ivan L. Head, *ADIZ, International Law, and Contiguous Airspace*, 3 ALBERTA L. REV. 182, 182 (1964) (noting that in 1950 the attitude of most States affected by establishment of the U.S. ADIZ “was not one of protest; it was one of quiet compliance”); Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239, 261 (1988) (noting that the United Kingdom’s creation of a 150-nautical-mile “protection zone” around the Falklands after the cessation of hostilities with Argentina in July 1982 did not evoke international concern outside of Latin America); *id.* at 260 n.116 (noting that no State has ever challenged the validity of the Australian ADIZ); *but see* NIELS VAN ANTWERPEN, CROSS-BORDER PROVISION OF AIR NAVIGATION SERVICES 100 (2008) (“The legality of ADIZ and CADIZ rest much more on comity and tolerance by other States than on strict law.”); BOCZEK, *supra* note 105, at 202 (“The so-called air defense identification zones ... and similar zones extending off the coasts hundreds of miles beyond the territorial sea are of dubious validity in international law.”); Hailbronner, *supra* note 198, at 500 (“The legality of establishing large defense zones in which foreign aircraft not complying with certain identification requirements could be intercepted is still doubtful under customary international law.”).

<sup>370</sup> *See* RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 278, § 521 cmt. d; Williams, *supra* note 114, at 95; George K. Walker, Information Warfare and Neutrality, 33 VAND. J. TRANSNAT’L L. 1079, 1155-56 (2000); *see also* RAAF PUB. 1003, *supra* note 216, at 19 (“Declaration of an ADIZ does not constitute a claim of any sovereign rights.”).

<sup>371</sup> *See* Williams, *supra* note 114, at 95-96; *see also* Hailbronner, *supra* note 198, at 500; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.3 (“The United States does not recognize the right of a costal state to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace.”); *compare* MCDUGAL, ET AL., *supra* note 369, at 308-09 (stating that CADIZ rules “prescribe that position reports be made by foreign aircraft within defense zones whether or not they are bound for Canada or its territorial waters”); *and* Bourbonniere & Haeck, *supra* note 24, at 954 (“[A]pplication of ADIZ rules to the flight of an aircraft whose flight path would be from one area of the high seas to another simply transiting through an ADIZ could be problematic.”).

<sup>372</sup> 14 C.F.R. §§ 99.41–99.47 (2003); *see also supra* note 363.

procedures to foreign aircraft not intending to enter U.S. airspace.<sup>373</sup> Furthermore, DoD regulations make clear the U.S. position that military aircraft transiting through a foreign ADIZ without intending to penetrate foreign sovereign airspace are not required to follow foreign ADIZ procedures.<sup>374</sup> DoD guidance therefore instructs that “U.S. military aircraft not intending to [enter a foreign State’s] national airspace should not identify themselves or otherwise comply with ADIZ procedures established by foreign nations, unless the United States has specifically agreed to do so.”<sup>375</sup>

## 2. *Flight Information Regions (FIRs)*

On top of all of the aforementioned airspace management and security zones, the world’s airspace has also been divided into a series of contiguous Flight Information Regions (FIRs). FIRs are delimitations of airspace that generally correspond to the sovereign territory of the subjacent State wherein the State concerned has accepted responsibility for ATC services.<sup>376</sup> For coastal States, FIRs can also include large swaths of international airspace above oceanic areas in addition to the airspace over their territory and territorial waters<sup>377</sup> (see, e.g., Figure 6).<sup>378</sup> However, unlike similar zones discussed previously that States draw up unilaterally (albeit, in some cases, under the authoritative umbrella of the Chicago Convention), air traffic control authority for designated FIRs is specifically assigned to States in ICAO Regional Air Navigation Plans (RANPs). These RANPs are, in turn, collectively drafted by ICAO member States through Regional Air Navigation Conferences and approved by the ICAO Council.<sup>379</sup>

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<sup>373</sup> See 14 C.F.R. § 99.23 (2003); see also USAF OPS LAW HANDBOOK, *supra* note 83, at 13; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.3.

<sup>374</sup> DoDI 4540.01, *supra* note 28, para. 6.4; see also USAF OPS LAW HANDBOOK, *supra* note 83, at 13; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.3.

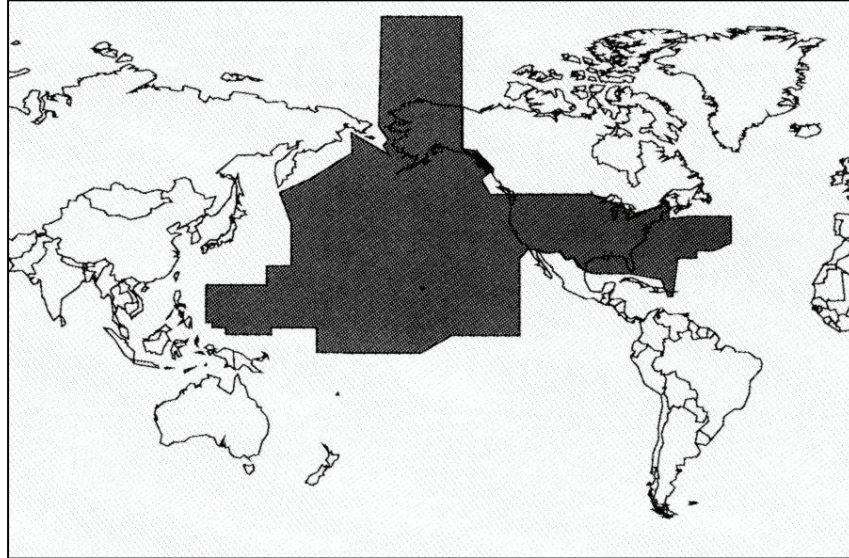
<sup>375</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.3; see also USAF OPS LAW HANDBOOK, *supra* note 83, at 13. For procedures applicable to U.S. military aircraft penetrating a foreign ADIZ on a flight plan or intending to penetrate the sovereign airspace of the ADIZ country, see FLIP, *supra* note 28, para. 8-9.

<sup>376</sup> *But see* Mark Franklin, *Sovereignty and Functional Airspace Blocks*, 32 AIR & SPACE L. 425, 426 (2007) (arguing that per Annex 11 to the Chicago Convention, States may delegate responsibility for the provision of ATC services over their territory to other States and/or entities domiciled in other States “without derogation of... national sovereignty”) (emphasis in original).

<sup>377</sup> DEMPSEY, *supra* note 23, at 36; see also DIEDERIKS-VERSCHOOR, *supra* note 56, at xxxvii (defining FIR as “an airspace of defined dimensions within which air traffic services are provided by the named centre/country”).

<sup>378</sup> U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMINISTRATION, WASHINGTON, DC VAAC [VOLCANIC ASH ADVISORY CENTER] – INTRODUCTION (2009), at <http://www.ssd.noaa.gov/VAAC/intro.html>.

<sup>379</sup> MILDE, *supra* note 39, at 202.



**Figure 6. U.S. Flight Information Regions (FIRs).**

Annex 11 to the Chicago Convention allows coastal States providing ATC services across oceanic regions within their FIRs to apply the same rules and regulations States have adopted for air navigation services within their national airspace to international airspace.<sup>380</sup> Additionally, consistent with Article 12 of the treaty, contracting States must ensure that all aircraft bearing their “nationality mark” comply with applicable ATC service rules and regulations.<sup>381</sup> Here again, however, Article 3 exempts military aircraft from the provisions of the Chicago Convention and its Annexes and thus, by extension, from ICAO SARPs.<sup>382</sup> So, while coastal State FIR procedures and ICAO air traffic control measures are equally applicable to *civil* aircraft of other contracting States,<sup>383</sup> ATC services have no authority to control navigation or restrict operations of *military* aircraft transiting international airspace within the FIR.<sup>384</sup>

<sup>380</sup> ICAO, BOOKLET ON THE ANNEXES, *supra* note 353, *Annex 11 – Air Traffic Service*; AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 7.

<sup>381</sup> Chicago Convention, *supra* note 17, art. 12, 61 Stat. at 1183.

<sup>382</sup> See *supra* note 356; ICAO MIDDLE EAST OFFICE, REPORT OF THE SPECIAL CIVIL/MILITARY COORDINATION MEETING (SCMCM) 3-2 (2006) [hereinafter SCMCM REPORT], at <http://www.icao.int/icao/en/ro/mid/2006/SCMCM/SCMCMFinalReport.pdf>; see also generally MILDE, *supra* note 39, at 67-69 (on the applicability of ICAO SARPs to military aircraft).

<sup>383</sup> AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8; see also RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 278, § 514 cmt. d (stating that over the high seas, civil aircraft “are obliged to observe... the [ICAO] Rules of the Air”).

<sup>384</sup> FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.1.1; AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8; DENİZ BÖLÜKBAŞI, TURKEY AND GREECE: THE AEGEAN DISPUTES (A

Areas of air traffic management responsibility also must not be confused with national airspace. In other words, though the Chicago Convention and its Annexes require States to ensure air navigation safety and allow them to apply domestic ATC procedures within their assigned FIRs, a FIR does not confer State sovereignty over international airspace,<sup>385</sup> nor may States use a FIR as a national security zone.<sup>386</sup> Thus, military aircraft not intending to penetrate foreign sovereign airspace may operate in international airspace within a FIR without a diplomatic clearance or other permission or clearance from the coastal State or the ATC service provider.<sup>387</sup> Furthermore, although military aircraft must always operate with due regard for the safety air navigation,<sup>388</sup> they are not subject to the

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UNIQUE CASE IN INTERNATIONAL LAW) 111 (2004); *see also* MILDE, *supra* note 39, at 202-03 (questioning the legal status of the Regional Air Navigation Plans (RANPs) drafted by the Regional Air Navigation Conferences and approved by the ICAO council, which assign States authority over the designated FIRs); NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.2.2:

Some nations ... purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. ... The United States does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances.

*cf.* 1999 SECRETARY OF DEF. ANN. REP. TO THE PRESIDENT AND THE CONGRESS, APP. I, at 1 (1999) (noting that U.S. armed forces conducted “Freedom of Navigation” program operations to challenge Cuba’s claim that state aircraft flying in its FIR must comply with ATC directions), at <http://www.dod.mil/execsec/adr1999/index.html>; MONTEAGLE STEARNS, ENTANGLED ALLIES: U.S. POLICY TOWARD GREECE, TURKEY, AND CYPRUS 140 (1992) (noting that in 1974, Turkey withdrew its recognition of the Athens FIR after Greece claimed ten miles of national airspace around its islands on the Aegean Shelf (in contrast to a six mile territorial sea) and asserted the right to oversee all Turkish military flights in international airspace above the Aegean Sea based on its FIR authority).

<sup>385</sup> *See* NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.7.1; *see also* SCMCM REPORT, *supra* note 382, para. 3.11 (noting the concerns of Iran regarding the continuous presence of uncoordinated/military flights over the Gulf area within the Tehran FIR, “[t]he meeting recognized that sovereignty is not observed over the high seas.”).

<sup>386</sup> BÖLÜKBAŞI, *supra* note 384, at 111; *cf.* Sung Hwan Shin, *Legal Aspects of the Peaceful Use of the Far East Airspace*, in *THE UTILIZATION OF THE WORLD'S AIR SPACE AND FREE OUTER SPACE IN THE 21ST CENTURY* 251, 252 (Chia-Jui Cheng & Doo Hwan Kim eds., 2000) (noting that N. Korea’s *de facto* expansion of its FIR through creation of a “security zone” extending beyond its territorial sea and denial of overflight rights to all foreign military aircraft, as well as civil aircraft absent prior approval, had no precedent or recognition in international law).

<sup>387</sup> DoDI 4540.01, *supra* note 28, para. 6.5 (“The airspace beyond the territorial sea is considered international airspace where the permission of the coastal State is not required for overflight or related military operations. ... Flight operations in international airspace are exempt from diplomatic clearance requirements.”); *see also* BÖLÜKBAŞI, *supra* note 384, at 111; *cf.* U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INT’L ENVTL. & SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS (No. 112): U.S. RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 76 (1992) (discussing the United States’ 1986 protest of Cuba’s claim that U.S. military aircraft were required to have Cuba’s permission to operate in the Cuban FIR), *available at* <http://www.state.gov/documents/organization/58381.pdf>.

<sup>388</sup> Chicago Convention, *supra* note 17, art. 3, 61 Stat. at 1181; RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 278, § 514 cmt. d (“State aircraft, while not formally subject to



jurisdiction or control of any foreign country's ATC authorities.<sup>389</sup> As a result, the coastal State or ATC provider cannot require military aircraft to give prior notification or to submit a flight plan before operating in international airspace within a FIR.<sup>390</sup>

In practice, however, the exemption for military aircraft from ICAO rules and procedures has limited operational significance, because military aircraft are generally expected not to contravene these regulations.<sup>391</sup> As has been noted, U.S. military flights in international airspace will typically observe ICAO rules and procedures,<sup>392</sup> to include, for example, filing an ICAO flight plan with foreign civil aviation authorities.<sup>393</sup> The DoD expressly reserves the right to conduct certain operations in international airspace under the "due regard" prerogative instead of ICAO flight procedures,<sup>394</sup> but even "due regard" requires aircraft to operate subject to one or more conditions designed to provide for a level of safety equivalent to that normally given by ICAO ATC agencies.<sup>395</sup> Moreover, DoD guidance spells out that flight under "due regard" deviates from normally accepted operating procedures and practices and so is not to be undertaken routinely,<sup>396</sup> and further specifies that any such departures from procedures "shall be of no greater extent or duration than is required to meet the [operational] contingency."<sup>397</sup>

## B. Sovereign Immunity of State Aircraft

Beginning with the Paris Convention of 1919, military aircraft have long been recognized as instrumentalities of State sovereignty having the same status under international law as warships<sup>398</sup>—*i.e.*, "they are immune

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ICAO rules, must operate at all times with due regard for the safety of navigation."); *see also* AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8 ("It is the policy of the DoD that all United States military aircraft ... shall operate with due regard for the safety of all air and surface traffic.").

<sup>389</sup> *See supra* note 357.

<sup>390</sup> *See* DoDI 4540.01, *supra* note 28, para. 6.3 & 6.5; FLIP, *supra* note 28, para. 8-14; *see also* BÖLÜKBAŞI, *supra* note 384, at 111.

<sup>391</sup> AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8; *see* MILDE, *supra* note 39, at 67-69.

<sup>392</sup> *See supra* note 28 and accompanying text.

<sup>393</sup> *See* FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.

<sup>394</sup> *See supra* note 360 and accompanying text; *see generally* U.S. DEP'T OF TRANS., FED. AVIATION ADMIN., ORDER JO 7110.65T: AIR TRAFFIC CONTROL 1-2-1 (2010) (discussing pilot responsibilities when flying "due regard"), at <http://www.faa.gov/documentLibrary/media/Order/7110.65TBasic.pdf>; FLIP, *supra* note 28, para. 8-8.

<sup>395</sup> FLIP, *supra* note 28, para. 8-8; *see also* AIR TRAFFIC BULLETIN 99-3, *supra* note 342, at 8; *see also* DoDI 4540.01, *supra* note 28, para. 6.3.2.

<sup>396</sup> FLIP, *supra* note 28, para. 8-8; *see also id.* para. 8-11 (noting that combat operations in time of war, armed conflict, national emergencies, situations requiring self-defense, or similar military contingencies, may require departure from SARPs).

<sup>397</sup> FLIP, *supra* note 28, para. 8-11.

<sup>398</sup> *See* Paris Convention, *supra* note 38, art. 32, 11 L.N.T.S. at 195.

from the jurisdiction of other States, even when they are in the territory of those other States.”<sup>399</sup> The Chicago Convention does not explicitly recognize the sovereign immunity of military aircraft, but Professor Cooper states,

It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of international law even though not restated in the Chicago Convention.<sup>400</sup>

Indeed, prominent air law commentators have noted that sovereign immunity is not typically set forth in positive rules of international law but instead is oftentimes expressed by exempting public vessels from the terms of a particular treaty.<sup>401</sup> So, for example, per Article 3 of the Chicago Convention, state aircraft are excluded from the legal framework for civil aviation, whereby civil aircraft are not only subject to the jurisdiction or control of foreign air traffic control authorities when operating in international airspace<sup>402</sup> but also subject to search and inspection while within a foreign State’s territory as well.<sup>403</sup>

More traditionally, however, the sovereign immunity of military aircraft has referred to customary immunity from the exercise of “enforcement jurisdiction” or, in other words, immunity from arrest, attachment, or execution in the territory of any foreign state.<sup>404</sup> Specifically, under the protections international law affords to state aircraft, foreign officials may not board another State’s military aircraft without the aircraft commander’s consent.<sup>405</sup> Military aircraft commanders also cannot be required to consent to an onboard search or inspection, including customs,

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<sup>399</sup> Williams, *supra* note 114, at 104; *see also* FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.1.5; NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.2.

<sup>400</sup> Williams, *supra* note 114, at 105 (quoting John Cobb Cooper, *A Study on the Legal Status of Aircraft*, in EXPLORATIONS IN AEROSPACE LAW 205, 243 (Ivan A. Vlasic ed., 1968)).

<sup>401</sup> *See* ROACH & SMITH, *supra* note 278, at 466-67; *see also* MILDE, *supra* note 39, at 61 (“The status of military aircraft is not clearly determined by positive rules of international law.... The identifiable rules are mostly negative—stating what does not apply to military aircraft or what such aircraft are not permitted to do.”).

<sup>402</sup> Chicago Convention, *supra* note 17, arts. 3, 12, 61 Stat. at 1181, 1183.

<sup>403</sup> *Id.*, art. 16, 61 Stat. at 1185.

<sup>404</sup> ROACH & SMITH, *supra* note 278, at 466 (citing RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 278, § 457 n.7); *see also* *The Schooner Exchange v. McFaddon & Others*, 11 U.S. 116; 3 L. Ed. 287; 1812 U.S. LEXIS 377 (1812) (holding that a public vessel of war of a sovereign is exempt from the jurisdiction of a foreign country).

<sup>405</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.2; *see also* U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE DIRECTIVE 4500.54E, DoD FOREIGN CLEARANCE PROGRAM (FCP), 2 (2009) (“DoD aircraft commanders shall not consent to the exercise of jurisdiction by foreign government authorities over U.S. military aircraft, except at the direction of the appropriate DoD Component headquarters.”) [hereinafter DoDD 4500.54E].

safety, and agricultural inspections.<sup>406</sup> Moreover, the crew and the aircraft are immune from arrest or seizure when lawfully in the territory of another State and exempt from taxes and regulation. The owning state also exercises exclusive control over all aircrew members and passengers with regard to acts performed on board.<sup>407</sup> Finally, unless there is an express agreement between the States concerned to the contrary, military aircraft are exempt from fees for transit through another country's airspace or FIRs in international airspace, as well as landing, parking and other use fees at foreign government airports, including military installations.<sup>408</sup>

Of course, States have the sovereign prerogative to grant or deny any overflight clearances or rights to foreign state aircraft.<sup>409</sup> Absent a general or permanent clearance – sometimes referred to as a “blanket clearance”<sup>410</sup> – the overflown State generally authorizes overflight by state aircraft on a case-by-case basis through the competent military or civil authorities and usually requires a statement of the flight's purpose, route and final destination and the aircraft used.<sup>411</sup> However, because States enjoy complete and exclusive sovereignty over their airspace,<sup>412</sup> overflight permission may, for example, be further conditioned upon compliance with aircraft “disinsection” and quarantine requirements, providing passenger lists or cargo information, or other stipulations.<sup>413</sup> Aircraft that fail to

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<sup>406</sup> See NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.2.2; see also DoDD 4500.54E, *supra* note 405, at 2.

<sup>407</sup> See NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.2.2; see also DoDD 4500.54E, *supra* note 405, at 2.

<sup>408</sup> See DoDD 4500.54E, *supra* note 405, at 2; see also MILDE, *supra* note 39, at 72 (“Reasonable charges for services requested and received at foreign airports shall be payable.”); DoDD 4500.54E, *supra* note 405, at 2; see also MILDE, *supra* note 39, at 72 (“[I]t is mostly recognized, as a matter of natural justice, that even military aircraft cannot be exempted from payment for service made available or actually rendered.”).

<sup>409</sup> See *supra* notes 33-39 and accompanying text; Chicago Convention, *supra* note 17, art. 3(c), 61 Stat. at 1181.

<sup>410</sup> FOREIGN CLEARANCE MANUAL, *supra* note 28, para. DL1.6 (defining “blanket clearance” as a “prearranged clearance for special categories of flights or personnel travel, usually granted on a periodic basis for a specified purpose and/or period of time”).

<sup>411</sup> See *Secretary General's Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies*, Council of Europe, para. 45, Doc. SG/Inf(2006)5 (2006) [hereinafter *Sec. Gen. Report (Art. 52 ECHR)*]. In accordance with ICAO regulations, all flights into foreign airspace generally require an ATC clearance. Such clearance is given on the basis of the aircraft's flight plan, which contains general information on the aircraft, its route and the number of persons on board but does not require details about cargo or passenger list. The type of flight is indicated according to standardized categories (scheduled air service, nonscheduled air transport operations, general aviation, military or other). *Id.* para 48; see also FOREIGN CLEARANCE MANUAL, *supra* note 28, para. C2.2.2-C2.2.3.

<sup>412</sup> Chicago Convention, *supra* note 17, art. 1, 61 Stat. at 1180.

<sup>413</sup> See, e.g., AUSTL. QUARANTINE & INSP. SERV. (AQIS), AQIS Arrangements for Aircraft Involving Sovereign Immunity (May 8, 2008) (discussing “disinsection” requirements, or treatment to destroy insects), at <http://www.daff.gov.au/aqis/avm/aircraft/sovereign-immunity>; *Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 411, para. 45 (“States applying for overflight

comply with a foreign State's customs or security requirements may simply be denied access to or directed to immediately leave the State's territory and/or national airspace.<sup>414</sup>

A 2006 report by the Council of Europe (CE)<sup>415</sup> Secretary General highlighted this tension between the sovereign immunity of state aircraft on the one hand, and States' sovereignty over the airspace above their territory on the other. The report addressed allegations that State Parties to the European Convention on Human Rights (ECHR) had failed to fulfill their treaty obligations with respect to the clandestine transport of terror suspects through their territory and airspace.<sup>416</sup> In the report, Secretary General Terry Davis notes, "State aircraft benefit from immunity and [are] not subject to [foreign] controls," and that "such immunity also extends to ... personnel for acts committed on board ... and even those committed on the territory of the State where the aircraft made a stop."<sup>417</sup> Because it is thus "virtually impossible for States to assess with certainty whether aircraft transiting through their airspace or even using their airport facilities are used for purposes incompatible with the [ECHR],"<sup>418</sup> Davis concludes member States cannot effectively fulfill their treaty responsibilities in this regard once overflight authorization has been granted.<sup>419</sup>

The Secretary General therefore recommended changes to member States' procedures for granting overflight clearances.<sup>420</sup> First, to provide for effective human rights guarantees, he proposed drafting model "human

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permissions are not systematically requested to provide passenger lists or information about cargo, even though this would be possible"); *see infra* notes 420-423.

<sup>414</sup> NAVAL WARFARE PUB. 1-14M, *supra* note 42, para. 2.4.2; *see also* Chicago Convention, *supra* note 17, art. 3(c), 61 Stat. at 1181.

<sup>415</sup> Established in 1949, the Council of Europe is a purely intergovernmental organization whose stated aims include "the protection of human rights and the promotion of democracy and the rule of law." It is perhaps best known for producing the European Convention on Human Rights, which was signed in 1950 and established the European Court of Human Rights to enforce the obligations of contracting States. Today, Council of Europe has 47 member States. The U.S. holds "observer status" within the Council. *Generally* <http://www.coe.int/aboutCoe/default.asp>.

<sup>416</sup> *See Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 411; *see also Secretary General's Supplementary Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies*, Council of Europe, Doc. SG/Inf(2006)13 (2006) [hereinafter *Sec. Gen. Supp. Report (Art. 52 ECHR)*]; *Follow-Up to the Secretary General's Reports under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies (SG/Inf(2006)5 and SG/Inf(2006)13)*, Council of Europe, Doc. SG(2006)01 (2006) [hereinafter *Follow-Up to Sec. Gen. Report (Art. 52 ECHR)*].

<sup>417</sup> *Sec. Gen. Supp. Report (Art. 52 ECHR)*, *supra* note 416, para. 51 & 63.

<sup>418</sup> *Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 411, para. 54.

<sup>419</sup> *See id.* para. 9 ("The fundamental rights and freedoms enshrined in the Convention include positive obligations for the States Parties ... to take action through protective measures to prevent violations from taking place and, where such violations have taken place, to conduct prompt and effective investigations ...").

<sup>420</sup> *Follow-Up to Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 416, para. 12.

rights clauses,” which could be inserted in member States’ bilateral agreements granting overflight rights to foreign state aircraft requiring that such flights comply with the ECHR and other internationally recognized human rights standards.<sup>421</sup> Secondly, to safeguard against abuse, States may appropriately require a waiver of sovereign immunity (*e.g.*, authorization for search and seizure) as a condition for diplomatic clearances in certain instances.<sup>422</sup> Finally, in all cases, “[r]equests for overflight authorizations should provide sufficient information as to allow effective monitoring regarding the identities and status of all persons on board, the purpose of the flight and its final destination as well as the final destination of each passenger.”<sup>423</sup>

Although the Secretary General’s recommendations are non-binding, they could foretell a potential shift in European political norms away from the deference to sovereign immunity demonstrated in the post-September 11 practice of “[providing] blanket overflight clearances for the United States’ and other Allies’ aircraft for... operations against terrorism.”<sup>424</sup> If so, changes to European overflight clearance requirements along the lines of those proposed by the Secretary General could significantly impact MAF operations. Consider, for example, the proposed waiver of sovereign immunity. To be an effective check on abuses, it would arguably have to grant the overflown State not only the right of inspection, but also the right to issue a summons to land that transiting foreign state aircraft would be duty-bound to obey.<sup>425</sup> Such a requirement would, therefore, theoretically subject all U.S. airlift, aeromedical evacuation, and air refueling aircraft to random landings and inspections when overflying the territory of any of the forty-seven CE member States, which together

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<sup>421</sup> *Id.*; see also *Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 411, para. 101 (“Mere assurances that the activities of foreign agents comply with international and national law are not enough. We need effective guarantees and mechanisms to enforce, if necessary, the rights and freedoms enshrined in the Convention. Such guarantees should be set out in international or bilateral agreements and in domestic law.”).

<sup>422</sup> *Follow-Up to Sec. Gen. Report (Art. 52 ECHR)*, *supra* note 416, para. 12.

<sup>423</sup> *Id.*

<sup>424</sup> See *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Report of the Committee on Legal Affairs and Human Rights*, Eur. Parl. Ass., Doc. No. 1126 rev. (Jun. 11, 2007), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11302.htm>; see also NORA BENSANEL, THE COUNTERTERROR COALITIONS: COOPERATION WITH EUROPE, NATO, AND THE EUROPEAN UNION 6-8 (2003) (discussing NATO support to ease U.S. planning for counter-terrorism activities), available at [http://www.rand.org/pubs/monograph\\_reports/MR1746/MR1746.pdf](http://www.rand.org/pubs/monograph_reports/MR1746/MR1746.pdf); Stephen Grey, *Flight Logs Reveal Secret Rendition*, THE SUNDAY TIMES, Nov. 25, 2007, (discussing the controversy surrounding NATO and other European countries’ support to detainee transport flights, including “blanket overflight clearances for the United States and other allies’ aircraft for military flights related to operations against terrorism”), at <http://www.timesonline.co.uk/tol/news/world/europe/article2936782.ece>.

<sup>425</sup> *Cf. supra* notes 145-151, 157-166, and accompanying text.

comprise approximately twenty-percent of the earth's land area.<sup>426</sup> Compliance with this mandate would clearly necessitate a drastic overhaul of U.S. policy on the sovereign immunity of military aircraft,<sup>427</sup> and, even then, would still seemingly be operationally untenable for the MAF, whose value lies in its ability to provide "rapid, flexible and responsive air mobility."<sup>428</sup>

Arguably, on a broader scale, "long-term success of the [U.S.] counter-terror campaign will depend on concerted cooperation from the European states."<sup>429</sup> The Council of Europe's proposal to restrict member States in granting diplomatic clearances shows how the role of European multilateral institutions continues to develop.<sup>430</sup> The emerging European order has been characterized as one of "compromised sovereignty."<sup>431</sup> That is, a system in which European States' "sovereignty" – "in the sense understood by diplomats and constitutional lawyers half a century ago" – is "increasingly held in common."<sup>432</sup> In the policy balance between bilateral and multilateral approaches to counter-terror cooperation with Europe, multilateral cooperation may thus become increasingly important.<sup>433</sup> So for policy-makers a "key question" will be "the extent to which that cooperation should be pursued through European multilateral institutions" versus traditional bilateral relationships.<sup>434</sup> However, from an air mobility operations perspective, cooperative bilateral relationships with States in Europe and elsewhere are obviously not only imperative, but essential, especially insofar as those States retain the right to grant or deny foreign state aircraft overflight clearances through their national airspace.<sup>435</sup>

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<sup>426</sup> See THE NEW YORK TIMES GUIDE TO ESSENTIAL KNOWLEDGE 589 (John W. Wright ed., 2nd ed.) (2007) (noting that the European continent comprises 6.7 percent of the world's total land area); 2 HELMUT GEIST, OUR EARTH'S CHANGING LAND: AN ENCYCLOPEDIA OF LAND-USE AND LAND-COVER CHANGE (L-Y) 515 (2006) (noting that Russia is "[t]he largest country in the world, comprising 13.1 percent of the earth's land surface.").

<sup>427</sup> See *supra* notes 399, 404-407.

<sup>428</sup> U.S. DEP'T OF DEFENSE, U.S. TRANS. COMMAND, AIR MOBILITY COMMAND... PROVIDING AMERICA'S GLOBAL REACH (2009), at <http://www.transcom.mil/missions/amc.cfm>; see *supra* note 30 and accompanying text.

<sup>429</sup> BENSANEL, *supra* note 424, at ix.

<sup>430</sup> *Id.* at 54.

<sup>431</sup> See William Wallace, *The Sharing of Sovereignty: the European Paradox*, in SOVEREIGNTY AT THE MILLENNIUM 81, 85-86 (Robert Jackson ed., 1999), available at <http://courses.essex.ac.uk/gv/gv546/Wallace%20sovereignty.pdf>.

<sup>432</sup> *Id.* at 81, 84.

<sup>433</sup> BENSANEL, *supra* note 424, at 54.

<sup>434</sup> *Id.* at ix.

<sup>435</sup> See *supra* note 409.

## VI. SUMMARY & CONCLUSION

Certainly, every Airman must have a solid foundation in LOAC, and especially the fundamental principles of necessity, distinction, and proportionality that are the underpinnings for combat ROE. In fact, for Air Force judge advocates and paralegals in particular, the *jus ad bellum* and *jus in bello* are considered *core competencies*. But in an age when adherence to the “rule of law” can itself be viewed as a “center of gravity” for democratic societies,<sup>436</sup> it is more important than ever for Air Force and, indeed, all operations law practitioners to have an effective understanding of the legal touchstones for their commanders’ specific missions.

From providing fuel, materiel and aeromedical support to combat forces, to providing humanitarian supplies to hurricane, flood, and earthquake victims both at home and abroad, global air mobility is neither exclusively a wartime mission nor a peacetime mission—it is an everywhere, all the time mission. The rapidity and uniquely international character of MAF operations makes mission success inimitably dependent upon the navigational rights and freedoms of overflight enshrined in international law. Although the 1944 Chicago Convention governs civil aviation and confirms State sovereignty over territorial airspace, it also recognizes military needs for access to all airspace, as well as the customary freedom of overflight over the high seas encapsulated in UNCLOS.<sup>437</sup> Additionally, global air mobility also benefits from the standardization and improved air traffic management offered by ICAO SARPs; so much so that DoD aircraft, though not bound by the international regulatory regime, will normally follow ICAO flight procedures. These are among the factors that make the “*corpus juris aeris*” presented here preeminent as a legal framework for global air mobility operations.

Of course, a number of the international legal principles expounded here apply equally to *all* military aircraft, MAF and CAF alike. However, as the foregoing discussion and analysis makes clear, due to fundamental differences in the purpose, nature, and volume of air mobility operations versus combat air operations, these tenets hold much greater significance for the MAF. At the same time, certain other of these principles relate to unique aspects of air mobility operations (*e.g.*, overflight rights of military medical transports or contractor aircraft), which have little relevance in the air combat realm. This body of law, which has here been christened the

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<sup>436</sup> Major General Charles J. Dunlap, *Lawfare—A Decisive Element of 21<sup>st</sup> Century Conflicts?*, JOINT FORCE Q., 3rd Quarter 2009, Issue 54, at 34, 39, available at [http://www.dtic.mil/doctrine/jel/jfq\\_pubs/](http://www.dtic.mil/doctrine/jel/jfq_pubs/).

<sup>437</sup> See ICAO Provisions Related to Access to the High Seas, European Air Navigation Planning Group (EANPG) Flexible Use of Airspace (FUA) Task Force (FUA-TF/1), 1st Meeting, Agenda Item 1, at 1, ICAO Doc. FUA TF/1-IP/03 (2008), available at [http://www.paris.icao.int/documents\\_open\\_meetings/subcategory.php?id=89](http://www.paris.icao.int/documents_open_meetings/subcategory.php?id=89).

*Law of Air Mobility* or *LOAM*, thus stands out as a distinct operations law discipline.

The United States' military airlift forces notably once brandished the slogan "Anything-Anywhere-Anytime."<sup>438</sup> Although this slogan has been supplanted, it still rings true and highlights the fact that air mobility operations are constant and characteristically the same whether conducted in wartime or in peacetime. Likewise, in contrast to LOAC, ROE and other targeting-related issues that are of primary concern to the CAF, with few exceptions the principles of international law upon which global air mobility and sustainment depend transcend armed conflict. Perhaps because the MAF is so ubiquitous and the rules and principles that facilitate its mission derive from the well-established, widely recognized legal regime for international aviation, LOAM has oftentimes been given scant attention in our traditional approach to operations law.

However, the many examples of "effective application of non-lethal airpower" in Afghanistan, Bosnia, Iraq, Cambodia, Somalia, Rwanda and, most recently, the U.S. response to the Haiti earthquake, show air mobility to be "a national asset of growing importance for responding to emergencies and protecting national interests around the globe."<sup>439</sup> With more emphasis now being placed on using America's "soft power"<sup>440</sup> to counter terrorism,<sup>441</sup> and the vital role of the MAF in delivering what has been termed "human security"<sup>442</sup> (see Appendix 1),<sup>443</sup> the importance of air mobility to furthering U.S. national security and foreign policy

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<sup>438</sup> Lieutenant Colonel Robert C. Owen, *The Airlift System*, AIR POWER J., Fall 1995, at 1, 3; see also John T. Correll, *Anything, Anywhere, Anytime*, AIR FORCE MAG., Feb. 1996, at <http://www.airforce-magazine.com/MagazineArchive/Pages/1996/February%201996/0296edit.aspx> ("Lt. Gen. William H. Tunner, who commanded the airlift over the Himalayan Hump in World War II and the Berlin Airlift after the war, said in his memoirs that 'I have been convinced that we can carry anything, anywhere, anytime.'").

<sup>439</sup> U.S. DEP'T OF THE AIR FORCE, AIR MOBILITY COMMAND, FACTSHEET: AIR MOBILITY COMMAND (2008), at <http://www.amc.af.mil/library/factsheets/factsheet.asp?id=229>.

<sup>440</sup> "Soft power" is a State's ability to achieve a preferred end state using cultural, ideological, and institutional influences to shape others' views so they independently come to desire the same end state, as opposed to "hard power," which is a State's ability to achieve a preferred end state using military and economic strength to coerce or induce others act in a manner consistent with that end state. See JOSEPH S. NYE, BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER 31-33, 32 n.11 (1990).

<sup>441</sup> Admiral Mike Mullen, Landon Lecture Series Remarks, Kansas State University, Manhattan, Kansas (Mar. 3, 2010), at <http://www.jcs.mil/speech.aspx?ID=1336> (Adm. Mullen is currently chairman of the Joint Chiefs of Staff).

<sup>442</sup> John W. Bellflower, *The Soft Side of Airpower*, SMALL WARS J. (2008), at 4 n.18, at <http://smallwarsjournal.com/blog/journal/docs-temp/161-bellflower.pdf> ("Human security traditionally consists of seven distinct elements of security: economic, environmental, political, community, personal, food, and health." (citing Dan Henk, *Human Security: Relevance and Implications*, PARAMETERS, Summer 2005, at 91)).

<sup>443</sup> U.S. DEP'T OF THE AIR FORCE, AIR MOBILITY COMMAND, RAPID, PRECISE GLOBAL MOBILITY, at <http://airforcelive.dodlive.mil/index.php/2009/01/soft-power-includes-airlift/>.



objectives will likely increase exponentially.<sup>444</sup> It is hoped this article has begun the process of delineating *Law of Air Mobility* as a MAF-centric subset of international law and will prove a useful resource on LOAM to the correspondingly increasing number of lawyers, planners, policymakers, and others likely to be concerned with air mobility operations in the future.

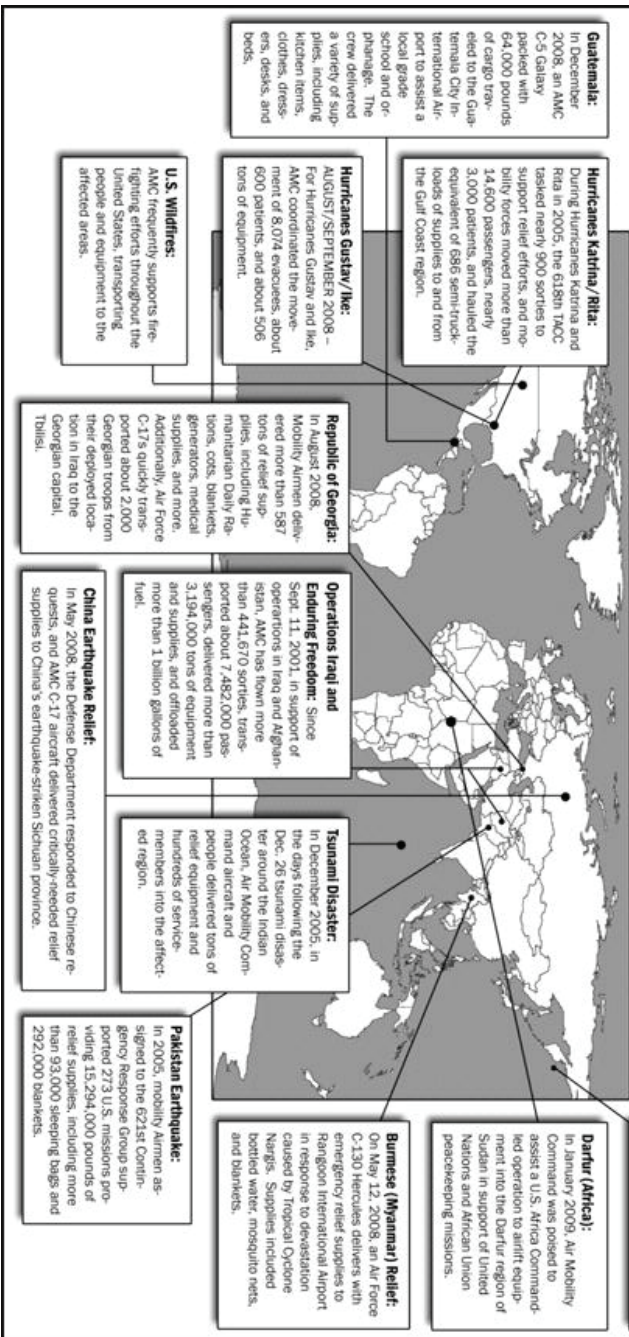
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<sup>444</sup> See Bellflower, *supra* note 442, *passim*; David G. Estep, Air Mobility: The Strategic Use of Nonlethal Airpower (1994) (unpublished Master's thesis, Air University, Maxwell Air Force Base, Alabama), at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA425680&Location=U2&doc=GetTRDoc.pdf>; see also Roger Drinnon, *Air Mobility Builds, Sustains Partner Nation Capacity in Era of Irregular warfare*, A.F. PRINT NEWS TODAY (Jul. 20, 2009), <http://www.af.mil/news/story.asp?id=123159427>.

# Rapid, Precise Global Mobility

On a typical day, Air Mobility Command coordinates an average of 900 airlift and air refueling missions, moving nearly 2,000 tons of cargo and more than 6,000 passengers. From providing fuel, supplies and aeromedical support to troops on the frontline of the Global War on Terrorism, to providing humanitarian aid – or soft power – to victims of natural disasters both at home and abroad, Air Mobility Command has been engaged in almost nonstop operations since its inception. This map includes just a few highlights of AMC operations since Sept. 11, 2001.

Information Graphic by Mark D. Diamond, AMC Public Affairs



**Guatemala:** In December 2008, an AMC C-5 Galaxy packed with 64,000 pounds of cargo traveled to the Guatemala City International Airport to assist a local grade school and orphanage. The crew delivered a variety of supplies, including kitchen items, clothes, dressers, desks, and beds.

**Hurricanes Katrina/Rita:** During Hurricanes Katrina and Rita in 2005, the 618th TACC tasked nearly 900 sorties to support relief efforts, and mobility forces moved more than 14,600 passengers, nearly 3,000 patients, and hauled the equivalent of 686 semi-truckloads of supplies to and from the Gulf Coast region.

**Hurricanes Gustav/Ike:** AUGUST/SEPTEMBER 2008 – For Hurricanes Gustav and Ike, AMC coordinated the movement of 8,074 evacuees, about 600 patients, and about 506 tons of equipment.

**U.S. Wildfires:** AMC frequently supports firefighting efforts throughout the United States, transporting people and equipment to the affected areas.

**Republic of Georgia:** In August 2008, Mobility Airman delivered more than 587 tons of relief supplies, including Hi-maintenance Daily Rations, coats, blankets, generators, medical supplies, and more. Additionally, Air Force C-17s quickly transported about 2,000 Georgian troops from their deployed location in Iraq to the Georgian capital, Tbilisi.

**Operations Iraq and Enduring Freedom:** Since Sept. 11, 2001, in support of operations in Iraq and Afghanistan, AMC has flown more than 441,670 sorties, transported about 7,482,000 passengers, delivered more than 3,194,000 tons of equipment and supplies, and offloaded more than 1 billion gallons of fuel.

**China Earthquake Relief:** In May 2008, the Defense Department responded to Chinese requests, and AMC C-17 aircraft delivered critically-needed relief supplies to China's earthquake-stricken Sichuan province.

**Tsunami Disaster:** In December 2005, in the days following the Dec. 26 tsunami disaster around the Indian Ocean, Air Mobility Command aircraft and people delivered tons of relief equipment and hundreds of service members into the affected region.

**Pakistan Earthquake:** In 2005, mobility Airman assigned to the 621st Contingency Response Group supported 273 U.S. missions providing 15,294,000 pounds of relief supplies, including more than 93,000 sleeping bags and 292,000 blankets.

**Darfur (Africa):** In January 2009, Air Mobility Command was poised to assist a U.S. Africa Command-led operation to airlift equipment into the Darfur region of Sudan in support of United Nations and African Union peacekeeping missions.

**Russian Sub Rescue:** In August 2005, AMC generated airlift and air refueling missions supporting the rescue effort to save seven Russian sailors stranded aboard a submarine off Russia's coast.

**Burmese (Myanmar) Relief:** On May 12, 2008, an Air Force C-130 Hercules delivers with emergency relief supplies to Rangoon International Airport in response to devastation caused by tropical Cyclone Nargis. Supplies included bottled water, mosquito nets, and blankets.

Appendix 1



SENTENCE APPROPRIATENESS RELIEF IN THE COURTS OF  
CRIMINAL APPEALS

LIEUTENANT COLONEL JEREMY STONE WEBER\*

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## I. INTRODUCTION

Article 66(c) of the Uniform Code of Military Justice (UCMJ) provides the military's courts of criminal appeals – the first-level review of more severe court-martial convictions – with power unrivaled by any other appellate court in the American criminal justice system. The article provides a court of criminal appeals, or CCA, with broad powers to act for the benefit of an appellant, empowering the court with an “awesome, plenary, *de novo* power of review” that grants it the authority to “‘substitute its judgment’ for that of the military judge,” or for that of the court members.<sup>1</sup> Indeed, the CCAs have been described as “something like the proverbial 800-pound gorilla when it comes to their ability to protect an accused.”<sup>2</sup>

The bedrock of the CCAs' power is sentence appropriateness authority. Through Article 66(c), Congress “provided the courts of criminal appeals not only with the power to determine whether a sentence is correct in law and fact, but also with the highly discretionary power to determine whether a sentence ‘should be approved.’”<sup>3</sup> This grant offers the CCAs “broad discretion . . . a power that has no direct parallel in the federal civilian sector.”<sup>4</sup> The CCAs are unique in that they even have broader jurisdiction than their superior court, the Court of Appeals for the Armed Forces (CAAF), which has no power to determine sentence appropriateness.<sup>5</sup> In fact, a CCA's decision to grant sentence appropriateness relief is so discretionary that such decisions are almost entirely off-limits to CAAF review.<sup>6</sup>

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<sup>1</sup> *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

<sup>2</sup> *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993).

<sup>3</sup> *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999).

<sup>4</sup> *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

<sup>5</sup> See UCMJ art. 67(c) (2008) (“In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. . . . The Court of Appeals for the Armed Forces shall take action only with respect to matters of law”).

<sup>6</sup> See *Uniform Code of Military Justice*, Pub. L. No. 81-506., S. Rep. No. 81-486 at 29 (June 10, 1949), 10 U.S.C. §§ 801-946 (2006) (“only action which the Court of Military Appeals [the predecessor to the Court of Appeals for the Armed Forces] may take with respect to the sentence is to determine whether or not it is within legal limits”); *United States v. Jones*, 39 M.J. 315, 316-17 (C.M.A. 1994) (“Traditionally, this Court has avoided making sentence-appropriateness determinations. Sentence reassessment is within the province of the [court of criminal appeals], which has unique fact-finding powers pursuant to Article 66, UCMJ”) (citations omitted); *United States v. Dukes*, 5 M.J. 71, 72-73 (C.M.A. 1978) (noting that the Court of Military Appeals would “avoid evaluating appropriateness determinations for particular courts-martial sentences” but would “continue to review, as a matter of law, sentence affirmations based on legal determinations by the [courts of criminal appeals] . . .”); *United States v. Turner*, 35 C.M.R. 410, 411 (C.M.A. 1965) (“exercise by a [CCA] of its discretionary and fact-finding function of determining the appropriateness of an adjudged

One would think that the employment of such a unique and sweeping authority would be the subject of intense study. However, while commentators have explored various aspects of Article 66,<sup>7</sup> the author could locate no published work that examined how the CCAs exercise their sentence appropriateness powers in practice. This article aims to fill this gap. This article begins by placing the issue in a historical context, explaining the underlying concerns that led to the grant of sentence appropriateness power in the UCMJ. It next surveys the major published decisions that help define the contours of sentence appropriateness authority for the CCAs. The heart of this article then surveys CCA decisions over a recent five-year period that have granted sentence appropriateness relief, breaking down the decisions by service court and basis for sentence appropriateness relief. Finally, this article draws some conclusions as to whether CCAs are employing this power in a manner consistent with the concerns that led to the enactment of Article 66(c) and what the future of sentence appropriateness power should be. This article is not intended criticize the CCAs' exercise of their broad discretion, either in general or in any particular case. Rather, the purpose of this article is to question whether changed circumstances have rendered sentence appropriateness authority obsolete to the point where it is no longer being employed in the way Congress originally intended,

## II. SENTENCE APPROPRIATENESS—THE HISTORICAL CONTEXT

The courts of criminal appeals possess unparalleled power among federal appellate courts. Article 66(c) of the UCMJ sets forth this broad authority:

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct

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sentence may not be utilized as a basis for creating a certified question reviewable by this Court”).

<sup>7</sup> See, e.g., Major William J. Nelson, *A Right Way and a Wrong Way: Remediating Excessive Post-Trial Delay in Light of Tardif, Moreno, and Toohey*, 198 MIL. L. REV. 1 (2008) (asserting that recent CAAF decisions improperly interpreted Article 66(c) to grant the courts of criminal appeals the authority to remedy excessive post-trial delay not resulting in prejudice); Captain David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c)*, 38 A.F. L. REV. 63 (1994) (arguing that the courts of criminal appeals employed Article 66(c) to improperly resolve contradictory post-trial factual assertions); Roger M. Currier & Irvin M. Kent, *The Boards of Review of the Armed Forces*, 6 VAND. L. REV. 241 (1953) (generally surveying the new powers of service courts under the recently-enacted UCMJ, including sentence appropriateness).

in law and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.<sup>8</sup>

Under this broad authority, the courts of criminal appeals are required to review the evidence on their own, and they may overturn a conviction simply because they do not agree that guilt has been proven beyond a reasonable doubt.<sup>9</sup> The service courts have de novo authority to “disbelieve the witnesses, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused’s punishment.”<sup>10</sup> A CCA may choose to exercise its broad mandate and disregard deferential appellate standards such as abuse of discretion and plain error and thereby “substitute its judgment for that of the military judge.”<sup>11</sup> A CCA may even set aside a legally and factually sufficient conviction it determines should not be approved, so long as it does not base its decision on purely equitable factors.<sup>12</sup> Given such exceptional and wide-ranging powers, it is appropriate to ask why Congress saw fit to uniquely empower the courts of criminal appeals (earlier called boards of review or courts of military review), with this authority.

The relevant language of Article 66(c) has appeared in substantially its current form since the Uniform Code of Military Justice was enacted in 1950.<sup>13</sup> By way of background, prior to World War I, commanders were

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<sup>8</sup> UCMJ art. 66(c) (2008).

<sup>9</sup> *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

<sup>10</sup> *United States v. Crider*, 46 C.M.R. 108, 111 (C.M.A. 1973).

<sup>11</sup> *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

<sup>12</sup> In *United States v. Nerad*, 67 M.J. 748 (A.F. Ct. Crim. App. 2009), the Air Force Court disapproved a conviction for possession of child pornography, notwithstanding that it was correct in law and fact, because the court reasoned that the charge, “though technically accurate, unreasonably exaggerates the criminality of the appellant’s actions.” *Id.* at 752. The court reasoned that although the appellant’s conduct of possessing sexually explicit pictures of his 17-year-old paramour was illegal, since she was of age to consent to sexual relations, the appellant “was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sex with, but could not legally possess nude pictures of her that she took and sent to him.” *Id.* at 751. CAAF overturned the CCA’s decision, holding that while the CCAs have broad authority under Article 66(c) to disapprove a finding, that authority must be exercised in the context of legal – not equitable standards, subject to appellate review. *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010).

<sup>13</sup> *See* Article 66(c), UCMJ, 64 Stat. 128, 50 U.S.C. § 653(c) (1950).

In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It



allowed broad authority to administer justice, with little oversight from reviewing authorities.<sup>14</sup> Colonel William Winthrop, “the Blackstone of American military law,”<sup>15</sup> expressed the prevailing view of his day that a court-martial was an instrument of the Executive Branch, not a “court” in the full sense of the term that should be subject to appellate review.<sup>16</sup> Colonel Winthrop wrote:

Not being subject to be reversed or appealed from, the judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive. Its sentence, if *per se* legal, cannot, after it has received the necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can – provided it be not as yet executed – be rendered in whole or in part inoperative.<sup>17</sup>

Two controversial courts-martial in 1917, however, began to change that attitude. In the so-called “Texas Mutiny” case, a number of noncommissioned officers refused to attend a drill formation and were convicted and sentenced in proceedings eventually declared unlawful. The case, combined with a complex series of events and personality differences, led to a public debate between Brigadier General Samuel Ansell, the senior officer in the office of The Judge Advocate General, and Major General Enoch Crowder, The Judge Advocate General who had been temporarily detailed to administer the Selective Service Act. This debate, combined

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shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

*Id.*

<sup>14</sup> See, e.g., Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 426 (2008) (“From the colonial period until well into the twentieth century, U.S. military commanders enjoyed a position of almost absolute power within the military justice system”); Jividen, *supra* note 7, at 64 (Explaining the process “by which military law was slowly converted from a commander’s private disciplinary tool to a respected and equitable justice system which maintains discipline without the abrogation of fundamental constitutional rights”); *United States v. Bauerbach*, 55 M.J. 501, 502 (A. Ct. Crim. App. 2001) (“Up until World War I, commanders and the public felt that the disciplining of troops was primarily commanders’ business, because a commander who could be trusted to take his troops into combat could also be trusted to treat them fairly in courts-martial”).

<sup>15</sup> Honorable Walter T. Cox III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 9 (1987).

<sup>16</sup> COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49-50 (2d ed. 1920).

<sup>17</sup> *Id.* at 54.

with the dubious nature of the Texas Mutiny proceedings, prompted calls for reform,<sup>18</sup> especially when General Ansell took his criticisms of the military justice system public with several unflattering characterizations.<sup>19</sup> The “Crowder-Ansell Dispute” led to an uproar that spurred two independent investigations of the military justice system and lengthy congressional hearings.<sup>20</sup>

In the second, related, case – the “Houston Riot” case – sixty-three black soldiers were court-martialed at one mass trial during a time of escalating racial confrontations. Of the fifty-eight soldiers convicted at this court-martial, thirteen were sentenced to death, sentences that were carried out the next morning before any review of the court-martial or sentences took place.<sup>21</sup> Senate debates that ensued poignantly noted that “the cases of these men did not reach the reviewing authority until the daisies were growing over the graves of the convicted men. Anything permitting such a thing in America is outrageous.”<sup>22</sup>

These two cases brought to light perceived flaws in the military justice system, specifically the danger presented by a lack of proper review of courts-martial. The ensuing Congressional interest led to the creation of the advisory board of review in the Army in 1918.<sup>23</sup> The board of review, however, was empowered only to advise The Judge Advocate General on legal matters, and was only required to review the record of trial in cases in which a sentence had been adjudged that required approval or confirmation by the President.<sup>24</sup> If the board of review found the conviction legally insufficient or determined the proceedings were tainted by prejudicial error, The Judge Advocate General could disagree with the board’s findings and forward the matter to the Secretary of War for the President’s action.<sup>25</sup> In the Navy regulations provided for Judge Advocate General review of general court-martial convictions for legal error and Bureau of Naval Personnel review “for comment and recommendation as to disciplinary features.”<sup>26</sup> Insufficient staffing of lawyers and lack of emphasis on court-martial review meant sailors’ due process rights were not necessarily

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<sup>18</sup> See Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109, 112-15 (1989); Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 2 (1967).

<sup>19</sup> Cox, *supra* note 15, at 10 (noting that General Ansell characterized the military justice system as “un-American,” “unconstitutional,” and “lawless”).

<sup>20</sup> Brown, *supra* note 18, at 2-3.

<sup>21</sup> Wiener, *supra* note 18, at 120.

<sup>22</sup> 66 CONG. REC. S6495 (1919) (statement of Sen. Chamberlain).

<sup>23</sup> The Army Board of Review was established by regulation in 1918, and codified two years later in Article of War 50 1/2, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 797-99 (1920), *reprinted in* Manual for Courts-Martial, 1920, at 512-15.

<sup>24</sup> Art. of War 50 1/2.

<sup>25</sup> Brown, *supra* note 19, at 32-33.

<sup>26</sup> WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 12 (1973).

ensured by the Navy's system.<sup>27</sup> Despite the deficiencies of the Army and Navy's review procedures, they were tolerated well enough during the two decades following World War I, when America maintained a small, peacetime military. The reforms prompted by World War I proved to have limited effect.<sup>28</sup> It would take another World War to overcome institutional inertia and overhaul military justice, with particular emphasis on review of courts-martial.

World War II brought to light perceived problems with the military justice system as never before, with particular emphasis on the need for a more robust system of appellate review. As the large mobilization of World War II drew to a close, and hundreds of thousands of Americans returned to civilian life, veterans began to report about what they perceived as an unfair and arbitrary system of justice. There certainly was no shortage of veterans who had first-hand experience with military justice, as during the war more than two million courts-martial took place.<sup>29</sup> Many veterans did not like what they saw, and citizen-soldiers and military leaders alike cited the adverse effect on morale and discipline – not to mention the drain on manpower – caused by the court-martial process.<sup>30</sup> Reports filtered in about hasty proceedings, lack of sufficiently trained lawyers, dicey convictions and severe sentences. As Robinson O. Everett (later to become the Chief Judge of the Court of Military Appeals – CAAF's forerunner) stated in his 1958 book on military justice:

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 13.

Following the 1919 burst of activity, however, both the Army and Navy settled back into a comfortable peacetime routine much like the one that had existed before 1917. Their court-martial systems were largely forgotten by the American population as a whole. The reforms of 1919 would prove to be limited and not very effective, as Morgan and Ansell had predicted. But a pattern of change had been established that would continue with different results after the next great war.

*Id.*

<sup>29</sup> Lieutenant Colonel James B. Roan and Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 187 (2002); Captain John T. Willis, *The United States Court of Military Appeals, Its Origin, Operation, and Future*, 55 MIL. L. REV. 39, 39-41 (1972).

<sup>30</sup> See Cox, *supra* note 15, at 12.

Citizen-soldiers now returned from the war and put back into civilian life were concerned, as were the military leaders of the times. Not the least of these concerns was the valuable drain of manpower lost to court-martial processes that were considered to be both inefficient and unfair. The adverse effect on morale and discipline was also of great concern.

*Id.*

When Johnny came marching home again from World War II, he brought with him numerous complaints about justice as then dispensed in the Army and the Navy. Many of these were prompted by a conviction that the administration of military justice had not always lived up to the goals of fairness and impartiality which were accepted as part of the American legal tradition. Other complaints may merely have reflected the basic maladjustment to military life of the person complaining. In any event, the upshot was ultimately the Uniform Code of Military Justice . . . .<sup>31</sup>

More than any other problem, reports focused on undue influence by commanders in the court-martial process. Mr. Arthur E. Farmer, Chairman of the Committee on Military Law for the Veterans Bar Association, reported that it was not uncommon for commanding officers to tell members, "Gentlemen, when you pass sentence on the accused, you will give him the maximum sentence. Clemency is my function."<sup>32</sup> The case of Ernest W. Gibson, later to become governor of Vermont, is a well-known example of the abuses in military justice during the war:

I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted – yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith.<sup>33</sup>

As reports flowed in from veterans unhappy with their exposure to military justice, Congress commissioned exhaustive studies and held extensive hearings, ultimately resulting in the Uniform Code of Military Justice, signed into law in 1950.<sup>34</sup> A student of the legislative intent behind the original UCMJ does not suffer from a lack of information. Extensive Senate and House hearings on the proposed UCMJ, along with committee

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<sup>31</sup> ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 9 (1958).

<sup>32</sup> *A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles of the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before the Subcomm. of the House Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 640 (1949) (hereinafter *Hearings on H.R. 2498*).

<sup>33</sup> *Willis*, *supra* note 29, at 41-42.

<sup>34</sup> Uniform Code of Military Justice, Pub. L. No. 506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801-950).

and drafter reports, supply “one of the best and most informative pieces of legislative history anywhere.”<sup>35</sup> Article 66(c) is no exception. A review of the thousands of pages of publicly-available legislative history concerning the 1950 UCMJ<sup>36</sup> indicates Congress granted the service courts such extraordinary powers primarily to address one overriding problem with the military justice system, a problem with two primary consequences. The overriding problem was undue command influence over courts-martial. The two primary consequences were harsh and inconsistent sentences and a poor perception of the military justice system by the public.

Any objective reading of the legislative history behind Article 66(c) supplies the unmistakable impression that Congress’s primary concern in establishing a better system for appellate review was to mitigate the virtually unfettered control commanders enjoyed over the court-martial process. Whereas before World War I the general consensus was that military justice was a commander’s prerogative, the experience of World War II changed this view. Widespread reports asserted that commanders enjoyed undue influence over court-martial members, and wielded this power to produce excessively harsh sentences. Tales abounded of commanders who would reprimand court members who sentenced too leniently, with the result that members would hand down extremely harsh sentences and let the commander essentially decide the sentence through exercise of his clemency power. The *Report of War Department Advisory Committee on Military Justice* captured the findings of an exhaustive study by a distinguished panel appointed to identify faults in the military justice system.<sup>37</sup> The report succinctly but thoroughly summarized its findings about this problem:

The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the late war a general

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<sup>35</sup> Brigadier General (retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8 (2000).

<sup>36</sup> In particular, the Library of Congress maintains an extensive website offering transcripts of Congressional testimony, drafting committee reports, and other documents evidencing the legislative history of the UCMJ. See The Library of Congress, Researchers, Military Legal Resources, [http://www.loc.gov/rr/frd/Military\\_Law/UCMJ\\_LHP.html](http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html) (last visited June 28, 2010).

<sup>37</sup> REPORT OF U.S. WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE HONORABLE THE SECRETARY OF WAR (Dec. 13, 1946), available at [http://www.loc.gov/rr/frd/Military\\_Law/Vanderbilt-report.html](http://www.loc.gov/rr/frd/Military_Law/Vanderbilt-report.html).

court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas. Not infrequently the general reprimanded the members of a court for an acquittal or an insufficient sentence. Sometimes the reproof was oral and sometimes in writing by way of what the Army has come to know as a “skin-letter.” For example, one lieutenant general of unquestioned capacity voluntarily testified that he wrote a stinging letter of rebuke to the members of a court who had imposed a sentence of five years upon a soldier who deserted his division while in training in the United States. The general was incensed because the sentence was not twenty-five years and considered it his duty to chastise the court for extreme leniency.<sup>38</sup>

Congress created a new system of appellate review largely to address concerns over commanders influencing sentences at the trial level. Secretary of Defense James Forrestal appointed Harvard Law Professor Edmund A. Morgan to chair the committee that would draft the uniform code. Professor Morgan and his committee were tasked with creating a system of justice that would achieve the “proper accommodation between the meting out of justice and the performance of military operations,” a precise tipping point Secretary Forrestal acknowledged “no one has discovered.”<sup>39</sup> The report of the “Morgan Committee” noted that “[o]ne important concern of the committee throughout its deliberations was the position of military command in the court-martial system.”<sup>40</sup> The committee recognized that it needed to strike a balance between command discretion and judicial oversight: “It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian court was impractical.”<sup>41</sup>

In deciding exactly what powers to grant the new appellate tribunals to combat this problem, Professor Morgan’s committee was not starting

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<sup>38</sup> *Id.* at 6-7.

<sup>39</sup> *Hearings on H.R. 2498, supra* note 32, at 597.

<sup>40</sup> *A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice: Hearings Before a Subcomm. of the Comm. on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st Sess. (1949), at 37.*

<sup>41</sup> *Id.*

from scratch. The recently-enacted Elston Act had codified several reform initiatives for the Army, including giving the board of review the power to review “weigh evidence, judge the credibility of witnesses and determine controverted questions of fact.”<sup>42</sup> Professor Morgan’s committee not only spread this power to the other services, but took it one step further. The new service boards of review would now have the power to approve only those sentences they determined should be approved. This “sentence appropriateness” authority was “[t]he single greatest change brought about in the powers and duties of the boards of review by the Uniform Code of Military Justice.”<sup>43</sup> This new, broad power of sentence appropriateness was a necessary check on commanders if Congress was to allow commanders to retain a primary role in the court-martial process.<sup>44</sup> As Professor Morgan himself later wrote, allowing a panel of experienced judges to review sentences was seen as an important check to ensure commanders were not influencing courts-martial to hand down excessive sentences.<sup>45</sup>

The problem of undue command influence over sentences had two main consequences, both of which Article 66(c) also sought to alleviate. The first consequence was, of course, that sentences were often harsh and uneven. The subcommittee that conducted hearings about the new proposed UCMJ in the House Committee on Armed Services provided the following commentary about the proposed Article 66(c):

The board of review shall affirm a finding of guilty of an offense or a lesser included offense (see art. 59) if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, Commentary.) The board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. *It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces.*<sup>46</sup>

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<sup>42</sup> Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 (1948) (also known as Elston Act).

<sup>43</sup> Currier and Kent, *The Boards of Review of the Armed Forces*, *supra* note 7, at 242.

<sup>44</sup> See *Senate Report to Accompany H.R. 4080*, S. REP. NO. 81-486, 5-6 (1949) (noting the protection the boards of review provide and how they safeguard against excessive command influence).

<sup>45</sup> Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 31 (1965) “These provisions for review were designed to lessen the dangers of command control.” *Id.*

<sup>46</sup> *Hearings on H.R. 2498*, *supra* note 32, at 1187 (emphasis added); see also *Senate Report to Accompany H.R. 4080*, S. REP. NO. 81-486, 28 (1949); *Uniform Code of Military Justice; Text, References and Commentary Based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense [the Morgan Draft]* (1949), 94.

The inconsistency and harshness of sentences was a major concern in the immediate aftermath of World War II. The War Department's Advisory Committee Report noted that many witnesses opined that, "although the innocent were not punished, there was such disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed."<sup>47</sup> The committee noted that a frequent criticism of the military justice system was that "[t]he sentences originally imposed were frequently excessively severe and sometimes fantastically so."<sup>48</sup> Testimony before the Senate by the Chairman of the Special Committee on Military Justice of the American Bar Association noted, "There is something, it seems to me, wrong with the system which results in a clemency board, established in Washington, reducing or remitting over 27,000 sentences."<sup>49</sup>

A second consequence of the influence commanders exercised over sentences was erosion of the public's confidence in the military justice system. The large number of complaints about harsh and uneven sentences certainly caused concern for a Congress that would need the public's support of the military to rebuild Europe and oppose communism.<sup>50</sup> Congress was under intense pressure from the American public to restore confidence of military justice. Representative Mendel Rivers noted that "every Member of this House . . . has been deluged with complaints of autocracy in the handling of these courts-martial throughout the Armed Forces."<sup>51</sup> Behind these complaints lay a new idea – that servicemembers deserved, if not the same constitutional protections as the civilians they defended, then at least the next closest thing. Senator Wayne Morse no doubt expressed the feelings of many when he stated, "I do not like this idea in this new era in which we are living of building up one justice system here for men in uniform and another one for so-called free citizens. You cannot keep a civilian Army, in my judgment, under two systems of justice."<sup>52</sup> The

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<sup>47</sup> *Report of War Department Advisory Committee on Military Justice*, *supra* note 37 at 3-4.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 2498 Before the Subcommittee of the Senate Armed Services Committee*, 81st Cong., 1st Sess. 80 (1949) (statement of Mr. George A. Spiegelberg, Chairman, American Bar Association Special Committee on Military Justice).

<sup>50</sup> See Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 939 (2010) "Given the limited number of actors involved in developing the system, much of the evolution of the military justice system has focused on a single concern: its perceived legitimacy." *Id.*

<sup>51</sup> Willis, *supra* note 29, at 42 (quoting 94 CONG. REC. 163 (1948) (remarks by Congressman Mendel Rivers on Elston Act)).

<sup>52</sup> *A Bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and*



large-scale expansion of the military during World War II magnified the importance of the military in America, and caused the public (and therefore Congress) to re-examine the traditionally assumed relationship between the Constitution and members of the military.<sup>53</sup> Someone would have to provide oversight of the military justice system in order for an energized public to accept the system as legitimate. In the area of sentences, that role was given to the boards of review.

### III. DECISIONS INTERPRETING THE CCAS' SENTENCE APPROPRIATENESS POWER

The new UCMJ soon came under judicial review, and within six years of the Code's enactment, the Supreme Court was called upon to interpret the scope of Article 66(c). In *Jackson v. Taylor*,<sup>54</sup> a Soldier in military confinement challenged the validity of his sentence through habeas corpus proceedings. Jackson was convicted of attempted rape (which carried a maximum sentence of twenty years confinement) and premeditated murder (which required the death sentence or life imprisonment). The court-martial sentenced him to life imprisonment.<sup>55</sup> On appeal, the Army Board of Review found his conviction on the premeditated murder charge "incorrect in fact and law," and set the conviction aside. The Army board then reassessed Jackson's sentence, and approved only so much of the approved sentence as provided for a dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years.<sup>56</sup>

Through a petition for extraordinary relief, Jackson challenged the validity of the Army board's action. Jackson argued that the board should have either ordered a sentencing rehearing or ordered that he be released, because the board was without authority to impose the twenty-year sentence to confinement.<sup>57</sup> The Supreme Court refused to grant relief, noting that the UCMJ's drafters intended to grant "broad powers of review" to the boards of review.<sup>58</sup> The Court stated:

Petitioner finds the language of [Article 66(c)] ambiguous and argues that any ambiguity must be resolved in favor of the accused. That would be true if there were ambiguity in the section. But the words are clear. The board may

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*establish a Uniform Code of Military Justice: Hearing on S.857 and H.R.4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 84 (1949).

<sup>53</sup> Willis, *supra* note 29, at 49-50.

<sup>54</sup> 353 U.S. 569 (1957).

<sup>55</sup> *Id.* at 570.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 572. Jackson argued that the court-martial did not impose a sentence on the attempted rape conviction, since life imprisonment was not authorized for this offense. *Id.* at 573.

<sup>58</sup> *Id.* at 576.

“affirm . . . such part or amount of the sentence, as it finds correct . . . .” That is precisely what the review board did here. It affirmed such part, 20 years, of the sentence, life imprisonment, as it found correct in fact and law for the offense of attempted rape. Were the words themselves unclear, the teachings from the legislative history of the section would compel the same result.<sup>59</sup>

The Court then reviewed congressional testimony of Professor Morgan indicating the broad grant of authority under Article 66(c), and noted:

Military officials opposed giving the review boards power to alter sentences. The Subcommittee nevertheless decided the boards should have that power. The Committee Report to the Senate augments the conclusion that the boards of review were to have the power to alter sentences. A study of the legislative history of the Code in the House of Representatives leads to the same conclusion. Article 66 was enacted in the language approved by the committees. It is manifest then that it was the intent of Congress that a board of review should exercise just such authority as was exercised here.

Boards of review have been altering sentences from the inception of the Code provision. These alterations have been attacked but have found approval in the courts as is shown by the list of cases collected in the opinion of Judge Hastie in the Court of Appeals. Petitioner objects, however, that the board of review should not have imposed the maximum sentence for attempted rape because the court-martial might have imposed a lesser sentence had it considered the matter initially. But this is an objection that might properly be addressed to Congress. It has laid down the military law and it can take it away or restrict it. The Congress could have required a court-martial to enter a sentence on each separate offense just as is done in the civilian courts. The board of review would then know the attitude of the court-martial as to punishment on each of its findings of guilt. But this the Congress did not do. The argument, therefore, falls since it is based on pure conjecture. No one could say what sentence the court-martial would have imposed if it had found petitioner guilty only of attempted rape. But Congress avoided the necessity

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<sup>59</sup> *Id.*

for conjecture and speculation by placing authority in the board of review to correct not only the findings as to guilt but the sentence as well.<sup>60</sup>

In upholding the Army board's action in reassessing Jackson's sentence, the Supreme Court stamped its imprimatur upon a broad and deferential reading of Article 66(c). Appellate courts have regularly come down on the side of such expansive readings in the decades since.

Case law over the past sixty years has established at least four ways the CCAs may employ this "should be approved" discretion to grant sentence relief to an appellant, apart from any legal error with the sentence. This is not necessarily an all-exhaustive list, as the broad "should be approved" language seems to mean the CCAs' Article 66(c) cannot be pigeon-holed into specific categories of relief. Nonetheless, four categories of sentence appropriateness relief have emerged, and nearly every instance of sentence appropriateness relief by the service courts over the decades falls within one of these four classes.<sup>61</sup>

#### A. Sentence Severity

First, the service courts may simply find that the sentence adjudged and approved is inappropriately severe. From the earliest days of the UCMJ, the boards of review exercised their authority to grant relief where they found particular sentences adjudged and approved were inappropriately severe.<sup>62</sup> In every case that comes before it for Article 66 review, a CCA must conduct a de novo review and determine from its own reading of the record whether it finds the sentence to be appropriate.<sup>63</sup> In any given case, the court "may not affirm a sentence that the court finds inappropriate," a

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<sup>60</sup> *Jackson*, 353 U.S. at 577-78 (footnotes and citations omitted). Justices Brennan, Black, Douglas and Chief Justice Warren dissented, asserting that the Army board was imposing an original sentence upon the attempted rape conviction. The dissent asserted, "Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step; it failed to do so." *Id.* at 582 (Brennan, J., dissenting).

<sup>61</sup> This article treats sentence relief for unreasonable multiplication of charges as a subcategory of sentence reassessment, just like reassessment for any other legal error affecting findings, since unreasonable multiplication of charges is considered a legal error requiring a CCA that modifies findings to then reassess the sentence. *See United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

<sup>62</sup> *See, e.g., United States v. Jimmerson*, 15 C.M.R. 550 (N.M.B.R. 1954) (finding confinement at hard labor for twelve months inappropriately severe and reducing to six months); *United States v. Washington*, 11 C.M.R. 388 (A.B.R. 1953) (finding death sentence legally correct but inappropriate and approving only so much of the sentence as provided for dishonorable discharge and confinement at hard labor for life).

<sup>63</sup> *See, e.g., United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

broad mandate than merely determining whether the sentence is “so disproportionate as to cry out’ for reduction.”<sup>64</sup>

The CCAs’ sentence severity responsibility represents a “sweeping Congressional mandate to ensure ‘a fair and just punishment for every accused.’”<sup>65</sup> This responsibility “involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves.”<sup>66</sup> Under Article 66(c), CCAs “can, in the interests of justice, substantially lessen the rigor of a legal sentence.”<sup>67</sup> CCAs judge sentence appropriateness by “‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’”<sup>68</sup>

The judges of the courts of criminal appeals are to “utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused’s delict, his sentence was appropriate.”<sup>69</sup> While sentence severity authority is determined based on an individual case, this responsibility includes general considerations of uniformity and evenhandedness of sentencing decisions.<sup>70</sup> However, despite their broad powers, the CCAs may not grant clemency, which as opposed to ensuring justice is defined as “bestowing mercy – treating an accused with less rigor than he deserves.”<sup>71</sup> Clemency is a function reserved for the convening authority.<sup>72</sup>

## B. Sentence Comparison

Sentence severity requires the judges of the courts of criminal appeals to utilize their broad experience in courts-martial and their “feel” for what justice demands to determine whether an appellant’s sentence falls outside the general range of sentences normally imposed for similar misconduct. Sentence comparison – a distinct but related category of sentence appropriateness relief – requires much more specific determinations. Under sentence comparison authority, CCAs may grant sentence relief because an appellant’s sentence is inappropriately severe

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<sup>64</sup> *Id.*

<sup>65</sup> *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

<sup>66</sup> *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

<sup>67</sup> *Lanford*, 20 C.M.R. at 94.

<sup>68</sup> *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

<sup>69</sup> *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

<sup>70</sup> *See United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).

<sup>71</sup> *Healy*, 26 M.J. at 395.

<sup>72</sup> *See UCMJ art. 60(c)(1)* (2008) (“authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority”).

when compared to a particular, related case. Recognizing that one of the goals of Article 66(c) was to further uniformity in sentencing in a system that has no sentencing guidelines and is highly decentralized, the CCA judges may engage in sentence comparison with companion cases.<sup>73</sup>

CCAs are not required to engage in sentence comparison with specific cases “except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.”<sup>74</sup> To prevail in a sentence comparison argument at the CCA, an appellant bears the burden of demonstrating that any cited cases are “closely related” to the appellant’s case and that the sentences are “highly disparate.”<sup>75</sup> Cases are closely related where, for example, they involve “coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.”<sup>76</sup> Case law has never provided one definition as to what constitutes “highly disparate” sentences, though the courts have recognized that “[s]entence comparison does not require sentence equation.”<sup>77</sup> In general, courts conducting a sentence comparison analysis have required quite a large discrepancy between cases to find sentences highly disparate.<sup>78</sup>

If the appellant meets this burden, or if the court raises the issue on its own motion, then the government must show that there is a rational basis for the disparity.<sup>79</sup> Courts have identified the following as potential rational bases for highly disparate sentences: whether the breadth of one co-actor’s offenses was greater,<sup>80</sup> whether the co-actor testified for the government,<sup>81</sup>

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<sup>73</sup> See *Lacy*, 50 M.J. at 288; *United States v. Ballard*, 20 M.J. 282 (C.M.A. 1985).

<sup>74</sup> *Ballard*, 20 M.J. at 283; accord *United States v. Brock*, 46 M.J. 11, 13 (C.A.A.F. 1997) (holding that Air Force Court of Criminal Appeals erred by not admitting evidence of fellow Airman’s sentence in order to consider (1) whether the appellant’s case was closely related to other Airman’s, and if so, (2) whether the sentences were highly disparate).

<sup>75</sup> See *Lacy*, 50 M.J. at 288. The CCAs may even compare the sentence of a co-actor where the co-actor was sentenced in a civilian criminal justice system. See *Sothen*, 54 M.J. at 296-97.

<sup>76</sup> *Lacy*, 50 M.J. at 288.

<sup>77</sup> *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001).

<sup>78</sup> See, e.g., *United States v. Fee*, 50 M.J. 290 (C.A.A.F. 1999) (appellant’s sentence of thirty-six months confinement and dishonorable discharge not highly disparate with co-actor spouse’s sentence of fifteen months confinement and bad conduct discharge); *United States v. Rodriguez*, 57 M.J. 765, 773-74 (N-M. Ct. Crim. App. 2002) (ten years confinement not highly disparate from co-actor’s sentence including four years confinement).

<sup>79</sup> *Lacy*, 50 M.J. at 288.

<sup>80</sup> See *Fee*, 50 M.J. at 291 (finding rational basis for disparity where the appellant’s LSD offenses covered a much longer period of time and where appellant was also convicted of distribution of marijuana).

<sup>81</sup> See *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (noting that the CCA considered the co-actor’s assistance to the prosecution as a factor which supported the differences in sentences); *United States v. Odom*, 53 M.J. 526, 541 (N-M. Ct. Crim. App. 2000) (noting that co-actors’ willingness to admit their guilt and testify against appellant supported their lesser sentences).

whether one of the co-actors was more violent,<sup>82</sup> and whether one of the co-actors was the principal actor.<sup>83</sup> If the government cannot demonstrate a rational basis for the disparity, the CCA may grant sentence relief to harmonize the two sentences. The Navy-Marine Corps court has observed that the authority to correct sentence disparities “is necessary to ensure both fairness and integrity, without which the public, members of Congress, and service personnel will lose confidence in the military justice system.”<sup>84</sup>

### C. Sentence Appropriateness Relief for Post-Trial Delay

The courts of criminal appeals have long been recognized to have authority to grant relief based on sentence severity and sentence comparison. Similar expansive authority to grant sentencing relief for unreasonable post-trial processing delay is a more recent development.

Servicemembers have a due process right to timely post-trial processing, including appellate review, but to establish a claim that untimely post-trial processing amounts to a due process violation, an appellant must normally demonstrate that the delay resulted in some prejudice.<sup>85</sup> This can be a difficult proposition. To evaluate prejudice caused by untimely post-trial processing, appellate courts normally analyze whether one of three interests has been affected: 1) prevention of oppressive incarceration pending appeal; 2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; or 3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.<sup>86</sup> Appellants have traditionally had a difficult time demonstrating that untimely post-trial processing caused prejudice.<sup>87</sup>

In 2002, however, CAAF greatly expanded the ability of CCAs to grant sentence relief for post-trial delay. In *United States v. Tardif*, CAAF

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<sup>82</sup> See *Odom*, 53 M.J. at 541 (noting that appellant was the only person among co-actors involved in “the most heinous crime” among the co-actors, pushing another person off a bridge).

<sup>83</sup> See *Rodriguez*, 57 M.J. at 774 (finding that appellant’s involvement as “the primary actor” in an illegal enterprise to buy and resell handguns on the criminal market supported his harsher sentence).

<sup>84</sup> *United States v. Kelly*, 40 M.J. 558, 570 (N-M.C.M.R. 1994).

<sup>85</sup> See generally *United States v. Moreno*, 63 M.J. 129, 135-52 (C.A.A.F. 2006) (recognizing that convicted servicemembers have a due process right to timely review and appeals of court-martial convictions, and applying the four-part test of *Barker v. Wingo*, 407 U.S. 514 (1972) for analyzing issues of untimely post-trial processing: 1) length of the delay; 2) reasons for the delay; 3) assertion of the right to a timely review and appeal; and 4) prejudice).

<sup>86</sup> *Moreno*, 63 M.J. at 138-39 (quoting *Rheark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

<sup>87</sup> See generally Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the Moreno Decision Hasn’t Changed the World and Other Post-Trial News*, ARMY LAW., June 2008 (asserting that appellate courts are not granting “wholesale relief” to appellants based on post-trial delay largely due to difficulty establishing prejudice).

held that the CCAs may grant sentence relief for post-trial delay, even in the absence of prejudice, due to their power of sentence appropriateness.<sup>88</sup> In *Tardif*, it took the government 384 days after trial to forward the record of trial to the Coast Guard Court of Criminal Appeals.<sup>89</sup> The Coast Guard court concluded that the delay was “unexplained and unreasonable,” and that it “casts a shadow of unfairness over our military justice system,” yet afforded the appellant no relief because it concluded that “an appellant must show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights.”<sup>90</sup> In its review, CAAF noted that it had “consistently recognized that the charter of the Courts of Criminal Appeals on sentence review is to ‘do justice.’”<sup>91</sup> Citing an Army Court of Criminal Appeals decision which had held that Article 66(c) empowers the CCAs with “broad power to moot claims of prejudice,”<sup>92</sup> the court held that Article 66(c) provides a separate basis for a CCA to grant relief than Article 59(a), which requires a showing of prejudice before an appellate court can grant relief.<sup>93</sup> Therefore, even where an appellant has not demonstrated prejudice, CCAs must “determine what findings and sentence ‘should be approved,’ based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.”<sup>94</sup>

CAAF further defined this element of sentence appropriateness power broadly in *United States v. Toohey*.<sup>95</sup> In *Toohey*, 2240 days elapsed between completion of the appellant’s court-martial and the decision by the Navy-Marine Corps Court of Criminal Appeals.<sup>96</sup> After finding no prejudice, the CCA considered but rejected *Tardif* relief for sentence inappropriateness, holding that such relief “should only be granted under the most extraordinary of circumstances.”<sup>97</sup> CAAF agreed that the appellant suffered no prejudice, but held that it could still find a due process violation when in balancing the other *Barker v. Wingo*<sup>98</sup> factors, “the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.”<sup>99</sup> Relevant to the CCA’s separate sentence appropriateness determination, CAAF chastised the CCA for its conclusion that the appellant’s case was not among “the most extraordinary of circumstances,” citing the “extreme, unjustified, and

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<sup>88</sup> *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

<sup>89</sup> *Id.* at 220.

<sup>90</sup> *United States v. Tardif*, 55 M.J. 666, 668 (C.G. Ct. Crim. App. 2001).

<sup>91</sup> *Tardif*, 57 M.J. at 223.

<sup>92</sup> *United States v. Collazo*, 53 M.J. 721, 727 (A. Ct. Crim. App. 2000) (quoting *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998)).

<sup>93</sup> *Tardif*, 57 M.J. at 224.

<sup>94</sup> *Id.*

<sup>95</sup> 63 M.J. 353 (C.A.A.F. 2006).

<sup>96</sup> *Id.* at 358.

<sup>97</sup> *United States v. Toohey*, 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004).

<sup>98</sup> 407 U.S. 514 (1972).

<sup>99</sup> *Toohey*, 63 M.J. at 362.

unexplained delays” in the case.<sup>100</sup> CAAF then held that “most extraordinary” is not the standard for judging sentence appropriateness: “The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of ‘most extraordinary’ should be erected to foreclose application of Article 66(c), UCMJ, consideration or relief.”<sup>101</sup>

#### D. Sentence Reassessment

Finally, if the CCA finds the court-martial committed a legal error that prejudiced the appellant, the court may reassess the sentence instead of remanding the case for a rehearing. Where the court has found legal error that affects the findings of the court-martial, and if “the court can determine that, absent the error, the sentence would have been at least of a certain magnitude,” then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing.<sup>102</sup> While sentence reassessment differs somewhat from other sentence appropriateness powers because it serves as a remedy for a legal error, it is nonetheless an exercise of a court’s Article 66(c) discretion and flows directly from the CCAs’ sentence appropriateness power.<sup>103</sup> Under this arm of the sentence appropriateness power, the service court looks not at what would be imposed at a sentencing rehearing, but “what would have been imposed at the original trial absent the error.”<sup>104</sup> CAAF has placed “great confidence in the ability of the [CCAs] to reassess sentences in order to purge the effects of prejudicial error at trial,”<sup>105</sup> and has held that the “experienced and mature judges of the Courts of Criminal

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

<sup>103</sup> *See United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

We start from the premise that, when a Court of Military Review reassesses a sentence because of prejudicial error, its task differs from that which it performs in the ordinary review of a case. Under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, the Court of Military Review must assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted; and, if the sentence is excessive, it must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must the Court of Military Review assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also it must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. Only in this way can the requirements of Article 59(a), UCMJ, 10 U.S.C. § 59(a), be reconciled with the Code provisions that findings and sentence be rendered by the court-martial, *see* Articles 51 and 52, UCMJ, 10 U.S.C. §§ 851 and 852, respectively.

*Id.*

<sup>104</sup> *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

<sup>105</sup> *United States v. Peoples*, 29 M.J. 426, 429 (C.M.A. 1990).



Appeals are fully capable in a given case of determining whether an error is harmless, whether corrective action should be taken by the Court of Criminal Appeals, or whether the case should be returned to the convening authority for a new action.”<sup>106</sup>

Taken together, it should be apparent that appellate decisions have construed Article 66(c)’s “should be approved” language expansively. The CCAs may grant sentence relief under at least four bases, and have broad latitude in so doing. The one limitation upon their authority is that the CCAs may not grant clemency,<sup>107</sup> but even there, the line between sentence appropriateness and clemency is thin indeed. Matters the convicted servicemember submitted in clemency may also be considered in evaluating sentence appropriateness.<sup>108</sup> Many types of information can bear on both clemency and sentence appropriateness; for example, evidence of the appellant’s potential for rehabilitation may properly be considered for both purposes.<sup>109</sup> Determining where the line between “mercy” and “justice” falls can be an extremely difficult task, and given the almost unlimited deference CAAF grants such decisions, the practical effect is that appellate interpretations of Article 66(c) grant the courts of criminal appeals almost unlimited authority to grant sentence relief.

#### IV. COURTS OF CRIMINAL APPEALS’ EMPLOYMENT OF SENTENCE APPROPRIATENESS AUTHORITY: A STUDY

*“O, it is excellent to have a giant’s strength, but it is tyrannous to use it like a giant.”<sup>110</sup>*

How, then, have the CCAs employed such awesome power? Remarkably, no published works could be located that analyze how broadly the courts of criminal appeals have chosen to exercise their authority. To some extent, this is understandable. The CCAs issue hundreds of decisions each year, only a tiny fraction of which are published decisions. Sentence appropriateness decisions in particular tend not to result in published decisions, and the vast majority of unpublished decisions from the courts of criminal appeals are not available on electronic research services. Even those that are available are not listed in a comprehensive format susceptible to case-by-case study.<sup>111</sup>

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<sup>106</sup> United States v. Cook, 46 M.J. 37, 39 (C.A.A.F. 1997). CAAF held that sentence reassessment is a “well-established feature of military law” and a “long-standing practice.” *Id.*

<sup>107</sup> United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).

<sup>108</sup> *Peoples*, 29 M.J. at 428.

<sup>109</sup> *Healy*, 26 M.J. at 396.

<sup>110</sup> WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2.

<sup>111</sup> Westlaw offers some unpublished decisions from courts of criminal appeals beginning in 1989. However, not all unpublished CCA decisions are offered even in the present day. Even for decisions that are available, services such as Westlaw offer no method of easily

This section seeks to provide information about CCA employment of sentence appropriateness in a manner which best makes use of available data. This section summarizes a study of more than 4000 CCA decisions – published and unpublished – in the five years from 2005 through 2009, seeking to answer the question of how the CCAs have employed Article 66(c) sentence appropriateness authority. The author chose a five-year study primarily due to data availability. Each of the CCAs offers an internet site listing decisions by that court.<sup>112</sup> However, some courts' sites date back only slightly more than five years, while others offer a longer period of time.<sup>113</sup> A five-year study offered the opportunity to produce a more even comparison across the services. In addition, a five-year period offered the opportunity to study each aspect of Article 66(c) sentence appropriateness, including relief for untimely post-trial processing, which CAAF only recognized as a basis for sentence appropriateness power in 2002.<sup>114</sup> A five-year time period also encompassed the service of more than one chief judge and other judges for each court, as each court except the Coast Guard employs only military judges.<sup>115</sup>

Each court's decisions were studied to determine how many times the court granted Article 66(c) sentence relief, and under what component of sentence appropriateness power the court granted such relief. Before examining the results, however, several disclaimers are in order. First, the scope of this study is limited by the available information and the different ways in which the various courts of criminal appeals approach sentence appropriateness decisions. It was initially the author's hope to study not only the number of times each court granted relief, but also the ratio of cases in which relief was granted to the cases in which appellate defense counsel requested sentence appropriateness relief. This quickly proved impossible, because many decisions did not list every issue briefed by counsel, especially those personally asserted by the appellants.<sup>116</sup> In addition, it was

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viewing every CCA decision from a given time period, and Boolean searches for sentence appropriateness decisions are not likely to produce meaningful results to procure every sentence appropriateness decision.

<sup>112</sup> See Army Court of Criminal Appeals website, <https://jagcnet.army.mil/ACCA>; Navy-Marine Corps Court of Criminal Appeals website, <http://www.jag.navy.mil/nmcca.htm>; Air Force Court of Criminal Appeals website, <http://afcca.law.af.mil/>; Coast Guard Court of Criminal Appeals website, [http://www.uscg.mil/legal/cca/Court\\_of\\_Criminal\\_Appeals.asp](http://www.uscg.mil/legal/cca/Court_of_Criminal_Appeals.asp).

<sup>113</sup> The Army court's web site offers at least some decisions dating back to 1996; the Navy-Marine-Corps court offers decisions since 2004; the Air Force court's site lists apparently every decision by the court since 2002; and the Coast Guard court offers decisions dating back to 1997.

<sup>114</sup> See *supra* notes 88-101 and accompanying text.

<sup>115</sup> See Annual Report of the Code Committee on Military Justice, United States Court of Appeals for the Armed Forces (Oct. 1, 2008-Sept. 30, 2009), available at <http://www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf>.

<sup>116</sup> See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) (holding that where an appellant wishes to assert some form of error, appellate defense counsel must, at a minimum, invite the court's attention to those issues).

not even clear whether sentence appropriateness had been requested in many cases in which the issue was discussed; after all, the courts are required to consider sentence appropriateness in every case they review under Article 66, regardless of whether appellate defense counsel raises the issue.<sup>117</sup> Even more fundamentally, the available data was not the same for every service. The Air Force and Coast Guard sites purport to list every decision by the courts during the available time frames. The Navy-Marine Corps site, however, did not begin listing summary decisions on its site until September 2009.<sup>118</sup> The Army's website does not contain a statement as to what percentage of cases receiving Article 66 review are listed on the site; the court's site only lists "Summary Dispositions" for 2008 and 2009, with "Opinions of the Court" and "Memorandum Opinions" dating back several years earlier.<sup>119</sup> Therefore, conducting any sort of detailed statistical comparison across services proved unfeasible.

Nonetheless, the author diligently attempted to gather information to at least gain a general sense of how often and in what manner the service courts are employing their Article 66(c) sentence appropriateness authority. Of course, this effort was not an exact science.<sup>120</sup> In instances in which some gray area appeared as to whether a court had really exercised discretion in granting sentence appropriateness relief, every effort was made to judge consistently. Despite the data limitations and difficult calls, meaningful conclusions may be drawn about how the CCAs are using their sentence appropriateness authority. Some are using it more than others, and

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<sup>117</sup> See, e.g., *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (a court of criminal appeals must review the record in each case referred to it and may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved; sentence appropriateness is an "affirmative obligation" of the CCAs).

<sup>118</sup> U.S. Navy Judge Advocate General's Corps, Courts, Navy-Marine Corps Court System, Navy-Marine Corps Court System of Criminal Appeals, [http://www.jag.navy.mil/courts/opinion\\_archive.htm](http://www.jag.navy.mil/courts/opinion_archive.htm).

<sup>119</sup> U.S. Army Court of Criminal Appeals, Opinions of the Court, <http://www.jagcnet.army.mil/ACCA>.

<sup>120</sup> In the area of sentence reassessment, for example, there were many occasions where a service court reassessed a sentence but did so only to correct some technical and plain error. See, e.g., *United States v. Hines*, No. S31515 (A.F. Ct. Crim. App. May 20, 2009) (accepting the government's concession and reducing the approved confinement from four months to 105 days to conform to the pretrial agreement); *United States v. Aubert*, No. S31420 (A.F. Ct. Crim. App. Nov. 26, 2008) (affirming the approved sentence with the exception of a reprimand, because the reprimand was not reduced to writing in the convening authority's action); *United States v. Murphy*, No. 20050948 (A. Ct. Crim. App. Mar. 7, 2007) (disapproving the adjudged and approved bad conduct discharge because an administratively-issued honorable discharge effectuated prior to the convening authority's action rendered the punitive discharge a nullity). These types of minor sentence reassessments solely to comply with some unambiguous legal requirement were not counted among the instances in which a court was considered to have granted sentence appropriateness relief. By the same token, instances in which a CCA reassessed a sentence solely to bring it into compliance with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002) were not counted as instances of granting sentence appropriateness relief.

some categories of sentence appropriateness relief are finding more receptive audiences than others. More importantly, the decisions in which the CCAs have offered sentence appropriateness relief over a five-year period offer important insight as to whether Article 66(c) is still furthering the intent of its drafters.

#### A. The Army Court of Criminal Appeals

Apart from sentence reassessment, the study of the Army Court of Criminal Appeals' (ACCA) decisions from 2005 through 2009 quickly leads to two conclusions. First, the Army court rarely grants sentence appropriateness relief. Second, it seldom even discusses the issue. Of all the CCAs, the Army court has provided the least insight into how it views its sentence appropriateness authority. The lack of insight into the Army court's mindset is unfortunate, since the Army traditionally has the largest court-martial docket of the services and therefore presumably has the most appellate cases to review.<sup>121</sup>

##### 1. Sentence Severity

In no decision during this five-year time frame did the Army court grant relief on sentence severity grounds. In fact, unlike the other services, ACCA rarely even analyzed the issue in writing. From 2005 through 2009, the Army court's web site – which lists a total of 688 decisions for this period – contains only four opinions where the court explicitly addressed sentence severity. In all four of these cases, the court denied sentence relief.

One of these cases that addressed sentence severity was a published decision, *United States v. Roukis*.<sup>122</sup> In *Roukis*, the appellant was convicted of murdering his wife, and was sentenced to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.<sup>123</sup> Aside from claiming that the evidence to support the premeditated murder conviction was legally and factually insufficient, the appellant also claimed that life imprisonment was inappropriately severe. The court noted its duty to give individualized consideration to the appellant's case and that the appellant's punishment should "fit the offender and not merely the crime."<sup>124</sup> The court further noted that it could conduct a sentence severity review even where life imprisonment was a mandatory minimum sentence.<sup>125</sup> The court then held that: "Appellant's acts,

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<sup>121</sup> See ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, *available at* <http://www.armfor.uscourts.gov/Annual.htm>.

<sup>122</sup> 60 M.J. 925 (A. Ct. Crim. App. 2005).

<sup>123</sup> *Id.* at 925.

<sup>124</sup> *Id.* at 931 (quoting *United States v. Wright*, 20 M.J. 518, 519 (A.C.M.R. 1985)).

<sup>125</sup> *Id.* (citing *United States v. Jefferson*, 21 C.M.R. 319, 320 (C.M.A. 1956); *United States v. Anderson*, 36 M.J. 963, 987 (A.F.C.M.R. 1993)).

character, and mental state at the time of the offense place this case squarely within the ‘heartland’ of premeditated-murder offenses. Notwithstanding appellant’s mental condition, we find no reason in the record of this case to depart from the mandatory minimum sentence established by Congress for premeditated murder.”<sup>126</sup> The court concluded, “A sentence of confinement for life is, under the facts of this case and in our specific determination, fair, just, and appropriate.”<sup>127</sup>

In *United States v. Campos*,<sup>128</sup> the appellant challenged the sufficiency of his guilty plea to murder based on an inherently dangerous act when he drove his vehicle toward a group of people outside a night club.<sup>129</sup> After finding the appellant’s plea provident, the court then turned its attention to the appellant’s second assigned error – that his sentence (including twenty-four years confinement) was inappropriately severe.<sup>130</sup> The appellant presented a mixed claim of sentence severity and sentence comparison, asking that his sentence to confinement be reduced to ten years in part based on the sentence in a more than quarter-centuryold Army court-martial with somewhat similar facts.<sup>131</sup> The court noted that since the two cases did not arise from the same incident, the two cases could not be considered closely related.<sup>132</sup> The court then concluded that Campos’s conviction was for more offenses than in the older case, and based on its review of the record, Campos’s sentence of twenty-four years confinement was not inappropriately severe.<sup>133</sup>

The other two cases in which the Army court discussed sentence severity provide no insight into the court’s mindset. In *United States v. Trevino*,<sup>134</sup> the court noted in a footnote that the appellant personally asserted that his sentence was inappropriately severe, but the court did not reach this issue because it remanded the case for new post-trial processing.<sup>135</sup> The same situation occurred in a 2005 memorandum opinion.<sup>136</sup> Apart from this, no Army court case listed on the court’s web site even discussed the issue of sentence appropriateness.

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<sup>126</sup> *Id.* (citing *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005); *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001).

<sup>127</sup> *Id.*

<sup>128</sup> No. 20060301 (A. Ct. Crim. App. July 3, 2008).

<sup>129</sup> *Id.* slip op. at 2, 7.

<sup>130</sup> *Id.* at 13.

<sup>131</sup> *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983).

<sup>132</sup> *Campos*, slip op. at 14.

<sup>133</sup> *Id.*

<sup>134</sup> No. 20040144 (A. Ct. Crim. App. Apr. 19, 2006).

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *United States v. Cotti*, No. 20021210 (A. Ct. Crim. App. Nov. 16, 2005).

## 2. Sentence Comparison

The Army court offered next to no insight into how it applies its power to grant sentence relief based on comparison with closely related cases. The *Campos* decision discussed above was the only case during this time period in which the court even addressed the issue. That case involved an extremely obvious case for rejection of sentence comparison relief, given that the two courts-martial at issue were twenty-five years apart and the more severe sentence involved more offenses.

## 3. Sentence Appropriateness Relief for Untimely Post-Trial Processing

In contrast to its lack of decisions regarding sentence severity and sentence comparison, ACCA made fairly frequent use of its power to grant sentence appropriateness relief for untimely post-trial processing. In fact, in the majority of cases in which the court discussed the issue, it granted relief. ACCA granted relief in eleven cases for untimely post-trial processing, and each time it did so under its Article 66(c) sentence appropriateness powers rather than under the due process violation framework.

Six of these eleven cases granting relief came in 2005, when *Tardif* and *Toohey* were still fairly new and fresh in the CCAs' consciousness. *United States v. Bodkins*<sup>137</sup> represents a good example of aggressive use of Article 66(c) power. In *Bodkins*, the court first reviewed the appellant's case in 2003 and affirmed the findings and sentence; at that time, the appellant did not request any relief for untimely post-trial processing.<sup>138</sup> CAAF then set aside the sentence and remanded the case to ACCA "for further consideration of whether the sentence should be approved in view of the court's determination on initial review that the post-trial processing of the case was unreasonable, unexplained, and dilatory."<sup>139</sup> On remand, the appellant newly urged ACCA to grant relief by disapproving the appellant's two-month sentence to confinement and convert the credit to a monetary payment to the appellant.<sup>140</sup>

On remand, ACCA examined the 475-day period between the date the sentence was adjudged and the date the record arrived at the court.<sup>141</sup> The court again highlighted the deficiencies in the government's processing, but specifically noted that the court did not find specific or actual prejudice to the appellant for the delay.<sup>142</sup> Despite affirming the findings and sentence, the court held that "[a]ll known circumstances of the post-trial processing in this case have rendered appellant's sentence inappropriate,"

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<sup>137</sup> No. 20010107 (A. Ct. Crim. App. May 10, 2005) (unpublished).

<sup>138</sup> *United States v. Bodkins*, 59 M.J. 634 (A. Ct. Crim. App. 2003).

<sup>139</sup> *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004).

<sup>140</sup> *Bodkins*, slip op. at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4.

and engaged in extended discussion about what appropriate relief would entail before ordering a forfeiture credit of \$500.<sup>143</sup> A dissenting judge argued that the majority's relief was both unlawful and unwarranted – unlawful because the court affirmed the sentence as appropriate yet ordered financial compensation, and unwarranted because the sentence was appropriate and the appellant did not earlier demand speedy post-trial processing.<sup>144</sup>

In another example of use of sentence appropriateness authority to address post-trial processing delay, the court granted relief from one month of confinement and forfeitures where it took the government 260 days instead of the *Moreno* standard of 120 to obtain convening authority action.<sup>145</sup> In another case involving a lengthier delay, ACCA reduced confinement from thirteen to eight months where it took the government eight and a half months just between authentication of the record and preparation of a staff judge advocate's recommendation.<sup>146</sup> In yet another case, the government took 531 days to obtain the convening authority's action.<sup>147</sup> Despite finding no prejudice to the appellant and no evidence to dispute the government's contention that most of the delay was caused by the military judge and trial defense counsel, ACCA found the approved sentence inappropriate.<sup>148</sup> As it did in *Bodkins*, the court then at once affirmed the findings and sentence, yet ordered a credit of \$690.<sup>149</sup>

#### 4. *Sentence Reassessment*

Just based on number of times a reduced sentence was awarded, ACCA's activity for sentence reassessment dwarfed its actions in the other three categories of sentence appropriateness. The Army court granted sentence relief through reassessment ninety-seven times, more than any other service court. The court granted sentence reassessment relief in a full 14 percent of the cases listed on its web site for this period, not counting times where the court remanded the case for a sentence rehearing. However, in the vast majority of the cases in which the court granted sentence reassessment relief, it did so through a minor reduction to confinement – usually one month. In fact, even though it granted sentence reassessment relief more than any other CCA, the Army court seemed far more conservative in its use of sentence reassessment authority than the other services, generally either remanding a case for a sentence rehearing where

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<sup>143</sup> *Id.* at 5-6.

<sup>144</sup> *Id.* at 7 (Barto, J., concurring in part and dissenting in part).

<sup>145</sup> *United States v. Jones*, No. 20041034 (A. Ct. Crim. App. June 30, 2006).

<sup>146</sup> *United States v. Pattison*, No. 20031000 (A. Ct. Crim. App. June 23, 2006).

<sup>147</sup> *United States v. Frames*, No. 20010796 (A. Ct. Crim. App. Apr. 26, 2005).

<sup>148</sup> *Id.* at 2-5.

<sup>149</sup> *Id.* at 5-6. Judge Barto again dissented, asserting that “[n]either statute nor precedent . . . requires us to give sentence credit in every case involving nonprejudicial delay.” *Id.* at 6 (Barto, J., dissenting).

the sentencing landscape had dramatically changed, or reassessing to the same sentence as that approved where the change in findings was relatively minor. Rarely did the Army court reduce the sentence significantly through reassessment.

While most of the instances where the Army court granted sentence reassessment relief it adjusted the sentence by only a minor amount, a handful of cases break from this pattern. For example, in *United States v. Parrish*,<sup>150</sup> the appellant was charged with, among other offenses, fourteen specifications of larceny when he repeatedly filed false claims for household goods moves. The court found eight of these specifications legally insufficient, and reduced the appellant's punitive discharge from a dishonorable discharge to a bad conduct discharge.<sup>151</sup> *Parrish* actually represented the third significant sentence reassessment within the span of a week. In *United States v. Abbott*,<sup>152</sup> the court accepted the government's concession that the military judge erred by not resolving a possible mistake of fact defense raised during the appellant's providency inquiry. The court approved the appellant's bad conduct discharge but set aside the appellant's approved sentence of 180 days confinement and forfeitures of \$767.00 per month for nine months.<sup>153</sup> In *United States v. Brown*,<sup>154</sup> the court had previously remanded the record for the government to correct errors in the staff judge advocate's recommendation (SJAR). When the case was returned to ACCA, the court found numerous and serious defects with the recommendation. The court noted: "Ordinarily, a new recommendation and action would be an appropriate remedy for such SJAR errors. But where the government has demonstrated its persistent inability to properly deal with the post-trial processing of a case, judicial economy demands that we provide a remedy and some finality to the proceedings."<sup>155</sup> Therefore, the court reduced the appellant's sentence to confinement from eight months to six, despite the normal practice of CCAs to simply remand such cases for new post-trial processing.<sup>156</sup> For the most part, however, while ACCA granted sentence reassessment relief in a large number of cases, its use of its sentence reassessment authority was actually rather restrained.<sup>157</sup>

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<sup>150</sup> No. 20020178 (A. Ct. Crim. App. June 2, 2005).

<sup>151</sup> *Id.* at 3.

<sup>152</sup> No. 20030786 (A. Ct. Crim. App. May 27, 2005).

<sup>153</sup> *Id.* at 5.

<sup>154</sup> No. 20010599 (A. Ct. Crim. App. May 31, 2005).

<sup>155</sup> *Id.* at 5.

<sup>156</sup> *Id.* at 6.

<sup>157</sup> One other point deserves brief mention. From 2007 through 2009, ACCA granted sentence reassessment relief in a total of twenty-three cases. In 2006 alone, it granted sentence reassessment relief in twenty-five cases. In 2005 alone, it nearly doubled that number, granting relief in forty-nine cases. While it would appear that ACCA's employment of sentence reassessment is diminishing, the court's website also contains a much larger number of decisions in the earlier years.



## B. The Navy-Marine Corps Court of Criminal Appeals

The Navy-Marine Corps military justice system's difficulty with untimely post-trial processing is well-known, so much so that the Senate Armed Services Committee recently directed the Department of Defense's Inspector General to investigate the matter.<sup>158</sup> The Senate found that "action is long overdue to analyze and correct longstanding problems with the post-trial processes for preparation of records of courts-martial and for appellate review of court-martial convictions within the Department of the Navy."<sup>159</sup> One would expect, therefore, that the Navy-Marine Corps Court of Criminal Appeals (NMCCA) would be more active in the area of sentence appropriateness relief for untimely post-trial processing than the other CCAs. This assumption is correct; NMCCA granted sentence appropriateness relief in cases of post-trial delay thirty-seven times, nearly double the amount of the other three courts combined.

Nonetheless, NMCCA's activity was not limited to the untimely post-trial processing arena. Of the 863 cases listed on its web site, NMCCA granted some form of sentence appropriateness relief in ninety cases, or more than 10 percent of these cases. Most notable among all its sentence appropriateness decisions, even those in which it denied relief, was the depth of NMCCA's analysis. More so than the other CCAs, the Navy-Marine Corps court attempted to lay out its analysis in sentence appropriateness decisions, often devoting several paragraphs to cases in which the other courts might expend a sentence or two. As a result, NMCCA offers the best glimpse into the mind of CCAs in sentence appropriateness decisions.

### 1. *Sentence Severity*

Unlike the Army court, NMCCA spelled out all issues raised by appellate defense counsel in nearly all its decisions, and the defense regularly raised claims that sentences were inappropriately severe for one reason or another. In response, NMCCA granted relief in six instances where it found sentences inappropriately severe.

The court's relief for sentence severity ran the spectrum in terms of type and amount of relief afforded, and it offered relief for a variety of reasons. In *United States v. Baker*,<sup>160</sup> the court disapproved a \$5,000 fine as inappropriately severe – the only CCA to offer sentence severity relief for a fine during this time period – because it bore no relationship to the appellant's crimes. The court held that, "[s]imply put, we can discern no purpose for the \$5,000.00 fine in a case involving two specifications of

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<sup>158</sup> S. REP. NO. 111-35, at 131-33 (2009).

<sup>159</sup> *Id.* at 131.

<sup>160</sup> No. 200700567 (N-M. Ct. Crim. App. Apr. 15, 2008).

carnal knowledge.”<sup>161</sup> By way of contrast, in *United States v. Smith*,<sup>162</sup> the court totally disapproved the appellant’s bad conduct discharge after considering the appellant’s character and service record, including his combat service and subsequent diagnosis of post-traumatic stress disorder.<sup>163</sup>

*United States Schnable*<sup>164</sup> represents a significant exercise of sentence severity relief. In *Schnable*, the appellant (a chief petty officer) repeatedly committed sexual acts on his mentally retarded, 13-year-old daughter, once to the point of ejaculation.<sup>165</sup> The court, in a published decision, recognized the severity of the appellant’s crimes, but also considered “a number of factors that tend to extenuate or mitigate the offenses,” including a lack of evidence as to permanent physical injury to the child, the appellant’s acceptance of psychological treatment and counseling, the support appellant received from others, and his “unblemished service record” apart from this incident.<sup>166</sup> NMCCA therefore, “mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance,” reduced the appellant’s sentence to confinement from twenty years to sixteen years.<sup>167</sup>

In one particularly noteworthy example of sentence severity relief, NMCCA reduced an appellant’s sentence from confinement for life without eligibility for parole to confinement for fifty years. In *United States v. Rogers*,<sup>168</sup> the court rejected a sentence comparison attempt by the appellant, but the nine cases the appellant cited in comparison must have moved the court to some degree because, “mindful of our responsibility under Article 66(c) to ensure uniformity, even-handedness, and a fair and just punishment for every accused,” the court reduced the sentence to confinement.<sup>169</sup> The other two cases in which the court granted sentence severity relief also marked significant exercises of discretion on the part of NMCCA.<sup>170</sup> Four of the six sentences the court found inappropriately severe were imposed by a military judge sitting alone as the sentencing authority.

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<sup>161</sup> *Id.* at 3.

<sup>162</sup> No. 200900239 (N-M. Ct. Crim. App. Dec. 17, 2009).

<sup>163</sup> *Id.* at 2-3. The court did, however, approve the portion of the sentence that included confinement for ten months and forfeiture of \$923.00 pay per month for ten months.

<sup>164</sup> 65 M.J. 566 (N-M. Ct. Crim. App. 2006).

<sup>165</sup> *Id.* at 569.

<sup>166</sup> *Id.* at 574.

<sup>167</sup> *Id.* The court then granted an additional year of relief as to confinement for unreasonable post-trial delay. *Id.* at 575.

<sup>168</sup> No. 200600545 (N-M. Ct. Crim. App. May 10, 2007).

<sup>169</sup> *Id.* at 3.

<sup>170</sup> See *United States v. Payne*, No. 200501454 (N-M. Ct. Crim. App. Apr. 7, 2009) (reducing sentence to confinement from fifteen to seven years despite fact that convening authority had already suspended confinement in excess of seven years in an act of clemency); *United States v. Boggs*, No. 200600984 (N-M. Ct. Crim. App. June 20, 2007) (reducing sentence to confinement from eight to three years in a case where appellant “played a role in supporting and promoting the sexual exploitation and oppression of children” based on appellant’s service record even though member’s of appellant’s training assignment offered opinions that “he was less than trustworthy”).

Of course, given the frequency with which sentence severity was raised by appellate defense counsel, NMCCA denied relief in the vast majority of instances. For example, in *United States v. Lowe*,<sup>171</sup> on appeal, for the first time the appellant presented evidence of his alcohol dependence and chronic depression in a case in which he was convicted of unauthorized absence and missing movement. The court, “recogniz[ing] that we are the first court to view evidence of the appellant’s problems with alcohol and depression,” held that in its collective experience, “we have seen too many cases concerning similar crimes in which similar extenuation and mitigation was considered, yet resulted in a sentence similar to that of the appellant’s.”<sup>172</sup> The court therefore denied relief.<sup>173</sup> In *United States v. Wiest*,<sup>174</sup> the court spent the better part of two full pages analyzing why a dishonorable discharge was appropriate for the appellant’s crimes of larceny and forgery.<sup>175</sup> Similarly, the court engaged in a point-by-point refutation of the appellant’s claim of sentence severity in *United States v. Byard*.<sup>176</sup> Again, many of the decisions in which NMCCA denied sentence severity relief contain similar detailed analysis.

## 2. Sentence Comparison

Like most of the service courts, NMCCA was asked to grant relief based on a comparison with closely related cases on a fairly regular basis. During these five years, NMCCA addressed this issue in forty-six cases. Also, like the other service courts, NMCCA regularly denied relief on this basis. However, NMCCA was the only CCA to grant relief in any case based on sentence comparison.

In *United States v. Lambert*,<sup>177</sup> the court engaged in a protracted analysis of the appellant’s sentence comparison claim before granting significant sentence relief. Corporal Lambert was convicted before a military judge sitting alone of numerous offenses after he repeatedly sold remote control detonation devices and other military property to an undercover law enforcement agent. The appellant received some of this property from a fellow Marine, Sergeant (Sgt) Joshua Giddings, though Sgt Giddings was not involved in other instances for which the appellant was charged.<sup>178</sup> The appellant was sentenced to ten years of confinement, a dishonorable discharge, reduction to the grade of E-1 and total forfeitures;

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<sup>171</sup> No. 200000956 (N-M. Ct. Crim. App. Feb. 7, 2006).

<sup>172</sup> *Id.* at 8.

<sup>173</sup> *Id.*

<sup>174</sup> No. 200700024 (N-M. Ct. Crim. App. July 31, 2007).

<sup>175</sup> *Id.* at 2-3.

<sup>176</sup> No. 200602288 (N-M. Ct. Crim. App. May 22, 2007).

<sup>177</sup> No. 200401410 (N-M. Ct. Crim. App. Nov. 27, 2006).

<sup>178</sup> *Id.* at 3-4.

Sgt Giddings was sentenced to confinement for five years, reduction to the grade of E-1, total forfeitures, and a bad conduct discharge.<sup>179</sup>

On appeal, absent objection from either party, NMCCA considered pertinent portions of the record from Sgt Giddings' court-martial when reviewing the appellant's claim of sentence appropriateness based on sentence comparison. The court first held that the two cases were closely related, despite evidence that the appellant was the "catalyst" of the criminal enterprise and the appellant also conspired with others besides Sgt Giddings.<sup>180</sup> The court then found that the two sentences were highly disparate, even though the appellant's maximum punishment based on his offenses was greater than Sgt Giddings'.<sup>181</sup> Finally, the court concluded that the disparity in sentence was unsupported by any rational explanation. Even though the appellant's criminal offenses were greater and more widespread than those of Sgt Giddings, NMCCA focused on the following facts in reaching its conclusion: the appellant fully cooperated with authorities after his arrest; Sgt Giddings' sentence was lenient because the government failed to fully charge Sgt Giddings and presented no evidence in aggravation in his court-martial; and Sgt Giddings was of a higher rank than the appellant and therefore was "invested with greater responsibility and authority" than the appellant.<sup>182</sup> The court therefore granted relief to conform the appellant's sentence to that of Sgt Giddings, reducing confinement from ten to five years and lessening the severity of the punitive discharge from a dishonorable discharge to a bad conduct discharge.<sup>183</sup>

One of the three judges on the panel dissented, finding the two cases were not closely related, based on the appellant's "additional serious offenses."<sup>184</sup> The dissent then asserted that the disparity in the two cases' sentences was justified, because the appellant admitted to additional misconduct during his providency inquiry, the appellant's pre-existing reputation for this kind of behavior led to the formation of this criminal enterprise, and Sgt Giddings presented mitigating evidence of his honorable combat service.<sup>185</sup>

*Lambert* certainly represents the exception rather than the rule, as NMCCA rejected sentence comparison relief in every other one of the forty-six cases in which it was presented with the issue. The court only rarely even required the government to show a rational basis for a disparity, usually finding that cited cases were not closely related or the sentences were not highly disparate.<sup>186</sup>

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<sup>179</sup> *Id.* at 1-2.

<sup>180</sup> *Id.* at 3, 7.

<sup>181</sup> *Id.* at 7.

<sup>182</sup> *Id.* at 7-9.

<sup>183</sup> *Lambert*, slip op. at 9.

<sup>184</sup> *Id.* at 10 (Ritter, J., dissenting).

<sup>185</sup> *Id.* at 11-12 (Ritter, J., dissenting).

<sup>186</sup> *See, e.g.,* United States v. Casey, No. 200600552 (N-M. Ct. Crim. App. Dec. 27, 2006) (appellant's case not closely related with others where appellant stole debit card, used it to

### 3. Sentence Appropriateness Relief for Untimely Post-Trial Processing

The Navy-Marine Corps' struggles with untimely post-trial processing could literally fill a book, and NMCCA's activity in this area undeniably reflects this. NMCCA addressed the issue of untimely post-trial processing in no fewer than 217 cases, or a full quarter of its decisions during these five years. The court in *United States v. Brown*<sup>187</sup> offered a glimpse into the difficulties the Navy-Marine Corps has experienced in this area and the resulting issues at the appellate level:

The Department of the Navy typically convenes in excess of 2,000 special and general courts-martial each year, most of which are entitled to review under Article 66, UCMJ. This court cannot help noting the flood of records of trial that have been docketed long after their trial dates. Post-trial delay has become a systemic problem for many Navy and Marine Corps convening authorities and SJAs. In many cases, we are left without explanation for the delay. In cases such as the one at bar, we are left with an explanation that all but concedes indifference or gross neglect of the post-trial review process. In such cases, we are faced with the Hobson's choice of tolerating the intolerable by terming the delay unreasonable but awarding no relief, or accepting the unacceptable by awarding a windfall to the appellant at the expense of the Government's interest in a just punishment for the offender. In any case, it is simply unacceptable for any convening authority to amply sow the fertile fields of courts-martial referral without preparing for a timely harvest of the resulting records of trial.<sup>188</sup>

The breadth of this article simply does not permit a full treatment of NMCCA's activity in this area, but to put it succinctly, the court's struggles with the Hobson's choice described above were apparent. On the one hand, the court granted sentence appropriateness relief in 37 of the 217 cases

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steal money and merchandise, and then provided stolen debit card to two fellow Marines to commit separate acts of larceny); *United States v. Funiestas*, No. 200600235 (N-M. Ct. Crim. App. Nov. 30, 2006) (appellant's adjudged sentence of confinement for ten years, dishonorable discharge, and reduction to the grade of E-1 not highly disparate with co-actor's sentence of confinement for three years, bad conduct discharge, and reduction to the grade of E-1). *But see* *United States v. Peppers*, No. 200301247 (N-M. Ct. Crim. App. Aug. 26, 2005) (finding cases were closely related and assuming without deciding that they presented highly disparate sentences, the court nonetheless found a rational basis for the disparity based on co-actors' cooperation with law enforcement and pleas of guilty and appellant's position of leadership over co-actors).

<sup>187</sup> 62 M.J. 602 (N-M. Ct. Crim. App. 2005).

<sup>188</sup> *Id.* at 605-06.

addressing untimely post-trial delay. In many cases, this relief was considerable. In one case, the court reassessed a sentence by wholly setting aside a sentence that included a bad conduct discharge and confinement for four years for a marijuana dealer, in large part due to the delay in docketing the case for the court's review.<sup>189</sup> In many cases in which the only meritorious issue raised was unreasonable post-trial delay, the court either set aside a punitive discharge or lessened the discharge's severity, or granted significant confinement relief.<sup>190</sup> In addition to the thirty-seven cases in which the court granted sentence appropriateness relief for post-trial delay, NMCCA granted relief in eighteen post-trial delay cases based not on a pure sentence appropriateness determination, but upon reassessment after finding that a due process delay prejudiced the appellant. Thus, all told, the court granted some form of relief in fifty-five post-trial delay cases, and generally offered more aggressive sentence relief than the other service courts.

However, in another sense the Navy-Marine Corps court was also more tolerant of post-trial delay than the other services. Despite the large number of cases in which the court granted relief, it still refused to offer relief in the vast majority of the cases in which post-trial processing was raised. Many of these cases involved incredibly long delays of several years.<sup>191</sup> Unexplained delays of a year to two years to merely complete post-trial processing and forward the record to the court generally were not considered severe enough to result in relief. It is fair to say that NMCCA generally tolerated delays other courts likely would have found warranted sentence appropriateness relief.

Perhaps out of necessity, the Navy-Marine Corps court was the only CCA to attempt to provide a framework for analyzing untimely post-trial processing from a sentence appropriateness perspective. In the *Brown* case quoted above, the court set forth non-exhaustive factors to consider in determining whether and what part of the findings and sentence should be

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<sup>189</sup> United States v. Martinez-Garcia, No. 200101589 (N-M. Ct. Crim. App. Jan. 11, 2005).

<sup>190</sup> See, e.g., United States v. Woods, No. 200401704 (N-M. Ct. Crim. App. Dec. 14, 2005) (setting aside approved bad conduct discharge based on delay of more than five years from date of trial to convening authority action); United States v. Bishop, No. 200500613 (N-M. Ct. Crim. App. Oct. 17, 2005) (reducing confinement from 120 days to 50 days where it took the government two years to docket the case with the CCA despite the fact the record of trial was only forty pages long).

<sup>191</sup> See, e.g., United States v. Culbertson, 65 M.J. 587 (N-M. Ct. Crim. App. 2007) (no relief where six and one-half years passed between court-martial and redocketing with CCA after remand for new action, including about three years to comply with remand order); United States v. Thomas, No. 200201613 (Dec. 27, 2005) (no relief for "extremely unfortunate" delay of about four and one-half years between court-martial and CCA decision where government offered no reasons for the delay); United States v. McElhanon, No. 200500537 (Dec. 19, 2005) (no relief where government took twenty-one months to docket record of trial consisting of forty-two pages); United States v. Tootle, No. 9801945 (N-M. Ct. Crim. App. Nov. 30, 2005) (no relief where about seven years elapsed between court-martial and CCA decision, most of which occurred at the appellate level).

approved in cases involving post-trial delay.<sup>192</sup> The court properly noted that by publishing the factors it would use to meet its Article 66(c) mandate, “we shed light on the issue for the benefit of trial and appellate counsel, military judges, staff judge advocates, and appellants.”<sup>193</sup> The court then regularly applied the *Brown* factors in subsequent post-trial delay cases.

#### 4. Sentence Reassessment

NMCCA’s use of sentence reassessment power was unique. The court granted sentence relief based on sentence reassessment forty-six times, fewer than half the number of times as the Army court, even though NMCCA listed more decisions on its web site. Yet, NMCCA was nonetheless extremely active in the sentence reassessment arena, demonstrating a pronounced tendency to grant significant sentence relief rather than remand cases for sentence rehearings.

With certain notable exceptions, the other CCAs generally confined their exercise of sentence reassessment authority to minor adjustments in the approved sentence, presumably under the guise that the greater the adjustment, the less certain the courts could be as to exactly what sentence the court-martial would have imposed absent the error. NMCCA apparently had no such reservations. Numerous times it reassessed a sentence, resulting in either a reduction in the severity of a punitive discharge or setting aside the punitive discharge altogether.<sup>194</sup> In more than one case, the court granted vast relief as to confinement, sometimes even in conjunction with punitive discharge relief.<sup>195</sup> With the possible exception of the Air Force, NMCCA was the most aggressive of the service courts in its use of sentence reassessment authority to bring about large-scale modifications to sentences.

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<sup>192</sup> *Brown*, 62 M.J. at 606-07. Those factors are: 1) length of the delay (noting that depending on the case, a delay of more than one year from adjournment to docketing is facially unreasonable); 2) reasons for the delay; 3) the length and complexity of the record of trial and the number and complexity of potential appellate issues; 4) any evidence of bad faith or gross negligence on the part of the government in the post-trial review process; 5) whether the appellant has asserted the right to speedy review; 6) whether the appellant has made any showing of harm resulting from the delay; and 7) the offenses of which the appellant was found guilty and the sentence.

<sup>193</sup> *Id.* at 607.

<sup>194</sup> *See, e.g.*, *United States v. Holmes*, 65 M.J. 684 (N-M. Ct. Crim. App. 2007) (setting aside bad conduct discharge); *United States v. Beehner*, No. 200500683 (May 11, 2006) (setting aside bad conduct discharge); *United States v. Johnson*, No. 200300716 (July 18, 2005) (reassessing to bad conduct discharge instead of approved dishonorable discharge after finding unreasonable multiplication of charges).

<sup>195</sup> *See, e.g.*, *United States v. Thompson*, No. 200600807 (N-M. Ct. Crim. App. Dec. 17, 2007), *aff’d in part and rev’d in part*, 67 M.J. 106 (C.A.A.F. 2009) (reducing confinement from seven to three years and punitive discharge from dishonorable to bad conduct); *United States v. Chambers*, No. 200500329 (N-M. Ct. Crim. App. Aug. 3, 2006) (reducing confinement from twelve months to ninety days).

### C. The Air Force Court of Criminal Appeals

The Air Force Court of Criminal Appeals (AFCCA) offers by far the most decisions available on its internet site – more than the other three CCAs combined – and therefore offers a fairly comprehensive picture of its use of sentence appropriateness authority. From 2005 through 2009, AFCCA’s web site lists 2396 decisions in cases reviewed under Article 66, or purportedly every such decision issued by the court during this time period.<sup>196</sup>

Overall, out of the court’s 2396 Article 66 decisions from 2005-2009, AFCCA offered sentence appropriateness relief in seventy-three cases, or just over 3 percent of the cases it reviewed during this time. Excluding per curiam decisions in which appellate defense counsel submitted the case on the merits without assigning a specific error, the Air Force court provided some type of sentence appropriateness relief in slightly less than 6 percent of these cases.<sup>197</sup> Breaking down the cases by the type of sentence appropriateness relief offered, however, AFCCA’s relief has largely been confined to sentence reassessment after dismissing one or more specifications. The Air Force court has occasionally offered relief on sentence severity or post-trial delay grounds, and offered no relief on sentence comparison grounds during this time period.

#### 1. *Sentence Severity*

AFCCA found the sentence inappropriately severe in eleven cases during these five years, more than any other service court. In many cases, the court offered modest relief; in others it reduced confinement by a significant margin while leaving punitive discharges intact.<sup>198</sup> The court made more aggressive use of its sentence severity power in other cases. For example, in *United States v. Phillips*,<sup>199</sup> the appellant had been sentenced by a military judge sitting alone to a dishonorable discharge, confinement for twenty-eight years, and reduction to E-1 upon his conviction for several crimes, including two specifications of carnal knowledge and certain child pornography offenses. The court’s description of the facts notes the following:

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<sup>196</sup> See U.S. Air Force Court of Criminal Appeals, *Opinions Fact Sheet*, [http://afcca.law.af.mil/content/tjagc/about\\_opinions.pdf](http://afcca.law.af.mil/content/tjagc/about_opinions.pdf) (last visited June 28, 2010).

<sup>197</sup> From 2005-2009, 1173 of the 2396 decisions were summary opinions resulting from merits submissions by appellate defense counsel.

<sup>198</sup> See, e.g., *United States v. Wallace*, No. 36407 (A.F. Ct. Crim. App. Aug. 29, 2006) (reducing confinement in drug distribution case from fifty-four to forty-eight months but affirming bad conduct discharge, forfeiture of all pay and allowances, and reduction to E-1); *United States v. Shatusky*, No. 36136 (A.F. Ct. Crim. App. May 20, 2006) (reducing confinement from nine years to seven in “shaken baby” involuntary manslaughter case but affirming dishonorable discharge and reduction to E-1).

<sup>199</sup> No. 36412 (A.F. Ct. Crim. App. Mar. 19, 2008).



During the appellant's brief time on active duty, he was involved with several young girls, ranging in age from 14 to 16. Two of the individuals were victims named in the allegations – JO and MD. The appellant pled guilty to carnal knowledge with JO when she was 14, and to violating a no contact order involving MD, who was 16 at the time. Contrary to his pleas, he was convicted of having sexually explicit photographs of these two on his web site, and of using materials to create the pictures that had been mailed, shipped or transported in interstate commerce as those pictures involved JO. Further, he was convicted of carnal knowledge of JO.<sup>200</sup>

The court rejected several alleged errors in the case, but accepted the appellant's contention that the sentence was inappropriately severe. Noting that the appellant's offenses were "serious," the court, without analysis, reduced the appellant's confinement from twenty-eight years to fifteen years, otherwise leaving the sentence intact.<sup>201</sup>

In some instances, AFCCA reduced a dishonorable discharge to a bad conduct discharge. For example, in *United States v. Lazard*,<sup>202</sup> the court reduced the severity of the punitive discharge but left the appellant's confinement and reduction in rank intact.<sup>203</sup> In another case, the court granted a reduction from a dishonorable discharge to a bad conduct discharge in addition to confinement relief.<sup>204</sup>

In none of the eleven cases in which AFCCA granted relief for sentence severity did the court offer any significant analysis as to why the court considered the sentence inappropriately severe. The court's opinion in *Lazard* is typical of the court's decisions granting sentence severity relief:

We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case. The sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during either the findings or the sentencing proceedings. Nonetheless, we find that a lesser sentence of a bad-conduct discharge, confinement for 18 months, and reduction to the grade of E-1 should be affirmed.<sup>205</sup>

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<sup>200</sup> *Id.* at 2 (footnotes omitted).

<sup>201</sup> *Id.* at 6.

<sup>202</sup> No. 36430 (A.F. Ct. Crim. App. Oct. 18, 2006).

<sup>203</sup> See also *United States v. Johnson*, No. 36909 (A.F. Ct. Crim. App. Dec. 17, 2008); *United States v. Gustafson*, No. 36918 (A.F. Ct. Crim. App. June 3, 2008); *United States v. Wade*, No. 35458 (A.F. Ct. Crim. App. Feb. 25, 2005).

<sup>204</sup> *United States v. Tallman*, No. 36050 (A.F. Ct. Crim. App. Feb. 28, 2006).

<sup>205</sup> *Lazard*, slip op. at 4.

In seven of the eleven cases in which AFCCA granted relief for sentence severity, the sentence was handed down by a military judge sitting alone.<sup>206</sup> None of the cases in which sentence severity relief was granted discussed any concern about a commander's influence over the proceedings.<sup>207</sup> Overall, the Air Force court's use of sentence severity authority stands somewhere between that of the Army and Navy-Marine Corps courts.<sup>208</sup>

## 2. Sentence Comparison

The Air Force court offered no relief on sentence comparison grounds, despite the fact that appellate defense counsel raised the issue in many cases. AFCCA did, however, issue one published decision in a sentence comparison case. In *United States v. Anderson*,<sup>209</sup> the court was faced with an appellant who was convicted of intentional infliction of grievous bodily harm and who was sentenced to, *inter alia*, confinement for fifteen years.<sup>210</sup> On appeal, he claimed that his sentence was inappropriately severe compared to that of his co-actor, who was sentenced to seventeen years confinement but had only ten years approved, pursuant to a pretrial agreement.<sup>211</sup> After examining the language used in a leading CAAF sentence comparison case,<sup>212</sup> the court determined it would compare the

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<sup>206</sup> *Gustafson*, slip op. at 1; *Phillips*, slip op. at 1; *Lazard*, slip op. at 1; *Shatusky*, slip op. at 1; *United States v. Andre*, No. 35846 (A.F. Ct. Crim. App. Nov. 18, 2005); *United States v. Gilliam*, No. 35674 (A.F. Ct. Crim. App. Nov. 3, 2005); *Wade*, slip op. at 1.

<sup>207</sup> See *supra* notes 37-203 and accompanying text.

<sup>208</sup> While outside the time period for this study, two 2010 decisions indicate that the Air Force court may be growing more aggressive in using its sentence severity authority. In *United States v. Arriaga*, No. 37439 (A.F. Ct. Crim. App. May 7, 2010) (unpublished), the last of the appellant's seven assigned errors claimed – pursuant to *Grosteffon* – that his sentence that included confinement for four years and a dishonorable discharge was inappropriately severe. The appellant requested that his sentence to confinement be reduced to three years confinement. After finding no merit in the appellant's other assigned errors, the court found the appellant's sentence inappropriately severe, and granted the appellant more relief than he requested, reducing his confinement from four years to two and lessening the severity of his punitive discharge from a dishonorable discharge to a bad conduct discharge. *Arriaga*, slip op. at 11. In *United States v. Humphries*, No. 37491 (A.F. Ct. Crim. App. May 24, 2010) (unpublished), the appellant was convicted of adultery and divers occasions of sodomy, and sentenced to a bad conduct discharge and reduction to the grade of E-1. On appeal, the appellant claimed, *inter alia*, that his sentence to a bad conduct discharge was inappropriately severe. The court found an unsuspended bad conduct discharge to be inappropriately severe, even though the appellant committed adultery in base housing with the spouse of a deployed military member and the appellant was himself married with three children because of the "consensual nature of the crimes." *Id.* at 4. Instead of modifying the sentence, however, the court set aside the convening authority's action and notified the convening authority that if the convening authority did not suspend the bad conduct discharge, the court would not approve an unsuspended bad conduct discharge. *Id.*

<sup>209</sup> 67 M.J. 703 (A.F. Ct. Crim. App. 2009).

<sup>210</sup> *Id.* at 704.

<sup>211</sup> *Id.*

<sup>212</sup> See *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) ("Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which

adjudged sentences in the two cases instead of the approved sentences.<sup>213</sup> Interestingly, when the court later decided the case of the co-actor, it did not cite *Anderson*, and instead noted that the co-actor's sentence was not highly disparate from Anderson's in part because the co-actor's *approved* sentence was five years less than that of Anderson.<sup>214</sup> CAAF later approved of the Air Force court's sentence comparison holding in *Anderson* in another Air Force case.<sup>215</sup>

### 3. Sentence Appropriateness Relief for Untimely Post-Trial Processing

The Air Force court was largely reluctant to grant Article 66(c) sentence appropriateness relief based on post-trial processing delay, despite several opportunities to do so. In fact, in several cases involving significant post-trial delay, the court did not even discuss its ability to grant relief under its sentence appropriateness authority, instead analyzing the issue strictly under the *Barker v. Wingo* due process framework. In *United States v. Preciado*,<sup>216</sup> for example, the court examined a claim of unreasonable post-trial delay in a case in which the court had returned the record to the installation legal office on 20 December 2005 to accomplish new post-trial processing. It was not until 21 February 2008 – twenty-six months later – that the case was re-docketed with AFCCA.<sup>217</sup> As one of three assigned issues upon further review, appellate defense counsel specifically requested relief for this delay on sentence appropriateness grounds.<sup>218</sup> In response, the government provided “absolutely no plausible explanation for this lengthy delay.”<sup>219</sup> The court held that the appellant had not demonstrated prejudice caused by the delay, and though the court acknowledged its ability to find a due process violation where “the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system,”<sup>220</sup> the court held that relief was not warranted because the government demonstrated that any error was harmless beyond a

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sentence appropriateness can be fairly determined only by reference to disparate sentences *adjudged* in closely related cases”) (emphasis added) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).

<sup>213</sup> *Anderson*, 67 M.J. at 706.

<sup>214</sup> *United States v. Neal*, No. 37334, slip op. at 3 (A.F. Ct. Crim. App. July 10, 2009).

<sup>215</sup> In *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010), the court held that when engaging in sentence comparison, the courts of criminal appeals should examine adjudged versus approved sentences; however, when exercising their powers of sentence appropriateness generally, the courts may consider both adjudged and approved sentences. *Id.* at 21.

<sup>216</sup> 67 M.J. 559 (A.F. Ct. Crim. App. 2008).

<sup>217</sup> *Id.* at 560-61.

<sup>218</sup> *Id.* at 561 “Whether the unreasonable delay in the post-trial processing of Appellant’s case renders his approved sentence inappropriate.” *Id.*

<sup>219</sup> *Id.* at 563.

<sup>220</sup> *Id.* at 564 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

reasonable doubt.<sup>221</sup> Therefore, despite the “clearly egregious” delay in the case that “represents a complete disregard for the constitutional protections afforded to an accused during the post-trial process,” the court granted no relief to the appellant, and failed to analyze the issue from the *Tardif* sentence appropriateness perspective.<sup>222</sup> The court also took similar action in another unpublished post-trial delay case arising from the same Air Force base around the same time that involved an even longer delay.<sup>223</sup>

Nonetheless, AFCCA did provide post-trial processing delay sentencing relief in four cases from 2005 to 2009, and in each of those four cases, the court granted relief based on its Article 66(c) sentence appropriateness powers rather than upon a finding of a due process violation and prejudice to the appellant. One of the cases in which AFCCA granted relief involved the same base and the same time period as the two cases discussed immediately above. In *United States v. Roberts*,<sup>224</sup> the appellant was convicted of several offenses, including unpremeditated murder, after he got into an argument at a party, left, and returned with a handgun, whereupon he shot the other participant in the argument in the face from a distance of less than thirty inches.<sup>225</sup> His adjudged sentence included a dishonorable discharge and confinement for thirty-seven years.<sup>226</sup> After trial, it took the government 635 days to complete initial post-trial processing and docket the case with the Air Force court, more than four times the *Moreno* standards.<sup>227</sup> In response to this delay, the convening authority reduced the appellant’s sentence to confinement by one year, from thirty-seven years to thirty-six, before forwarding the case for appellate review.<sup>228</sup> Despite the appellant’s concession that he suffered no actual prejudice from the delay, the court granted additional sentencing relief, reducing the appellant’s confinement by an additional year.<sup>229</sup> In so doing, the court noted that it was particularly concerned that *Roberts* was the third case arising from the same installation during the same time, and that the

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* The Court was influenced in its decision by the fact that in issuing a new action, the convening authority granted relief, likely due to the delay, by changing the finding of guilty as to indecent assault to indecent act. *Id.*

<sup>223</sup> *United States v. Myers*, No. 35781 (f rev) (A.F. Ct. Crim. App. Dec. 12, 2008) (holding that where the government took 946 days to return the record of trial after the court remanded the case for a new action, indicating a “complete collapse of the post-trial process,” relief was not appropriate because the delay was harmless.)

<sup>224</sup> No. 37000 (A.F. Ct. Crim. App. Mar. 4, 2009).

<sup>225</sup> *Id.* at 2-3.

<sup>226</sup> *Id.* at 1.

<sup>227</sup> *Id.* at 9. The appellant’s case was tried prior to CAAF’s *Moreno* decision, so the presumptions of unreasonable delay that *Moreno* established (120 days from sentencing to convening authority action, and thirty days from action to docketing with the CCA) did not apply to this case. Nonetheless, the court found the pre-docketing delays in the case were facially unreasonable, triggering a due process *Barker v. Wingo* review. *Id.*

<sup>228</sup> *Id.* at 10.

<sup>229</sup> *Id.* at 11.

government took an additional 175 days to complete post-trial processing after the appellant expressed his concern over the post-trial delay to the installation legal office.<sup>230</sup>

The other three cases in which AFCCA granted sentence appropriateness relief for post-trial delays involved far shorter delays and relatively minor relief in regard to confinement.<sup>231</sup> Sometimes, the court engaged in fairly substantive analysis;<sup>232</sup> other times, it granted relief with little to no analysis as to why sentence appropriateness relief was warranted.<sup>233</sup> Delays at the appellate level were less likely to move the court to grant relief than delays at the installation level.<sup>234</sup>

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<sup>230</sup> *Id.* at 11.

<sup>231</sup> *United States v. Strout*, No. 37161 (A.F. Ct. Crim. App. Dec. 10, 2009) (disapproving appellant's forfeitures of \$433.00 per month for one month due to delay at appellate level); *United States v. Miller*, 64 M.J. 666 (A.F. Ct. Crim. App. 2007) (reducing appellant's sentence to confinement from twelve years to 138 months on sentence appropriateness grounds due to the thirteen-month lapse in time between date of sentencing and convening authority action); *United States v. Due*, No. 36424 (A.F. Ct. Crim. App. May 30, 2007) (reducing appellant's sentence to confinement from thirteen months to twelve months for post-trial processing delay despite the lack of prejudice where the delay denied the appellant at least the opportunity to seek parole earlier). Though not counted among cases in which AFCCA granted relief for sentence appropriateness, it should be noted that in *United States v. Castilleja*, No. 36975 (A.F. Ct. Crim. App. Nov. 21, 2007), the court dismissed all charges and specifications against the appellant where copies of the record of trial were lost in transit from the installation legal office to the Court, and all other copies of the record in possession of the government were destroyed. About ten years later, the missing status of this case was apparently discovered but the government was unable to recreate most of the record. AFCCA held that the incomplete record of trial and length of delay combined to "render it impossible for the appellant to receive any meaningful appellate review." *Id.* at 3.

<sup>232</sup> See *Due*, slip op. at 3 at 4-6 (explaining why the appellant made a strong showing that absent the delay, he could have been favorably considered for parole, and therefore "the equities lie with the appellant").

<sup>233</sup> See *Strout*, slip op. at 3 at 2.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt. However, we also recognize that we have the power, under Article 66, U.C.M.J., to grant relief even in the absence of a showing of prejudice. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Such action is warranted here. We approve the findings and only so much of the sentence that calls for a bad-conduct discharge, 21 days hard labor without confinement, and a reduction to airman basic.

*Id.*

<sup>234</sup> See, e.g., *United States v. Long*, No. 37044 (A.F. Ct. Crim. App. Dec. 18, 2009) (no relief for overall delay of more than 880 days between docketing and decision; much of delay was after case was joined and unexplained); *United States v. Roberts*, No. 36905 (A.F. Ct. Crim. App. July 24, 2009) (no relief for unspecified delay exceeding 540 days between docketing and AFCCA decision).

#### 4. Sentence Reassessment

As with the Army, the vast majority of AFCCA's sentence appropriateness activity was in the area of sentence reassessment. AFCCA granted some sentence relief through reassessment in fifty-eight cases, or nearly 80 percent of the cases in which it granted sentence appropriateness relief. Typically this occurred when the court disapproved one or more findings of guilt, but other, more serious offenses remained. In such instances, where the court saw fit to grant some form of relief, it typically did so through a minor decrease in the approved sentence to confinement.

However, as with the Army and Navy-Marine courts, AFCCA elected to reassess more boldly than normal in certain cases. A few Air Force decisions in the reassessment area are particularly noteworthy. One such decision is *United States v. Carroll*,<sup>235</sup> a short *per curiam* two-page opinion. In this 2006 case, the appellant pled guilty to and was convicted of wrongfully using and distributing marijuana. On appeal, the court accepted the government's concession and found that the military judge erred by admitting sentencing evidence that the appellant was previously acquitted of marijuana use and by instructing the members that confinement is corrective rather than punitive. While the approved sentence was a dishonorable discharge, confinement for three years, total forfeitures and reduction to E-1, the court noted that the appellant's trial defense counsel had asked the members for a sentence of a bad conduct discharge, confinement for ninety-eight days, and reduction to E-1. Therefore, in a single sentence, the court reassessed to the punishment trial defense counsel had requested, thereby at once lessening the severity of the punitive discharge, cutting confinement eleven-fold, and disapproving all forfeitures.<sup>236</sup>

*United States v. Dalton*<sup>237</sup> also marks another forceful exercise of sentence reassessment authority. In this case, the appellant killed a young Airman in a deployed environment when he pointed a weapon at him in the barracks and inadvertently shot him. The appellant pled guilty to involuntary manslaughter and disobeying a general regulation by violating an Air Force Instruction that prohibits drawing or aiming a firearm when deadly force is not necessary. On appeal, the court on its own initiative raised the issue of the providence of the plea as to the violation of a general regulation charge, and then found the plea improvident because the instruction did not apply in a combat zone.<sup>238</sup> The issue then became how to reassess the appellant's sentence of a dishonorable discharge, confinement for ten years, total forfeitures, and reduction to E-1. The court noted that as a result of the change in findings, the maximum sentence to confinement the court-martial could have adjudged only dropped from twelve years to ten

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<sup>235</sup> No. 36225 (A.F. Ct. Crim. App. May 16, 2006).

<sup>236</sup> *Id.* at 2.

<sup>237</sup> No. 37057 (A.F. Ct. Crim. App. Nov. 25, 2008).

<sup>238</sup> *Id.* at 2.

years and six months. The court also noted that dismissal of the charge did not affect the admissibility of any of the evidence or aggravation surrounding the appellant's involuntary manslaughter, including the fact that he pointed a weapon at a fellow Airman without cause. Nonetheless, although the maximum possible sentence to confinement was reduced by only eighteen months and the violation of the instruction did not represent the gravamen of the appellant's actions, the court nonetheless reassessed the sentence by the full eighteen months, dropping the appellant's confinement from ten years to eight years and six months.<sup>239</sup>

The cases discussed above are only two examples of several cases in which the Air Force court granted vast sentence relief, generally with little analysis as to how it reached its conclusion.<sup>240</sup> While AFCCA often remanded for a sentencing rehearing, reassessed to the same sentence, or granted only minor relief, AFCCA did appear to use its sentence reassessment authority more aggressively than the Army, and close to the degree employed by NMCCA.

#### D. The Coast Guard Court of Criminal Appeals

The Coast Guard Court of Criminal Appeals (CGCCA) has by far the smallest docket of the service appellate courts. During the five-year period studied, CGCCA issued just 112 decisions, or a few months' worth of decisions for the other courts. The Coast Guard court, however, exercised its sentence appropriateness powers aggressively. Of those 112 decisions, the court granted some form of sentence appropriateness relief in nine cases, or about 8 percent of the cases reviewed.

##### 1. *Sentence Severity*

CGCCA granted relief on sentence severity grounds in two cases. *United States v. Hewitt*<sup>241</sup> is a particularly noteworthy example of the reach of the Coast Guard court's sentence severity power. In *Hewitt*, the appellant was convicted by a military judge alone of forcible sodomy, two specifications of indecent assault, and one specification of providing an alcoholic beverage to an individual under the age of twenty-one.<sup>242</sup> The military judge sentenced him to a dishonorable discharge, confinement for

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<sup>239</sup> *Id.* at 5.

<sup>240</sup> See, e.g., *United States v. Nicely*, No. 36730 (A.F. Ct. Crim. App. Aug. 15, 2007) (unpublished) (setting aside the appellant's bad conduct discharge); *United States v. Barrett*, No. 35790 (A.F. Ct. Crim. App. Mar. 21, 2007) (unpublished) (setting aside the appellant's bad conduct discharge); *United States v. Cendejas*, No. 34864 (f rev) (A.F. Ct. Crim. App. May 26, 2006) (unpublished) (reducing confinement from fifty-four to thirteen months); *United States v. Craig*, 63 M.J. 611 (A.F. Ct. Crim. App. 2006) (setting aside appellant's bad conduct discharge and reducing confinement from four to two months).

<sup>241</sup> 61 M.J. 703 (C.G. Ct. Crim. App. 2005).

<sup>242</sup> *Id.* at 703.

eighty-four months, and reduction to E-1.<sup>243</sup> The appellant initially submitted his case to the appellate court “on the merits,” meaning he did not allege any specific error by the court-martial. However, the appellate court ordered the parties to brief the issue of sentence appropriateness, and in response to this order, the appellant submitted a brief documenting his post-trial diagnosis with Human Immunodeficiency Virus (HIV), including the impact of the condition on his future health and the bearing of these factors on determining an appropriate sentence.<sup>244</sup> The court first held that it could consider post-trial information in its determination on the appropriateness of the sentence,<sup>245</sup> and then, having considered the information about the appellant’s HIV diagnosis, decided to grant sentence relief. The court reduced the dishonorable discharge to a bad conduct discharge, and reduced the appellant’s confinement from eighty-four to sixty months.<sup>246</sup> Chief Judge Baum, writing for the court, stated that he would have further reduced confinement to thirty-six months, but since he lacked another vote for this sentence, he concurred in the reduction to sixty months.<sup>247</sup>

In the other case in which the court granted relief on the grounds of sentence severity, *United States v. Tuscan*,<sup>248</sup> the appellant was convicted by officer and enlisted members of assault with an unloaded firearm and assault consummated by a battery.<sup>249</sup> On appeal, he claimed, among other alleged errors, that his sentence was inappropriately severe in comparison with a co-actor.<sup>250</sup> The court found that the disparity in the sentences between the two co-actors was justifiable, but based on sentence severity, without substantive analysis, the court decided to exercise its Article 66(c) authority and approve only six of the twelve months of the appellant’s adjudged confinement.<sup>251</sup>

## 2. Sentence Comparison

CGCCA granted no sentence relief based on sentence comparison. In the few cases in which the issue was raised, the court disposed of the issue fairly easily. For example, in *United States v. Montuoro*,<sup>252</sup> the court noted the appellant was convicted of several charges of which his purported

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 703-04.

<sup>245</sup> See also *United States v. Hutchinson*, 56 M.J. 684, 686 (C.G. Ct. Crim. App. 2001), *holding aff’d*, 57 M.J. 231, 234 (C.A.A.F. 2002) (holding that fact developed after trial, “if properly a part of the entire record, may be considered by this Court when determining a sentence that should be approved pursuant to Article 66(c), UCMJ”).

<sup>246</sup> *Hewitt*, 61 M.J. at 704.

<sup>247</sup> *Id.* at 704-05.

<sup>248</sup> 67 M.J. 592 (C.G. Ct. Crim. App. 2008).

<sup>249</sup> *Id.* at 593.

<sup>250</sup> *Id.* at 595.

<sup>251</sup> *Id.* at 596, 598.

<sup>252</sup> 68 M.J. 565 (C.G. Ct. Crim. App. 2009).



co-actor was not, and therefore even assuming the cases were closely related and their sentences were highly disparate, there was “clearly” a rational basis for the appellant’s more severe sentence.<sup>253</sup> In *United States v. Harris*,<sup>254</sup> the court did not even reach the issue of whether the sentences were highly disparate or whether there was a rational basis for the disparity, instead finding the appellant did not establish that the compared cases were closely related to his own.<sup>255</sup>

### 3. *Sentence Appropriateness Relief for Untimely Post-Trial Processing*

The court was extremely active in granting relief based on post-trial processing delay. The court granted relief in five such instances, generally passing over the issue of whether the appellant could demonstrate prejudice from the delay and skipping right to the appropriateness of the sentence based on the delay. *United States v. Lind*<sup>256</sup> is one such case. In *Lind*, the appellant was tried by a military judge alone and pled guilty to one specification each of using ecstasy, distributing ecstasy, conspiring to possess, use, and distribute ecstasy, along with a specification of making a false official statement.<sup>257</sup> The military judge sentenced the appellant to reduction to E-1, forfeiture of \$938.00 pay per month for four months, confinement for four months, and a bad conduct discharge.<sup>258</sup> On appeal, the appellant alleged that his sentence was inappropriately severe due to the comparison with a co-actor in a closely-related case, and that he was subjected to unreasonable post-trial delay, among other errors.<sup>259</sup> The court found sentence comparison did not provide a basis for relief; however, the court found that the 175 days that elapsed between the time the sentence was adjudged and the time the convening authority took action<sup>260</sup> rendered the sentence inappropriate.<sup>261</sup> Thus, even though the court found the appellant’s misconduct “runs counter to the core values of the Coast Guard” and “cannot be tolerated,” the court disapproved all reduction in rank, forfeitures and confinement, and approved only the bad conduct discharge.<sup>262</sup>

In the other four cases in which the court granted sentence relief based on untimely post-trial processing, the court granted some lesser amount of relief not requiring the appellant to demonstrate prejudice. It is important to note that each time CGCCA granted relief, it was for some

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<sup>253</sup> *Id.* at 567-68.

<sup>254</sup> 67 M.J. 550 (C.G. Ct. Crim. App. 2008).

<sup>255</sup> *Id.* at 553.

<sup>256</sup> 64 M.J. 611 (C.G. Ct. Crim. App. 2007).

<sup>257</sup> *Id.* at 612.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 612-13.

<sup>260</sup> *Moreno* established a 120-day time standard for such processing, the surpassing of which would trigger a full *Barker* analysis. *Moreno*, 63 M.J. at 142.

<sup>261</sup> *Lind*, 64 M.J. at 615.

<sup>262</sup> *Id.* at 617.

relatively minor delay that paled in comparison to delays in many other courts' decisions where relief was denied. In two cases, the court overturned reductions in rank where the government took 173 days and 162 days from sentence to convening authority action instead of the *Moreno* standard of 120 days.<sup>263</sup> In another case the court granted confinement relief where the government took 215 days from sentencing to action.<sup>264</sup>

#### 4. *Sentence Reassessment*

The Coast Guard court reassessed sentences and granted relief in a mere two cases after disapproving a finding for legal error. In one case, the court disapproved a finding of guilty as to an aggravated assault charge, and reduced confinement and forfeitures from nine months to two.<sup>265</sup> In the other, the court found the military judge failed to award credit for a prior non-judicial punishment and reassessed the appellant's sentence, granting minor confinement and forfeitures relief.<sup>266</sup> Apart from the sizable reassessment in the first case, both cases otherwise represent fairly typical exercises of service courts' sentence reassessment powers and do not warrant further discussion.<sup>267</sup>

### V. ANALYSIS: ARE THE COURTS OF CRIMINAL APPEALS EMPLOYING SENTENCE APPROPRIATENESS POWERS IN A MANNER CONSISTENT WITH THE INTENT BEHIND ARTICLE 66(C)?

The courts of criminal appeals have exceptional powers without parallel in the American criminal justice system. By their very nature, these powers rub up against typical notions of an appellate court's proper authority. Article 66(c) sentence appropriateness power allows a court of criminal appeals to tread dangerously close to the clemency power of the convening authority, given the difficulty defining the break between clemency and sentence appropriateness. Sentence appropriateness allows the courts to grant extraordinary relief with little to no analysis – and, in all fairness, given the intentionally vague “should be approved” standard,

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<sup>263</sup> United States v. Greene, 64 M.J. 625 (C.G. Ct. Crim. App. 2007) (173 days); United States v. Holbrook, 64 M.J. 553 (C.G. Ct. Crim. App. 2007) (162 days).

<sup>264</sup> United States v. Denaro, 62 M.J. 663 (C.G. Ct. Crim. App. 2006).

<sup>265</sup> United States v. Upham, 64 M.J. 547, 551-52 (C.G. Ct. Crim. App. 2006).

<sup>266</sup> United States v. Gormley, 64 M.J. 617, 621 (C.G. Ct. Crim. App. 2007).

<sup>267</sup> In another case, the court exercised its sentence appropriateness authority to correct an error, though this case does not fall neatly within any of the four categories described here. In *United States v. Gormley*, 64 M.J. 617 (C.G. Ct. Crim. App. 2007), the court held that the appellant's failure to object at trial to the government's preemptive use of his prior non-judicial punishment did not waive the issue of sentencing credit for the prior punishment on appeal. The court held that the military judge committed prejudicial error when he failed to state the specific credits he awarded for the prior punishment, and, “[r]ather than speculate as to the military judge's intent, we will resolve the doubt in Appellant's favor and order credit to ensure that he is not punished twice for the same offense.” *Id.* at 621.

perhaps there is often little analysis a CCA can offer for what ultimately comes down to a judgment call. The exercise of this power is almost entirely unreviewable by higher courts, a particularly unusual arrangement in the American judicial system.

The CCAs were given these unique powers for a reason. In the case of sentence appropriateness, these powers were granted with a specific purpose in mind – to reduce the possibility of abuse caused by commanders' role in the military justice system, thereby smoothing out sentence disparities and strengthening the public's confidence in the military justice system.<sup>268</sup>

Has the way in which the CCAs currently employ this power aligned with Congress's original intent? This is no mere academic question. If the courts are using sentence appropriateness authority in a manner consistent with the reasons they were given this authority, then this should be applauded and cited as evidence that the reforms Congress enacted sixty years ago have had their intended purpose and remain in place for a reason. If, however, times have changed such that sentence appropriateness remains in place as a "vestigial tail" of the military justice system, then perhaps the time has come to revoke sentence appropriateness power, or at least provide some structure (judicially or legislatively) for its employment.

This review of the CCAs' sentence appropriateness decisions should make four conclusions apparent. First, sentence appropriateness discretion is by far most often used in the context of reassessing sentences where the court has found a legal error that affects findings. In 72.5 percent of the times the four CCAs combined granted sentence appropriateness relief, it was based on sentence reassessment instead of sentence severity, sentence comparison, or delay in post-trial processing. However, application of this power was inconsistent. The Army exercised this power more often but less aggressively than others. Many times, the courts granted minor sentencing relief, reducing a lengthy general court-martial sentence to confinement by a few months or a special court-martial sentence by a month. However, this was not always the case, especially in the Navy-Marine Corps and Air Force, where significant relief on confinement and punitive discharges was not uncommon. The Navy-Marine Corps court frequently reduced the severity of a punitive discharge and significantly lessened confinement and forfeitures.<sup>269</sup> The Air Force Court reduced confinement eleven-fold without meaningful explanation in one case and reduced the confinement by the maximum possible amount after disapproving a throwaway charge in another case with a dead victim.<sup>270</sup>

Second, where the courts did grant some other type of relief besides reassessment, the majority of those times it did so for post-trial delay where the court did not find the appellant was prejudiced by the delay. The four

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<sup>268</sup> See *supra* notes 29-53 and accompanying text.

<sup>269</sup> See *supra* notes 194-195 and accompanying text.

<sup>270</sup> See *supra* notes 235-237 and accompanying text.

service courts combined granted sentence appropriateness relief for post-trial processing delay fifty-seven times (plus twelve times for due process violations caused by untimely post-trial processing), compared to nineteen times for sentence severity and just one instance of sentence comparison. However, application of this power was again inconsistent. The Coast Guard Court of Criminal Appeals regularly granted significant sentence relief for minor post-trial delays without explaining how the delay rendered the sentence inappropriate. The Navy-Marine court granted meaningful relief in many cases, but due to the aforementioned Hobson's choice such cases present in an environment with rampant delays, it often held that absurdly long delays had no effect on the sentence. All the courts seemed to struggle with transplanting the sentence appropriateness concept to post-trial delay, with only the Navy-Marine Corps even attempting to lay out a coherent framework for analyzing when post-trial delay could affect a sentence's appropriateness.

Third, relief based on sentence comparison was granted in only one case, and even that represents a controversial exercise of the power in a two-to-one decision. Almost always, the courts easily disposed of such claims without even requiring the government to demonstrate a rational basis for sentence disparity. This was particularly true in cases where appellants attempted to demonstrate sentence inappropriateness based not on comparison with a co-actor's case, but by citing to other cases that merely contained similar misconduct in otherwise unrelated cases. Courts generally dispatched such claims by noting that the cases were not closely related and that so many variables exist in the disposition of cases to render any meaningful comparison impossible.

Finally, where the courts did grant relief for sentence severity, they generally did so with little or no analysis, simply finding that some portion of the sentence approved by the convening authority should not be approved. The Navy-Marine Corps court provided the best attempt at explaining its reasoning in sentence severity allegations, but even NMCCA lapsed into the same habit the other courts demonstrated of stating conclusions under the guise of the courts' experience and expertise rather than truly analyzing *why* a particular sentence should or should not be approved. Many of the decisions exuded a sense that since CCA sentence severity decisions are afforded such broad deference, the less said, the better.

As reviewed above, Congress and the drafters of the original UCMJ gave the CCAs sentence appropriateness to address one overriding concern with two main consequences. The overriding concern was that commanders wielded too much power in the court-martial process. The two consequences of this power were harsh and inconsistent sentences, and a diminution of the public's confidence in the military justice system.<sup>271</sup>

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<sup>271</sup> See *supra* notes 39-53 and accompanying text.

However, the CCAs' sentence appropriateness decisions reviewed here never expressed any consideration or concern about commanders improperly influencing members, establishing a climate where harsh sentences were encouraged, or even failing to take their clemency responsibilities seriously. This is no surprise, for the command climate that exists today is poles apart from the environment that spawned sentence appropriateness authority. In fact, it is not unreasonable to conclude that concerns about undue command influence over court members in sentencing have almost entirely disappeared. If undue command influence was a factor in any sentence appropriateness decision, the CCAs never addressed it. Nor should we expect them to have done so, since another, more effective mechanism exists for appellate defense counsel to address any such issue. The UCMJ prohibits unlawful command influence, specifically stating that no commander "may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court . . . ."<sup>272</sup> CAAF has demonstrated tremendous sympathy for unlawful command influence claims throughout the decades,<sup>273</sup> to the point where a commander today could never get away with any attempts – subtle or otherwise – to influence the sentencing authority. In any event, of the twenty cases CCAs granted relief on sentence severity or sentence comparison grounds, the majority (thirteen) were handed down by military judges, who are presumably free of any taint by a command environment. Sentence appropriateness decisions today evidence little to no concern over the role of commanders in the court-martial process.

As to the first of the two consequences of commanders' role in the military justice process which led to Article 66(c)'s enactment, certainly to some extent the service courts' sentence severity and sentence comparison decisions are intended to have some leveling effect on the military justice system as a whole. Sentence severity decisions are supposed to include considerations of uniformity and evenhandedness of sentencing decisions,<sup>274</sup> and there is no indication that the CCAs did not take this charge to heart. In a system that does not employ sentencing guidelines, perhaps allowing de novo review of sentences at the appellate level helps guard against at least some gross inconsistencies. Yet, one wonders how much uniformity

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<sup>272</sup> UCMJ art. 37(a) (2008).

<sup>273</sup> *See, e.g.*, *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010) (holding that military judge acted within her discretion in crafting a remedy to ameliorate effects of unlawful command influence but, although it was a close case, government did not demonstrate beyond a reasonable doubt that the remedy was actually carried out, despite the lack of a defense objection when trial resumed); *United States v. Bartley*, 47 M.J. 182, 186-87 (C.A.A.F. 1997) (noting that the court "has been diligent in guarding against unlawful command influence" and holding that it could not be convinced beyond a reasonable doubt that a command influence issue raised by a poster outside the office of the convening authority did not induce the appellant's guilty plea).

<sup>274</sup> *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999)).

concerns truly drive the service courts' sentence appropriateness decisions, especially given that when the matter came down to comparing cases before them with specific other adjudged sentences – sentence comparison – only one case led to any relief, and even that was a controversial two-to-one decision with ample evidence weighing against the decision to grant relief. In the areas in which sentence appropriateness relief has been most often granted – sentence reassessment and post-trial delay – it is difficult to see how concerns of uniformity and evenhandedness could play a role.

Relief for post-trial delay most directly implicates the other consequence of commanders' role in military justice – the importance of ensuring public confidence in the military justice system. In *Toohey*, CAAF recognized that excessive delays in post-trial processing may rise to the level of a due process violation based solely on the effect the delay could have on public confidence in the military justice system. CCAs struggled to transplant this concept to sentence appropriateness for post-trial delay, however. It does not seem to be a stretch to argue that use of sentence appropriateness authority for this purpose is analogous to placing a square peg in a round hole. Where appellants were unable to establish prejudice, CCAs were often understandably unwilling to provide relief. CCAs seemed to oscillate between granting broad relief for minor delays (the Coast Guard), and tolerating long delays up to a point without relief (the Navy-Marine Corps). The courts exhibited an enormous lack of consistency, which is not surprising since CAAF has never defined how an appropriate sentence can be transformed into an inappropriate one based solely on post-trial delay that does not prejudice the appellant. At the very least, the CCAs would benefit from CAAF setting forth criteria (as did the Navy-Marine court in *Brown*) that provide guidance on this point. Perhaps the CCAs' general struggles in this area reflect a recognition that just as post-trial delay can impair confidence in the military justice system, so too can awarding sentence relief to a convicted criminal who has not been prejudiced by the delay.

In the other areas of sentence appropriateness, if concern over the public's view of the military justice system played any role in the CCAs' analysis, it did not make its way into writing. Even the one case granting sentence comparison relief – a power NMCCA had previously held furthered public confidence in the military justice system – contained no discussion indicating public perception played a role in the decision. From a larger perspective, the mere knowledge that an appellate body has oversight over sentence appropriateness may provide a protection that strengthens public confidence in the system. However, it may be equally possible that having distant judges passing judgment on sentences imposed by those who heard the evidence (and previously reviewed by presumably trustworthy senior commanders) based on some unnamed experience-based “feel” that is essentially unreviewable may cause more harm to public confidence than

good. No other appellate court has sentence appropriateness power, and no one seems to worry about the public's perception concerning those systems.

Sentence appropriateness authority was, for the most part, utilized as a tool to abrogate the effect of legal error at trial by reassessing the sentence instead of requiring the government to conduct a rehearing. From a policy perspective, this has a certain appeal. CCAs find some legal error in dozens upon dozens of cases each year; requiring a rehearing in cases where the error has obviously had little effect on the sentence can be a waste of resources and a strain on organizations that are supposed to be focused on our nation's defense. However, the problem is that because sentence reassessment authority has been inherently linked with sentence appropriateness authority, the CCAs are encouraged to take the same sort of intuition-based, unreviewable approach to remedying legal error that they are authorized to take in the realms of sentence severity, sentence comparison, and post-trial delay sentence appropriateness decisions. A CCA's decision in remedying legal error should not be treated as an equitable matter, and there is no reason why CAAF should not be able to have meaningful authority to review such a decision for legal error. Granting *carte blanche* authority for a CCA to – in some instances – drastically reduce or totally disapprove confinement or to presume what sort of punitive discharge the sentencing authority would have granted is an extraordinary power, seemingly unrelated to the reasons Article 66(c) was enacted. Most cases of sentence reassessment were relatively uncontroversial, but the courts did decide a meaningful number of cases in which they undertook wholesale reassessment instead of remanding the cases for rehearings. The UCMJ placed sentencing decisions in the hands of military judges and court-martial members. Where a CCA undertakes extensive reassessment, it quite possibly invades the province of the sentencing authority, even though it has been granted the deference to choose to do so.<sup>275</sup>

It must be stressed that none of this analysis is intended to impugn the judges of the courts of criminal appeals, who are tasked with a tremendously difficult responsibility in the area of sentence appropriateness. The CCAs are in a no-win scenario here. Use sentence appropriateness too assertively and they run the risk of being accused of abusing their authority. Use it too little and they could be accused of shirking their statutory responsibility. Overall, the CCAs combined granted some form of sentence appropriateness relief in 280 cases out of 4059 total decisions, or less than 7

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<sup>275</sup> In addition, it bears noting that every appellant enjoys a robust clemency process beyond the convening authority and appellate levels. Article 74 of the UCMJ allows the service Secretary or a designee to remit or suspend any unexecuted part of a sentence, and it allows the Secretary to substitute an administrative discharge for an adjudged punitive discharge. In addition, each service maintains further opportunities for relief. The Air Force, for example, operates a clemency and parole board, a discharge review board, and a board for correction of military records, all of which offer the opportunity for convicted servicemembers to obtain additional relief.

percent of the time. It would be unwise to assert, based solely on this data, that the CCAs are rogue courts intoxicated with power. The focus of this article is not to criticize the CCAs' exercise of their broad discretion but to question whether in this day and age the grant of such broad authority is proper in the first place as a matter of policy. The question is all the more relevant when considering the resources that must be expended to raise and respond to sentence appropriateness issues on a frequent basis.

In the end, this study indicates that the courts of criminal appeals should no longer be granted sentence appropriateness authority. The courts have used this power inconsistently, and in a manner inapplicable to the reasons they were initially granted it. Just as concerning, the courts have shown a disturbing tendency to use Article 66(c) as a cloak to hide themselves from further appellate review. Sentence appropriateness authority has mostly been used in the sentence reassessment arena to decide what is essentially a legal issue – the effect of legal error upon sentences – placing such determinations essentially outside the scope of CAAF review. This situation hinders CAAF from exercising the type of supervisory oversight the superior court is supposed to exercise over the entire military justice system, including the courts of criminal appeals.<sup>276</sup> The courts of criminal appeals' common use of sentence appropriateness authority to remedy post-trial delay has discouraged the CCAs from utilizing the more appropriate due process framework; many decisions involving post-trial delay issues skipped right past the due process framework to sentence appropriateness.<sup>277</sup> Similarly, CCAs are prodded down the path of least resistance in sentence severity determinations, since a decision that says little essentially cannot be reviewed while a more substantive decision risks an inaccuracy that could allow greater CAAF review. The superficial analysis displayed in most sentence severity decisions (with the general exception of the Navy-Marine Corps court) indicates that sixty years after the enactment of Article 66(c), courts of criminal appeals have resorted to summary conclusions as a substitute for legal analysis. From using sentence appropriateness where another framework would be more appropriate to relying on intuition and conclusion instead of analysis, Article 66(c) sentence appropriateness authority has encouraged a sort of “judicial minimalism” in the courts of criminal appeals. Sometimes “judicial minimalism” is appropriate,<sup>278</sup> but where, as here, courts are encouraged to say as little as possible merely to avoid further appellate review, one can hardly argue that the lack of analysis is somehow beneficial.

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<sup>276</sup> See, e.g., Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 65-69 (2000) (discussing the concept of CAAF's supervisory jurisdiction over the military justice system).

<sup>277</sup> See *supra* notes 137-149, 189-190, 224-234, and 256-264 and accompanying text.

<sup>278</sup> See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (setting forth the principle of “judicial minimalism” and asserting that such an approach is sometimes, but not always, appropriate).



## VI. CONCLUSION

The time has come to take a good, hard look at whether the courts of criminal appeals should continue to possess sentence appropriateness authority. This study supports the conclusion that the courts should no longer wield such power. Sentence appropriateness decisions today bear little evidence that the service courts are using this power to counter the effects of undue command influence over sentences or even to promote uniformity in sentences or public confidence in the military justice system. Rather, sentence appropriateness authority is often based more off feel, experience, and unstated analysis, perhaps because CAAF cannot second-guess decisions that may not contain significant analysis, but at least do not demonstrate error. Appellants may receive relief in a limited number of cases, but often no one apart from the CCA judges truly knows why. Many questions are left unanswered by such decisions. Why is a given sentence (often imposed by a military judge) inappropriately severe, particularly when the appellant cannot point to a closely related case with a highly disparate sentence? Why is a sentence that was appropriate transformed into an inappropriate one by virtue of unreasonable post-trial delay, even though the appellant cannot demonstrate prejudice? Why is dramatic sentence relief appropriate instead of a sentence rehearing, and how could the court possibly know what a military judge or members would have done absent the error?

The courts of criminal appeals have discretion no other appellate court possesses, including the unique status of possessing more authority than their superior court. They were given this authority for good reasons, but time and circumstances seem to have altered, alleviated or outright eliminated these concerns. Why, then, should the CCAs continue to possess this power?

Providing relief is all well and good. However, without tying such relief to a specific anchor, such as the concerns that led to sentence appropriateness authority in the first place, relief seem to randomly flow down, like the rewards in some of B.F. Skinner's operant conditioning experiments with animals.<sup>279</sup> This may please the appellants who happen to

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<sup>279</sup> In 1948, Skinner published a paper in the *Journal of Experimental Psychology* called "Superstition in the Pigeon," detailing his conditioning experiments with pigeons. Skinner would keep the pigeons in a box and deliver food "at regular intervals with no reference whatsoever to the bird's behavior." Sally Jenkins, *New York Jets Are Among the Playoff Leaders in Superstitious Traits*, WASH. POST.COM, Jan. 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104603.html> (last visited Aug 20, 2010). Skinner discovered that his pigeons began to associate the delivery of the reward with whatever actions they were performing as the food was delivered. Sally Jenkins, *The Superstition Bowl*, WASH. POST, Jan. 22, 2010 (Business Section); B.F. Skinner, *Superstition in the Pigeon*, J. EXPERIMENTAL PSYCHOL., Vol. 38(2), 168 (1948).

receive relief , but it does little to satisfy the congressional concerns that led to sentence appropriateness authority in the first place, and it actually may do more harm to the public perception of the military justice system than good. In an age where sentence appropriateness decisions are not tied to concerns about command influence, sentence uniformity, or public perception of the military justice system, Article 66(c)'s "should be approved" language no longer provides sufficient structure. Either the CCAs should be given a more specific, reviewable sentence appropriateness charge that may be applied more uniformly, or they should be stripped of this power altogether. If no other court has sentence appropriateness power, and if the courts of criminal appeals no longer have a good reason for their unique status, then it is time to bring the military courts of criminal appeals in line with their fellow appellate courts.



CICA STAYS REVISITED: KEYS TO SUCCESSFUL OVERRIDES

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## I. INTRODUCTION

Three years ago, we published an article in the *Air Force Law Review*<sup>1</sup> to provide practical advice to Air Force contracting decision makers and reviewers regarding mandatory, automatic stays of award or performance pursuant to the Competition in Contracting Act (CICA) of 1984.<sup>2</sup> CICA provides for the automatic stay of a contract award and suspension of performance of a newly awarded contract after the timely filing of a bid protest at the Government Accountability Office (GAO) and notice to the procuring agency.<sup>3</sup> Agencies must withhold contract award when they receive notice of a protest from GAO before contract award, and suspend performance of an awarded contract when GAO notifies them within ten calendar days of the contract award date or within five days of a required debriefing.<sup>4</sup>

Although the “CICA stay” is automatic, there are narrow ways around it. Under both CICA and the Federal Acquisition Regulation (FAR), agencies may override a CICA stay if they meet certain defined circumstances. If the protest is in the pre-award stage, an agency may only override the stay where “urgent and compelling circumstances that significantly affect interest of the United States will not permit waiting for the decision of the Comptroller General.”<sup>5</sup> If the protest comes post-award, the urgent and compelling circumstances standard still applies, but CICA adds an alternative “best interests” standard as well. Under the “best interests” standard, an agency may override the stay “upon a written finding that performance of the contract is in the best interests of the United States.”<sup>6</sup>

In the original article, we showed how, in the beginning, CICA stay overrides had become so common that it appeared that the exceptions were swallowing the rule. Agencies commonly justified an override with procurement circumstances that did not present truly urgent, compelling, or sufficiently significant Government interests, as least not as the courts interpreted and applied those standards. As a result, a protester (frequently

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<sup>1</sup> Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 A.F. L. Rev. 91 (2007). Maj Dennis Ehlers retired from the U.S. Air Force Reserve in 2008. When discussing the previous article, “we” refers to Maj Wilkinson and Maj Ehlers; in the context of this article, it refers to the current authors. However, for ease of reading, we will not differentiate between the two in the body of the text.

<sup>2</sup> 31 U.S.C. §§ 3551-56 (2007).

<sup>3</sup> *Id.* at § 3553.

<sup>4</sup> See Wilkinson & Ehlers, *supra* note 1, at 92 (text and accompanying notes).

<sup>5</sup> 31 U.S.C. § 3553(c)(2)(A); see also FAR 33.104(b)(i). The finding must also include that “[a]ward is likely to occur within 30 days of the written finding.” FAR 33.104(b)(ii).

<sup>6</sup> 31 U.S.C. § 3553(d)(3)(C); FAR 33.104(c)(2). The agency must first notify GAO before it can proceed with performance.

the incumbent) often turned to the only avenue of relief available and filed suit in federal court alleging a CICA violation. Faced with obvious examples of Government overreaching in CICA stay overrides, the courts did not hesitate to prevent agencies from awarding or continuing the performance of an awarded contract where the court found the agency's justification for an override decision to be weak or unsupported.

Since our article was published, we have received numerous requests from fellow military and civilian practitioners of government contract law to provide updates, if any, to CICA stay jurisprudence. Seven published opinions addressing CICA stays provide exclamation marks to our existing recommendations and expressly address other areas of emphasis. These recent cases all highlight the need for thorough, objective decision making in the CICA stay override process.<sup>7</sup>

In Section II, we will set the context for this article, addressing the cases that, beginning in 2006, further defined CICA stay requirements. As we noted in our original article, our practical tips were not stand-alone factors; rather they overlapped and were intertwined. Therefore, we will not distinguish between whether these "new" factors are additional factors or subfactors to our previously articulated factors for consideration or simply amorphous concepts that span multiple factors or inherent assumptions. In Section III, we set forth observations and recommendations based on the 2007 to 2009<sup>8</sup> case law. Finally, in Section IV we conclude that the current state of unsettled law and court analyses surrounding CICA stay overrides requires extremely comprehensive analysis and thorough documentation. We further conclude that properly tailored bridge contracts<sup>9</sup> may therefore provide a stronger and better alternative for maintaining necessary services, thereby preserving the spirit and intent of CICA while ensuring needed services continue while the stay is pending.

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<sup>7</sup> For an excellent review of CICA stay case law and "lessons to be learned," see Kara M. Sacilotto, *Is the Game Worth the Candle? The Fate of the CICA Override*, 45 *PROCUREMENT LAW* 3 (Fall 2009); see also Jason P. Matechak, Lawrence S. Sher, & Steven D. Tibbets, *GAO Protestors: Stand Up for Your Right to a Stay of Performance*, 22 *ANDREWS GOV'T CONT LITIG. REP.* No. Issue 17 (Dec. 29, 2008).

<sup>8</sup> At the time of article submission, there were no published CICA stay cases in 2010.

<sup>9</sup> A bridge contract is generally a stop-gap measure to fill a temporary need for services and is a crucial part of government contracting. See RALPH C. NASH, JR. ET. AL., *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 71 (2007).

## II. BACKGROUND

### A. The Year the Courts Pushed Back: 2006

2006 was a watershed year for CICA stay override cases. The U.S. Court of Federal Claims (COFC) overturned four CICA stay overrides.<sup>10</sup> In a fifth override-related case, the court let the agency's override stand, but only after the agency's third attempt at demonstrating that the contract at issue involved "interests of national defense and national security."<sup>11</sup> Before 2006, the history of CICA stay jurisprudence in the federal courts was deferential to the agency, and sustaining agency overrides was the rule more than the exception.<sup>12</sup>

Most notable among the 2006 cases is *Reilly's Wholesale Produce v. United States*. In *Reilly's*,<sup>13</sup> Judge Allegra distilled from prior COFC cases the "relevant" factors—*i.e.*, factors the agency "must consider" and address when considering an override decision—and those that are "off-limits"—*i.e.*, "irrelevant."<sup>14</sup> The "must consider" factors include:

- (i) whether significant adverse consequences will necessarily occur if the stay is not overridden; (ii) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented; (iii) how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs; and (iv) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.<sup>15</sup>

Judge Allegra's two "irrelevant" factors are (i) that the new contract would be better than the old one, and (ii) that the agency would prefer override and continuation of the contract.<sup>16</sup> As noted, for its override decision to be upheld, the agency must not only sort through relevant and irrelevant factors, addressing the relevant ones; it must also base its decision

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<sup>10</sup> *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705 (Allegra, J., 2006); *Automation Tech., Inc. v. United States*, 72 Fed. Cl. 723 (Horn, J., 2006); *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25 (Baskir, J., 2006); *Cigna Gov't Servs., LLC v. United States*, 70 Fed. Cl. 100 (Williams, J., 2006).

<sup>11</sup> *Maden Tech Consulting, Inc. v. United States*, 74 Fed. Cl. 786, 792 (Braden, J., 2006).

<sup>12</sup> See Wilkinson & Ehlers, *supra* note 1, at n.13 and accompanying text.

<sup>13</sup> The *Reilly's* case was the impetus behind our initial 2007 article.

<sup>14</sup> *Reilly's Wholesale Produce*, 73 Fed. Cl. at 710-711.

<sup>15</sup> *Id.* at 711 (citations omitted).

<sup>16</sup> *Id.* (citations omitted).

and findings on the relevant factors that do not “run[] counter to the evidence before the agency.”<sup>17</sup> The court did note that some of the cases it cited for the factors that are legally relevant and irrelevant were cases in which the agency override decision was based upon the “best interests” standard. However, “in the court’s view, the rationale employed in those cases has, where indicated, application to the review of an override decision based upon urgent and compelling circumstances.”<sup>18</sup>

We took issue with the court’s conclusion that prior cases established “irrelevant factors” that agencies could not consider.<sup>19</sup> We concluded that case law supported the finding that such factors *alone* did not justify an override,<sup>20</sup> and if these two factors were the *only* considerations in support of an override decision, they may not be sufficient. We recommended that agency override deliberations include careful, thorough, and objective consideration of all factors, including the so-called irrelevant factors.

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<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> *Id.* at 711 n.10.

<sup>19</sup> Wilkinson & Ehlers, *supra* note 1 at 104-105. Other commentators also expressed concern for such a “broad” and “inflexible” interpretation. See Michael F. Mason & Christopher G. Dean, *Living the Life of Reilly’s: Recent U.S. Court of Federal Claims Decisions Highlight Need for Improved Regulatory Guidance in CICA Override Determinations*, 87 FED. CONT. REP. (BNA) 90 (Jan. 23, 2007). But see Paul E. Pompeo, Feature Comment, *Establishing Trends in Override Case Law*, 49 No. 9 GOV’T CONT. ¶ 87, 4 (Mar. 8, 2007) (warning that “[i]n proving these factors, the Government must be wary to issue a complete D&F addressing the approved factors and *avoiding the others*” (emphasis added)). A “D&F” is a “Determination and Findings,” which is “special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions.” GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.701 (July 2010) [hereinafter FAR]. In this case, the “determination” that an override is justified must be supported by “findings” of fact or rational that cover each requirement. See *id.*

<sup>20</sup> Wilkinson & Ehlers, *supra* note 1, at 105. In note 75, we observed:

In *Automation Technologies*, Judge Horn found that a \$103,000 per month savings on a five-year \$46.6 million contract did not warrant overriding the stay. 72 Fed. Cl. 723, 730 (2006). However, she expressly stated that “cost savings may be sufficient to support an override in the proper case.” *Id.* But the savings must be balanced against other factors, “including the ramifications of an agency loss in the GAO protest.” *Id.* In *Cigna*, Judge Williams stated that “[t]he prospect of newer, better contracts is not itself a sufficient basis to override a stay.” 70 Fed. Cl. 100, 113 (2006). In *Advanced Sys. Dev.*, Judge Baskir found the fact that “the new contract is better than the old one in terms of cost or performance is not enough to justify a best interests determination.” 72 Fed. Cl. 25, 31 (2006). Therefore, it appears unlikely that these factors will be treated as “broadly and inflexibly” as Judge Allegra’s opinion may suggest. However, they are two of several factors to consider.

*Id.* at note 75.



## B. COFC Cases 2007 to Present

Over the last three years seven published COFC opinions involved CICA stay overrides: *Superior Helicopter v. United States* (2007),<sup>21</sup> *EOD Technology v. United States* (2008),<sup>22</sup> *e-Management Consultants v. United States* (2008),<sup>23</sup> *Nortel Government Solutions v. United States* (2008),<sup>24</sup> *Access Systems v. United States* (2008),<sup>25</sup> *PlanetSpace v. United States* (2009),<sup>26</sup> and *Analysis Group, LLC v. United States*.<sup>27</sup> CICA stay override cases directly involving the Air Force are almost nonexistent, and we hope this is because past Air Force decisions were handled correctly - decisions to override stays were so strong legally that protesters did not challenge the overrides, or because the government left automatic stays in place because the legal basis to override was shaky.<sup>28</sup>

The seven cases mentioned above show mixed results when the Government attempts to override a CICA stay. In *e-Management Consultants*, *Superior Helicopter*, and *Nortel Government Solutions*, the court found against the Government, holding in each case that the Government's decision to override was arbitrary, capricious, and contrary to law. In *e-Management*, the National Highway Traffic Safety Administration (NHTSA) justified its override by claiming that continuing with the contract was within the Government's best interests. The court methodically went through each of the *Reilly's* factors and found that the Government had not passed the test.<sup>29</sup> The court in the other cases, *Superior Helicopter* and *Nortel Government Solutions*, came to similar conclusions, again relying on a thorough analysis of the *Reilly's* factors to determine whether the Government complied with the law. In each case, the court found that the Government had failed to meet all of the factors, noting in *Nortel Government Solutions* that "[f]ailure by an agency to consider just one of these factors is fatal to an override decision based on urgent and compelling circumstances."<sup>30</sup>

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<sup>21</sup> *Superior Helicopter v. United States*, 78 Fed. Cl. 181 (Lettow, J., 2007).

<sup>22</sup> *EOD Tech. v. United States*, 82 Fed. Cl. 12 (Lettow, J., 2008).

<sup>23</sup> *e-Mgmt. Consultants v. United States*, 84 Fed. Cl. 1 (Hewitt, J., 2008).

<sup>24</sup> *Nortel Gov't Solutions v. United States*, 84 Fed. Cl. 243 (Futey, J., 2008).

<sup>25</sup> *Access Sys. v. United States*, 84 Fed. Cl. 241 (Bruggink, J., 2008).

<sup>26</sup> *PlanetSpace v. United States*, 86 Fed. Cl. 566 (Hodges, J., 2009).

<sup>27</sup> *Analysis Group, LLC*, No. 09-542C, Nov. 5, 2009 (Smith, J., 2009).

<sup>28</sup> We also hope that our advice may have contributed to thorough analysis and correct decisions. Although the authors have learned anecdotally that the article has been a valuable reference tool to some Air Force practitioners, we imagine that the hoped-for impact of our practical advice is more wishful thinking than empirically confirmed.

<sup>29</sup> In response to one of the 2008 cases, *e-Management Consultants*, commentators heralded the plaintiff's victory and made a clarion call for GAO protestors to stand up for their rights to a stay of performance. See Matechak et al, *supra* note 7. Two of the authors, Mr. Matechak and Mr. Sher, were counsel and of counsel for plaintiff in the case.

<sup>30</sup> *Nortel Gov't Solutions*, 84 Fed. Cl. at 247 (2008).

On the other hand, in three other cases, *EOD Technology*, *PlanetSpace*, and *Analysis Group*, the court sided with the Government and upheld the Government's decision to override the CICA stay.<sup>31</sup> Contrary to *EOD Technology*, the *PlanetSpace* court specifically ignored the *Reilly's* factors, saying, "We did not consider the *Reilly's*<sup>32</sup> factors at the hearing because Congress limited the court's review of an agency's decision in a CICA override action to the Administrative Procedure Act standards."<sup>33</sup> This was followed by the October 2009 *Analysis Group* case in which the court listed the "four *Reilly* factors" and stated "while these four additional factors may be helpful in analyzing the agency's override decision, they are not dispositive."<sup>34</sup> The court cited *PlanetSpace*, following its holding that "when considering injunctive relief in override cases, the Court should only apply the APA four-factor test for injunctive relief and not the additional four *Reilly* factors."<sup>35</sup>

These cases make clear (whether the override is upheld or not) that the analytical approaches cross the spectrum. They range from the assertion of strict APA review and express rejection of any consideration of the *Reilly's* factors, (*PlanetSpace* and *Analysis Group*) all the way to considerably heightened scrutiny and the full application of the *Reilly's* factors (*Superior Helicopter* and *Nortel Government Solutions*). As we acknowledged in the 2007 article, the outcome seems to rest largely on which judge has been assigned to the case. The lack of unified precedence among COFC cases seems to prompt "luck of the draw" decisions, although

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<sup>31</sup> Note that *Access Systems* was not an override case but a challenge to a bridge contract as tantamount to an override. The court found that the bridge contract was not the functional equivalent of an override because it did not disturb the status quo with respect to the original contract. *Access Systems*, 84 Fed. Cl. at 243.

<sup>32</sup> The courts sometimes refer to the case as "*Reilly*" and to the factors as the "*Reilly* factors." We view "*Reilly's*" as the more correct shortened reference but leave direct quotes unchanged.

<sup>33</sup> *PlanetSpace, Inc.*, 86 Fed.Cl. 566, 567 (2009). The Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, provides for judicial review of government agency action. In short, the courts may

"hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

*Id.* at 706.

<sup>34</sup> *Analysis Group*, No. 09-542 at 4.

<sup>35</sup> *Id.* "This Court agrees. Even so, if the Court applied the *Reilly* factors in this case, it is clear that [the agency] justified its override of the stay." *Id.*

there have been no appeals of the COFC decisions and no demand in academic circles for the Court of Appeals for the Federal Circuit to lay the factors to rest.<sup>36</sup>

### III. RECOMMENDATIONS REVISITED IN LIGHT OF MORE RECENT CASE LAW

In light of the 2006 cases, we labeled our advice as “keys to ensuring overrides are reasonable, supportable, and less vulnerable to attack” and heavily footnoted our observations and recommendations with case law. For brevity’s sake, this section only refers practitioners to the previous article for a complete recitation of our findings and recommendations (“keys”). This section supplements such advice and gives cites back to the relevant section of the previous article.

#### A. Issues Involving National Security<sup>37</sup>

The agency should assert interests of national defense and national security when they are present; however, be sure not to overstate the interest, because the courts are clearly wary when this assertion is made and demand that the record back it up. Also remember that all other issues pertaining to overrides must be addressed as well.

The courts give legitimate interests of national security and national defense significant weight. In *EOD Technology*, which involved vital contract working dog (CWD) services in Afghanistan,<sup>38</sup> the court noted up front that “the action was heavily infused with national-security concerns, of an immediate tactical nature.”<sup>39</sup> Of course, Judge Hewitt also emphasized that “the all too evident national-security considerations here present no bar to the court’s exercise of jurisdiction.”<sup>40</sup> He noted, “When considering national security interests in procurement cases, the court has typically done so in determining whether to provide injunctive relief *after exercising jurisdiction adjudicating the merits*. . . . The court must balance national security concerns with the ‘overriding public interest in preserving the

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<sup>36</sup> See Wilkinson & Ehlers, *supra* note 1, at n. 32. We were specifically referring to whether a judge would apply the elements of injunctive relief. However, from CICA stay case law we can see that “luck of the draw” decisions may also extend to other such elements as review of national security cases on the merits, application of *Reilly’s* factors, or application of CICA stay to bridge contracts.

<sup>37</sup> See Wilkinson & Ehlers, *supra* note 1, at nn. 60-64 and accompanying text.

<sup>38</sup> *EOD Tech. v. United States*, 82 Fed. Cl. 12, 12-13 (Lettow, J., 2008) (“Contract working dogs are used by Special Forces teams to detect improvised explosive devices (‘IEDs’) and narcotics and to deal with terrorists and other combatants forces.”).

<sup>39</sup> *Id.* at 13.

<sup>40</sup> *Id.* at 18.

integrity of the procurement process by requiring the government to follow its procurement regulations.”<sup>41</sup>

In *Nortel Government Solutions*, the court recognized that the Drug Enforcement Agency was “essentially asserting a national security argument regarding the necessity of the override.”<sup>42</sup> As it did with *EOD Technology*, the *Nortel Government Solutions* court balanced the impact of the override on competition and the integrity of the procurement system with the asserted national security concerns. This time, however, the court found that “the record fail[ed] to demonstrate that abiding by the CICA stay [would] compromise the safety and welfare of agency personnel.”<sup>43</sup> The court quoted *Superior Helicopter*, saying, “Ultimately, the public’s interest in a fair, competitive federal procurement system outweighs unsubstantiated claims, even those related to the public safety.”<sup>44</sup>

Even where a court rules in the agency’s favor regarding issues of national security, it does not give the agency not carte blanche. Although the national security concerns in *EOD Technology* were of “an immediate tactical concern” and “all too evident,” and the court declined to preliminarily enjoin the override of the automatic stay, the court nevertheless prohibited the Army from extending the six-month bridge contract with the awardee on a sole-source basis. “For additional CWD requirements, the Army must consider [the protester] and other potential suppliers of CWD services, absent exigent circumstances.”<sup>45</sup>

In *Analysis Group*, the court did not expressly address “national security” nor does the decision make clear that the agency asserted such basis the “significant adverse consequences” criterion. The agency determined that

significant lapses in the continuous services provided would be comprised, such as its ongoing international treaties, health and welfare of military personnel, H1N1 virus planning, troop deployments, air flight planning for military operations in Afghanistan and similar locations, Air Force Counter-Radiological Warfare capabilities, and the implementation of toxins handling procedures and recommendations.<sup>46</sup>

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<sup>41</sup> *Id.* (emphasis added). “Although the government has cited [*Kropp Holdings* and *Maden Tech Consulting*] as decisions indicating that a case may involve such strong interests of national security that this court may decline to exercise jurisdiction, even assuming that they are correct, may be distinguished from this case.”

<sup>42</sup> *Nortel Gov’t Solutions v. United States*, 84 Fed. Cl. 243, 251 (Futey, J., 2008).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *EOD Tech. v. United States*, 82 Fed. Cl. 12, 22 (Lettow, J., 2008).

<sup>46</sup> *Analysis Group*, No. 09-542 at 4.

The court found the agency's "decision—that significant adverse consequences would likely occur absent to override—was not an unreasonable conclusion."<sup>47</sup>

Again, a word of caution: justifications cited as "interests of national defense and national security" must be legitimate, significant—paramount to the procurement itself—and above all supported by the record. Do not overstate or make bald assertions that the record cannot support.

## B. Supplementing the Administrative Record<sup>48</sup>

### 1. *Contemporaneous Documentation*

Some of the recent cases addressed supplementing the administrative record, usually with discouraging results for the Government. The *e-Management Consultants* court decided that "in an override case 'the focal point of judicial review should be the administrative record already in existence.'"<sup>49</sup> The court denied the agency's request to add to the record with Supplemental Declarations, finding that "the information contained in the [administrative record] and [override memorandum] is sufficient for this court to conduct 'meaningful judicial review.'"<sup>50</sup> The court also found that "the Supplemental Declarations [were] written, intentionally or not, with the perspective obtained through the 'lens of litigation'"<sup>51</sup> and so should be treated with skepticism.

Similarly, in *EOD Technology*, the Government unsuccessfully tried to submit a post-hearing declaration after the court raised questions about the sole-source nature of a bridge contract. The court noted that the reasons had not appeared in the agency's prior memoranda. "Accordingly, the [contracting officer's] reasons . . . must be examined with a critical eye."<sup>52</sup> The court also cited the Supreme Court, stating "a reviewing court must critically examine any *post hoc* rationalization."<sup>53</sup>

Finally, in *Nortel Government Solutions*, the Government tried to enter documents for the first time at oral argument. Over plaintiff's "strenuous objection," the court allowed the exhibits but warned that it would "value

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<sup>47</sup> *Id.*

<sup>48</sup> See Wilkinson & Ehlers, *supra* note 1, at 111-12.

<sup>49</sup> *e-Mgmt. Consultants v. United States*, 84 Fed. Cl. 1, 11 (Hewitt, J., 2008). Interestingly, the court did not cite or refer to other CICA stay override cases that addressed and denied requests to supplement the administrative record. It did, however, turn to cases from the Court of Appeals for the District of Columbia Circuit and Court of Appeals for the Federal Circuit, and non-procurement related cases in the Court of Federal Claims.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.*

<sup>52</sup> *EOD Tech. v. United States*, 82 Fed. Cl. 12, 21 (Lettow, J., 2008).

<sup>53</sup> *Id.*

the weight of each exhibit only as the Court deems appropriate.”<sup>54</sup> The court found “presentation of the exhibits problematic” and ultimately invalidated the override and reinstated the automatic stay.<sup>55</sup>

Finally, the record *must* substantiate the findings providing the basis for the override. In both *Nortel Government Solutions* and *e-Management Consultants*, the court noted that the agency-asserted significant impacts that would occur were “without support in the record.”<sup>56</sup> Additionally, an agency must “render findings . . . that do not ‘run[ ] counter to the evidence before the agency.’”<sup>57</sup> In *Superior Helicopter*, the court deemed the agency’s justifications as conclusory and ultimately rejected them because the administrative record did not support the rationale. The guarantee that the exclusive use contract would provide the required number of helicopters “might justify the override if the administrative record demonstrated that the [agency] would not be able to acquire sufficient helicopter services if remitted to reliance on CWN contracts, but . . . the administrative record contains *no such supporting data*.”<sup>58</sup> Thus, at all levels, reviewers must ensure the record contains accurate, supporting data.

## 2. *Supplementation by Plaintiffs or Intervenors*

The government cannot overlook the possibility that plaintiffs and intervenors may seek to supplement the administrative record. In *Superior Helicopter*, the court denied the plaintiff’s request to supplement the record with transcripts and declarations because they were “not before the [agency] as it made its determination to override the automatic stay, and consequently, the administrative record may not be properly submitted with them.”<sup>59</sup> In *Nortel Government Solutions*, however, the court allowed both plaintiff and intervenor supplement the administrative record with declarations. The court decided this supplementation “will assist the Court in conducting a ‘thorough, probing, in-depth’ review of the agency action.”<sup>60</sup> The Government must be prepared to address such requests but should expect that the court may not welcome “help” from intervenors without plaintiffs’ input as well.

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<sup>54</sup> *Nortel Gov’t Solutions v. United States*, 84 Fed. Cl. 243, 249 (Futey, J., 2008). Practitioners of government contract law, especially bid protests before the GAO, are familiar with this principle. “While we consider the entire record, including statements and arguments made in response to a protest in determining whether an agency’s selection decision is supportable, we accord greater weight to contemporaneous source selection materials rather than judgments, such as the selection officials’ reevaluation here, made in response to protest contentions.” *Boeing Sikorsky Aircraft, B-277263.2, B-277263.3*, Sept. 29, 1997.

<sup>55</sup> *Nortel Gov’t Solutions*, 84 Fed. Cl. at 249.

<sup>56</sup> *Id.* at 251.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 15 (emphasis added).

<sup>59</sup> *Superior Helicopter v. United States*, 78 Fed. Cl. 181, n.14 (Lettow, J., 2007).

<sup>60</sup> *Nortel Gov’t Solutions*, 84 Fed. Cl. at 247.

### C. Likelihood, Risks, and Costs of GAO Sustaining Protest<sup>61</sup>

All contracting officers would like to believe that GAO will deny any protest of their contract award decisions. However, if the contracting officers believed that in the four cases that went to GAO published decisions, two of them guessed wrong.<sup>62</sup> The agency must make an objective litigation assessment when deciding whether to override the CICA stay. Of course, if the decision to override is the first time in the acquisition process anyone has made such an assessment, it is probably too late. However, even an overdue litigation assessment can be useful where it leads to corrective action in the form of cancelling a solicitation or contract award. Another viable remedy may be a bridge contract, which is discussed in Section H below.

The agency *must* consider the costs associated with a sustained protest regardless of the “likelihood” of a sustained protest. As the court said in *Advanced Systems Development*, the agency cannot “ignore[] the possibility that the protest may have merit.”<sup>63</sup> The *Nortel Government Solutions* court also addressed deficiencies in an agency’s treatment of costs of a sustained protest, where it found that the agency had given “unacceptably brief treatment to the potential costs of a GAO recommendation sustaining the protest.”<sup>64</sup> The *Cigna Government Services* court slapped the agency for “not evaluat[ing] the ramifications of [the protester] prevailing on its protest at all—even in the most cursory fashion.”<sup>65</sup>

Agency consideration of the likelihood of prevailing on the merits may actually undercut the override itself. In *e-Management Consultants*, the agency’s override memorandum stated the costs of an override were low because the agency “has a reasonable chance of prevailing on the merits.”<sup>66</sup> The court found this “an impermissible consideration. This type of balancing would allow an agency to employ the very reasoning that CICA sought to prevent.”<sup>67</sup> So, however strong the agency’s case on the merits is or reasonably appears to be, agency officials must be careful to *always* consider the likelihood of losing at GAO and, even if the likelihood of a sustained protest is infinitesimally small, fully consider the costs associated with a sustained protest.

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<sup>61</sup> See Wilkinson & Ehlers, *supra* note 1, at 107-08.

<sup>62</sup> GAO sustained the protests in *Nortel Gov’t Solutions*, B-299522.5, B-299522.6, 2009 CPD ¶ 10 (Dec. 30, 2008), and *Access Sys.*, B-400623.3, 2009 CPD ¶ 56 (Mar. 4, 2009).

<sup>63</sup> *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 32 (Baskir, J., 2006); see also *Sacilotto*, *supra* note 7, at 3 (observing that success on the merits is largely irrelevant).

<sup>64</sup> *Nortel Gov’t Solutions*, 84 Fed. Cl. at 251. The GAO sustained the protest.

<sup>65</sup> *Cigna Gov’t Serv.*, 70 Fed. Cl. at 111.

<sup>66</sup> *e-Mgmt. Consultants v. United States*, 84 Fed. Cl. 1, 9 (Hewitt, J., 2008).

<sup>67</sup> *Id.* (emphasis added). The GAO ultimately dismissed one of *e-Management*’s complaints and denied the other on the merits. *Id.*

#### D. Use of *Reilly's* Factors

In 2007's *Superior Helicopter* and then in 2008's *EOD Technology*, Judge Lettow referenced *Reilly's* as the basis for considering the additional relevant factors under Administrative Procedures Act (APA) review.<sup>68</sup> In both cases, Judge Lettow advised, "The override determination may not be based simply on the agency's view that the new contract is better than the old one or that the agency simply prefers to override the stay rather than await GAO's decision."<sup>69</sup> In *EOD Technology*, Judge Lettow states: "When determining if an agency's override decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' courts have looked to the agency's consideration of factors that include" the *Reilly's* factors.<sup>70</sup> The *Nortel Government Solutions* and *e-Management Consultants* courts also reference the *Reilly's* factors. In *Nortel Government Solutions*, Judge Futey stated, in no uncertain terms, "Failure of an agency to consider just one of these factors is fatal to an override decision based on urgent and compelling circumstances."<sup>71</sup> Regarding best interests of the United States determinations, Judge Futey declared that "there must be some rationale asserted by the agency that is above and beyond its original purpose when it solicited bidders for the procurement, and 'that absolves the agency of its obligation to await the GAO's recommendation.'"<sup>72</sup>

The three other post-2006 cases did not apply the *Reilly's* factors. In *Access Systems*, the court found that a bridge contract was not a de facto override. Because the court therefore did not have to reach the merits of an override," the court dismissed the complaint.<sup>73</sup> In the two published override cases of 2009, *PlanetSpace* and *Analysis Group*, the judges expressly rejected consideration of the "four additional '*Reilly* factors.'" The *PlanetSpace* court stated,

Plaintiff offered arguments regarding four factors courts normally consider in deciding whether to grant an injunction. It contended that [the agency] did not consider

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<sup>68</sup> See *Superior Helicopter v. United States*, 78 Fed. Cl. 181, 189 (Lettow, J., 2007); *EOD Tech. v. United States*, 82 Fed. Cl. 12, 20 (Lettow, J., 2008).

<sup>69</sup> See *EOD Tech.* 82 Fed. Cl. at 20 (citing *Reilly's*, 73 Fed. Cl. at 711 (apparently agreeing with conclusion that the fact that the new contract is better than the old one is completely irrelevant)); *Superior Helicopter*, 78 Fed. Cl. at 11.

<sup>70</sup> *EOD Tech.*, 82 Fed. Cl. at 19-20.

<sup>71</sup> *Nortel Gov't Solutions v. United States*, 84 Fed. Cl. 243, 247 (Futey, J., 2008). Although the court does not adopt an "irrelevant," must not consider approach, it does find that the agency's assertions with regard to the necessity of the override amount to nothing more than defendant's strong preference to begin performance of the protested contract" and similarly-asserted cost savings had been found insufficient to support a best interests override. *Id.* at 252.

<sup>72</sup> *Id.* at 247-248.

<sup>73</sup> *Access Sys. v. United States*, 84 Fed. Cl. 241, 243 (Bruggink, J., 2008).



four additional ‘*Reilly* factors’ in making its decision. We did not consider the Reilly [sic] factors at the hearing because Congress limited the court’s review of an agency’s decision in a CICA override action to the Administrative Procedures Act standards.<sup>74</sup>

*PlanetSpace* is clearly inconsistent with the other four cases that reached the merits of the override, whereas *Analysis Group* acknowledges *Reilly*’s factors are “helpful” but states they are “not dispositive.” The “*Reilly*’s factors” moniker is arguably a misnomer. These factors were considerations of prior courts, and Judge Allegra merely consolidated and applied them. However, since *Reilly*’s, the courts addressing the factors have required that agencies consider *all* four of the relevant factors to pass judicial scrutiny. The most recent COFC cases, however, suggest limits to the factors’ usefulness. Despite the recent case law, agencies fail to consider these factors at their own risk.

#### E. Reasonable Alternatives<sup>75</sup>

The courts continue to reiterate that they will not substitute their judgment for the agency’s. “In conducting a review under [the APA] standards, the court may not ‘substitute its judgment for that of the agency,’ and may overturn an agency’s decision only if ‘the procurement official’s decision lacked a reasonable basis; or . . . the procurement procedure involved a violation of regulation or procedure.’”<sup>76</sup> Additionally, “[t]he test for whether a decision was made on a rational basis is ‘whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.’”<sup>77</sup>

Thus, provided the agency offers a coherent and reasonable explanation, the courts appear to be more concerned that the agency considered and ruled out all other options rather than the agency’s ultimate decision. In *Superior Helicopter*, the court stated that “the [agency’s] failure to evaluate an alternative provided in the contracts substantially undercuts the agency’s override decision.”<sup>78</sup> In *EOD Technology*, the court found the agency’s reasoning “at least partially deficient” because the agency failed to consider multiple contract awards.<sup>79</sup> The court thus prohibited the agency from continuing its sole source contract with the

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<sup>74</sup> *PlanetSpace v. United States*, 86 Fed. Cl. 566, 567 (Hodges, J., 2009).

<sup>75</sup> See *Wilkinson & Ehlers*, *supra* note 1, at pp. 106-07.

<sup>76</sup> *Superior Helicopter*, 78 Fed. Cl. at 187 (quoting Keeton); see also *e-Mgmt*, 84 Fed. Cl. at 4 (“reviewing court may not substitute its judgment for that of the agency”).

<sup>77</sup> *e-Mgmt. Consultants v. United States*, 84 Fed. Cl. 1, 4 (Hewitt, J., 2008) (quoting *Impreza Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir 2001)).

<sup>78</sup> *Superior Helicopter*, 78 Fed. Cl. at n.24.

<sup>79</sup> *EOD Tech. v. United States*, 82 Fed. Cl. 12, 22 (Lettow, J., 2008).

awardee and instead directed the agency to consider all potential suppliers “absent exigent circumstances.”<sup>80</sup> In *Nortel Government Solutions*, the court found that current bridge contracts were a reasonable alternative and noted the agency “failed to even consider *whether* reasonable alternatives to the override *exist*.”<sup>81</sup>

If one or more reasonable alternatives exist or appear to exist, the agency must show the significant adverse effects avoided by overriding the stay rather than choosing an apparently reasonable alternative. Recent cases maintained the “zone of acceptable results” language articulated in *Reilly’s*. It is not necessarily a zone of “only *one* acceptable result” if the agency’s decision is to override the stay, although it is a narrow zone.<sup>82</sup> According to Judge Hewitt in *e-Management Consultants*, “If the agency had reasonable alternatives to engaging the awardee, adverse consequences to the agency’s mission would not necessarily result from the stay.” That said, Judge Hewitt then noted that evidence in the administrative record “indicates that there may have been reasonable alternatives and NHTSA choose [sic] not to pursue them. This decision could be considered ‘arbitrary and capricious.’ Nevertheless, *it is possible that the discussion about alternatives in the [override memorandum] fits into the ‘zone of acceptable results.’*”<sup>83</sup>

The court failed to dispose of the case at that point of its analysis (where other reasonable alternatives existed but were not chosen) and turned to the cost-benefit analysis. The court appears to allow for reasonable alternatives to exist if the agency performed a proper cost-benefit analysis: “If, after considering reasonable alternatives, an agency believes that significant adverse consequences will result if the stay is not overridden, then the ‘benefit’ variable to be used in the calculation is the benefit of *avoiding* the significant adverse consequences.”<sup>84</sup>

Independent, objective review during the override decision making process is essential. For this reason, decision makers and reviewers/advisors must become intimately familiar with the current status of automatic stay override case law. This familiarity with the standards and with objective review must start at the “bottom” with the contracting officers and their documentation, because this serves as the basis for the “higher-ups” ultimate override decision.

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<sup>80</sup> *Id.* at 23.

<sup>81</sup> *Nortel Gov’t Solutions v. United States*, 84 Fed. Cl. 243, 251 (Futey, J., 2008) (emphasis added).

<sup>82</sup> According to *Reilly’s*, the bridge contract to the awardee should have been viewed as “a last resort, undertaken only after all reasonable alternatives were fully explored.” *Reilly’s*, 73 Fed. Cl. at 715.

<sup>83</sup> *e-Mgmt.*, 84 Fed. Cl. at 8.

<sup>84</sup> *Id.* at 9. Emphasis added or in original

## F. Cost-Benefit Analysis and Impact on Federal Procurement System<sup>85</sup>

Recent cases point to particular costs and benefits that the agency must be considered as well as some costs and benefits that it should *not* be considered as part of the cost-benefit analysis. The *e-Management* court addresses a variety of government-asserted costs and benefits. First, the benefits of override must be those that avoid the significant adverse consequences of the other reasonable alternatives.<sup>86</sup> Second, a decision that the cost of override was low because the agency had “a reasonable chance of prevailing on the merits” was impermissible and “would allow an agency to employ the very reasoning that CICA sought to prevent.”<sup>87</sup> Third, “avoiding ‘termination costs’ and uninterrupted performance beyond the calendar year”<sup>88</sup> are not the sorts of benefits envisioned in the cost-benefit calculation.<sup>89</sup> Fourth, while not technically a “cost,” the agency decision *must* show it considered the impact of the override on the procurement system—which the court viewed as “an important aspect of the problem.”<sup>90</sup> Because the agency ignored this factor, the court ruled that the agency “therefore, failed to act rationally and in accordance with law.”<sup>91</sup>

In *Superior Helicopter*, the agency’s “override findings did not seek to place its override action respecting the . . . contracts within the broad context of federal procurement law. The court must do so. . . .” Based on this analysis that the agency’s overarching justification was that service under the new contract was better than the old contract, “along with an assessment of how the override affects competition and the integrity of the procurement system, the court concludes that the override determination was arbitrary and not in accordance with law.”<sup>92</sup> Again, an agency’s failure to consider the integrity of the procurement system can prove fatal to the override determination.

The *Superior Helicopter* court also addressed the nature of the costs. Plaintiff objected that the agency “did not quantify the costs of the override versus the benefits of allowing the . . . awardees to proceed with their performance.”<sup>93</sup> The court noted the agency had “based its decision on the effectiveness . . . not on the *cost effectiveness* of those contracts.”<sup>94</sup> The court found “the fact that the [agency’s] findings lacked quantitative

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<sup>85</sup> See Wilkinson & Ehlers, *supra* note 1, at 108-09.

<sup>86</sup> *e-Mgmt.*, 84 Fed. Cl. at 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 9-10.

<sup>90</sup> *Id.* at 10-11.

<sup>91</sup> *Id.* at 10.

<sup>92</sup> *Superior Helicopter v. United States*, 78 Fed. Cl. 181, 194 (Lettow, J., 2007).

<sup>93</sup> *Id.* at 193.

<sup>94</sup> *Id.* emphasis added?

calculations of costs . . . not itself problematic.”<sup>95</sup> Whereas costs and benefits must be balanced, this is not solely a dollars and cents analysis but also a qualitative judgment by the decision makers, within a maze of the permissible and impermissible.

#### G. Declaratory v. Injunctive Relief<sup>96</sup>

The debate within the case law of whether proof to justify an injunction is required or whether that for a declaratory judgment is sufficient continues.<sup>97</sup> The injunctive relief burden is on the plaintiff; however, the trend appears to be toward relieving the plaintiff of this additional burden.<sup>98</sup> The *Nortel Government Solutions* court said declaratory relief was sufficient, deciding that “Congress did not require any evaluation of injunctive relief factors as a prerequisite to a stay of contract performance . . . Declaratory relief preserves the scheme that Congress enacted.”<sup>99</sup> The court also found an “incongruity in forcing a plaintiff to meet the high burden necessary for obtaining extraordinary relief, when the statute gives presumptive weight to the otherwise required showings of irreparable harm and public interest.”<sup>100</sup>

Notwithstanding this perceived trend, agencies should be mindful of, and continue to assess, the requirements for injunctive relief.<sup>101</sup> A plaintiff may prevail under the APA analysis and still fail to meet the requirements for injunctive relief, thus allowing the override to remain intact. Additionally, the trend toward shifting the injunctive relief burden

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<sup>95</sup> *Id.* “[T]he [agency’s] override decision did not rely on the quantitative costs associated with [its] decision[; the] administrative record is silent on quantitative costs generally, and . . . the termination and transition costs do not qualitatively appear to be significant.”

<sup>96</sup> See Wilkinson & Ehlers, *supra* note 1, at nn. 31-32 & p. 108.

<sup>97</sup> See *id.* at n.32.

<sup>98</sup> See James Y. Boland, Feature Comment, *CICA Override Practice--The Case Against Injunctive Relief*, 50 GOV’T CONTRACTOR ¶ 1 (Jan. 9, 2008). “This is a welcome trend because injunctive relief imposes an unnecessary burden on plaintiffs and diverts attention from the paramount issue-whether an agency’s decision to override the statutory suspension of contract performance is arbitrary, capricious or irrational.” *Id.*

<sup>99</sup> *Nortel Gov’t Solutions v. United States*, 84 Fed. Cl. 243, 252 (Futey, J., 2008) (citing *Chapman Law Firm v. United States*, 65 Fed. Cl. 422, 424 (2005), *Automation Techs. v. United States*, 72 Fed. Cl. 723, 730 n.5 (2006), and *CIGNA Gov’t Servs. LLC v. United States*, 70 Fed. Cl. 100, 114 (2006)).

<sup>100</sup> *Id.* at 252 (quoting *Advanced Sys. Dev. v. United States*, 72 Fed. Cl. 25, 32 (2006)).

<sup>101</sup> Although injunctive relief carries with it additional burden to the plaintiff, once an injunction is granted, it may place a burden on the government. One commentator observes that CICA does not limit the government to “a one strike and you’re out” rule. Boland, *supra* note 95, at 4. “CICA does not restrict an agency’s ability to override a stay to a single D&F. If urgent and compelling circumstances exist, the government should not have its hands tied during the GAO protest period simply because the agency’s documented rationale for the override was deficient the first time around.” *Id.* The 2006 *Maden Tech Consulting* case is illustrative. Had an injunction been imposed, the government might have prevented the agency issuing a new override. *Id.* (citing *Maden Tech Consulting, Inc., v. United States*, 74 Fed. Cl. 786 (2006)).

off of the plaintiff is not universal. In *Superior Helicopter*, the court considered declaratory relief but still applied the injunctive relief standards. The court cited the Federal Circuit, stating “that if a declaratory judgment and an injunction would have the same practical effect in a case, consideration of declaratory relief under injunctive relief standards is appropriate.”<sup>102</sup>

Unfortunately, as we mentioned in our first article, it may come down to the luck of the draw as to whether a plaintiff will be required to meet the injunctive relief burdens. Therefore, the agency must recognize that the U.S. Department of Justice will in all likelihood have to defend the agency’s decision. Accordingly, the agency should continue to consider the four-factor test for injunctive relief as part of any litigation assessment associated with override decision making.

#### H. The Bridge Contract: The Non-Override

When faced with a protest, an agency will frequently turn to a bridge contract to meet the agency’s acquisition needs while the protest is pending. Because of this heavy reliance, both the COFC and the GAO have intensified their scrutiny of these crucial stop-gap measures.

In *Reilly’s* and *EOD Technology*, the courts treated the bridge contracts as de facto overrides and applied the same scrutiny and standards as they do to actual overrides.<sup>103</sup> The sole exception to this approach was the 2008 *Access Systems* case where the court found a bridge contract to be so separate and distinct from the original contract that it was not a de facto override.<sup>104</sup> The *Access Systems* court entered a judgment in favor of the United States and dismissed the complaint.<sup>105</sup> Although the plaintiff, Access Systems, did not find relief at COFC for the bridge contract, it ultimately prevailed in the underlying bid protest at the GAO.<sup>106</sup> The *Access Systems* court recognized that it was in new territory with this line of reasoning and addressed the dilemma this way:

This case is . . . unlike traditional override cases in that we are asked to decide whether the bridge contract represents the functional equivalent of an override. We have not been presented with any decisions discussing this question, but in our view the relevant question is whether the bridge contract shares the same character or function as a formal

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<sup>102</sup> *Id.* (citing *PGBA*, 389 F.3d at 1228) (“by declaratory judgment, plaintiff is ‘asking to have the award set aside, which is coercive and has the same practical effect as an injunction;’ [sic] thus the trial court’s analysis under injunctive relief standard was correct”).

<sup>103</sup> In *Reilly’s*, the court found the agency’s “action actually taken was tantamount to overriding the automatic stay on the initial contract.” *Reilly’s*, 73 Fed. Cl. at 715.

<sup>104</sup> *Access Sys. v. United States*, 84 Fed. Cl. 241, 243 (Bruggink, J., 2008).

<sup>105</sup> *Id.*

<sup>106</sup> *Access Systems*, B-400623.3, 2009 CPD ¶ 56 (Mar. 4, 2009).

override and, thus, whether the bridge contract could prejudice plaintiff in its protest before the GAO or in subsequently performing the work if it is successful in its protest.<sup>107</sup>

Judge Bruggink recognized that some bridge contracts are de facto overrides and should be reviewed as such. Here, however, he found, “The facts . . . demonstrate that the character of the bridge contract is distinctly different from an override because the bridge contract does not disturb the status quo with respect to the original contract.”<sup>108</sup> In deciding that the bridge contract to the original contract awardee was “distinct from the original contract,” the judge looked to the following: (1) a stop-work order that had been issued to the awardee preventing further performance on the original contract; (2) the bridge contract was designed as a separate, self-contained contract; (3) services were only to be performed during the pendency of the protest; (4) the appropriation used to fund the bridge contract was separate from that used to fund the original contract and the appropriated funds for the original contract remained untouched; and, (5) the bridge contract’s term of 120 days was independent of the term of the original contract and would not lessen the amount of work on the original contract.<sup>109</sup> Given all of these specific differences, the court decided to dismiss the plaintiff’s complaint that the bridge contract was for the identical services involved in the original contract. “Contracts may share the same subject matter and yet remain separate and distinct from one another.”<sup>110</sup> The court also concluded, “There is no reason to think that the award . . . will prejudice plaintiff in the action before the GAO. Moreover, if the plaintiff is successful at the GAO, the original contract, in its entirety, will still be available to plaintiff.”<sup>111</sup>

Thus, when fashioning a bridge contract to maintain necessary services in the face of protests and perhaps corrective actions (up to and including re-procurement), agencies would be wise to consider this analysis. Most bridge contracts will not be approved by the agency override authority (generally the head of contracting activity) unless the dollar amount independently triggers such approval under applicable procurement regulations. Agencies award non-competitive bridge contracts based on a justification and approval process apart from the override determination. Because the court may treat bridge contracts as de facto overrides, agency personnel at all levels should document their considerations carefully under

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<sup>107</sup> *Access Sys.*, 84 Fed. Cl. at 243.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

the FAR and CICA stay override case law so as to withstand scrutiny under both GAO bid protest and COFC stay override review.<sup>112</sup>

#### IV. CONCLUSION

The Court of Federal Claims jurisprudence in CICA stay override cases remains unsettled. The prudent approach in deciding whether to override a stay would be to (1) start with the four APA factors, (2) because the “*Reilly's* factors” still linger, agencies must consider them, and, (3) because the courts are mixed on whether injunctive relief or declaratory relief is necessary, agencies have to consider that the court will apply the four factors for injunctive relief. Nothing short of such a comprehensive analysis will do.

In summary, we supplement our 2007 observations and recommendations with the following from 2007-2009 cases:

- Use national security as a basis when legitimate concerns, paramount to the procurement itself, are supported by contemporaneous documentation.
- Make sure the record contemporaneous with the decision is complete. After-the-fact supplementation will be difficult and given little weight. Be prepared to address supplementation requests from protesters and intervenors.
- Consider costs if GAO sustains the protest, even if the likelihood the protester will prevail is infinitesimally small. Considering the likelihood of success on the merits of the protest itself may actually undercut the override argument and jeopardize the decision.
- Ignore the *Reilly's* factors at your own risk. Although courts may find them only helpful and not dispositive, they continue to be part of the courts’ analysis.
- Consider all reasonable alternatives. Some courts drew back from “last resort” language, and allowed for a “zone of reasonableness.” But, if the agency chooses override, it must justify why the awardee of the new contract must perform the services.
- Analyze each case in light of its own costs and benefits with an eye toward the general categories of permissible and relevant versus the impermissible and/or irrelevant considerations. Courts have specifically addressed numerous specific costs and benefits asserted by agencies.

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<sup>112</sup> The GAO recognizes the role bridge contracts play as stop-gap measures. In *Chapman Law Firm Co.*, B-296847, September 28, 2005, the GAO denied a protest of a bridge contract. The GAO found the sole source stop-gap measure was not due to the agency’s lack of advance planning. Furthermore, the term of four months with two four month options was reasonable in that it “did not exceed the agency’s minimum needs at the time of the award.” *Id.*

- Be prepared to defend against the arguments for injunctive relief. The trend of the courts is toward declaratory relief, which carries with it a lesser standard than injunctive relief. An injunction would require the agency to petition the court to lift the injunction in order to continue performance rather than simply preparing another determination and finding and putting the burden on the protester to challenge the override. Agencies, therefore, need to be prepared to make the fight initially or concede that declaratory relief is proper if the agency may need another “bite at the (override) apple.”
- Expressly consider a properly tailored bridge contract as a reasonable alternative to continue performance of necessary services.

Our observations and recommendations are to inform decision makers and reviewers that their decisions to override CICA stays must be made judiciously and are subject to intense scrutiny. Gone is the era of extreme deference to the agency. *Access Systems* demonstrates a reasonable compromise between competing interests of necessary performance of a contracted service and complying with the letter and spirit of Congressionally mandated CICA stays. Agencies will have to consider the reasonableness of properly tailored bridge contracts as an alternative for each override. As *Reilly’s* showed, courts are willing to treat bridge contracts as overrides and overturn them. Therefore, just as with overrides themselves, agencies should not abuse the use of bridge contracts. In terms of general fairness and integrity of the procurement system, bridge contracts are plausible alternatives to overrides provided they are tailored appropriately to bridge gaps in necessary services and not to circumvent federal procurement law.





“BLOODLESS WEAPONS”?  
THE NEED TO CONDUCT LEGAL REVIEWS OF CERTAIN  
CAPABILITIES AND THE IMPLICATIONS OF DEFINING THEM AS  
“WEAPONS”

*WING COMMANDER DUNCAN BLAKE\**  
*LIEUTENANT COLONEL JOSEPH S. IMBURGIA\*\**

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*It is by no means clear what . . . techniques will end up being considered to be “weapons,” or what kinds of . . . operations will be considered to constitute armed conflict.<sup>1</sup>*

## I. INTRODUCTION

The legal review of new weapons, means or methods of warfare is considered a customary obligation of all states,<sup>2</sup> yet the decision to conduct such a review of some advanced technology capabilities, such as those associated with the space and cyberspace domains, remains a difficult one.<sup>3</sup> Countries are, and have been for many years, creating non-lethal, bloodless capabilities in the space and cyberspace domains, capabilities these countries may well employ during any future conflict. In fact, some of these capabilities are designed so that they can even be used in peacetime with “plausible deniability” against an adversary.<sup>4</sup>

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<sup>1</sup> U.S. DEP’T OF DEF., OFFICE OF GEN. COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 8 (2d ed. 1999) [hereinafter OGC INFO OPS ASSESSMENT].

<sup>2</sup> See, e.g., JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005); Major Graham H. Todd, *Armed Attack in Cyberspace: Detering Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. REV. 65, 80 (2009), W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 Y.B. OF INT’L HUMANITARIAN L. 55 (2005); and ROYAL AUSTRAL. AIR FORCE, PUB. 1003, OPERATIONS LAW FOR RAAF COMMANDERS, para. 9.5 (2004); see also U.S. DEP’T OF AIR FORCE, THE JUDGE ADVOCATE GENERAL’S DEPT., AIR FORCE OPERATIONS & THE LAW 25, 48 (2002) [hereinafter USAF OPS LAW HANDBOOK] (listing those Articles of Protocol I that the United States does not accept as customary international law, specifically Articles 1(4), 35(3), 39(2), 44, 47, 55, and 56). For a detailed discussion on the U.S. position regarding these provisions, see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987). For the treaty-based international legal requirement to review new weapons, means or methods of warfare, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. For the treaty-based international legal requirements applicable to various weapons, means or methods of warfare, see the “Methods and Means of Warfare” section of the International Committee of the Red Cross’s website, <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (last visited Aug. 11, 2010).

<sup>3</sup> In 1999, the DoD Office of General Counsel issued an assessment of international legal issues surrounding information operations, highlighting the uncertainty over the term “weapons” should be used to describe certain types of operational cyberspace capabilities. OGC INFO OPS ASSESSMENT, *supra* note 1, at 8. More than a decade later, that uncertainty still exists. Unfortunately, the same legal ambiguity surrounding operational capabilities in cyberspace also applies to outer space.

<sup>4</sup> See, e.g., David Hambling, *US Boasts of Laser Weapon’s “Plausible Deniability”*, NEWSIDENTIST.COM (Aug. 12, 2008), <http://www.newscientist.com/article/dn14520-us-boasts-of-laser-weapons-plausible-deniability.html> (reporting statements by Air Force officials that one benefit of the Advanced Tactical Laser was that it could be used with “plausible deniability”). One of the Air Force briefings is available at

The legal dilemma created by such bloodless capabilities is whether they should actually be considered “weapons, means or methods of warfare” at all. An affirmative answer to that question has many complicated implications. First and foremost, it would require a legal review of that capability to determine if its employment would, in some or all circumstances, be prohibited by the laws of armed conflict (LOAC). It would also raise questions as to whether its use would cross the thresholds of Articles 2(4) or 51 of the United Nations (U.N.) Charter, and what and where an appropriate response, if any, would be to a nation’s use of that capability. Additionally, it could implicate civilians as direct participants in hostilities, making them legitimate targets. Improperly using such a bloodless capability could criminally implicate any civilian or military user. An affirmative answer could also fuel debates about weaponization of space and cyberspace, and it could restrict the flow of knowledge, technology and expertise under laws governing foreign military sales.

Unfortunately, the current international legal framework fails to provide clarity in this area. Many authors who have considered the subject appear to find answers in analyzing the effects the capability can cause.<sup>5</sup> Ostensibly, under such an effects-based analysis, the more deaths or bodily harm a capability can cause, the easier it becomes to determine that such a capability is a weapon. The question begged, however, is this: Does the converse also follow – that non-lethal, bloodless capabilities are therefore not weapons?

One argument that such non-lethal, “bloodless” space and cyberspace capabilities are not “weapons, means or methods of warfare” attractively co-exists with the highest ideals and the very *raison d’être* of international humanitarian law: preventing unnecessary human suffering.<sup>6</sup>

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www.nmoia.org/images/nmoptics\_briefings\_a.ppt, the other at  
http://www.ndiagulfcoast.com/events/archive/33rd\_symposium/day2/05\_XR\_NDIA\_10-11  
Oct\_Final.pdf.

<sup>5</sup> See, e.g., Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 417 (2003); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L 885, 912 (1999) (according to Schmitt, one approach to analyze the legalities of the use of a particular cyber capability is to apply an effects based analysis rather than an instrument based analysis using the following factors: (1) severity; (2) immediacy; (3) directness; (4) invasiveness; (5) measurability; (6) presumptive legitimacy; and (7) responsibility for a particular action in cyberspace); THOMAS C. WINGFIELD, *THE LAW OF INFORMATION CONFLICT: NATIONAL SECURITY LAW IN CYBERSPACE* 124-27 (2000) (according to Wingfield, the use of a non-traditional capability against an adversary can be considered an armed attack when the use of the capability becomes tantamount in effect to an armed attack).

<sup>6</sup> See generally Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. OF THE RED CROSS 737 (2005); RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002) (discussing the importance of preventing unnecessary human suffering in armed conflict); JENNY KUPER, *INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT* (1997) (analyzing the interplay of human rights and humanitarian law relevant to the treatment of child civilians in armed conflict); Asbjørn Eide, *The Laws of War and Human Rights—Differences and Convergences*, in

If the newer, high-tech space and cyberspace capabilities suffice, by themselves,<sup>7</sup> to settle differences between belligerents<sup>8</sup> without drawing blood, should international humanitarian law apply at all? If not, then arguably the international humanitarian law requirement to conduct a legal review would not exist in such a situation. Yet, to focus only on the bloodless potential of space and cyberspace capabilities would seem to miss the point, because their other potential effects are still quite frightening. These space and cyberspace capabilities may well leave a financial sector in ruins; seriously disrupt the provision of medical and emergency services to the sick and injured, or those in distress; endanger safe air, rail and marine navigation; silence the press and provide misinformation; undermine the government, including its national defense posture.<sup>9</sup> When used in such a way, these space and cyberspace capabilities may breach the international peace and security the U.N. Charter was designed to maintain.<sup>10</sup>

Whether it is appropriate to characterize space and cyberspace capabilities as “weapons, means or methods of warfare” and subject them to legal reviews as with any other new weapon is, however, not just a legal question – the law is inchoate. When the law lags behind technology, as it so often does, the gaps must be filled with declaratory acts, state practice and, thus, the formation of customary international law.<sup>11</sup> This paper is therefore not just about the law as it is, but what it could and should be.

This article seeks to further develop the law in this area. It is divided into four main parts, and begins by examining the scope of such legal reviews. This first section examines the phrase “weapons, means or methods of warfare;” what effects, designs or intents must be considered;

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STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 675 (1984) (discussing the intricacies of preventing unnecessary human suffering in armed conflict); Sergey Sayapin, *The International Committee of the Red Cross and International Human Rights Law*, 9 HUMAN RIGHTS L. REV. 95 (2009) (examining the application of human rights during armed conflicts through the prism of international humanitarian law).

<sup>7</sup> The 2007 cyber attacks against Estonia and the 2008 cyber attacks against Georgia demonstrate how cyber warfare can be used against a country to influence that country’s actions without causing widespread human injury or death. See, e.g., Scott J. Shackelford, *Nuclearwar to Netwar: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT’L L. 192, 202 (2009); Gregory Hafkin, *The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention After Kosovo*, 28 B.U. INT’L L.J. 219, 228 (2010) (discussing the 2008 cyber attacks in Georgia).

<sup>8</sup> Of course, if such capabilities are not “weapons, means or methods of warfare,” then using them does not necessarily indicate an “armed conflict,” and thus the term “belligerent” would not apply here.

<sup>9</sup> See, e.g., Shackelford, *supra* note 7, at 201 (referencing Alice M. Rivlin & Robert E. Litan, *The Economy and the Internet: What Lies Ahead?*, BROOKINGS INSTITUTION (2008), [http://www.brookings.edu/papers/2000/12technology\\_litan.aspx](http://www.brookings.edu/papers/2000/12technology_litan.aspx)).

<sup>10</sup> See U.N. Charter art. 1, para. 1, and art. 39.

<sup>11</sup> Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 4 (2010).

and the contexts for review. Of note, this paper will not discuss how that review should occur or the appropriate format. The paper will next consider space and cyberspace capabilities in general, along with a representative sample of specific capabilities. These contexts will form an important foundation for the third part of the paper, which will discuss the thresholds for *jus ad bellum* concepts like “threat or use of force”<sup>12</sup> and “armed attack”,<sup>13</sup> as well as the other implications of characterizing a capability as a “weapon, means or method of warfare” in armed conflict.<sup>14</sup> The paper will also consider whether space and cyberspace capabilities may be characterized as “weapons, means or methods of warfare” in some circumstances but not others.

Regardless of the implications of characterizing certain capabilities as “weapons, means or methods of warfare,” this paper will examine whether these capabilities should undergo a legal review. Ultimately, this article concludes that those non-lethal bloodless capabilities that can be applied to a military object or enemy combatant should be subjected to a legal review before that capability is used. Pertinent to this conclusion is whether calling these techniques or capabilities “weapons, means or methods of warfare” and their employment a “use of force” or an “armed attack” promotes or detracts from the desired perception that a country meticulously honors its international legal obligations. With the increasing threat represented by the potential use of space and cyberspace as direct theaters of war, there is a growing need to ensure that any space or cyberspace capability a nation uses complies with the U.N. Charter and LOAC. As technologies mature in these domains, the need to assess their impact as military forces embrace their capabilities continues as well. Accordingly, the prudent time to review these capabilities is before their employment.

## II. LEGAL REVIEW OF NEW ‘WEAPONS’

Without a doubt, technology has changed the nature of future conflicts. In fact, the military is often responsible for such technological advancement.<sup>15</sup> As technologies such as orbital intercept capabilities, lasers, cyberspace operations, nanotechnology, and high-powered microwave and

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<sup>12</sup> See U.N. Charter art. 2, para. 4.

<sup>13</sup> See *id.* at art. 51.

<sup>14</sup> Depending on a number of different factors applicable to a particular conflict, the phrase “armed conflict” can describe conflict of either an international or a non-international character. What protections under the Geneva Conventions apply to individuals involved in the conflict depends on how it is classified. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva PW]. All four 1949 Geneva Conventions share Articles 2 and 3.

<sup>15</sup> A prime example is the DoD’s involvement in developing the Global Positioning Satellite (GPS) system. See, e.g., Pamela Rigaux, *Invented by the Military, GPS is Now Common in Cars*, FREDERICK NEWS-POST (Md.), Jan. 23, 2007, at 2.

radio frequency advances, today's modern militaries have found innovative applications for those technologies.

Over time, nations may be required to explain to a tribunal, domestic or international court, or to the court of public opinion whether the use of a particular space or cyberspace capability was ever subjected to legal scrutiny. Unless the capability is classified as a weapon, means or method of warfare, the nation arguably had no requirement to have done so. Classifying these space and cyberspace capabilities, however, is not an easy task under the current international legal framework. Unfortunately, when making such a classification, "there is no international legal precedent from which to draw . . . and certainly LOAC is unsettled with respect to electronic applications."<sup>16</sup> As Estonia's justice minister, exclaimed after his country suffered cyber "attacks" in 2007, "international law is of little help" in dealing with them.<sup>17</sup> International law is also of little help in dealing with "attacks" using some of the various space capabilities currently available. Understanding the meaning of the phrase "weapons, means and methods of warfare" is fundamental to analyzing these issues.

#### A. Legal Foundation of the Requirement to Conduct a Legal Review

Whether various space and cyberspace capabilities qualify as "weapons, means or methods of warfare" is an important issue. Such a qualification would necessitate a legal review of that capability and arguably restrict international exchange of that capability under foreign weapons sales and technology transfer laws.<sup>18</sup> Two international legal obligations can drive the requirement for a nation to conduct a legal review of a weapon, means or method of warfare: (1) customary international law, and (2) Article 36 of Additional Protocol I to the 1949 Geneva Conventions.<sup>19</sup>

##### 1. Customary International Law Requirement

Regardless of whether a nation ratified Additional Protocol I to the 1949 Geneva Conventions, the requirement to conduct a legal review still exists under customary international law.<sup>20</sup> Article 36 of Additional Protocol I, which explicitly imposes a review requirement before a nation

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<sup>16</sup> Gregory F. Intocchia & Joe Wesley Moore, *Communications Technology, Warfare, and the Law: Is the Network a Weapon System?*, 28 HOUSTON J. INT'L L. 467, 484 (2006).

<sup>17</sup> *Estonia and Russia: A Cyber-Riot*, ECONOMIST, May 12, 2007, at 42 (reporting a statement by Rein Leing).

<sup>18</sup> See, e.g., 22 U.S.C. § 2403(d) (1996); 22 U.S.C. §§ 2751-79 (1982); International Traffic in Arms Regulation, 22 C.F.R. pt. 121 (discussing military computer and space electronics at category XI, para. (a)(6)); see also *Customs (Prohibited Exports) Regulations 1958* (Cth) (Austl.) (discussing in part 3, division 3, the limitations and prohibitions on the exportation of arms and related material).

<sup>19</sup> Protocol I, *supra* note 2, art. 36.

<sup>20</sup> See *supra* note 2 and accompanying text.



uses any new weapon, only implemented a pre-existing, customary obligation.<sup>21</sup> Although the United States has not ratified Additional Protocol I, it deems the requirements found in Article 36 to reflect customary international law.<sup>22</sup> As such, U.S. military lawyers review all new weapons pursuant to this customary international law requirement<sup>23</sup> as established in a number of military regulations and instructions.<sup>24</sup> “The purpose of the legal review is to ensure that the intended use of the weapon, weapon system, or munition is consistent with customary international law.”<sup>25</sup>

Customary international law develops through state practice and *opinio juris*, or an accepted legal obligation to follow that practice.<sup>26</sup> Specifically, customary international law is developed through state practice that develops into “a settled practice . . . carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”<sup>27</sup> Moreover, “the state practice must be ‘extensive and virtually uniform,’ particularly with respect to states whose interests are ‘specially affected.’”<sup>28</sup>

The customary international law requirement for legal review of a weapon to ensure its use will be lawful in conflict stems from the 1868 St. Petersburg Declaration,<sup>29</sup> the 1899 Hague Declaration Concerning Asphyxiating Gases,<sup>30</sup> the 1899 Hague Declaration Concerning Expanding Bullets<sup>31</sup> and the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.<sup>32</sup> These international instruments address the

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<sup>21</sup> Parks, *supra* note 2, at 57. Article 36 is discussed in more detail in the next section.

<sup>22</sup> See Todd, *supra* note 2, at 80; Parks, *supra* note 2, at 55; see also USAF Ops Law Handbook, *supra* note 2, at 48.

<sup>23</sup> See, e.g., W. Hays Parks, *Joint Service Shotgun Program*, ARMY LAW., Oct. 1997, at 16.

<sup>24</sup> See, e.g., U.S. DEP'T OF DEFENSE, DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (12 May 2003) (current as of 20 Nov. 2007); U.S. DEP'T OF AIR FORCE, INSTR. 51-504, WEAPONS REVIEW 1 (13 May 1994) [hereinafter AFI 51-504]; U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW para. 3.a (1 Jan. 1979) [hereinafter AR 27-53]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5000.2C, IMPLEMENTATION AND OPERATION OF THE DEFENSE ACQUISITION SYSTEM AND THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM para. 2.6.2 (19 Nov. 2004) [hereinafter DNI 5000.2C].

<sup>25</sup> Parks, *supra* note 23, at 16.

<sup>26</sup> North Sea Continental Shelf Cases, 1969 I.C.J. at 3.

<sup>27</sup> *Id.*

<sup>28</sup> Michael W. Taylor, *Trashing the Solar System One Planet at a Time: Earth's Orbital Debris Problem*, 20 GEO. INT'L ENVTL. L. REV. 1, 28 (2007) (discussing the North Sea Continental Shelf Cases).

<sup>29</sup> St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29 – Dec. 11, 1868 [hereinafter St. Petersburg Declaration], available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

<sup>30</sup> Hague Declaration Concerning Asphyxiating Gases, Jul. 29, 1899 [hereinafter Hague Asphyxiating Gases].

<sup>31</sup> Hague Declaration Concerning Expanding Bullets, Jul. 29, 1899 [hereinafter Hague Expanding Bullets].

<sup>32</sup> Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, 36 Stat. 2277 [hereinafter Hague Convention IV]. Article 1 of Hague Convention II

issue of whether a weapon causes superfluous injury in violation of the laws and customs of warfare.<sup>33</sup> Additionally, the International Court of Justice confirmed this customary international law status in its *Nuclear Weapons Opinion*.<sup>34</sup> In discussing customary international law requirements for a weapons legal review, the opinion stated that a nation must determine whether the employment of a weapon, means or method of warfare would violate customary international law.<sup>35</sup> In making that determination, the court noted that the legal principles that permeate the entire law of armed conflict apply “to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future,” adding that the newness of weaponry does not change this notion.<sup>36</sup>

Shortly after the end of World War II, and decades before Additional Protocol I or the *Nuclear Weapons Opinion* were ever debated, much less contemplated, citizens of Japan argued in a Japanese district court that the United States’ nuclear bombing of Hiroshima and Nagasaki violated the United States’ obligations under customary international law on the use of weapons in warfare.<sup>37</sup> The Tokyo District Court agreed with the citizens who brought suit, holding that the United States violated its customary international law obligations by causing unnecessary suffering through its

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with Respect to the Laws and Customs of War on Land of 29 July 1899 obligated States Parties to issue instructions to their armed land forces, which were to conform to the rules contained in the Annex to that Convention, including Article 23(e), which prohibited employment of “arms, projectiles or material of a nature to cause superfluous injury.” Parks, *supra* note 2, at 57. With non-substantive alteration, Article 1 of the Convention and Article 23(e) of the Annex were re-adopted in Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907. *Id.*

<sup>33</sup> Compare Saint Petersburg Declaration, *supra* note 29, with Hague Declaration Concerning Asphyxiating Gases, *supra* note 30, Hague Declaration Concerning Expanding Bullets, *supra* note 31, and Hague Convention IV of 1907, *supra* note 32, at annex, art. 23e.

<sup>34</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254, 262 (Jul. 8) [hereinafter Nuclear Weapons Opinion]. The Advisory Opinion concerns the legality under international law of the use or the threatened use of nuclear weapons. The U.N. General Assembly asked the court to decide whether the threat or use of nuclear weapons in any circumstances is permitted under international law. *Id.* at 227. In a split decision, the court ruled that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.” *Id.* at 266. The court added, however, that “in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” *Id.*

<sup>35</sup> *Id.* At 226, 254, 262.

<sup>36</sup> *Id.* at 259.

<sup>37</sup> Shimoda v. State (Japanese Gov’t), 8 Japan. Ann. Int’l L. 212, 242 (Tokyo Dist. Ct. 1964). Japanese citizens sued the Japanese government for injuries associated with the atomic bombings, claiming that the government was responsible for their injuries because the Japanese government waived the claims of its citizens against the United States for the bombings. *Id.* at 220. The Tokyo District Court dismissed plaintiffs’ claims because it found that international law does not recognize individuals’ claims until provided for in a treaty. *Id.* at 249-50.

use of nuclear weapons.<sup>38</sup> While the International Court of Justice indirectly put the Japanese court's decision in question in the *Nuclear Weapons Opinion*, both opinions underscore the principal that customary international law governs a weapon's legal use.

## 2. Article 36 Requirement, Additional Protocol I to the Geneva Conventions

To codify the customary international law requirement to review a new weapon, means or method of warfare in a treaty, the international community added the language of Article 36 to Additional Protocol I to the 1949 Geneva Conventions.<sup>39</sup> Article 36 specifies that:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol, or by any other rule of international law applicable to the High Contracting Party.  
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Central to Article 36 and this paper is what the phrase “new weapon, means or method of warfare” truly means. Understanding the context of the phrase is imperative, however, before exploring what it means.

First, Article 36 imposes international legal obligations early in the process. The article requires a Party to this protocol to perform a legal review of a new weapon, means or method of warfare not only once the nation acquires or adopts that weapon, means or method of warfare, but even while that weapon, means or method of warfare is being studied or developed. It is therefore an iterative process, and, in practice, legal reviews are, and should be, conducted when the weapon is being studied or acquired during peacetime.<sup>41</sup>

Second, the Article 36 requirement to conduct a legal review of all *new* weapons, means and methods of warfare “is prospective rather than necessarily retroactive.”<sup>42</sup> This means that Parties to Additional Protocol I need not review weapons or munitions in their inventory before ratification of Additional Protocol I. Both the United States and Australia take the view that the previously existing, customary international law requirement for a weapons legal review created a “rebuttable presumption of legality of pre-

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<sup>38</sup> *Id.* at 242.

<sup>39</sup> Protocol I, *supra* note 2, art. 36.

<sup>40</sup> *Id.*

<sup>41</sup> Protocol I, *supra* note 2, art. 36; *see also* James D. Fry, *Contextualized Legal Reviews for the Means and Methods of Warfare: Cave Combat and International Humanitarian Law*, 44 COLUM. J. TRANSNAT'L L. 453 (2006).

<sup>42</sup> Parks, *supra* note 2, at 114.

existing weapons and munitions.”<sup>43</sup>

Third, the phrase “of warfare” in Article 36 provides an important qualification. Because Article 36 is found in Additional Protocol I, the Article 36 legal review requirement is ostensibly limited to the situations described in Common Article 2 to the Geneva Conventions, i.e.,<sup>44</sup> situations of international armed conflict.<sup>45</sup> Additional Protocol II does not contain a similar obligation to conduct a legal review for new weapons designed for use in non-international armed conflicts.<sup>46</sup> Because Article 36 refers only to those capabilities that would actually be employed in international armed conflict, the language used in Article 36 technically only widens the scope of the review to “any other rule of international law applicable to the High Contracting Party” that would impact on the use of the weapon, means or method of warfare in international armed conflict.

This does not imply, however, that a State can forgo the legal review before using a weapon, means or method of warfare in non-international armed conflict. “Most of the rules apply to all types of armed conflict,” international or non-international.<sup>47</sup> Additionally, “as stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in relation to prohibited means and methods of warfare, ‘what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’”<sup>48</sup> Therefore, in certain situations, there is a customary law

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<sup>43</sup> See *Id.*; AUSTRAL. DEF. FORCE GEN. INTR., OPS. 44-1, LEGAL REVIEW OF NEW WEAPONS, para. 3 (2 June 2005) [hereinafter DI(G) Ops 44-1].

<sup>44</sup> See, e.g., Geneva PW, *supra* note 14, art. 2, and accompanying text.

<sup>45</sup> See Protocol I, *supra* note 2, art. 36. The treaty’s very title states that it applies to international armed conflict. Article 1, subparagraph 3 to the Protocol also states that it applies only in “situations referred to in Article 2 common” to the 1949 Geneva Conventions, which applied only to “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva PW, *supra* note 14, art. 2.

<sup>46</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II).

<sup>47</sup> INT’L COMM. OF THE RED CROSS [ICRC], A GUIDE TO THE LEGAL REVIEW OF NEW, MEANS AND METHODS OF WARFARE, MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977 9 (2006) [hereinafter ICRC LEGAL REVIEW GUIDE].

<sup>48</sup> *Id.* (quoting Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 119, 127 (Int’l Crim. Trib for the Former Yugoslavia Oct. 2, 1995) This same sentiment arose during negotiations on the Hague Declaration Concerning Expanding Bullets (or “dumdum” bullets). The British delegate to the Hague Peace Conference argued that “‘there is a difference in war between civilised (*sic*) nations and that against savages’ and that the use of dumdum bullets was justified against ‘the savage’ who ‘although run through two or three times, does not cease to advance.’” The other attendees, however, considered this view that different rules apply to different types of armed conflicts “as being ‘contrary to the humanitarian spirit.’” Robin Coupland & Dominique Loye, *The 1899 Hague Declaration concerning Expanding Bullets: A Treaty Effective for More Than 100 Years Faces Complex Contemporary Issues*, 849 INT’L REV. RED CROSS 135, 137 (2003), (quoting William Crozier, *Report to the United States’ Delegation to the First*

requirement to conduct a legal review in both international and non-international armed conflict

Fourth, any legal review must cover only employment of the weapon, means or method of warfare in armed conflict; mere possession does not technically trigger Article 36 requirements.<sup>49</sup> Furthermore, a State must assess its *anticipated* use of the weapon, means or method of warfare in armed conflict, not all *possible* uses. In other words, the Article 36 review is designed to assess whether the anticipated use of a weapon, means or method of warfare might be prohibited, rather than just regulated. Assessing a weapon's anticipated use ensures, as well, that the review occurs at the optimum time—well before a commander decides to actually employ such a capability in armed conflict.<sup>50</sup> The point at which lives are on the line is neither the time nor the place for a military commander to have to worry about the legality of a particular weapon, means or method of warfare he or she may choose or need to employ in an armed conflict to save those lives. Besides ensuring a less tension-filled review, early assessment also subjects the weapon, means or method of warfare to a legal review before investing a lot of national capital into acquiring a capability that ultimately may be prohibited for combat use.<sup>51</sup>

These four concepts are important to understanding when space and cyberspace capabilities might be regarded as weapons, means and methods of warfare. They are meant to highlight the requirements of Article 36, and some of the technicalities found within its language. They help determine whether a legal review of various space and cyberspace capabilities is necessary.

#### B. The Meaning of “Weapons, Means and Methods of Warfare”

Whether a legal review of various space and cyberspace capabilities is necessary turns first and foremost on whether such capabilities qualify as “weapons, means and methods of warfare.” According to the Drafter’s Commentary to Article 36, experts were concerned with whether various “future arms” would be properly reviewed before their employment in armed conflict.<sup>52</sup> In addition to nuclear, biological and chemical warfare,

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*Hague Conférence on the Proceedings of the First Commission and its Sub-Commission*, July 31, 1899).

<sup>49</sup> See Protocol I, *supra* note 2, art. 36.

<sup>50</sup> See *e.g.*, AFI 51-402, *supra* note 26, at 1 (“The Judge Advocate General (TJAG) ensure all weapons being develop, bought, built or otherwise acquired . . . are reviewed for legality under international law *prior* to their use in a conflict.”) (emphasis added).

<sup>51</sup> See *id.* at 1 (directing the Air Force acquisition office to ensure a legal review “at the earliest possible stage in the acquisition process, including the research and development stage”).

<sup>52</sup> JEAN DE PREUX ET AL., ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 427 (Yves Sandoz et al eds., Tony

the drafters were concerned with what they deemed could constitute “geophysical, ecological, electronic and radiological warfare” as well as with “devices generating radiation, microwaves, infrasonic waves, light flashes, and laser beams.”<sup>53</sup> The drafters even expressed prescient concern over automation of the battlefield, stating:

The use of long distance, remote control weapons, or weapons connected to sensors positioned in the field, leads to the automation of the battlefield in which the soldier plays an increasingly less important role. The counter-measures developed as a result of this evolution, in particular electronic jamming (or interference), exacerbates the indiscriminate character of combat. In short, all predictions agree that if man does not master technology, but allows it to master him, he will be destroyed by technology.<sup>54</sup>

Despite these concerns, the drafters chose a course that “correctly places the solution to the problem where it actually belongs, in the domestic government of nations,” allowing each country to determine whether a certain “future arm” qualifies as a “weapon, means or method of warfare.”<sup>55</sup> Making that determination, however, is complicated by the lack of any internationally agreed-on definition for that phrase or its individual words.

Article 36 does not define the term “weapon, means or method of warfare.” Despite the fact that 71 nations have ratified Additional Protocol I to the 1949 Geneva Conventions,<sup>56</sup> international law also currently offers no accepted definition of the term “weapon.”<sup>57</sup> According to the International Committee of the Red Cross (ICRC), the term “weapon” is unclear across the international community, as each state tends to have its own definition.<sup>58</sup>

Even within the United States, the term has caused confusion.<sup>59</sup> For example, the U.S. Department of Defense charges the military Secretaries to

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Langham et al trans., rev. ed. 1987), available at <http://www.icrc.org/IHL.NSF/COM/470-750045?OpenDocument>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 427-28.

<sup>55</sup> *Id.* at 428.

<sup>56</sup> See INT'L COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 13-AUG-2010 6 (2010) (providing a table showing that 170 countries are parties to Protocol I), at [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

<sup>57</sup> See Todd, *supra* note 2, at 79–80.

<sup>58</sup> ICRC LEGAL REVIEW GUIDE, *supra* note 47.

<sup>59</sup> See, e.g., OGC Info Ops Assessment, *supra* note 1, at 8 (discussing the difficulty in labeling a cyberspace capability a “weapon”); see also Todd, *supra* note 2, at 79–80 (highlighting the different definitions of the term “weapon” within the U.S. Army, Navy and Air Force).

“[e]nsure that a legal review of the acquisition of all non-lethal weapons is conducted.”<sup>60</sup> The directive, however, fails to define the term “weapon.” It does provide a definition for “non-lethal weapons” but uses the word “weapon,” without further elaboration, to do so, stating that “non-lethal *weapons*” are “*weapons* that are explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”<sup>61</sup>

Due to the lack of an overarching definition of the term, the United States military services have been left to create their own definitions of the word “weapon.” In the United States Army, the word “weapon” is defined to mean “chemical weapons and all conventional arms, munitions, materiel, instruments, mechanisms, or devices which have an intended effect of injuring, destroying, or disabling enemy personnel, materiel, or property.”<sup>62</sup> The United States Navy defines a “weapon” to mean “all arms, munitions, materiel, instruments, mechanisms, devices, and those components required for their operation, that are intended to have an effect of injuring, damaging, destroying, or disabling personnel or property, to include non-lethal weapons.”<sup>63</sup> These definitions also focus on the intended effect of a device.

The U.S. Air Force, however, defines the term “weapon” to mean “devices designed to kill, injure, or disable people, or to damage or destroy property” but explicitly excludes “electronic warfare devices”<sup>64</sup> “The definition also differentiates between effects on people and effects on property, failing to include devices that ‘disable’ property.”<sup>65</sup>

In contrast, both the U.S. Army and Navy classify weapons to specifically include devices that “disable” property.<sup>66</sup> By comparison, Australia defines “weapon” to be “an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten” or “any device, method or circumstance that can be used either directly or indirectly to destroy, injure or defeat an enemy.”<sup>67</sup> A note to the definition adds that a “computer

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<sup>60</sup> U.S. DEP’T OF DEFENSE, DIR 3000.3, POLICY FOR NON-LETHAL WEAPONS, para. 5.6.2 (9 July 1996)(current as of 21 Nov. 2003).

<sup>61</sup> *Id.* at para. 3.1, (emphasis added). The directive goes on to state, “Unlike conventional lethal weapons that destroy their targets principally through blast, penetration and fragmentation, non-lethal weapons employ means other than gross physical destruction to prevent the target from functioning.” *Id.* at para. 3.1.1. It also identifies non-lethal weapons as intended to have one, or both, of the following characteristics: (1) their effects on personnel or materiel are relatively reversible; and (2) they affect objects differently within their area of influence. *Id.* at para. 3.1.2.

<sup>62</sup> AR 27-53, *supra* note 26, para. 3.a.

<sup>63</sup> DNI 5000.2C, *supra* note 26, para. 2.6.2.

<sup>64</sup> AFI 51-402, *supra* note 26, at 1.

<sup>65</sup> Todd, *supra* note 2, at 80 (discussing AFI 51-402).

<sup>66</sup> Compare AR 27-53, *supra* note 62, para. 3.a, with DNI 5000.2C, *supra* note 26, para. 2.6.2, and AFI 51-402, *supra* note 26, at 1; see also Todd, *supra* note 2, at 80 (noting this distinction).

<sup>67</sup> DI(G) Ops 44-1, *supra* note 43, at para. 3.

expressly designed as a new weapon to offensively target enemy computer systems for destruction is covered.”<sup>68</sup>

Comparing words used in Articles 35 and 36 of Additional Protocol I to the 1949 Geneva Conventions may add some clarity. The phrase “weapons, means or method of warfare” in Article 36 differs from the language of Article 35, which uses the phrase “weapons, projectiles and material and methods of warfare” in paragraph two.<sup>69</sup> As such, the drafters arguably intended Article 36 to encompass more than just material, projectiles, or kinetic kill vehicles, thus including bloodless weapons.

The term “means or method of warfare” is even less clear than the meaning of the word “weapon.”<sup>70</sup> According to the ICRC, the words “means and method” include weapons in the widest sense, as well as the way in which they are used.<sup>71</sup> Furthermore, the terms “means” and “methods” should be read together.<sup>72</sup> Given these interpretations, “means and methods” arguably includes not only weapons in broadest but also those items which, while not constituting a weapon as such, still can directly impact the ability of a military force to engage in offensive operations.<sup>73</sup>

The Program on Humanitarian Policy and Conflict Research (HPCR) attempted to add some clarity to these terms in its 2009 “Manual on International Law Applicable to Air and Missile Warfare.”<sup>74</sup> For example, the manual defines “means of warfare” to mean “weapons, weapon systems or platforms employed for the purposes of attack,”<sup>75</sup> while “methods of warfare” is defined as

attacks and other activities designed to adversely affect the enemy’s military operations or military capacity, as distinct from the means of warfare used during military operations, such as weapons. In military terms, methods of warfare consist of the various general categories of operations, such as bombing, as well as the specific tactics used for attack, such as high altitude bombing<sup>76</sup>

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<sup>68</sup> *Id.* at para. 3 n. 2.

<sup>69</sup> Compare Article 35 with Article 36 of Protocol I, *supra* note 2, art. 35–36; see also Parks, *supra* note 2, at 118.

<sup>70</sup> See Justin McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, 850 INT’L REV. RED CROSS 397, 404 (2003).

<sup>71</sup> DE PREUX ET AL., *supra* note 52, at 421.

<sup>72</sup> McClelland, *supra* note 70, at 405.

<sup>73</sup> *Id.*

<sup>74</sup> PROGRAM ON HUMAN. POL’Y & CONFLICT RES., MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (May 15, 2009). The HPCR, based in Brussels, describes itself as an “independent non-profit organization . . . aimed at developing innovative approaches and strategic policy tools to address complex security challenges, particularly in situations of armed conflict.” HPCR International Home Page, <http://www.hpcr.org/index.html> (last visited Aug. 13, 2010).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> *Id.* at 5.



Finally, the manual defines “weapon” to mean “a means of warfare used in combat operations, including a gun, missile, bomb or other munitions, that is capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of, objects.”<sup>77</sup> While this manual adds a little clarity in this area, the manual is not law, and the debate over these terms remains.

Some commentators have suggested that defining the term “weapon” should be relatively straightforward.<sup>78</sup> One British army legal officer argues that the term “connotes an offensive capability that can be applied to a military object or enemy combatant,”<sup>79</sup> adding that the phrase “means of warfare” connotes “all weapons, weapons platforms, and associated equipment used directly to deliver force during hostilities.”<sup>80</sup> Thus, he says, “It is unclear how the term ‘weapon’ differs from ‘means of warfare.’”<sup>81</sup> Another commentator states,

The means whereby this is achieved will involve a device, munition, implement, substance, object, or piece of equipment, and it is that device, etc. that is generally referred to as a weapon. Methods of warfare, on the other hand, are taken to mean the way in which weapons are used in hostilities.<sup>82</sup>

### C. Call a Spade a Spade

These experts make a very valid point. Defining the term “weapon” *should* be relatively straightforward. The term should connote any *capability*, offensive or defensive, which can be applied against a military object or enemy combatant. The key word here is “capability,” which would include non-lethal, bloodless space and cyberspace capabilities, as it should. Even, however, if one were to argue that such capabilities were not “weapons,” they would surely fall under the definition of “means or methods of warfare.” Such capabilities can and do provide (by their very usage) a direct impact on the ability of a military force to engage in operations, and they should be reviewed before use.

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<sup>77</sup> *Id.* at 6.

<sup>78</sup> McClelland, *supra* note 70, at 404; *see also* WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 4 (2009)(discussing McClelland’s definition of the term “weapon”).

<sup>79</sup> McClelland, *supra* note 70, at 404.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 405.

<sup>82</sup> BOOTHBY, *supra* note 78, at 4, *see also* McClelland, *supra* note 70, at 404 (indicating that “method of warfare” is “usually understood to mean the way in which weapons are used”).

### III. A LOOK AT SOME BLOODLESS CAPABILITIES

Understanding the space and cyberspace capabilities in question is crucial to addressing whether certain bloodless capabilities require a legal review before being employed in armed conflict. As mentioned earlier, each State bears the onus to determine whether a space or cyberspace capability qualifies as a weapon, means or method of warfare.<sup>83</sup> While the debate about what does or does not qualify continues, various space and cyberspace capabilities independently exist, mature and serve as tools in various arenas.

In 1995, the Secretary and Chief of Staff of the U.S. Air Force directed the Air Force Scientific Advisory Board “to identify those technologies that [would] guarantee the air and space superiority of the United States in the 21st century.”<sup>84</sup> In the ensuing study, the board predicted that the future of the U.S. Air Force will “contain space, ground, and airborne weapons that can project photon energy, kinetic energy, and information against space and ground assets. Many space and information weapons will destroy. Others will confuse the enemy . . . .”<sup>85</sup> More than fifteen years later, those capabilities already exist. The next section examines the relevant capabilities, as well as the features that may be relevant to assessing whether they should be considered weapons, means and methods of warfare.

#### A. Kinetic Energy Anti-Satellite

Kinetic energy anti-satellite (ASAT) capabilities have existed for over four decades.<sup>86</sup> By 1963, both the United States and the former Soviet Union were investing in kinetic energy ASAT capabilities.<sup>87</sup> Because of technological limitations with “the guidance systems of the time, the early interceptors were nuclear-tipped, allowing a successful [anti-ballistic missile or] ASAT attack without precision guidance.”<sup>88</sup> In the 1980s, ASAT capabilities focused primarily on more precisely guided air-launched missile ASAT techniques.<sup>89</sup> In 1985, the crew of an F-15 conducted an air-launched

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<sup>83</sup> DE PREUX ET AL, *supra* note 52, at 428.

<sup>84</sup> GENE MCCALL & JOHN CORDER, U.S. AIR FORCE SCI. ADVISORY BD., NEW WORLD VISTAS: AIR AND SPACE POWER FOR THE 21ST CENTURY 3 (1995) (summary volume), *available at* <http://www.au.af.mil/au/awc/awcgate/vistas/vistas.htm>.

<sup>85</sup> *Id* at 11.

<sup>86</sup> *See* NICHOLAS JOHNSON & DAVID RODVOLD, EUROPE AND ASIA IN SPACE 1993-1994 at 347 (1995).

<sup>87</sup> *See, e.g.*, LAURA GREGO, UNION OF CONCERNED SCIENTISTS, SHORT HISTORY OF US AND SOVIET ASAT PROGRAMS I, (2003), *available at* [http://www.ucsusa.org/assets/documents/nwgs/asat\\_history.pdf](http://www.ucsusa.org/assets/documents/nwgs/asat_history.pdf); *see also* William Marshall et al., *Space Weapons: The Urgent Debate*, 1 INT’L STUDENT/YOUNG PUGWASH J. ON SCI. & WORLD AFF. 19, 21-22 (2005).

<sup>88</sup> GREGO, *supra* note 87, at 1.

<sup>89</sup> *See id.* at 3.

ASAT test against an aging U.S. satellite,<sup>90</sup> and the resulting space debris remained in orbit until 2002.<sup>91</sup> After the test, the U.S. Congress immediately restricted authorization for future air-launched ASAT tests on objects in space.<sup>92</sup> In 1986, they placed a moratorium on ASAT testing on objects in space altogether unless the President could certify to Congress that the former Soviet Union had first conducted such a test.<sup>93</sup> When the former Soviet Union agreed to honor the moratorium on kinetic ASAT tests,<sup>94</sup> the U.S. Secretary of Defense canceled plans to research, develop, test, and evaluate kinetic energy ASAT capabilities against objects in space.<sup>95</sup>

For the next twenty years, kinetic energy ASAT capabilities seemed to be an afterthought, until China blasted the capability back into the spotlight. On 11 January 2007, China launched a small ballistic missile 537 miles into space to destroy an aging weather satellite, the *Fengyun-1C*.<sup>96</sup> The explosion sent thousands of destructive pieces of debris from both the satellite and the missile into various orbital planes around the Earth, “ranging in altitude from 3,800 km. [2,361 miles] on the high end down to about 200 km. [124 miles] at the lowest.”<sup>97</sup> At the beginning of 2009, the United States was tracking 2,378 fragments greater than five centimeters in diameter from this ASAT mission, plus another 400 fragments that had not yet been cataloged.<sup>98</sup>

Just about a year after the Chinese ASAT test, the United States was forced to shoot down one of its own satellites, destroying the satellite just before it fell out of orbit.<sup>99</sup> On 14 February 2008, the United States launched an Aegis-LEAP SM-3 interceptor missile from the *USS Lake Erie* to destroy the *USA-193* spy satellite’s toxic hydrazine fuel propellant tank

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<sup>90</sup> *Id.*

<sup>91</sup> See JESSICA WEST ET AL., SPACE SECURITY.ORG, SPACE SECURITY 2008 28 (2008) (discussing the debris left by a 1985 U.S. “kinetic energy test”), available at <http://www.spacesecurity.org/SSI2008.pdf>.

<sup>92</sup> Department of Defense Authorization Act for Fiscal Year 1986, Pub. L. No. 99-145, §208, 1985 Stat. 1160 (1985)(discussing, the budgetary limitations placed on future ASAT tests on objects in space).

<sup>93</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-161, §231, 1986 Stat. 2638 (1986) (discussing the ASAT testing moratorium).

<sup>94</sup> GREGO, *supra* note 87, at 4.

<sup>95</sup> See, e.g., National Defense Authorization Act for Fiscal Year 1989, Pub. L. 100-456, § 216, 102 Stat. 1918 (1988) (discussing the canceled F-15 ASAT weapon program and limitations on obligating funds dedicated to that program).

<sup>96</sup> Craig Covault, *Space Control: Chinese Anti-satellite Weapon Test Will Intensify Funding and Global Policy Debate on the Military Uses of Space*, AVIATION WK. & SPACE TECH., Jan. 22, 2007, at 24.

<sup>97</sup> Frank Moring, Jr., *Worst Ever: Chinese Anti-satellite Test Boosted Space-Debris Population by 10% in an Instant*, AVIATION WK. & SPACE TECH., Feb. 12, 2007, at 20.

<sup>98</sup> *Fengyun-1C Debris: Two Years Later*, 13 NASA’S ORBITAL DEBRIS Q’LY NEWS 1, 2 (2009).

<sup>99</sup> *Satellite Breakups During First Quarter of 2008*, 12 NASA’S ORBITAL DEBRIS Q’LY NEWS 2, (2008) [hereinafter 12 ORBITAL DEBRIS Q’LY NEWS]. The United States timed the intercept to occur at the lowest possible altitude before the satellite began re-entry. *Id.*

that officials said could be hazardous if it crashed back to Earth.<sup>100</sup> Some experts worried that “the impact would blast [more] debris into orbit around Earth, threatening the space station” and other space-based systems.<sup>101</sup> However, the Pentagon and NASA planned for the created space debris to quickly disintegrate in the Earth’s atmosphere.<sup>102</sup> Indeed, the “majority of the debris fell to Earth within an hour of the break-up, and the remaining debris was left in short-lived orbits.”<sup>103</sup> According to the U.S. Strategic Command, no debris from that ASAT mission currently remains in orbit.<sup>104</sup>

Although kinetic energy ASATs may cause more harm to a country’s own space assets than the enemy’s due to the amount of space debris they create, they are capabilities countries still possess and will continue to study and use if necessary. China, Russia and the United States have demonstrated their ability to use this capability. Now, India is also planning its own ASAT capability. India’s Defence Research and Development Organisation (DRDO) is developing a “satellite killer” to “eliminate enemy satellites operating in low-earth orbits.”<sup>105</sup> According to the DRDO director, the purpose of these efforts is “to deny the enemy access to its space assets.”<sup>106</sup> Because space assets are so important to today’s modern military, and because most “[c]urrent-generation satellites are not equipped to defend themselves,”<sup>107</sup> the international community should expect more and more space-faring nations to study, and perhaps use, this capability in armed conflict. The nation that first decides to use this capability in armed conflict will almost certainly have other countries and organizations second-guessing its decision, which makes the legal review for compliance with LOAC and the U.N. Charter so crucial.

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<sup>100</sup> *Missile Hits Spy Satellite, Pentagon Says*, CHI. TRIB., Feb. 21, 2008, at 3. The ASAT mission drew criticism from abroad over concerns about the militarization of space and whether the U.S. concern over hydrazine was just a pretext to respond to the Chinese ASAT mission with its own ASAT mission. See, e.g., Jack Gillum, et. al, *How Satellite Shot Went Down*, ARIZ. DAILY STAR, Apr. 13, 2008, at D1. This debate prompted the State Department to send a cable to all U.S. embassies abroad. *Id.* “Diplomats were told to draw a clear distinction between the [U.S. ASAT mission] and [2007’s] test by China of a missile specifically designed to take out satellites, a test that was criticized by the United States and other countries.” *Id.*

<sup>101</sup> *Missile Hits Spy Satellite, Pentagon Says*, *supra* note 118, at 3.

<sup>102</sup> *Id.*

<sup>103</sup> 12 ORBITAL DEBRIS Q’LY NEWS, *supra* note 99, at 1.

<sup>104</sup> Jim Wolf, *U.S. Satellite Shootdown Debris Said Gone From Space*, REUTERS, Feb. 27, 2009, (quoting STRATCOM Commander General Kevin Chilton); available at <http://www.reuters.com/article/idUSTRE51Q2Q220090227>.

<sup>105</sup> See, e.g., *India’s “satellite killer” to take on China*, MSN News, Jan. 4, 2010, <http://news.in.msn.com/national/article.aspx?cp-documentid=3517606>.

<sup>106</sup> *Id.* (quoting General V. K. Saraswat).

<sup>107</sup> GREGO, *supra* note 87, at 8.

## B. Co-orbital ASAT and Microsatellites

One of Russia's dedicated ASAT capabilities is the co-orbital ASAT system.<sup>108</sup> This capability includes a missile armed with explosives that is "launched when a target satellite's ground track rises above the launch site and the ASAT is placed into an orbit close to that of the target."<sup>109</sup> Once in orbit, the co-orbital ASAT is designed to maneuver close enough to the target satellite to collide with or explode close enough to the target satellite to destroy it through the ensuing blast.<sup>110</sup> Co-orbital ASAT technology can also describe maneuvering one satellite into the orbital path of another in an attempt to cause a collision. On 10 February 2009, a non-functioning Russian communications satellite collided 500 miles over Siberia with a telecommunications satellite previously operated by Iridium, a privately owned U.S. satellite company.<sup>111</sup> Some analysts believe Russia maneuvered the satellite into the path of the Iridium satellite to test its co-orbital ASAT capabilities,<sup>112</sup> while Russian military officials countered with the allegation that the United States may have been testing its own co-orbital ASAT capabilities.<sup>113</sup>

China is also suspected of possessing a co-orbital ASAT technology. In 2008, during China's third manned mission into space, the Shenzhou-7 spacecraft released a microsatellite called the "VX-1."<sup>114</sup> In general, microsatellites are small craft that track and follow other satellites and can maneuver close enough to the target satellite to disrupt or destroy it.<sup>115</sup> China's microsatellite "maneuvered to more than 200 kilometers away, after which it returned to a discarded module of the spacecraft and orbited it."<sup>116</sup> One Air Force official stated that "many observers interpret the microsatellite's maneuvers as a demonstration of a potential co-orbital ASAT capability" by China.<sup>117</sup>

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<sup>108</sup> *Id.*, at 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Traci Watson, *Two satellites collide 500 miles over Siberia*, USA TODAY, Feb. 12, 2009, at 9A.

<sup>112</sup> See, e.g., Editorial, *Strike From Space?*, WASH. TIMES, Mar. 6, 2009, at A18 (reporting the statement of Department of Defense space consultant Taylor Dinerman).

<sup>113</sup> *Id.* (quoting Russian Major General Leonid Shershnev).

<sup>114</sup> Robert K. Ackerman, *Space Now a Contested Venue*, SIGNAL, June 2009 at 70.

<sup>115</sup> See GREGO, *supra* note 87, at 7-8.

<sup>116</sup> Ackerman, *supra* note 114, at 70.

<sup>117</sup> *Id.* (quoting Col. Sean D. McClung, director of the National Space Studies Center).

### C. Directed Energy

In addition to kinetic capabilities, countries are studying, developing and employing non-kinetic space and cyberspace capabilities.<sup>118</sup> The U.S. Air Force, for example, is currently studying directed energy capabilities for use in space and cyberspace.<sup>119</sup> Several capabilities currently exist, to include dazzlers,<sup>120</sup> lasers, high-powered microwave, and high-powered radio frequency.<sup>121</sup> The Airborne Laser (ABL) and the Advanced Tactical Laser (ATL) are two capabilities that can be directed against satellites. The ABL is a chemical laser mounted in a modified version of a Boeing 747 called the NKC-135A that has successfully destroyed five air-to-air missiles and one “target drone.”<sup>122</sup> The system works by dispersing “heat from what Boeing calls the ‘megawatt class’ laser beam—the precise power level is classified—[to] cause the pressurised [*sic*] part of the missile to warp, bend and buckle, resulting in the missile’s complete disintegration.”<sup>123</sup>

At the time this article was written, the DoD had most recently tested the ABL in February 2010. On 3 February 2010, the Missile Defense Agency used the ABL to destroy a solid fuel short-range missile launched from an island off the central California coast.<sup>124</sup> On 11 February 2010, the ABL again used its infrared sensors to find and destroy an in-flight ballistic missile—this time a liquid-fueled missile.<sup>125</sup> The ABL “fired its megawatt-class High Energy Laser, heating the boosting ballistic missile to critical structural failure.”<sup>126</sup> The test marked the first time a directed energy weapon mounted on an airborne platform was used to intercept a liquid-fueled ballistic missile,<sup>127</sup> “and the first time any system has accomplished it in the missile’s ‘boost’ phase of flight. It was also the highest-energy laser

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<sup>118</sup> See Maj Gen David Scott & Col David Robie, *Directed Energy: A Look to the Future*, AIR & SPACE POWER J., Winter 2009, at 6, 9 (asserting that “[p]otential adversaries are making significant investments” in directed energy capabilities).

<sup>119</sup> *Id.*

<sup>120</sup> Dazzlers are essentially lasers designed to blind electro-optical surveillance satellites much the way shining a flashlight at a camera would blind the camera as it takes the picture. See, e.g., *Space and U.S. National Power: Hearing Before the Strategic Forces Subcomm. of the H. Comm. on Armed Services*, 109th Cong., (2006) (statement of Michael O’Hanlon, senior fellow, foreign policy studies, Brookings Institution) [hereinafter *Space and U.S. National Power Hearing*, O’Hanlon statement].

<sup>121</sup> Scott & Robie, *supra* note 118, at 8.

<sup>122</sup> *Id.* At 7

<sup>123</sup> Paul Marks, *Airborne Laser Lets Rip on First Target*, 200 NEWSCIENTIST 26, 26 DEC. 13, 2008).

<sup>124</sup> *Testing Airborne Laser Weapons*, FOXNEWS.COM (Feb. 17, 2010), <http://www.foxnews.com/scitech/2010/02/17/video-testing-armys-new-airborne-laser/>; [hereinafter *Testing Airborne Laser Weapons*]; Press Release, Missile Defense Agency, Airborne Laser Test Bed Successful in Lethal Intercept Experiment (Feb. 11, 2010) available at <http://www.mda.mil/news/10news0002.html> [hereinafter MDA Press Release].

<sup>125</sup> MDA Press Release, *supra* note 124.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

ever fired from an aircraft—and the most powerful mobile laser in the world.”<sup>128</sup>

Similar to the ABL in terms of its use of directed energy, the ATL is a high-energy laser that also engages targets at the speed of light.<sup>129</sup> The ATL is a laser weapon designed to be mounted on Special Operations C-130 Hercules aircraft.<sup>130</sup> This advanced laser weapon can “deliver the heat of a blowtorch with a range of 20 kilometres”.<sup>131</sup> “The target would never know what hit them. . . . Further, there would be no munition fragments that could be used to identify the source of the strike.”<sup>132</sup> Thus, with no attack debris, a “silent and invisible” laser beam, and a transport plane flying far enough away to feasibly avoid detection, the ATL “has the added benefit that the US could convincingly deny any involvement with the destruction it causes.”<sup>133</sup>

Recent advances in chemical lasers, optics, and beam control have led to improvements in both the ABL and ATL.<sup>134</sup> The directed energy capabilities can be used against any target susceptible to heat failure. The range and speed of these lasers make them ideal for use against satellites, and, in fact, both lasers have latent anti-satellite capability.<sup>135</sup>

Additionally, the United States, Russia, and China possess ground-based lasers (GBL) they can use against space assets and other targets susceptible to heat failure. One such GBL is the mid-infrared advanced chemical laser (MIRACL), a megawatt-class chemical laser located at the White Sands Missile Range in New Mexico.<sup>136</sup> While funding for the MIRACL program has not always been consistent, and a Congressional ban on its testing was in place from 1991 to 1995,<sup>137</sup> the Air Force resurrected the program again in 1996. In 1997, the Air Force tested the MIRACL capability against a satellite orbiting approximately 260 miles above the earth.<sup>138</sup> Despite using only a thirty-watt laser, the test showed that even such a low-powered laser could temporarily blind a satellite.<sup>139</sup> This MIRACL test was touted in 2006 Congressional testimony to highlight the United States’ capability to use “ground-based high-energy laser in an

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<sup>128</sup> *Testing Airborne Laser Weapons*, *supra* note 124.

<sup>129</sup> Scott & Robie, *supra* note 118, at 1

<sup>130</sup> See Hambling, *supra* note 4.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (quoting John Pike, an analyst with the Virginia-based think-tank [Global Security](#)).

<sup>133</sup> *Id.* (recounting claims made by senior Air Force officials). For the briefings that provided the source for these claims, see note 5, *supra*.

<sup>134</sup> See Scott & Robie, *supra* note 118, at 7-8 (discussing the “significant advances in directed energy weapons and technology”).

<sup>135</sup> *Space and U.S. National Power Hearing*, O’Hanlon statement, *supra* note 120.

<sup>136</sup> See GREGO, *supra* note 87, at 5.

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> John Donnelly, *Laser of 30 Watts Blinded Satellite 300 Miles High*, DEF. WK., Dec. 8, 1997, at 1.

ASAT mode.”<sup>140</sup>

The 1997 MIRACL test showed the benefit of temporarily blinding a satellite. As a result of this concept, the “Army has reportedly been working on laser dazzlers to blind surveillance satellites and jammers to disrupt communications and surveillance satellites.”<sup>141</sup> Russia and China are also believed to possess this capability, and the United States claims that China tested the country’s laser dazzler capability against a U.S. satellite in 2006.<sup>142</sup>

Mirrors—either airborne or even orbital—can increase the range and accuracy of directed-energy lasers. The Air Force Research Laboratory has developed a program called the “Tactical Relay Mirror System” designed for this very purpose—to “extend the range and accuracy of high-energy lasers by means of airborne mirrors or relay systems (active mirrors).”<sup>143</sup> As part of the overall system, mirrors make these directed energy capabilities that much more effective.

In addition to lasers, radio frequency, most commonly high-power microwaves (HPM), also has demonstrated unique bloodless capabilities.<sup>144</sup> In 2009, the Air Force announced a three-year plan to study “HPM weapons capable of disrupting any military system containing electronics by disabling or destroying the electronics components.”<sup>145</sup> This study will build on a much earlier one, in 1995, which highlighted the advantage of combining high radio frequency power and large antenna technology in space, stating that such a capability in “geo-synchronous orbit could create a six mile footprint on a battlefield, which would ‘blank out’ all radar receivers and damage all unprotected communication sets within that area.”<sup>146</sup>

Besides the United States, Russia and China, the French, British, and Germans are also believed to possess directed energy capabilities.<sup>147</sup> Clearly, countries are developing directed energy capabilities with an eye towards using them in future conflicts. What is not clear is whether these same countries are reviewing the developing capabilities for compliance with LOAC across the international community or use in conformity with the U.N. Charter, but they should be.

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<sup>140</sup> *Space and U.S. National Power Senate Hearing*, O’Hanlon statement, *supra* note 120.

<sup>141</sup> *Id.*

<sup>142</sup> See *US claims that China has used lasers to attack satellites*, JANES DEFENSE WEEKLY, Oct. 16, 2006, at 7. In October 2006, Donald Kerr, director of the National Reconnaissance Office, confirmed the incident but said the U.S. satellite was not materially damaged. *China Jamming Test Sparks U.S. Satellite Concerns*, USATODAY.COM, Oct. 5, 2006, [http://www.usatoday.com/tech/news/2006-10-05-satellite-laser\\_x.htm](http://www.usatoday.com/tech/news/2006-10-05-satellite-laser_x.htm).

<sup>143</sup> Scott & Robie, *supra* note 118, at 7, n.2.

<sup>144</sup> *Id.*, at 3.

<sup>145</sup> *Id.* Major General Scott at the time was deputy chief of staff for the Air Force’s Operations, Plans and Requirements division.

<sup>146</sup> Ivan Bekey, *Force Projection from Space*, in *NEW WORLD VISTAS: AIR AND SPACE POWER FOR THE 21ST CENTURY* 83, 83-84 (1995).

<sup>147</sup> Scott & Robie, *supra* note 118, at 4.



#### D. Nanotechnology

Like the other capabilities previously discussed, nanotechnology has the potential to revolutionize modern and future warfare without the blood normally associated with conventional weapons, but nanotechnologies can also create special problems and dangers of their own.<sup>148</sup> Nanotechnology is essentially “the principle of atom manipulation atom by atom, through control of the structure of matter at the molecular level.”<sup>149</sup> This type of capability would provide militaries across the world with “the ability to build molecular systems with atom-by-atom precision, yielding a variety of nanomachines.”<sup>150</sup>

Nanotechnology “contains many far-reaching visions that would have vast impacts on individuals, societies and the international community.”<sup>151</sup> The U.S. Department of Defense, China and Russia are openly investing significant amounts of money in nanotechnology, and some see this developing capability as “the next step in biological and chemical warfare or, in extreme cases, as the opportunity for people to create the species that will ultimately replace humanity.”<sup>152</sup>

Nanotechnology “would provide capabilities for qualitatively new means and methods of warfare.”<sup>153</sup> Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual’s knowledge.<sup>154</sup> So called “nanoweapons” have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence.<sup>155</sup> Some experts also believe nanotechnology possesses the potential to attack buildings as a “swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building,” thus avoiding the collateral damage a kinetic strike on that same building would cause.<sup>156</sup>

With such potential, nanotechnology can profoundly impact the

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<sup>148</sup> See, e.g., JÜRGEN ALTMANN, MILITARY NANOTECHNOLOGY: POTENTIAL APPLICATIONS AND PREVENTIVE ARMS CONTROL 1 (2006); Gregory Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. 1323 (2008).

<sup>149</sup> K. Eric DREXLER, ENGINES OF CREATION, THE COMING AGE OF NANOTECHNOLOGY 4–5 (1990).

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., ALTMANN, *supra* note 148, at 1; Mandel, *supra* note 148, at 1323.

<sup>152</sup> MARK A. RATNER, NANOTECHNOLOGY: A GENTLE INTRODUCTION TO THE NEXT BIG IDEA 2 (2003).

<sup>153</sup> ALTMANN, *supra* note 148, at 110.

<sup>154</sup> *Id.* at 5.

<sup>155</sup> FRITZ ALLHOFF, NANOETHICS: THE ETHICAL AND SOCIAL IMPLICATIONS OF NANOTECHNOLOGY 270 (2006).

<sup>156</sup> *Id.*

very nature of futuristic warfare.<sup>157</sup> States should not be allowed to use such a capability in international armed conflict with impunity. Because of its potential impact, any use of nanotechnology capability in modern warfare should first undergo a rigorous legal review.

#### E. Cyberspace Capabilities

The cyber world is yet another domain in which the world powers are developing capabilities. Such a domain houses the possibility to develop “game-changing technologies”<sup>158</sup> that have the ability to jeopardize the security, reliability, resilience and trustworthiness of the digital infrastructure, as well as equipment items that rely on such an infrastructure.<sup>159</sup> The United States, Russia and China each have complex and often classified cyberspace policies.<sup>160</sup> The U.S. Department of Defense has even acknowledged the potential for cyber operations to be directed against enemy computer networks as a possible instrument of national security policy.<sup>161</sup> Unfortunately, research into such capabilities is not limited to the world’s major powers. One hundred and twenty nations either already have or are currently in the process of establishing competence in this area.<sup>162</sup> As a result, “cyber security is now a core national security priority” in Australia, the United States, and many other countries, as fears of a “cyber tsunami” or “immaculate Pearl Harbor” have entered the vocabulary of cyber threats.<sup>163</sup>

An event that took place a decade ago highlights the reasons for heightened emphasis on cyber security and the ever-increasing potential for cyber warfare. In October 2000, cyber operators gained access to Microsoft’s internal network in the United States and sent passwords to a Russian email account by using a relatively unsophisticated program called a Trojan horse.<sup>164</sup> A Trojan horse is essentially a virus or “type of malicious

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<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., Alastair MacGibbon, *Cyber Security: Threats and Responses in the Information Age*, AUSTL. STRAT. POL’Y INST., Dec. 2009, at 1, 1.

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., Shackelford, *supra* note 7, at 202.

<sup>161</sup> See Bradley Graham, *Bush Orders Guidelines for Cyber-Warfare*, WASH. POST, Feb. 7, 2003 at A1; OGC INFO OPS ASSESSMENT, *supra* note 1, at 8.

<sup>162</sup> See, e.g., Shackelford, *supra* note 7, at 202.

<sup>163</sup> See MacGibbon, *supra* note 158, at 1; see also AUSTL. DEP’T OF DEF., DEFENDING AUSTRALIA IN THE ASIA PACIFIC CENTURY: FORCE 2030 (DEFENCE WHITE PAPER 2009) (2 May 2009) (emphasizing the importance Australia now places on cyber security in conjunction with the United States and noting that Australia has opened a Cyber Security Operations Centre). The phrases “cyber tsunami” and “immaculate Pearl Harbor” have been used in cyber security discussions the authors have attended to explain the potential devastating effects a cyber capability can have without the visible destructive evidence one may expect to see in a traditional attack.

<sup>164</sup> Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT’L L. 207, 209–10 (2002).

software that fools a computer user into thinking that it will perform a wanted function but instead gives unauthorized access to the infected machine to a third party.”<sup>165</sup> Once a computer is compromised by a Trojan horse, an unauthorized user can take over that computer through remote access and collect, exploit, falsify or destroy data.<sup>166</sup> The cyber operators who gained access to Microsoft’s internal network in the United States likely obtained the necessary codes to alter program operation or install programs to later allow them access into computers and networks running Microsoft software.<sup>167</sup> Because most of the United States government and military computer systems and networks operate on Microsoft software, the 2000 incident posed “grave national security-related concerns” in the United States over two years later.<sup>168</sup> Efforts such as this to gain unauthorized intrusions into government computer networks are unfortunately commonplace. In fact, “on a single day in 2008, the Pentagon was ‘attacked’ electronically six million times by people seeking access.”<sup>169</sup> That number stands in stark contrast to the 22,144 total cyber “attacks” that occurred on DoD networks for all of 1999.<sup>170</sup>

Operational employment by a state of malicious software similar to that used against Microsoft back in 2000 can give that state the ability to adversely affect the enemy’s military operations or military capacity through the cyber domain. If employed to falsify or destroy data, with the corresponding effect of neutralizing a command and control network or a weapon system reliant on that data, such a capability becomes more than just hacking or cyber espionage and crosses the line into a method of warfare that should be reviewed before use.

The potential of cyber capabilities such as these to cause serious harm to an adversary is far from theoretical. During the Cold War, the Central Intelligence Agency (CIA) allegedly gained unauthorized access to a Soviet computer to install malicious code, called a logic bomb, which the CIA subsequently used to destroy a Soviet natural gas pipeline.<sup>171</sup> An expertly conducted cyber attack “could destroy a nation’s economy and deprive much of its population of basic services, including electricity, water, sanitation, and even police and fire protection if the emergency bands similarly crashed.”<sup>172</sup> Estonia and Georgia experienced these frightening results when coordinated cyber attacks were carried out against each country

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<sup>165</sup> Wolfgang McGavran, *Intended Consequences: Regulating Cyber Attacks*, 12 TUL. J. TECH. & INTELL. PROP. 259, 263 (2009) (citations omitted).

<sup>166</sup> *See id.*

<sup>167</sup> Jensen, *supra* note 164, at 209–10.

<sup>168</sup> *Id.*

<sup>169</sup> Major Patrick W. Franzese, *Sovereignty in Cyberspace: Can it Exist?*, 64 A.F.L. REV. 1, 2 (2009) (citations omitted).

<sup>170</sup> Shackelford, *supra* note 7, at 200.

<sup>171</sup> McGavran, *supra* note 165, at 263.

<sup>172</sup> *See, e.g.*, Shackelford, *supra* note 7, at 201; *see also* Geoff Kitney and John Kerin, *ASIO Chief Warns on Cyber Attacks*, AUSTL. FIN. REV., July 30, 2010, at 1, 4.

in the last three years—attacks for which many believe Russia is responsible.<sup>173</sup> In Estonia, over just a few short hours on April 27, 2007, the online portals of its leading banks crashed, government communications were impeded, and the websites for Estonia's primary newspapers were blocked.<sup>174</sup> While bloodless and non-lethal, the effects of this cyber attack “were potentially just as disastrous as a conventional attack”<sup>175</sup> and underscore the reason a legal review should be performed on such a capability prior to employment.

Because advanced nations’ infrastructures depend so heavily on online technologies, experts point out how effectively cyber attacks can “even the playing field.”<sup>176</sup> Chief among U.S. rivals, “China apparently agrees with this assessment, believing that U.S. dependency on information technology ‘constitutes an exploitable weakness.’”<sup>177</sup> Four main factors motivate the Chinese: the comparatively low costs of cyber operations, the difficulty tracing a cyberattack’s source, the chaos such attacks can create, and “the ‘underdeveloped legal framework to guide responses.’”<sup>178</sup> The last point is the most troubling because with these cyber capabilities, as with almost all of these bloodless capabilities, there exist two questions that are difficult to answer under the current international legal framework.<sup>179</sup> First is how to determine the true identity of the attacker and properly attribute the attack to that person. Second is a legal determination about the scope of an appropriate response to such an attack. Whether the attack was conducted with a weapon, means or method of warfare will help answer the appropriateness of the response.

#### IV. IMPLICATIONS

A conclusion that the capabilities described above are “weapons,” or, at the very least, “means or methods of warfare” may seem obvious. However, a State should be wary of characterizing them as such; it should do so with “eyes wide open,” cognizant of the consequences of such a characterization. If a State does so, it must be prepared to confront the debates about the weaponization of space and cyberspace. It must be

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<sup>173</sup> See generally *Estonia hit by ‘Moscow cyber war’*, BBC NEWS, May 17, 2007, <http://news.bbc.co.uk/2/hi/europe/6665145.stm>; Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED MAG., Aug. 21, 2007, [http://www.wired.com/politics/security/magazine/15-09/ff\\_estonia](http://www.wired.com/politics/security/magazine/15-09/ff_estonia) (detailing a rogue computer network's assault on Estonia); *Putin Warns Against Belittling War Effort*, RADIO FREE EUROPE, May 9, 2007, <http://www.rferl.org/featuresarticle/2007/05/704c2d80-9c47-4151-ab76-b140457a85d3.html>; see also Shackelford, *supra* note 7, at 198 n.24, 208.

<sup>174</sup> See, e.g., Shackelford, *supra* note 7, at 202.

<sup>175</sup> *Id.*

<sup>176</sup> Franzese, *supra* note 169, at 36–37.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., *supra* note 7, at 201.

prepared to accept that civilians operating such capabilities could be regarded as directly participating in hostilities, that they may therefore be legitimately targeted, and that they may be criminally culpable without the protection of combatant immunity.<sup>180</sup> Outside the context of armed conflict, characterizing such capabilities as weapons may impose criminal culpability on any user, civilian or military. Furthermore, characterization as weapons may severely restrict technology-sharing arrangements due to export controls on weapons. However, the most significant implication, and the first to be considered below, is that the use of such capabilities, if characterized as weapons, is more likely to qualify as a “threat or use of force,” or worse, an “armed attack” for the purposes of the U.N. Charter, and what may have started as a relatively bloodless battle may legitimately escalate into a bloody, kinetic battle.<sup>181</sup>

Before embarking on this discussion it is important to add a qualification. The fact that there might be implications of characterizing certain capabilities as “weapons, means or methods of warfare” is unlikely to change the legal determination of the character of such capabilities. However, as has been shown above, the law is unsettled – the proper legal characterization is open to question. In such situations, a State’s position on the law is as much a statement of what the law should be, as opposed to a statement of what the law actually is. While the consequences of the characterization of space and cyberspace capabilities may be of no relevance to the law once formed, the consequences are the *sine qua non* of the policy that forms the foundation of the law in development. Thus, the discussion below is intended to inform both the consideration of the law as it is now and the future development of the law.<sup>182</sup>

#### A. Use of “Weapons” and the *Casus Belli*

A fundamental issue in characterizing the use of these capabilities as “weapons” for policy-makers is reciprocity. If one State characterizes the use of such capabilities against it as the “use of a weapon,” it must be prepared to accept a consistent characterization if it uses that same

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<sup>180</sup> Protocol I, *supra* note 2, art. 51(3).

<sup>181</sup> See generally, Daniel M. Creekman, *A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-attacks from China*, 17 AM. U. INT’L L. REV. 641, 641–81 (2002). However, other comments have indicated that States would prefer to counter an attack in the cyber domain with a response limited to the cyber domain. See, e.g., Lolita C. Baldor, *Military Asserts Right to Return Cyber Attacks*, ASSOCIATED PRESS, Apr. 14, 2010, available at <http://abcnews.go.com/Technology/wirestory?id=10371000&page=3> (last visited Aug. 26, 2010).

<sup>182</sup> Boothby, *supra* note 78, at 353–88; see also Marie Jacobsson, *Modern Weaponry and Warfare: The Application of Article 36 of Additional Protocol I by Governments*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 137 (Anthony M. Helm ed., 2006).

capability against other States. Thus, where one State uses offensive cyber capabilities against another State, the “victim” State may choose not to declare those actions as “use of force” by a “weapon” (and therefore unlawful as a violation of Article 2(4) of the U.N. Charter) because the second State may wish to engage in the very same activities itself.

Another crucial factor is the concept of aggression, which is an important influence to Articles 2(4) or 51 of the U.N. Charter, although it does not equate neatly with the thresholds under either. If the first State’s actions can be said to have crossed a certain legal threshold, especially the threshold of “armed attack” for the purposes of Article 51 of the U.N. Charter, then certain responses become legitimate and the *casus belli* is made out. For example, the “victim” State can lawfully do more to prevent the action from being taken again or continuing. Furthermore, the initiating State may be labeled an aggressor, a label that carries with it the likelihood of U.N.-mandated military action and the possibility of international criminal charges. This section initially considers Articles 2(4) and 51 independently of the concept of aggression and then explores whether it matters how capabilities are characterized when considering the thresholds referred to in this paragraph.

It is not necessarily a simple, binary classification. These capabilities could be weapons, means or method of warfare, or they could not—or they could be weapons, means or method of warfare in some circumstances but not in others. The phrase itself provides the threshold condition: “of warfare,” and this section explores that threshold further.

### 1. *Threat or Use of Force*

The prohibition against the threat or use of force in Article 2(4) of the U.N. Charter is generally recognized as referring to “armed” force.<sup>183</sup> However, this does not imply that the use of physical “arms” (i.e., “weapons” and perhaps “means of warfare”) is definitive. Rather, references in the U.N. Charter to “armed force” are, almost without exception,<sup>184</sup> taken as references to the military forces of the State concerned.<sup>185</sup> Use of force of a non-military nature may, in extreme

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<sup>183</sup> Albrecht Randelzhofer, *Art. 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, para. MN 16 (Bruno Simma ed., 2d ed. 2002) (citing a long list of international law scholars who take this position).

<sup>184</sup> For a discussion of possible exceptions, including Computer Network Attack, see Daniel B. Silver, *Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 73, 82 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002).

<sup>185</sup> Randelzhofer, *supra* note 183, at para. MN 16-27, and Albrecht Randelzhofer, *Art. 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, para. MN 16 (Bruno Simma ed., 2d ed. 2002). The “certain level of assistance” is a reference to *Nicaragua Case* (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)),

circumstances, rise to the level of “armed” force,<sup>186</sup> but this article deals only with military force. Nevertheless, the exception is instructive, since effects analogous in scale and gravity to a conventional military attack may be just the extreme circumstances that amount to a use of force.<sup>187</sup> The reference to “gravity” reinforces the emphasis on “effects;” it is not the size of the cause that is important, but the magnitude of the effects.<sup>188</sup> For example, a denial of service attack involving hits to a single web page many millions of times per day is unlikely to have a significant effect notwithstanding the scale of the attack, whereas a small microsatellite performing an ASAT mission that takes out a Global Positioning System satellite could severely affect many States, notwithstanding its diminutive size.<sup>189</sup>

Does the same effects-based approach also apply to the use of capabilities by military forces, or does such use against another State amount to a “use of force” merely by virtue of the status of the initiator as a military unit? Pursuant to Article 41 of the Charter, the “complete or partial interruption of . . . telegraphic, radio, and other means of communication” does not necessarily amount to a use of armed force, notwithstanding that the interruption of such communications might be achieved through a military capability or using the same means as a military capability. Furthermore, espionage has existed as long as military forces have (in fact, the former pre-dates the latter). While States often carry out espionage by military means, the international community generally has not characterized spying, intelligence and related activities as a “threat or use of force.” China did not use such language with respect to the EP3 signals surveillance aircraft that conducted an emergency landing on Hainan Island in 2001,<sup>190</sup> and no country has claimed that intelligence, surveillance, and reconnaissance satellites constitute the “threat or use of force.” Finally, since the use by belligerents “of telegraphy or telephone cables or of wireless telegraphy apparatus” belonging to a neutral State would not

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1986 I.C.J. 14, 101 (June 27)), but for the purposes of this present article, it is not necessary to explore that “certain level.”

<sup>186</sup> Randelzhofer, *supra* note 183, at para. MN 21.

<sup>187</sup> Silver, *supra* note 184, at 83 (countering the assertion that the use of physical force would have to be analogous to an “armed attack”) *see also* Randelzhofer, *supra* note 183, at para. MN 21.

<sup>188</sup> *See* Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE* 193–95 (4<sup>th</sup> ed., 2005); Randelzhofer, *Art. 2(4)*, *supra* note 183, at para. MN 17-27; *and* Randelzhofer, *Art. 51*, *supra* note 185, at para. MN 16. For an alternate to the effects-based approach, *see* Todd, *supra* note 2.

<sup>189</sup> *See* notes 108-117, *supra*, and accompanying text.

<sup>190</sup> But *see* the Russian reaction to the US spy plane brought down in their territory in 1960, which is discussed in the United Nations Security Council’s *Verbatim Report* from meeting 857 of May 23, 1960, *available at* UNDemocracy.com, <http://www.undemocracy.com/S-PV-857> (last visited Apr. 14, 2010).

violate that State's neutrality,<sup>191</sup> using such things would hardly seem to equate to a "threat or use of force."

Thus, the same effects-based approach must apply to the use of capabilities by military forces, although the initiator's status as military probably lowers the bar. One State's use of bloodless capabilities with negligible effects in scale and gravity in another State, especially if the effects are not directed at that State, is unlikely to amount to a "threat or use of force against the territorial integrity or political independence" of that State, even if a military force is operating the capability. Whether the capability may be characterized as a "weapon, means or method of warfare" for the purposes of Article 36 of Additional Protocol I or under customary international law seems only to be relevant in that it tends to link the capability with military forces.

## 2. *Armed Attack*

The notion of "armed attack" referenced in Article 51 of the U.N. Charter has a narrower meaning than the phrase "threat or use of force" under Article 2(4).<sup>192</sup> As previously discussed, the use of physical "arms" is not definitive when deciding whether an "armed attack" has occurred. Given, however, that the effects of an "armed attack" must be greater in scale or gravity than a "threat or use of force," it seems unlikely that few, if any, circumstances not involving physical "arms" could qualify as an "armed attack." Yet, conceivably, a series of space and cyberspace attacks could render a military force and its individual units relatively blind, deaf, mute and lost (without access to satellites for position, navigation and timing) without using anything traditionally regarded as military "arms." International legal writers differ on what scenarios involving space and cyberspace capabilities might amount to an "armed attack."<sup>193</sup> Suffice it to say, however, that while characterization as a "weapon, means or method of warfare" for the purposes of Article 36 of Protocol I should not determine the issue, it could significantly impact the issue.

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<sup>191</sup> Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ch. 1, art. 8, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

<sup>192</sup> Ranzelzhofer, *Art. 2(4)*, *supra* note 183, para MN 16-27, and Ranzelzhofer, *Art. 51*, *supra* note 185, para. MN 16-36; *see also* Dinstein, *supra* note 188.

<sup>193</sup> *See, e.g.*, Schmitt, *Solf Lecture*, *supra* note 5, at 417; Schmitt, *Network Attack*, *supra* note 5, at 912; WINGFIELD, *supra* note 5, at 124-127; *see also* THOMAS C. WINGFIELD, *WHEN IS A CYBER ATTACK AN ARMED ATTACK? LEGAL THRESHOLDS FOR DISTINGUISHING MILITARY ACTIVITIES IN CYBERSPACE* (2006); WALTER GARY SHARP, SR., *CYBERSPACE AND THE USE OF FORCE* (1999); Todd, *supra* note 2; Sklerov, *supra* note 11; *See generally*, Yoram Dinstein, *Computer Network Attacks and Self-Defense*, in *COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 99* (Michael N. Schmitt & Brian T. O'Donnell eds., 2002); Jackson Nyamuya Maogoto & Steven Freeland, *Space Weaponization and the United Nations Charter Regime on Force: A Thick Legal Fog or a Receding Mist?*, 41 INT'L LAW. 1091 (2007).



### 3. Aggression

Even before the U.N. Charter, dating back to at least the first drafts of the Charter of the International Military Tribunal at Nuremberg, customary international law criminalized acts of aggression.<sup>194</sup> Article 39 of the U.N. Charter gave the Security Council the power to determine the existence of an act of aggression, at least for the purposes of collective measures that might follow such a determination. Yet a definition of aggression eluded the international community until 14 December 1974 when the General Assembly adopted Resolution 3314 defining aggression by consensus.<sup>195</sup> The mechanics of a potential crime of aggression were only just recently considered at the first Review Conference of the International Criminal Court in June of this year.<sup>196</sup>

This concept of aggression matters not only because of potential criminal culpability, but also because it influences the other thresholds. More importantly, the definition of aggression specifically mentions the word “weapons.” The annex to the resolution begins with a broad definition of aggression, drawn largely from Article 2, paragraph 4, of the U.N. Charter (though omitting reference to threats) and then enumerates specific examples of acts of aggression.<sup>197</sup> The acts set out in Article 3 qualify as acts of aggression, subject to the provisions of Article 2, which envisage that the Security Council may decide not to make a determination of aggression in the light of the circumstances, including the fact that the acts are not of sufficient gravity. Relevantly, Article 3(b) of the annex states that the “use of any weapons by a State against the territory of another State” constitutes an act of aggression.<sup>198</sup>

However, several caveats are necessary before drawing any conclusions about the characterization of a capability as a weapon and the use of that capability in “an act of aggression.” First, the definition is not intended to, nor can it, limit the discretion of the Security Council under Article 39 of the U.N. Charter to make a determination of aggression regardless of whether a country characterizes the capability used as a “weapon” for the purposes of a legal review. Such a determination of aggression is a political act, not a judicial act. As mentioned above, the determination of an act of aggression gives rise to potential collective action against the State under the *U.N. Charter* as mandated by the Security Council.<sup>199</sup> It can also make certain individual action against the aggressor State lawful.

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<sup>194</sup> Dinstein, *supra* note 188, at 117–18.

<sup>195</sup> Definition of Aggression, G.A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

<sup>196</sup> The agenda for the first Review Conference of the International Criminal Court can be found at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/> (last visited July 14, 2010).

<sup>197</sup> Definition of Aggression, G.A. Res. 3314, Annex art. 1, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

<sup>198</sup> *Id.*, art. 3(b).

<sup>199</sup> Dinstein, *supra* note 188, at 70.

In 1970, the U.N. General Assembly, in Resolution 2625, alluded to the fact that any act of “aggression” necessarily crosses the Article 2(4) threshold.<sup>200</sup> A State would be lawfully entitled to take countermeasures (acts that would be unlawful if not responding to another State’s unlawful acts), provided that such countermeasures are not a threat or use of force themselves.<sup>201</sup> Some commentators and the International Court of Justice have suggested that even a form of self-defense may be available.<sup>202</sup> However, acts labeled “aggression” will not necessarily rise to the level of an “armed attack,” so the right to act in self-defense under Article 51 of the U.N. Charter does not automatically follow from a determination that a State has become the victim of an act of aggression.

The second caveat is similar: The definition is not intended to, nor can it, limit a court’s determination of aggression. Furthermore, given that no international court currently has jurisdiction to try a crime of aggression, a finding that a State has committed an act of aggression is of limited value. This may change, depending on whether States ratify over the next seven years the Amendment on the Crime of Aggression put forth during the first Review Conference of the International Criminal Court.<sup>203</sup> Finally, just as with the other threshold concepts, the concept of aggression is dependent on gravity of causes, as well as effects. The “use of any weapons by a State against the territory of another State” will not amount to aggression if the acts concerned or their consequences are not of sufficient gravity.<sup>204</sup>

Nevertheless, characterizing a capability as a “weapon” appears to make it more likely that its use against another State will constitute an act of aggression under General Assembly Resolution 3314. Pursuant to General Assembly Resolution 2625, using such a weapon, therefore, would also, *ipso facto*, cross the threshold set forth in Article 2(4) of the U.N. Charter. Before committing to this conclusion, though, there is another caveat. A “weapon” for the purposes of Article 36 of Additional Protocol I does not necessarily have the same meaning as a “weapon” for the purposes of General Assembly Resolution 3314.

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<sup>200</sup> See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 Annex, U.N. Doc. A/RES/2625 (Oct. 24, 1970).

<sup>201</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 281–305 (2002).

<sup>202</sup> Dinstein, *supra* note 188, at 221–31.

<sup>203</sup> The advanced copy of the Resolution on the Crime of Aggression adopted, by consensus, on 11 June 2010 at the 13th plenary meeting during the first Review Conference of the International Criminal Court can be found at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (last visited July 14, 2010). The text pertaining to the proposed Crime of Aggression to be inserted in the Rome Statute at Article 8 *bis* and Article 15 *ter* can be found in the Annexes to the resolution. *Id.*, annex I.

<sup>204</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101 (June 27).

#### 4. A “Weapon” for All Reasons?

What is the scope of purposes for which a capability might be characterized as a “weapon, means or method of warfare”? As discussed above, this phrase is not explained in the commentaries on Protocol I, although the reference to “warfare” is an important qualifier. On that point, however, the commentaries simply state that the term “warfare” was preferred to “combat” because the latter was considered too narrow and the former encompasses the latter.<sup>205</sup> Nevertheless, as part of Protocol I, the phrase “weapon, means or method of warfare” cannot be defined for purposes outside Protocol I unless the treaty expresses that intention. It does not. Therefore, whatever the term “warfare” encompasses in Article 36 of Additional Protocol I, it is no wider than armed conflict.<sup>206</sup>

To put it another way, certain capabilities may require review under Article 36 because a State expects to employ them in armed conflict, but the converse does not hold true. That is, just because a State has used these capabilities, it does not follow that there is an armed conflict or that a “weapon” has been used. The fact that a State determines whether employing a particular capability in an armed conflict would, in some or all circumstances, be prohibited by any rule of applicable international law, does not mean that the capability is necessarily a weapon, or a weapon in every sense of the word.<sup>207</sup> Thus, just because capabilities are subject to review under Article 36 does not mean that they are weapons for all reasons.<sup>208</sup>

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<sup>205</sup> DE PREUX ET AL, *supra* note 52, at 421.

<sup>206</sup> Parks, *supra* note 2, at 121-22 (arguing that Protocol II to the 1949 Geneva Conventions has no equivalent to Article 36, which cannot be said to apply to the use of weapons in non-international armed conflict as a rule of customary international law) *but see supra* notes 47-48 and accompanying text (discussing whether a State must perform a legal review on a weapon, means or method of warfare before using it in non-international armed conflict).

<sup>207</sup> Thus the necessity of restricting the transfer of dual-use goods under the Wassenaar Arrangement.

<sup>208</sup> As an example, consider a water-bombing helicopter. Surely, no one would suggest that such a thing is a weapon *per se*. Or if it is a weapon, then it is a fire-fighting weapon, not a weapon “of warfare.” Yet, in an international armed conflict a commander may choose to use a water-bombing helicopter to disable a telephone exchange that is critical to enemy communications but is also in an area densely populated with civilians. A water-bombing helicopter may be ideal for achieving the desired effect, without a significant impact on the surrounding civilians. In this context it is probably a weapon of warfare, yet it would be absurd to suggest that the use of a water-bombing helicopter in another State’s territory is an act of aggression solely because it could be used as a weapon of warfare.

## B. “Weaponization” of Space

There is a certain paradox between the noble foundations of space law and the genesis of humanity’s exploitation and military use of space.<sup>209</sup> The first human artifact into space, the German V2 rocket, resulted from a German retaliation against allied bombing of its cities. Furthermore, a space race between Cold War powers marked the formative years of space law. The noble sentiments of space law may have more to do with a fear of being left behind than with states bound by a common sense of humanity or notions of exclusively peaceful uses of space.<sup>210</sup>

Thus, the noble sentiments go only so far. The international legal instruments of space law prohibit placing nuclear weapons or any other weapons of mass destruction in outer space (in orbit, on celestial bodies, or otherwise stationing them in outer space). Apart from testing any type of weapon on celestial bodies, the prohibition does not extend beyond nuclear weapons or other such weapons of mass destruction.<sup>211</sup> The deployment of conventional weapons in outer space is not prohibited, although limitations may arise from the U.N. Charter, LOAC obligations and the norm of “peaceful purposes”—although the last is less than clear.

The many references throughout the instruments of space law to “peaceful purposes” are equivocal. The stated interpretation or the practice of most space-faring nations has been consistent with a view of “peaceful purposes” that allows for any activity that is not aggressive, although a strong minority interpret the phrase “peaceful purposes” to mean “non-military.”<sup>212</sup> Nevertheless, deploying conventional weapons in outer space could be supported by the status of self-defense as a *jus cogens* norm, its recognition under Article 51 of the U.N. Charter as an inherent right of

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<sup>209</sup> Michel Bourbonniere, *National Security Law in Outer Space: The Interface of Exploration and Security*, 70 J. OF AIR L. & COM. 3 (2005) (providing a very good description of the paradox).

<sup>210</sup> Adam G. Quinn, *The New Age of Space Law: The Outer Space Treaty and the Weaponization of Space*, 17 MINN. J. INT’L L. 475, 477 (2008); see also Jonathan F. Galloway, *The Revolution and Evolution in the Law of Outer Space*, 87 NEB. L. REV. 516 (2009) (offering a useful account of the evolution of space law).

<sup>211</sup> Treaty on Principles 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, 61 U.N.T.S. 205 [hereinafter Outer Space Treaty]; see generally also Michel Bourbonniere & Ricky Lee, *Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict*, 18 EUR. J. INT’L L. 873 (2008).

<sup>212</sup> Michael N. Schmitt, *International Law and Military Operations in Space*, 10 MAX PLANCK Y.B. OF U.N. L. 89, 101 (2006); Tare C. Brisibe, *Customary International Law, Arms Control and the Environment in Outer Space*, 8 CHINESE J. INT’L L. 375, 388 (2009). For example, in 2009, a high-ranking Chinese military commander made statements supporting the militarization of space, but he was quickly corrected by the Chinese Ministry of Foreign Affairs, who reiterated China’s official position opposing weaponization of space. Peter J. Brown, *Space is Suddenly On the Agenda*, ASIA TIMES ONLINE, Nov. 12, 2009, <http://www.atimes.com/atimes/China/KK12Ad01.html> (recounting remarks by General Xu Qiliang, commander of the Chinese air force).

every state, the obligation under Article III of the Outer Space Treaty to carry on activities “in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security,”<sup>213</sup> and the obligation to contribute to the maintenance of international peace and security if called upon to do so under Article 42 of the U.N. Charter.<sup>214</sup> Furthermore, “in an extreme circumstance of self-defense, in which the very survival of a State would be at stake” even the use of nuclear weapons in outer space may be lawful.<sup>215</sup>

The debate about weaponization of space therefore belongs in the policy domain, rather than the legal domain—at least for now.<sup>216</sup> But one should not underestimate the efforts that have occurred, and are still ongoing, to bring the concept of space weaponization into the legal domain. Every year since 1981, the General Assembly has adopted a resolution widely known as the “Prevention of an Arms Race in Outer Space,” or “PAROS,” prompting some to say that the broad principles of prevention of an arms race in outer space are customary international law in the making.<sup>217</sup> However, the principle is broad indeed – the resolution is no more specific than the phrase “prevention of an arms race in outer space.”

In February 2008, China and Russia jointly submitted a draft treaty on this topic to the Conference on Disarmament.<sup>218</sup> Such a treaty would prohibit the placement of any weapon in outer space, and defines a weapon as:

[A]ny device ... specially produced or converted to destroy, damage or disrupt the normal function of objects in outer space, on the Earth or in its air, as well as to eliminate population, components of biosphere critical to human

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<sup>213</sup> Outer Space Treaty, *supra* note 211, art. III.

<sup>214</sup> Bourbonniere & Lee, *supra* note 211, at 877-81.

<sup>215</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254, 262 (July 8). Russia apparently has reached this conclusion. Their anti-ballistic missile system around Moscow still uses a 10 kiloton tactical nuclear weapon as an inter-continental ballistic missile kill vehicle. See Review of *SH-08 ABM-3 Gazelle*, <http://warfare.ru/?catid=315&linkid=2206> (last visited July 27, 2010).

<sup>216</sup> There is currently a website specifically dedicated to the debate: <http://www.spacedebate.org/> (last visited Apr. 14, 2010).

<sup>217</sup> Brisibe, *supra* note 212, at 384. The latest was on 2 December 2009, General Assembly resolution A/RES/64/28.

<sup>218</sup> Ministry of Foreign Affairs of the People’s Republic of China, *Prevention of an Arms Race in Outer Space*, Aug. 10, 2009, <http://www.mfa.gov.cn/eng/wjb/zzjg/jks/kjlc/wkdd/t410757.htm>; see also Permanent Mission of the Russian Federation to the United Nations Office and other International Organizations in Geneva, *Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects: Statement by the Permanent Representative of the Russian Federation Ambassador Valery Loshchinin at the Plenary meeting of the Conference on Disarmament, Geneva*, Feb. 13, 2007, <http://www.geneva.mid.ru/disarm/13.html> accessed on 14 April 2010.

existence or inflict damage to them.<sup>219</sup>

This would appear to cover any weapon for the purposes of Article 36 of Protocol I, but not necessarily the system supporting it, or the way in which it is used. Such a weapon would be considered “placed” in outer space even if following only a section of an orbit.<sup>220</sup>

The United States has been opposed to negotiations in the Conference on Disarmament on a draft treaty.<sup>221</sup> But as President Obama stated in his presidential campaign: “There is a simpler and quicker way to go: a Code of Conduct for responsible space-faring nations.”<sup>222</sup> The idea of a Code of Conduct had been proposed as an alternative to a treaty well before the China/Russia draft treaty,<sup>223</sup> but perhaps the most significant development recently in respect of this approach was the adoption in December 2008 by the European Union member states of a “Draft Code of Conduct for Outer Space Activities.”<sup>224</sup> That Draft Code of Conduct expressly recognizes the “legitimate defence interests of States” and the inherent right of self-defense in accordance with the U.N. Charter. The code might be said to take an effects-based approach. Rather than focusing on weapons as the cause, subscribing States promise to:

[R]efrain from any intentional action which will or might bring about, directly or indirectly, the damage or destruction of outer space objects unless such action is conducted to reduce the creation of outer space debris and/or justified by imperative safety considerations [and] take appropriate steps

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<sup>219</sup> Draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects, Russia-China, art. I, para. (c), Feb. 29, 2008 (attached to a letter dated 12 February 2008 from the permanent representative of the Russian Federation and the permanent representative of China to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting the Russian and Chinese texts of the draft treaty).

<sup>220</sup> *Id.*, art. I, para. (d).

<sup>221</sup> David A. Kaplow, *ASAT-ism: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT’L L. 1187 (2009); see also Ineke Malsch, *Negotiating Space*, THE BROKER ONLINE, Oct. 7, 2009, <http://www.thebrokeronline.eu/en/articles/Negotiating-space>, and Jeff Abramson, *EU Issues Space Code of Conduct*, ARMS CONTROL TODAY, January/February 2009, [http://www.armscontrol.org/act/2009\\_01-02/eu\\_issues\\_space\\_code\\_conduct](http://www.armscontrol.org/act/2009_01-02/eu_issues_space_code_conduct).

<sup>222</sup> Senator Barack Obama, *Response to Policy Questionnaire*, COUNCIL FOR A LIVABLE WORLD, at [http://livableworld.org/assets/pdfs/2008\\_presidential\\_candidates\\_questionnaire\\_responses.pdf](http://livableworld.org/assets/pdfs/2008_presidential_candidates_questionnaire_responses.pdf) (last visited Apr. 14, 2010).

<sup>223</sup> See the list of supporters for an idea of a code of conduct at The Henry L. Stimson Center, Space Security Program, *Endorsements of a Code of Conduct*, <http://www.stimson.org/space/?SN=WS200701191170> (last visited Apr. 14, 2010).

<sup>224</sup> *Draft Code of Conduct for Outer Space Activities*, 25 Space Policy 144 (2009). See the full text of the draft, and another proposal for a Code of Conduct at: <http://www.stimson.org/space/?SN=WS200702131213> (last visited Apr. 14, 2010).

to minimize the risk of collision[.]225

Given that the Conference on Disarmament requires consensus, even on agenda setting, there is no prospect that any meaningful negotiation can even proceed on the China/Russia draft treaty while the United States opposes it.<sup>226</sup> Thus, characterization of space capabilities as weapons will have no legal consequences in the space domain for the foreseeable future, although it could make policy debates more challenging.

### C. “Weaponization” of Cyberspace

The closest thing to a specific treaty regulating the behavior of states in cyberspace towards one another is the European Convention on Cybercrime.<sup>227</sup> However, that instrument obliges state parties to criminalize certain cyber activities by individuals, as opposed to the states themselves, and it does not define “weapon” in the context of cyberspace. Major Graham Todd, United States Air Force, suggested in a recent article that this treaty might be used as a model for a treaty regulating the behavior in cyberspace between states, and to this end, he proposed a definition of weapon.<sup>228</sup> There is no evidence yet that this innovative thinking has been officially considered by states.

In the absence of such treaties or customary international law, the debate has focused on the application of more general principles from the U.N. Charter and LOAC.<sup>229</sup> The implications of characterizing cyber capabilities as a weapon, means or method of warfare in the first legal framework has already been covered, and some implications in LOAC are covered below. Legal implications aside, there also seems to be very little policy debate about weaponizing cyberspace. There are at least two explanations for this. The first is that the offensive cyber capabilities of a state appear to be very close-held. States are reluctant to initiate a debate since it may entail giving away too much about their cyber capabilities. The second is very much related to this paper – that is, it is not clear when a

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<sup>225</sup> See *id.*, para. 4.2.

<sup>226</sup> Kaplow, *supra* note 221, at 1217-18.

<sup>227</sup> Convention on Cybercrime, Nov. 23, 2001, 2296 U.N.T.S. 167, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

<sup>228</sup> Todd, *supra* note 2, at 70, 81-82.

<sup>229</sup> See, e.g., Dr Knut Dörmann, Applicability of the Additional Protocols to Computer Network Attacks, Address Before the Stockholm International Committee of the Red Cross’s International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law (Nov. 17, 2004); Arie J. Schaap, (2009), *Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F.L. REV. (CYBERLAW ED.) 121 (2009); Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 409 (2009); Michael N. Schmitt, Heather A. Harrison-Dinniss, & Thomas C. Wingfield, Computers and War: The Legal Battlespace, Address Before the Program on Humanitarian Policy and Conflict Research at Harvard University, Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law (June 25, 2004).

cyber capability should be characterized as a weapon. If cyber capabilities are the subject to legal reviews under Article 36 of Protocol I or under customary international law, then this may spark the debate.

#### D. Participation in Hostilities

If a capability is a weapon, means or method of warfare it follows that the use of such a capability amounts to participation in hostilities.<sup>230</sup> Only combatants have the right to participate in hostilities. Consistent with that right they are entitled to be treated as prisoners of war if captured, to be repatriated at the conclusion of hostilities, and are immune from criminal responsibility for their participation in hostilities (provided that they do nothing unlawful in the way in which they participate).<sup>231</sup> They are certainly not protected from targeting – quite the contrary, their mere status as a combatant is sufficient to make them lawful targets at any time, regardless of what they may be doing at that time.

Yet many of the ‘bloodless’ capabilities discussed in this paper will be developed, prepared, or even operated by civilians. ‘Civilian’ is defined negatively – anyone who is not a combatant.<sup>232</sup> A civilian generally enjoys legal protection from attack, but has no right to participate in hostilities.<sup>233</sup> This is the case even though certain civilians, namely those accompanying the armed forces (such as supply contractors), are entitled to prisoner of war status.<sup>234</sup> A civilian who takes a direct part in hostilities loses the legal protection from attack and may be liable for a criminal offence if he or she does so.<sup>235</sup> Thus, a civilian who uses one of the capabilities discussed in this paper, if it is regarded as a weapon, means or method of warfare, may be targeted, even by kinetic means, and may be prosecuted for his or her activities.

There are two caveats to this conclusion. First, a civilian who takes a direct part in hostilities loses protection from attack only for such time as he or she is directly participating in hostilities. This is not confined to the moment of launching an attack; it at least includes preparation necessary for the conduct of a specific hostile act, and deployment to a location from which an attack will be launched and return from that location.<sup>236</sup> The more

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<sup>230</sup> NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 44 n.88, 47 n.96 (2010) (referencing Sandov, *supra* note 52, § 1943).

<sup>231</sup> The current legal framework for combatant immunity relative to the status of civilians is considered in detail, in the context of cyberspace, in Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT’L L., 391, 411-23 (2010).

<sup>232</sup> Protocol I, *supra* note 2, Art. 50(1).

<sup>233</sup> *Id.*, Art. 51(3).

<sup>234</sup> Geneva Convention Relative to the Treatment of Prisoners of War art 4(A)(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>235</sup> However, prosecutions for civilian participation in hostilities are rare. See Watts, *supra* note 231, at 422.

<sup>236</sup> Melzer, *supra* note 230, at 65-68.



controversial issue is the ‘revolving door’ situation – does a civilian who repeatedly undertakes activities harmful to an adversary regain his or her protection in between each such activity? For example, a civilian operator of a directed energy weapon controlled remotely goes to work each day and returns home overnight. Is he or she targetable overnight? This issue is central to the debate about direct participation in hostilities, but the solution is beyond the scope of this paper.<sup>237</sup> Suffice to say that characterization of a capability as a weapon, means or method of warfare makes no difference to this debate. This assertion is supported by the next caveat.

Secondly, what involvement in hostilities amounts to direct participation in hostilities? There must be a degree of causal proximity. To paraphrase the recently completed Interpretive Guidance on the Notion of Direct Participation in Hostilities by the International Committee of the Red Cross (ICRC), the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, must reasonably be expected to directly – in one causal step – cause death, injury or destruction or adversely affect military operations or military capacity of a party to the conflict.<sup>238</sup> While there is much debate about the exact degree, a computer network attack is given as an example of participation that has the requisite causal proximity, notwithstanding that the initiator may be geographically and temporally remote.<sup>239</sup>

This second caveat is particularly relevant to the characterization of capability as a weapon, means or method of warfare. The use of a weapon, means or method of warfare by a civilian may be sufficient to make that civilian a legitimate target and also make him or her liable to prosecution for a criminal offense, but these consequences are likely to follow whether the capabilities discussed in this paper are characterized as weapons, means or methods of warfare or not.

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<sup>237</sup> See Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L.Q. 180 (2010) (discussing, in Section IV, the debate over continuous direct participation in hostilities).

<sup>238</sup> Melzer, *supra* note 230, at 51-58.

<sup>239</sup> The relationship between the first and second caveat, particularly the temporal elements, reveals a challenge in the application of the ICRC parameters and this challenge is especially relevant to the sort of capabilities discussed in this paper. Certain involvement with capabilities other than initiating their effects on the adversary may be sufficiently direct to meet the test. For example, writing code of a specific computer network attack. Experts that contributed to the ICRC Interpretive Guidance also gave an example of a particular civilian of such expertise that it could change the outcome of an armed conflict, such as the case of nuclear weapons experts during the Second World War. One can imagine an expert developing a missile defense shield with directed energy weapons that render the nuclear deterrent of an adversary nugatory. In these examples the direct participation in hostilities may be occurring over an extended period, including overnight.

## E. Weapons and Export Control

As explained above, the legal review of new weapons is typically focused on the employment of weapons, not on possession, or sale and transfer. While a negative legal review of the employment of a weapon may operate as a bar to import, and potentially export, of the weapon, there are specific laws that relate directly to the transfer of weapons, technology and the sharing of expertise. For the most part, the laws applicable to weapons and export control are domestic laws. The majority of the arms control instruments in international law tend to focus on the proliferation of nuclear weapons; however, there are some relevant treaties and arrangements that regulate non-nuclear weapons.

The development of weapons using nanotechnology must potentially confront the Biological Weapons Convention (BWC)<sup>240</sup> as well as the Chemical Weapons Convention (CWC).<sup>241</sup> The BWC relates to: “(1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;” and “(2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.”<sup>242</sup> The BWC does not define “weapon” in the context of the convention. However, it prohibits more than weapons – the reference to “equipment or means of delivery” especially in conjunction with “hostile purposes or armed conflict”<sup>243</sup> undoubtedly encompasses “means of warfare,” and the decision to use biological capabilities “for hostile purposes or in armed conflict” undoubtedly amounts to a “method of warfare.” Thus, the BWC is one of the many treaties typically considered by those undertaking legal reviews of new weapons.

That is, the characterization of a capability as a weapon, means or method of warfare for the purposes of legal review is sufficient to invoke consideration of the BWC. This is significant because under Article III of the BWC, States undertake “not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.” However, there is a difference between a weapon, means or method of warfare for the purposes of the legal review of a new weapon on the one hand, and a weapon under

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<sup>240</sup> Convention on the Prohibition of the Development, Production, Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention].

<sup>241</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature Jan. 13, 1993, S. Treaty Doc. No.103-21, 1974 U.N.T.S. 3 [hereinafter Chemical Weapons Convention].

<sup>242</sup> Biological Weapons Convention, *supra* note 240, art. I.

<sup>243</sup> Contrast this with Article I of the Biological Weapons Convention, *supra* note 240, which refers to “prophylactic, protective or other peaceful purposes”.

the BWC. The former may include defensive instruments of combat, yet the latter allows the “exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes”,<sup>244</sup> which purposes include protection and prophylaxis as Article 1(1) indicates. Thus, a decision to conduct a review of nanotechnologies that could be described as “microbial or other biological agents or toxins” may lead to a prohibition on transfer of the capability itself, as well as transfer of related technology and expertise, although this depends on the purpose to which the nanotechnology will be put.

The CWC does have a specific definition of “Chemical Weapons” and it is as follows:

- (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
- (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
- (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).<sup>245</sup>

The phrase “purposes not prohibited under this Convention” is also defined to cover peaceful purposes (such as for agriculture), protective purposes (such as developing countermeasures to chemical weapons), law enforcement purposes (such as riot control) and “military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare.”<sup>246</sup> The prohibitions in the CWC are in very similar terms to the BWC and include direct or indirect transfer.<sup>247</sup> Thus, a decision to conduct a legal review of nanotechnologies that involve toxic chemicals may also lead to a prohibition on transfer of the capability itself, as well as transfer of related technology and expertise, although again this depends on the purposes to which the nanotechnology will be put.

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<sup>244</sup> Biological Weapons Convention, *supra* note 240, art. X.

<sup>245</sup> Chemical Weapons Convention, *supra* note 241, art. II(1).

<sup>246</sup> *Id.*, art. II(9).

<sup>247</sup> *Id.*, art. I(1)(a).

The Wassenaar Arrangement covers a much broader range of weapons and their component parts than the CWC or BWC. The Wassenaar Arrangement is a grouping of states that have decided, without a formal treaty, to restrict the transfer of sensitive weapons technologies.<sup>248</sup> There is emphasis on the technologies in addition to the weapons themselves. Thus, participating states have decided to restrict the export of comprehensive lists of sensitive, dual-use goods and technologies. These lists are specifically not dependent on characterization of the goods and technologies as a weapon, means or method of warfare, but rather it is the fact that they could be transferred for an apparently innocent purpose, and subsequently used for hostile purposes, that is the rationale for the lists. The Wassenaar Arrangement is implemented in participating states through domestic legislation. Domestic laws on export controls, however, are not necessarily limited to the Wassenaar Arrangement.

An example of domestic laws on sale and transfer of weapons and associated technology and knowledge in the U.S. is the Arms Export Control Act (AECA).<sup>249</sup> The AECA is the most significant piece of legislation that regulates the foreign military sales of weapons. Within the AECA is the Foreign Military Sales (FMS) Program.<sup>250</sup> Of note, under section 2761 of the AECA, “the President may sell defense articles and defense services,” and “defense article” is defined as “any weapon, weapons system, munition, aircraft, vessel, boat or other implement of war; or . . . any component or part of any article [thereof].”<sup>251</sup> The sale or transfer of weapons from the U.S. to any foreign country must conform to the restrictions in Department of State International Traffic in Arms Regulations (ITARs).<sup>252</sup> Sections 2778(a) and 2794(7) of the AECA provide that the President shall designate the articles and services deemed to be defense articles and defense services. The items so designated constitute the United States Munitions List and are specified in Part 121 of the ITAR. Like the Wassenaar Arrangement, the Munitions List is specifically not dependent on characterization of the goods and technologies as a weapon, means or method of warfare.<sup>253</sup> The same can be said of the Defense and Strategic

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<sup>248</sup> The official website for the Wassenaar Arrangement is at <http://www.wassenaar.org/index.html> (last visited Apr. 14, 2010).

<sup>249</sup> 22 U.S.C. §§ 2751-79 (1982). Pertinent definitions can be found at 22 U.S.C. § 2403 (2009).

<sup>250</sup> 22 U.S.C. § 2761 (1982).

<sup>251</sup> *Id.*

<sup>252</sup> The United States Department of State Directorate of Defense Trade Controls maintains a consolidated version of the ITARs, which can be found at: [http://www.pmdtc.state.gov/regulations\\_laws/itar\\_consolidated.html](http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html) (last visited Apr. 14, 2010).

<sup>253</sup> Notably, Category XI “Military Electronics,” subparagraph (a)(6) of part 121 of the ITAR states that “computers specifically designed or developed for military application and any computer specifically modified for use with any defense article in any category of the U.S. Munitions List” is a defense article. Subparagraph (a)(6) to Category XI of part 121 of the ITAR also adds “electronic systems or equipment specifically designed, modified, or

Goods List in Australia under the Customs (Prohibited Export) Regulations, regulation 13E.<sup>254</sup>

In summary, the characterization of a capability as a weapon, means or method of warfare may have implications for the export of such a capability and the transfer of technology and sharing of expertise. However, it is hardly surprising that there would be export controls in respect to a prohibited weapon under the BWC and CWC, although this depends on the particular use to which the capability is put. Beyond the BWC and CWC, it is difficult to imagine how the restriction on transfer of other weapons and technology and the sharing of knowledge would be affected by the characterization of a capability as a weapon, means or method of warfare for the purposes of a legal review under Article 36 of Additional Protocol I or customary international law.

## V. CONCLUSION

The fact that a bloodless capability is considered to be a “weapon, means or method of warfare” for the purposes of conducting a legal review under Article 36 or customary international law cannot justify a conclusion that it is a weapon for all reasons. The assessment of a capability as a “weapon, means or method of warfare” would not necessarily determine that there has been a weaponization of space or cyberspace, and such a characterization would also not likely impact on weapons and export control. It would not indicate that there has been a threat or use of force, nor an armed attack, if that capability is later used. Use of the capability might, however, constitute an act of aggression against the territorial integrity or political independence of another State. Additionally, the use of that capability by a civilian operator could implicate that civilian as someone directly participating in hostilities and subject them to targeting, but the characterization of the capability as a weapon should not impact on the conclusion about whether the civilian was or was not, in fact, taking a direct part in hostilities. Regardless, none of the implications provide a compelling reason not to conduct a legal review of bloodless capabilities,

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configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems or equipment designed or modified to counteract electronic surveillance or monitoring. Finally, subparagraph (d) to Category XI of part 121 of the ITAR adds that “technical data” associated with these computers and/or electronic systems are also included.

<sup>254</sup> The Customs (Prohibited Export) Regulations, 1958 (Austl.), *available at* <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200400503>.

The Defence Export Control Office (DECO) is the Australian entity responsible for keeping the list required by the Wassenaar Arrangement and generally for controlling the export of sensitive, weapons-related technologies. The DECO maintain a very useful website at <http://www.defence.gov.au/strategy/deco/default.htm>.

nor can it be cogently argued that these bloodless capabilities are not “weapons, means or methods of warfare.”

As discussed in this paper, the future of warfare will no doubt contain many bloodless space and cyberspace capabilities that can destroy or confuse the enemy. Law abiding nations should conduct legal reviews of any such capability that can be applied to a military object or enemy combatant. Such a standard would necessarily include the requirement to perform a legal review of the bloodless space and cyberspace capabilities discussed in this paper before those capabilities are employed in an armed conflict. The implications do not justify the legal hair splitting and mental gymnastics that take place to conclude that a certain capability should *not* be subjected to a legal review. In case of doubt about whether a capability should be subjected to a legal review, the capability should be considered a “weapon, means or method of warfare” and subjected to a legal review as a matter of policy before it is employed in armed conflict.

The U.N. Charter and the laws governing armed conflict should not be flouted with impunity. Law abiding governments have the responsibility to lead, and lead by example. The decision about whether to conduct a legal review of some advanced technology capabilities, such as those associated with the space and cyberspace domains, should always be made with a view towards promoting the desired perception that a country meticulously honors its international legal obligations. Quite simply, conducting a legal review is the right thing to do.

Performing a legal review on such capabilities provides the military commander or owner of the capability with an acknowledgement of the legality of the capability in question. No one should ever be put in a position of doubt concerning the legality of their actions in the employment of a capability simply because that capability failed to undergo a proper legal review. Legal reviews inherently provide such an individual the peace of mind that what he or she is doing is, in fact, lawful. Similarly, legal reviews on bloodless capabilities also enhance unit morale by ensuring those concerned that they are fighting lawfully and honorably. Such a result, in turn, enhances public support of the mission. The legal review can also assist in identifying previously unthought-of issues and aid in demystifying the applicable law.<sup>255</sup>

Calling a capability a “weapon” for the purposes of a “weapons review” does not mean that such a capability is a weapon in every sense of the word. Conducting weapons reviews does not create a “situation in which ‘one size fits all’, nor one in which one government’s weapons review programme would be suitable for another government.”<sup>256</sup> Of

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<sup>255</sup> See, e.g., Parks, *supra* note 2, 106.

<sup>256</sup> *Id.* at 57. For instance, eye-safe lasers that exist today as nonlethal “laser dazzlers” do not meet the definition of a blinding laser weapon found in CCW Protocol IV; however, the United States and Australia required and conducted a legal review on each and every type of ‘dazzling laser’ prior to their acquisition and deployment by their militaries. *Id.* at 115.

significance is the fact that a particular weapon, means or method of warfare is subjected to legal scrutiny before it is employed in armed conflict.

Although some individuals may express concern that the mandatory legal review approach might give rise to delay, this has not proved to be the case in the past.<sup>257</sup> It is anticipated that legal reviews of most of the bloodless capabilities discussed in this paper would be fairly quick and routine, posing no unique legal issues or legal prohibitions to use in armed conflict. It is the establishment and maintenance of a weapons review program that is the important factor here.

In such a weapons review program, however, the term “weapon” should connote at a minimum, as Lieutenant Colonel Justin McClelland suggested, a capability that can be applied to a military object or enemy combatant. The bloodless space and cyberspace capabilities discussed in this paper provide the military possessing that capability with exactly that—a capability that can be applied to a military object or enemy combatant to gain a military advantage. The means whereby this is achieved will involve a device or object such as a computer, ASAT, or a directed energy weapon, or a substance or implement such as that being discussed in the realm of nanotechnology. The way these capabilities are used, such as the tactics, techniques and procedures developed to govern their use, will provide the “methods of warfare” subject to review.

These capabilities are *prima facie* bloodless by nature, ostensibly causing less death and injury to civilians and combatants. In many ways, these bloodless capabilities make the conflict easier and less costly. Overall, these bloodless capabilities provide the military with many more options to decrease human suffering, which is a positive result. Some may conclude, therefore, that a legal review is not needed because of this positive result.

Capabilities that become easier to use, however, become more ubiquitous by nature, and it is the proper, legal use of these capabilities that is the key. To ensure these bloodless capabilities are properly used and are indeed “bloodless”, they should undergo some sort of a legal review before their employment. How that legal review should occur is the subject of another discussion, but just as some semblance of an agreement has been achieved on the legal use of traditional, kinetic military capabilities, a similar result would be achieved if these bloodless capabilities are subjected to legal reviews to ensure they are humanely and properly used.

Moreover, while bloodless capabilities that prevent unnecessary death, bodily harm and human suffering certainly fall within the noble *raison d'être* of international humanitarian law, preserving international peace and stability is the *raison d'être* of the *U.N. Charter*, which also governs these capabilities' use.<sup>258</sup> The “contemporary world order . . . was born out of a desire ‘to save succeeding generations from the scourge of

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<sup>257</sup> *Id.* at 57.

<sup>258</sup> U.N. Charter art. 1, para. 1.

war’ and ‘to reaffirm faith . . . in the dignity and worth of the human person.’”<sup>259</sup> Capabilities designed to replace traditional war, capabilities that could actually start a war, or capabilities that threaten international peace and stability should be subjected to a legal review before employed.

This appears to be the better argument from a legal perspective. Under such an argument, any capability that can be applied to a military object or enemy combatant would be deemed a “weapon, means or method of warfare.”<sup>260</sup> This argument takes into account the notion that the modern military sees in space and cyberspace capabilities the promise of a surgical, asymmetric victory or mission success without risking a single hair on the heads of their own citizens, or those of their adversary. Such an approach confronts the fact that space and cyberspace capabilities can and do weaken an adversary’s will to resist, and can be potentially devastating for civilian populations. Faced with such a threat, it is unconvincing to maintain that space and cyberspace capabilities fail to qualify as “weapons, means or methods of warfare.”

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<sup>259</sup> Sayapin, *supra* note 6, at 95-96 (citing U.N. Charter preamble, para. 1–2).

<sup>260</sup> *See, e.g.*, McClelland, *supra* note 70, at 404; *see also* BOOTHBY, *supra* note 78, at 4 (discussing McClelland’s definition of the term “weapon”).





UNTOLD STORIES OF GOLDMAN V. WEINBERGER: RELIGIOUS  
FREEDOM CONFRONTS MILITARY UNIFORMITY

*SAMUEL J. LEVINE\**

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An earlier version of this article was published as a chapter in *LAW AND RELIGION: CASES IN CONTEXT* (Leslie Griffin ed., Aspen Publishers 2010). It is printed here with permission of the publisher. I thank Leslie Griffin for soliciting this chapter, Simcha Goldman, Ron Rakowsky, Jim Cohen, Ken Starr, Nat Lewin, Steve Solarz, and Rabbi Yitzchak Adlerstein for discussions of the case, and Scott Hodges for helpful suggestions. I thank Fraida Liba, Yehudah, Aryeh, Rachel, and Shira for continued encouragement.

## I. INTRODUCTION

The U.S. Supreme Court has historically shown considerable deference to the military on matters of good order and discipline.<sup>1</sup> A significant part of good order and discipline in the military relies on uniformity—uniformity in physical standards, uniformity in decorum, uniformity in clothing. At the same time, however, the Court has emphasized that “members of the military are not excluded from the protection granted by the First Amendment.”<sup>2</sup> As illustrated by current events, conflicts may arise between the military’s legitimate interest in uniformity and individuals’ constitutionally protected right to the free exercise of religion. Facing a dramatic shortage in manpower, the U.S. Army recently decided to relax uniform rules to accommodate the religious dress requirements for adherents of the Sikh religion. The exceptions to the regulations include allowing Sikhs to wear otherwise unauthorized headgear—a turban—and to wear otherwise unauthorized beards.<sup>3</sup>

Reflection upon these events may lead to questions about the extent to which these accommodations to religious garb will impact future policy decisions, at times when the United States military is not facing recruiting and retention difficulties. Although federal law and Department of Defense (DOD) policy require the military services to accommodate religious practice, there may be compelling reasons to restrict soldiers from wearing beards, such as the inability for a gas mask to seal against the facial hair. In addition, some have argued that turbans impact good order and discipline because they diminish the ability to distinguish officers from enlisted personnel,<sup>4</sup> while others have voiced concern over perceptions of favoritism or inequity that may result from substantial deviations from uniform standards. In short, having accommodated these exceptions to uniform standards for religious practice, can the Army continue to maintain

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<sup>1</sup> See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (stating that judicial deference “is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged”); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (“To ensure that they always are capable of performing their mission promptly and reliably, the military services must insist upon a respect for duty and discipline without counterpart in civilian life.”); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (stating that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.”).

<sup>2</sup> *Parker v. Levy*, 417 U.S. 733, 758 (1974).

<sup>3</sup> See Steve Elliot, *Sikh Soldiers Allowed to Serve, Retain Their Articles of Faith*, <http://www.army.mil/-news/2010/03/25/36339-sikh-soldiers-allowed-to-serve-retain-their-articles-of-faith/>; Paul Steven Ghiringhelli, *Traditional Sikh Serves as Army Dentist on Fort Drum*, <http://www.army.mil/-news/2010/05/20/39536-traditional-sikh-serves-as-army-dentist-on-fort-drum/>; *1st Sikh in Decades Graduates Army Officer School*, [http://www.usatoday.com/news/religion/2010-03-22-sikh-army\\_N.htm](http://www.usatoday.com/news/religion/2010-03-22-sikh-army_N.htm).

<sup>4</sup> Officers typically display their distinctive rank insignia on their headgear, a practice that may not be possible when turbans are worn.

arguments asserting a substantial or compelling interest in uniformity? The inevitable tension surrounding this issue brings to mind the most famous constitutional case to originate in the Air Force, the 1986 U.S. Supreme Court case of *Goldman v. Weinberger*.<sup>5</sup>

On March 25, 1986, the Court handed down a 5-4 decision ruling that Air Force regulations prohibiting Simcha Goldman from wearing a yarmulke while in uniform did not violate Goldman's First Amendment right to the free exercise of religion.<sup>6</sup> The Court's majority opinion, which accepted the government's assertion that allowing Goldman to wear a yarmulke would unduly upset important military interests, drew unusually harsh responses from both dissenting justices and legal scholars. For example, in a stinging dissenting opinion, Justice William Brennan characterized the majority's position as no less than an "eva[sion of] its responsibility"<sup>7</sup> and an "abdicat[ion of] its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertion of military necessity."<sup>8</sup>

Scholarly reaction likewise offered little sympathy for the majority's approach. Kent Greenawalt, one of the leading church-state theorists in the country, described the majority opinion as "both surprising and wholly unsatisfying from an intellectual point of view."<sup>9</sup> Writing in the Foreword to the *Harvard Law Review*, Frank Michelman referred to the *Goldman* decision as an illustration of "the discriminatory potential of determinedly abstract law,"<sup>10</sup> comparable to the Court's infamous holding in *Plessy v. Ferguson*,<sup>11</sup> which relied upon "sedulous abstraction from concrete experience" to conclude that "separate" could have seemed "equal."<sup>12</sup>

On the basis of interviews, unpublished documents, and press reports, this article suggests that, upon closer examination, perhaps what stands out most about the events surrounding the *Goldman* decision is the untold story of the process, which differs in significant respects from the official version of both the facts of the case and the ensuing litigation. The official narrative presents a dispute between a Jewish Airman who wants to wear his yarmulke during work and a commanding officer demanding strict adherence to military uniform protocol. However, as this article relates, the unofficial narrative demonstrates how much of the process was driven by more subtle factors that played a central role at each stage of the case.

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<sup>5</sup> 475 U.S. 503 (1986).

<sup>6</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>7</sup> *Id.* at 515 (Brennan, J., dissenting).

<sup>8</sup> *Id.* at 514 (Brennan, J., dissenting).

<sup>9</sup> Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 148 (2004).

<sup>10</sup> Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31 (1986).

<sup>11</sup> 163 U.S. 537 (1896).

<sup>12</sup> Michelman, *supra* note 5, at 31.

## II. THE FACTS

### A. The Official Story

As noted in the court opinions, for many years prior to the litigation, Goldman served in the military in a variety of capacities, wearing his yarmulke while in uniform without incident.<sup>13</sup> As an ordained rabbi who observed Orthodox Jewish religious practice, Goldman thereby complied with the religious obligation to keep his head covered at all times.<sup>14</sup> Goldman's military career began with service as a chaplain in the United States Navy from 1970 to 1972.<sup>15</sup> In 1977, after completing a Ph.D. in clinical psychology through a military scholarship program, Goldman joined the Air Force as a captain, serving as a clinical psychologist at the Mental Health Clinic of the March Air Force Base Regional Hospital in Riverside, California.<sup>16</sup> Throughout several years of service, Goldman covered his head with his service cap when outdoors and continued to wear his yarmulke indoors without raising any concerns.<sup>17</sup> In fact, Goldman received consistently outstanding evaluations from his superiors, including the category "Professional qualities (Attitude, dress, cooperation, bearing)."<sup>18</sup>

However, on May 8, 1981, Goldman was called before Colonel Joseph Gregory, the hospital commander at the installation, who informed Goldman that wearing a yarmulke while on duty violated Air Force rules regulating headgear.<sup>19</sup> Colonel Gregory ordered Goldman not to wear his yarmulke outside the hospital, and he later amended the order to prohibit Goldman from wearing his yarmulke inside the hospital as well.<sup>20</sup> Colonel Gregory's orders were prompted by a complaint filed by a military lawyer who had cross-examined Goldman in a court-martial proceeding in which Goldman wore his yarmulke.<sup>21</sup> When Goldman refused to comply with the orders, he received a letter of reprimand and was informed that he could face a court-martial.<sup>22</sup> In addition, Colonel Gregory, who had previously recommended approval of Goldman's application for extension of active service, instead submitted a negative recommendation.<sup>23</sup> Goldman filed suit on the grounds that the orders violated his First Amendment rights to free exercise of religion.<sup>24</sup>

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<sup>13</sup> Goldman v. Sec'y of Def., 734 F.2d 1531, 1532-33 (D.C. Cir. 1984).

<sup>14</sup> *Id.* at 1532.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1532-33.

<sup>17</sup> *Id.* at 1533.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Goldman v. Weinberger, 475 U.S. 503, 505 (1986).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 506.

## B. Goldman's Story

### 1. *Goldman's Prior Military Service*

Although the Court of Appeals and the Supreme Court acknowledged that Goldman had worn his yarmulke for many years of service without incident,<sup>25</sup> the opinions did not tell the entire story. For example, during Goldman's years as a chaplain in the Navy, he was stationed at the Marine Corps Recruit Depot, Parris Island, South Carolina.<sup>26</sup> The senior chaplain informed Goldman that Goldman's commander had called and asked, "Who is the hippie walking around my command with the beanie on his head?" The chaplain explained that Goldman was a "Jewish rabbi" and that the head covering was "his way of telling God that he's on duty." The commander was satisfied with this explanation, responding, "Okay, just make sure he keeps his brass polished!"<sup>27</sup>

In fact, Goldman remained with the Marines for two years, and in this most disciplined of military environments, he never experienced any other expressions of concern about his yarmulke.<sup>28</sup> In addition, during these years, Goldman was photographed in uniform and wearing his yarmulke standing alongside the Secretary of the Defense, Melvin Laird. Goldman, Secretary Laird, and two other individuals pictured with them, including the major general commanding the base, are all smiling broadly at the photographer or at one another.<sup>29</sup> Thus, Goldman did not hesitate to wear his yarmulke in uniform when he reported for duty with the Air Force in 1977, and for more than three years at March Air Force Base Goldman continued to serve with distinction without receiving any negative attention because of his yarmulke.<sup>30</sup>

Given that for so many years neither the Marine Corps commanders on Parris Island, nor the Secretary of Defense, nor the commanders at March Air Force Base considered Goldman's yarmulke to be a threat to discipline or uniformity, it seems surprising that in 1981, the hospital commander suddenly raised such voluble concerns about Goldman's wearing a yarmulke. Likewise, it seems difficult to understand why the United States Government considered the matter so important that it litigated the case all the way to the United States Supreme Court. As in countless historical events, the answers to these basic questions may be found in the mundane,

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<sup>25</sup> See *id.* at 505; *Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1532-33 (D.C. Cir. 1984).

<sup>26</sup> Author's Interview with Simcha Goldman, Los Angeles, California, May 4, 2008 [hereinafter Goldman Interview].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (photograph on file with author).

<sup>30</sup> *Id.*

personal—and sometimes petty—decisions and responses of certain individuals who played crucial roles in the story.

## 2. *The Origins of the Dispute*

As the Supreme Court's majority opinion noted in passing, the dispute over Goldman's yarmulke began in April 1981, after Goldman wore his yarmulke while testifying as a defense witness at a court-martial.<sup>31</sup> In a concurring opinion, Justice Stevens suggested that the timing of the complaint against Goldman gave the Court "reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive."<sup>32</sup> Again, however, although the justices identified an important piece of the puzzle that gave rise to the *Goldman* case, the Court did not describe the whole story connecting Goldman's testimony to the subsequent complaint about his yarmulke.

This piece of the story actually began at another court martial in 1980, a year before the event mentioned by the Supreme Court. At the earlier proceeding, Goldman testified as a defense witness, providing a psychological evaluation of the defendant.<sup>33</sup> Goldman was cross-examined by the military prosecutor, Captain Bouchard.<sup>34</sup> In the course of the cross-examination, Bouchard asked whether Goldman had conducted psychological testing on the defendant.<sup>35</sup> When Goldman responded that he had used the Minnesota Multiphase Personality Inventory (MMPI), Bouchard asked questions that were critical of the MMPI.<sup>36</sup> Throughout his testimony, Goldman was dressed in his uniform and wore his yarmulke, without eliciting any protests or objections from Bouchard, the judges, or any of the other officers present at the hearing.<sup>37</sup>

One year later, Goldman testified as a defense witness in the case referenced by the Supreme Court.<sup>38</sup> Once again, Goldman wore both his uniform and his yarmulke and was questioned by the same prosecutor.<sup>39</sup> Goldman explained that in this case, he had not found it necessary to conduct psychological testing.<sup>40</sup> Bouchard then asked a question critical of Goldman's decision not to use the MMPI, upsetting Goldman, who recalled that in the earlier proceeding, Bouchard had devalued the MMPI.<sup>41</sup> From Goldman's perspective, Bouchard was employing an intellectually dishonest

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<sup>31</sup> See *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986).

<sup>32</sup> *Id.* at 511 (Stevens, J., concurring).

<sup>33</sup> Goldman Interview, *supra* note 26.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *supra* note 26-27 and accompanying text.

<sup>39</sup> Goldman Interview, *supra* note 26.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

strategy, adopting contradictory views of the MMPI, in each case aiming to raise doubts about Goldman's methods and credibility.<sup>42</sup> Goldman responded with a vague answer, prompting a further exchange in which Goldman commented on the irrelevance of the question, thereby causing Bouchard both frustration and embarrassment.<sup>43</sup> It was only after this second encounter that Bouchard filed a complaint objecting to Goldman's wearing of a yarmulke while in uniform during his testimony.<sup>44</sup>

Notably, other Air Force lawyers had different perspectives regarding Goldman's decision to wear his yarmulke while in uniform. For example, Captain James S. Cohen, the defense attorney who called Goldman as a mitigation witness in the 1981 court-martial, was not concerned by the fact that Goldman would testify while wearing a yarmulke.<sup>45</sup> Cohen considered the yarmulke unobtrusive and, accordingly, he did not raise it as an issue in his conversations with Goldman.<sup>46</sup> In fact, although Cohen was not involved in the later proceedings against Goldman, had he been asked to do so, he would have been willing to defend Goldman in the case.<sup>47</sup>

After the 1981 court-martial, Major Ronald J. Rakowsky, the senior law officer at the base, was consulted about whether it had been permissible for Goldman to wear his yarmulke in court.<sup>48</sup> Rakowsky concluded, on the basis of his extensive knowledge, experience, and research on the subject, that the regulations did not provide an exception for wearing a yarmulke while in uniform.<sup>49</sup> However, Rakowsky also recognized the important free exercise implications of the case, and he understood that Goldman was asserting strong and sincere religious beliefs.<sup>50</sup> As Rakowsky explained to Colonel Charles McDonald, the Wing Commander, the conflicting constitutional interests of military authority and religious liberty represented an instance of "an irresistible force versus an immovable object."<sup>51</sup> In light of the constitutional significance of the issue, Rakowsky strongly recommended that Goldman be issued a Letter of Reprimand, so that any ensuing litigation would be handled as a civil matter in United States District Court rather than treated as a criminal matter subject to military justice.<sup>52</sup> McDonald accepted his recommendation, and the case proceeded in federal court.<sup>53</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Author's Telephone Interview with James S. Cohen, Los Angeles, California to Santa Fe, New Mexico, May 27, 2010.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Author's Telephone Interview with Ronald J. Rakowsky, Los Angeles, California to Greenwood Village, Colorado, May 26, 2010.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



### 3. Other Aspects of the Air Force's Conduct

The official version of Goldman's story as depicted in the cases does not include the dubious process some of the Air Force officers undertook to ascertain the significance of the yarmulke to Goldman's religious faith. Colonel Gregory asked the base chaplain, a colonel who was not Jewish, to make an inquiry as to whether wearing a yarmulke constituted a religious obligation.<sup>54</sup> Despite knowing that Goldman was a rabbi and had served as a Navy chaplain, the base chaplain decided to contact the New York-based Jewish Welfare Board, an organization that acted as the ecclesiastical liaison for the military regarding matters of Jewish faith.<sup>55</sup> However, rather than speaking with a rabbi at the Jewish Welfare Board, the base chaplain spoke with Dr. Diana Coran, who, he claimed, informed him that wearing a yarmulke was not a religious obligation.<sup>56</sup>

Disturbingly, in the process of consulting with Dr. Coran, the commanders not only deferred to the purported position of an individual who was not a rabbi, but they either misunderstood or intentionally misstated Dr. Coran's response.<sup>57</sup> As Dr. Coran later explained to Goldman, she had actually told the base chaplain that there is a Jewish religious obligation to cover one's head at all times, but that the form of head covering need not be a yarmulke; for example, the obligation can be fulfilled by wearing a cap.<sup>58</sup> Of course, because Goldman could not wear his military cap while indoors, he could satisfy his religious obligation only by wearing an item that was not part of his uniform, such as a yarmulke. Thus, the commanders relied on their own distorted interpretation of a statement from an individual who was not a rabbi as a basis for denying Goldman, who was a rabbi, the right to exercise his religious obligation.<sup>59</sup>

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<sup>54</sup> Goldman Interview, *supra* note 26.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Beyond the disconcerting process employed by these officials, the Air Force's underlying assumption, that it had the authority to second-guess a religious adherent's portrayal of religious obligations, contradicts a fundamental tenet of Free Exercise law. See *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 497 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997); Symposium, *The Supreme Court's Hands-Off Approach to Religious Doctrine*, 84 Notre Dame L. Rev. 793(2009).

Nevertheless, throughout the litigation process, the government would repeatedly challenge the validity of Goldman's claim that his religious faith required him to cover his head at all times. See *infra* text accompanying notes 71-74, 124-137.

Though also absent from the official version of the case, other aspects of the story illustrate the continuous insensitivity Goldman faced from his superiors. For example, amidst the controversy over his yarmulke, while Goldman was conducting a therapy session with eight or ten patients, he was interrupted by a knock on the door.<sup>60</sup> When he answered, Goldman was told that the base commander wanted to see him regarding the yarmulke.<sup>61</sup> Goldman sent back a message asking if the commander could wait one hour for the session to end, but the commander insisted that Goldman suspend the session and report immediately to receive an order to remove his yarmulke.<sup>62</sup>

After receiving the order to remove his yarmulke, Goldman requested an urgent meeting with the Vice Wing Commander, who served on the base as Inspector General and ombud.<sup>63</sup> However, the Inspector General refused to speak with him, responding that Goldman was out of uniform because he was wearing a yarmulke.<sup>64</sup> Of course, this charge, which originated with the military prosecutor and the base commander, was the matter Goldman wished to discuss. As an alternative, Goldman suggested they meet outdoors where he could cover his head with his military cap.<sup>65</sup> The Inspector General refused, thus leaving Goldman with no option but to seek the courts' protection.<sup>66</sup> Accordingly, Goldman filed a motion for a Temporary Restraining Order [TRO] to enjoin the Air Force from enforcing the order that he remove his yarmulke while in uniform.<sup>67</sup>

### III. THE LITIGATION

Throughout the litigation, Goldman was represented by a team of passionate lawyers led by Nathan Lewin, a prominent advocate of religious rights who took on the case *pro bono*.<sup>68</sup> The official story of the litigation captured in the case law provides a notable, often compelling study of varying judicial responses to the Free Exercise arguments asserted by Lewin and the other lawyers on behalf of a member of a religious minority serving in the military.<sup>69</sup> Yet again, the official story does not convey the extent to which the fate of Goldman's claims turned on personal attitudes often

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<sup>60</sup> Goldman Interview, *supra* note 26.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1533 (D.C. Cir. 1984).

<sup>68</sup> See <http://www.lewinlewin.com/nathan.html>

<sup>69</sup> See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Goldman v. Sec'y of Def.*, 739 F.2d 657, 658 (D.C. Cir. 1984); *Goldman v. Sec'y of Def.*, 734 F.2d 1531 (D.C. Cir. 1984); *Goldman v. Sec'y of Def.*, 1982 WL 311 (D.D.C. Apr. 26, 1982); *Goldman v. Sec'y of Def.*, 530 F. Supp. 12 (D.D.C. 1981).

influenced by non-legal considerations, some of which directly contradicted important principles in Free Exercise law.

## A. The Official Story

### 1. *The District Court*

On July 2, 1981, Goldman's motion for a TRO came before Judge Aubrey Robinson, Jr., in the United States District Court for the District of Columbia.<sup>70</sup> Following a hearing, Judge Robinson granted Goldman's motion, and on July 10, he granted Goldman's subsequent motion for a Preliminary Injunction enjoining the Air Force from prohibiting Goldman to wear a yarmulke while in uniform.<sup>71</sup> In his opinion, Judge Robinson declared unequivocally that "[c]onsistent with the requirements of Orthodox Jewish practice, [Goldman] wears a skull cap, or yarmulke, at all times."<sup>72</sup> Accordingly, he forcefully explained, "[t]here can be no doubt the [Goldman's] insistence on wearing a yarmulke is motivated by his religious convictions, and is therefore entitled to First Amendment protections."<sup>73</sup>

To be sure, Judge Robinson acknowledged that courts should show a measure of deference to the military's authority for imposing uniformity.<sup>74</sup> Moreover, the opinion quoted extensive sections from an affidavit submitted by Major General Herbert L. Emanuel, "impl[ying] that permitting [Goldman] to wear his yarmulke will crush the spirit of uniformity, which in turn will weaken the will and fighting ability of the Air Force."<sup>75</sup> Nevertheless, Judge Robinson ruled in Goldman's favor, deeming the Air Force's allegations "unlikely" and emphasizing that "deference" to the military "cannot and does not permit a court to abdicate its constitutional responsibilities" to protect Free Exercise rights.<sup>76</sup>

The court then conducted a trial on the merits of the case, and on April 26, 1982, Judge Robinson issued a decision.<sup>77</sup> Again, he stated in no uncertain terms that "[t]he wearing of a yarmulke by a Jewish male is a practice which falls within the ambit of the free exercise clause of the First Amendment to the United States Constitution."<sup>78</sup> The Air Force's position, set forth at trial by Major General William P. Usher, was that "discipline, esprit de corps, motivation, teamwork and image would be injured by allowing a religious exception for the wearing of yarmulkes."<sup>79</sup> However,

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<sup>70</sup> See *Goldman v. Sec'y of Def.*, 530 F. Supp. 12 (D.D.C. 1981).

<sup>71</sup> *Id.* at 17.

<sup>72</sup> *Id.* at 13.

<sup>73</sup> *Id.* at 16.

<sup>74</sup> *Id.* at 15-16.

<sup>75</sup> *Id.* At 16.

<sup>76</sup> *Id.* at 14, 16.

<sup>77</sup> See *Goldman v. Sec'y of Def.*, 1982 WL 311 (D.D.C. Apr. 26, 1982).

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.* at 4.

as Judge Robinson observed, these conclusions were not the result of empirical or psychological studies. Instead, he found, they were based on “the personal beliefs and assumptions of Air Force officials” and were therefore “inadequate to withstand constitutional scrutiny.”<sup>80</sup> Thus, Judge Robinson permanently enjoined the Air Force from enforcing the order banning Goldman from wearing a yarmulke while in uniform.<sup>81</sup>

## 2. *The Court of Appeals*

The government appealed Judge Robinson’s ruling, and on March 22, 1983, the case was argued in front of the United States Court of Appeals for the District of Columbia Circuit.<sup>82</sup> The three-judge panel that heard the case consisted of two eminent D.C. Circuit Court Judges, Abner Mikva and Harry Edwards, as well as Judge Luther Swygert, a Senior Judge on the Seventh Circuit Court of Appeals, sitting by designation.<sup>83</sup> More than one year later, on March 8, 1984, the court issued a unanimous decision, in an opinion written by Judge Swygert.<sup>84</sup> The court’s opinion both reversed Judge Robinson’s decision and, in some ways, inverted Judge Robinson’s conclusions.

Like Judge Robinson, the court rejected the Air Force’s assertion that “no free exercise interest is at stake.”<sup>85</sup> The Air Force’s claim was premised on the assumption that “Jewish law does not require the covering of the head during work,” purportedly corroborated by “Goldman’s own admission that some Orthodox Jews do not feel obliged to cover their heads at all times.”<sup>86</sup> As the appeals court explained, this line of reasoning ran afoul of the Supreme Court’s rule that “practices based on religious conviction, even if not universally followed, are protected by the free exercise clause.”<sup>87</sup> In short, the Court held, “[i]t is undisputable that covering his head is a protected part of Goldman’s exercise of his religion.”<sup>88</sup>

In addition, the court rejected as “unpersuasive” one of the Air Force’s ostensible justifications for its inflexible ban on all religious headgear. At trial, General Usher had testified that “an unauthorized hat worn on a flight line might fly into a jet engine and cause it to malfunction and explode.”<sup>89</sup> The court responded plainly, “We have no doubt that more narrowly drawn regulations, accommodating religious practices to a greater

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *See* *Goldman v. Sec’y of Def.*, 734 F.2d 1531 (D.C. Cir. 1984).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 1537.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)).

<sup>89</sup> *Id.* at 1539.

degree, would satisfy such safety concerns.”<sup>90</sup> As to any danger allegedly posed by Goldman’s yarmulke, the court offered the understated conclusion that “there is no indication that safety within the Mental Health Clinic was threatened.”<sup>91</sup> The court likewise characterized as “weak” the Air Force’s argument that “it cannot reasonably distinguish among various religious practices” and therefore “must either allow or disallow all requested exceptions.”<sup>92</sup>

Nevertheless, the court held that “the peculiar nature of the Air Force’s interest in uniformity renders the strict enforcement of its regulation permissible.”<sup>93</sup> The court accepted the Air Force’s argument that any exceptions for religious practice would “incur[] resentment from those who are compelled to adhere to the rules strictly . . . , thereby undermining the goals of teamwork, motivation, discipline, and the like . . . .”<sup>94</sup> In short, as the court noted, the Air Force “conclude[d] that strict enforcement of its regulations [was] necessary for its military purposes.”<sup>95</sup> Unlike Judge Robinson, who insisted that courts have the obligation to consider the plausibility of the military’s claim, the Court of Appeals declared nearly categorically that “the Air Force’s judgment on this issue is entitled to deference because it is within its expertise and outside ours.”<sup>96</sup>

In response to the Court of Appeals’ decision, Goldman filed a motion for rehearing en banc.<sup>97</sup> Although the court denied the motion,<sup>98</sup> three distinguished judges voted in favor of a rehearing, future Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia, and Kenneth Starr, future Solicitor General and later Dean of Pepperdine Law School.<sup>99</sup> Judge Starr filed a powerfully argued and eloquently written opinion dissenting from the court’s decision.<sup>100</sup> The opinion recounted the years of Goldman’s distinguished service, during which he “followed uneventfully the dictates of his conscience by wearing the traditional yarmulke, a symbol of his faith whose roots are as deep and venerable as Western civilization itself.”<sup>101</sup> While acknowledging the military’s interest in uniformity, Judge Starr emphasized the significance of the yarmulke as “a symbol of a great faith from which Western morality and the Judeo-Christian tradition have arisen.”<sup>102</sup> In light of the military’s insistence on adherence to an

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1540.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See* *Goldman v. Sec’y of Def.*, 739 F.2d 657 (D.C. Cir. 1984).

<sup>98</sup> *See id.*

<sup>99</sup> *See id.* at 658 (Starr, J., dissenting); *id.* at 660 (Ginsburg, J., dissenting).

<sup>100</sup> *See id.* at 658 (Starr, J., dissenting).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

“*admittedly arbitrary rule,*” Judge Starr found the Air Force’s treatment of Goldman “patently unconscionable.”<sup>103</sup> Thus, he concluded forcefully, the court’s holding in the case “does considerable violence to the bulwark of freedoms guaranteed by the Free Exercise Clause.”<sup>104</sup>

Separately, Judge Ginsburg, joined by Judge Scalia, filed a brief dissenting opinion, likewise emphasizing Goldman’s years of honorable service and referring to the military’s position as “[a]t the least, ... ‘callous indifference’” and “counter to ‘the best of our traditions’ to ‘accommodate[] the public service to the[] spiritual needs [of our people].’”<sup>105</sup> Thus, she reasoned, the court “should measure the command suddenly and lately championed by the military against the restraint imposed even on an armed forces commander by the Free Exercise Clause of the First Amendment.”<sup>106</sup>

### 3. *The Supreme Court*

Finally, Goldman appealed the case to the U.S. Supreme Court, which heard oral argument on January 14, 1986.<sup>107</sup> On March 25, 1986, the Court handed down a split decision, which included a majority opinion representing the view of five justices, a concurring opinion of three of those justices, and three separate dissenting opinions issued among the remaining four justices.<sup>108</sup> Justice Rehnquist, who would soon be elevated to Chief Justice of the U.S. Supreme Court, wrote a relatively brief majority opinion, emphasizing that “[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”<sup>109</sup> In response to Goldman’s assertion that a religious apparel exception would actually increase morale rather than undermine discipline, the Court deferred to the “considered professional judgment” of “the appropriate military officials” regarding the “desirability of dress regulations in the military.”<sup>110</sup> Although the Court conceded that not allowing such exceptions would likely render military life more “objectionable” to some religious adherents, the Court ruled that the First Amendment did not require these accommodations.<sup>111</sup>

Justice Stevens’ concurring opinion, joined by Justices White and Powell, acknowledged that Goldman “present[ed] an especially attractive

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<sup>103</sup> *Id.* at 659.

<sup>104</sup> *Id.* at 658 (emphasis in original).

<sup>105</sup> *Id.* at 660 (Ginsburg, J., dissenting) (citing *Zorach v. Clauson*, 343 U.S. 306 (1952)); *cf.* *Braunfeld v. Braun*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting).

<sup>106</sup> *Id.* at 660 (Ginsburg, J., dissenting) (alterations in original).

<sup>107</sup> *See* *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>108</sup> *See id.*; *id.* at 510 (Stevens, J., concurring); *id.* at 513 (Brennan, J., dissenting); *id.* at 524 (Blackmun, J., dissenting); *id.* at 528 (O’Connor, J. dissenting).

<sup>109</sup> *Id.* at 507.

<sup>110</sup> *Id.* at 508-09.

<sup>111</sup> *Id.* at 509.

case for an exception from the uniform regulations.”<sup>112</sup> Citing Judge Starr’s opinion, Justice Stevens added that the yarmulke “may evoke the deepest respect and admiration—the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism.”<sup>113</sup> Nevertheless, Justice Stevens supported the Air Force policy as a method of enforcing uniform treatment of all religions.<sup>114</sup>

Justice Brennan, joined by Justice Marshall, filed a sharply worded and vigorously reasoned dissenting opinion, nearly twice the length of the Court’s majority opinion and underlined with a deep sense of empathy for the predicament in which the military had placed Goldman.<sup>115</sup> The opening lines of Justice Brennan’s opinion frame the issue from Goldman’s perspective,<sup>116</sup> describing him as “invok[ing] this Court’s protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God.”<sup>117</sup> In Justice Brennan’s view, the Court “abdicate[d] its role as principal expositor of the Constitution and protector of individual liberties in favor of a credulous deference to unsupported assertions of military necessity.”<sup>118</sup> Indeed, he accused the Court of “overlook[ing] the sincere and serious nature of [Goldman’s] constitutional claim” and “attempt[ing], unsuccessfully, to minimize the burden that was placed on Dr. Goldman’s rights.”<sup>119</sup> Noting the majority’s characterization of the Air Force regulation as merely “objectionable” to Goldman, Justice Brennan emphasized that, in fact, Goldman “was asked to violate the tenets of his faith virtually every minute of every workday.”<sup>120</sup>

As to the substance of the majority’s analysis, Justice Brennan was no less critical, stating that the Court “evade[d] its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.”<sup>121</sup> In other words, the Court “eschew[ed] its constitutionally mandated role.”<sup>122</sup> Given the Court’s line of reasoning, Justice Brennan inferred, “[i]f a branch of the military declares one of its rules sufficiently important to outweigh a

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<sup>112</sup> *Id.* at 510 (Stevens, J., concurring).

<sup>113</sup> *Id.* (Stevens, J., concurring).

<sup>114</sup> *Id.* (Stevens, J., concurring).

<sup>115</sup> *See id.* at 513 (Brennan, J., dissenting).

<sup>116</sup> *See* Thomas L. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Samuel J. Levine, *Toward A Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 Wm. & Mary Bill Rts. J. 153 (1996).

<sup>117</sup> *Goldman*, 475 U.S. at 513 (1986) (Brennan, J., dissenting).

<sup>118</sup> *Id.* at 514 (Brennan, J., dissenting).

<sup>119</sup> *Id.* (Brennan, J., dissenting).

<sup>120</sup> *Id.* (Brennan, J., dissenting).

<sup>121</sup> *Id.* at 515 (Brennan, J., dissenting).

<sup>122</sup> *Id.* (Brennan, J., dissenting).

service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be."<sup>123</sup>

Addressing the military's claims directly, Justice Brennan barely contained his incredulity, facetiously restating the logic of the military's argument:

[D]iscipline is jeopardized whenever exceptions to military regulations are granted. Service personnel must be trained to obey even the most arbitrary command reflexively. Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.<sup>124</sup>

In short, Justice Brennan found that the Air Force's contention "surpasse[d] belief."<sup>125</sup>

Justice Brennan closed his opinion with an eloquent testament to the vital need for the Court to ensure that the military protect the rights of religious minorities:

The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values. A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

The Court and the military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice. Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The Court and the military have refused these servicemen their constitutional rights.<sup>126</sup>

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<sup>123</sup> *Id.* (Brennan, J., dissenting).

<sup>124</sup> *Id.* at 516-17 (Brennan, J., dissenting).

<sup>125</sup> *Id.* at 517 (Brennan, J., dissenting).

<sup>126</sup> *Id.* at 524 (Brennan, J., dissenting).

Justice Blackmun's dissent struck a similar note:



## B. The Unofficial Story

### 1. *Perspectives of Judge Robinson and Judge Starr*

In addition to Judge Robinson's written opinion, which plainly rejected the military's arguments, the press reports of the courtroom proceedings dramatically illustrate the extent to which Judge Robinson disapproved of the Air Force's claims.<sup>127</sup> In a sharply worded exchange with Royce C. Lamberth—then Assistant United States Attorney and later Chief Judge of the Court of Appeals for the District of Columbia—Judge Robinson pointedly asked, "Is March Air Force Base going to blow up because this man continues to wear his yarmulke?"<sup>128</sup> Lamberth could only reply, "Obviously, the base isn't going to blow up, your honor."<sup>129</sup> Judge Robinson continued, "And there aren't going to be any riots, are there?"<sup>130</sup> When Lamberth again responded, "No, your honor," Judge Robinson retorted, "Not unless the commanding officer starts them."<sup>131</sup>

Similarly, Judge Starr's dissenting opinion takes on even greater significance when viewed in broader context. Although Judge Starr had been on the Court of Appeals for less than one year when Goldman filed his motion for rehearing, he forcefully disagreed with the view of eight of his ten colleagues on the court.<sup>132</sup> Moreover, unlike Judges Ginsburg and Scalia, who issued a brief dissenting opinion calling on the court to take a closer look at the case,<sup>133</sup> Judge Starr wrote a stirring and powerful critique of the decision rendered just months earlier by two of his most distinguished

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If the Free Exercise Clause of the First Amendment means anything, it must mean that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows. Nor may free exercise rights be compromised simply because the military says they must be. The Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors. I agree with the Court that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps. But Goldman's modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness.

*Id.* at 525 (Blackmun, J., dissenting).

<sup>127</sup> See AP REPORT, July 11, 1981 (on file with author).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See *Goldman v. Sec'y of Def.*, 739 F.2d 657, 658 (D.C. Cir. 1984) (Starr, J., dissenting).

<sup>133</sup> See *id.* at 660 (Ginsburg, J., dissenting).

colleagues, Judges Mikva and Edwards.<sup>134</sup> Indeed, responding to the tone and language employed by Judge Starr, one Justice Department official dismissed the opinion as an “emotional rant.”<sup>135</sup> In contrast, Dean Starr views his opinion as an expression of his strongly held position that the Free Exercise Clause requires the government to accommodate religion.<sup>136</sup> In addition, he sees his willingness to disagree with his colleagues on the court as reflecting his understanding of the judge’s duty to exercise independent judgment on cases and controversies.<sup>137</sup>

## 2. *The Government’s Strategy*

Throughout the litigation, the government repeatedly questioned whether Goldman’s wearing a yarmulke qualified as a constitutionally protected religious exercise. In a deposition before the trial, an opposing lawyer asked Goldman about the fact that Nathan Lewin, who was representing Goldman in the case, observed Jewish religious practice but was not wearing a yarmulke.<sup>138</sup> Goldman responded that some devout Orthodox Jewish individuals do not wear yarmulkes when engaged in their professional work.<sup>139</sup> The question aimed to imply that if another Orthodox Jewish individual did not wear a yarmulke at all times, then Goldman could not have a religious obligation to wear a yarmulke while in uniform. However, as the Court of Appeals later emphasized, Supreme Court doctrine adopts the religious understanding and practices asserted by the plaintiff, not those adopted by other members of the plaintiff’s religious community.<sup>140</sup>

Nevertheless, the Court of Appeals ruled in favor of the Air Force, surprising even the Justice Department’s lawyer, who had wondered aloud whether it was worthwhile arguing the military’s appeal before a panel that consisted of such liberal judges as Abner Mikva and Harry Edwards.<sup>141</sup> Indeed, Judge Mikva later remarked to Judge Starr that the judicial views expressed in the Goldman case demonstrate that judges should not be pigeonholed.<sup>142</sup> Years later, Lewin asked Mikva about the basis for the court’s unexpected decision.<sup>143</sup> Mikva recalled that because he was Jewish, following oral argument the other two judges asked for his estimation of the

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<sup>134</sup> See *Goldman v. Sec’y of Def.*, 734 F.2d 1531 (D.C. Cir. 1984).

<sup>135</sup> Author’s Interview with Kenneth Starr, Dean, Pepperdine Law School, Malibu, California, June 13, 2008 [hereinafter Starr Interview].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Goldman Interview, *supra* note 26.

<sup>139</sup> *Id.*

<sup>140</sup> *Goldman v. Sec’y of Def.*, 734 F.2d 1531, 1537 n.8 (D.C. Cir. 1984). See *supra* note 45.

<sup>141</sup> Author’s Telephone Interview with Nathan Lewin, Partner, Lewin & Lewin, LLP, Los Angeles, California to Washington, D.C., Sept. 23, 2008 [hereinafter Lewin Interview].

<sup>142</sup> Starr Interview, *supra* note 135.

<sup>143</sup> Lewin Interview, *supra* note 141.

religious significance of wearing a yarmulke.<sup>144</sup> Mikva responded that the yarmulke was “not that important,” thus contributing to an attitude among the panel that minimized the value of Goldman’s religious claim.<sup>145</sup>

When the case reached the Supreme Court, the government continued to maintain the position that Goldman was not engaging in a required religious practice under Jewish law. In its brief to the Supreme Court, the government referred to the wearing of a yarmulke as “a custom followed by some, but not all, devout Orthodox Jewish males . . . .”<sup>146</sup> In a footnote, the government further asserted that “[a]lthough [Goldman’s] brief suggests that the wearing of a yarmulke is required by Jewish law, . . . authorities introduced in the district court clearly demonstrate otherwise.”<sup>147</sup> It seems odd for the government to make such a strong statement regarding a matter of complex religious interpretation, contradicting the religious interpretation offered by Goldman, who is a rabbi. Moreover, the government’s argument again betrayed a disregard for a basic element of free exercise jurisprudence, which requires that the court accept the plaintiff’s understanding of religious practice.<sup>148</sup>

Indeed, the government’s line of reasoning proved to be of considerable concern for at least one of the justices. At the very start of her oral argument before the Supreme Court, Kathryn Oberly, the Assistant Solicitor General, was interrupted with the direct question, “Are you still adhering to footnote four?”<sup>149</sup> Oberly responded, “As to whether the yarmulke is required? Yes, it’s our position . . . that although it is a strong, well-established practice and tradition of devout Orthodox Jewish males to wear a yarmulke, it is not a requirement of Jewish law.”<sup>150</sup> Although Oberly also acknowledged that Goldman’s “interpretation of what he should do as a devout Orthodox Jew is wear a yarmulke, and we are willing to accept that as a sincere religious belief on his part,” she nevertheless insisted that “it’s not at all irrelevant for the Court to take cognizance of the fact that . . . it’s not required by the laws of his religion and . . . Jewish rabbinical authorities agree with that.”<sup>151</sup>

Although the Supreme Court’s majority opinion does not reference this exchange, the opinion is noticeably silent regarding the religious significance of the yarmulke. As Justice Brennan observed, the opinion characterized the prohibition on wearing a yarmulke as merely

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> BRIEF FOR RESPONDENTS at 12, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (No. 84-1097).

<sup>147</sup> *Id.* at 6 & n.4.

<sup>148</sup> *See supra* note 45.

<sup>149</sup> TRANSCRIPT OF ORAL ARGUMENT at 24-25, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (No. 84-1097).

<sup>150</sup> *Id.* at 25.

<sup>151</sup> *Id.* at 26.

“objectionable” for Goldman.<sup>152</sup> In contrast, Justice Brennan’s dissenting opinion opened with an unequivocal reference to Goldman’s “First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God.”<sup>153</sup> Indeed, Justice Brennan accused the majority of “attempt[ing], unsuccessfully, to minimize the burden that was placed on Dr. Goldman’s rights.”<sup>154</sup> As Justice Brennan explained, the Air Force’s policy “sets up an almost absolute bar to the fulfillment of a religious duty[,]” requiring that Goldman “violate the tenets of his faith virtually every minute of every workday.”<sup>155</sup>

#### IV. CONCLUSION: LOOKING BACK AT THE CASE—QUESTIONS THAT REMAIN

In retrospect, it remains somewhat difficult to understand the attitudes motivating the military, the government lawyers, and the courts that ruled against Goldman. In fact, the legal effect of the Supreme Court’s decision in the *Goldman* case was short-lived, as Congress soon enacted legislation accommodating unobtrusive religious apparel in the military.<sup>156</sup>

From the outset of the case, the dispute surprised Goldman, who had worn his yarmulke through years of distinguished military service, without incident. Although the base commander supported the prosecutor’s complaint and ordered Goldman not to wear his yarmulke while in uniform, Lewin thought the order represented an outlandish policy issued by a single commander, and he approached the general counsel at the Pentagon to try to settle the matter.<sup>157</sup> Lewin was surprised, however, that the Department of Defense did not agree with his assessment and instead decided to litigate the case.<sup>158</sup> When Judge Robinson ruled in favor of Goldman, expressing similar outrage toward the base commander, Lewin expected the government to concede, and he was further surprised when the government appealed the decision.<sup>159</sup>

Likewise, Goldman remains both puzzled and upset by the military’s focus on his minor and seemingly inconsequential departure from uniform, given the prominent and sometimes routine acceptance of more significant violations of standards governing military uniforms and procedure.<sup>160</sup> In one particularly egregious example, just months after

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<sup>152</sup> *Goldman v. Weinberger*, 475 U.S. 503, 514 (1986) (Brennan, J., dissenting).

<sup>153</sup> *Id.* at 513 (Brennan, J., dissenting).

<sup>154</sup> *Id.* at 514 (Brennan, J., dissenting).

<sup>155</sup> *Id.* (Brennan, J., dissenting).

<sup>156</sup> See 10 U.S.C. § 774. See generally Dwight Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988).

<sup>157</sup> Lewin Interview, *supra* note 141.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Goldman Interview, *supra* note 26.

Goldman was ordered not to wear his yarmulke while in uniform—ostensibly because it detracted from the sense of discipline and uniformity in the Air Force—the entire front page of *The Beacon*, the unofficial newspaper at March Air Force base, was dedicated to the story headlined: “BUSY BREWER team smashes on-time record.”<sup>161</sup> The story boasted of the success of B-52 Bomber aircrews from March, who flew NATO exercises from a base in the United Kingdom, under conditions that “closely simulated a war-time deployed detachment.”<sup>162</sup> Among other details of the mission, the article recounted that “[t]he crew chiefs were led by MSgt. Walter Monk, who’s [sic] lucky green and white garter adorned his left arm for every launch.”<sup>163</sup>

To this day, Goldman continues to ask the obvious questions: Why was the Air Force so opposed to his wearing a yarmulke?<sup>164</sup> Why was the government so focused on Goldman’s case, to the extent that it litigated the matter all the way to the United States Supreme Court?<sup>165</sup> Finally, how could the Air Force justify permitting the crew chief of a major NATO exercise, flying B-52 bombers over Europe, to wear a flamboyant green and white garter as a sign of luck, while refusing to allow Goldman to wear a yarmulke, an expression of religious modesty and commitment, while serving as clinical psychologist at a military hospital in California?<sup>166</sup> While these questions may defy simple answers, they warrant careful reflection, not only because of their historical significance, but also because of the lessons they may provide for current and continuing issues of religious accommodation in the military.

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<sup>161</sup> See *Busy Brewer: Team Smashes On-Time Record*, THE BEACON, Oct. 16, 1981, at 1 (on file with author).

<sup>162</sup> *Id.* at 6.

<sup>163</sup> *Id.*

<sup>164</sup> Goldman Interview, *supra* note 26.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

PROMOTING INTEGRITY FROM WITHOUT: A CALL FOR THE  
MILITARY TO CONDUCT OUTSIDE,  
INDEPENDENT INVESTIGATIONS OF ALLEGED PROCUREMENT  
INTEGRITY ACT VIOLATIONS

*MAJOR TIMOTHY M. COX\**

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## I. INTRODUCTION

Imagine a contractor competing for a military contract. Prior to award, the contractor learns that someone from the contracting office may have shared the contractor's pricing information with a competitor for the contract. If true, such disclosure implicates Section 27 of the Office of Federal Procurement Policy Act, commonly known as the Procurement Integrity Act.<sup>1</sup> The contractor, to preserve its ability to protest award of the contract to the competitor, must report the alleged violation to the contracting officer.<sup>2</sup> What can the contractor expect from the military after it makes the required report?

Military procurement accounts for almost 72% of all federal procurement.<sup>3</sup> In light of the military's status as the federal government's largest procurer of goods and services, its response to a report of a possible Procurement Integrity Act violation actually presents an opportunity to bolster the procurement system's integrity. However, the current regulatory scheme governing the resolution of Procurement Integrity Act violations presents an opportunity to undermine it: the current scheme permits contracting activities to initiate internal investigations.

Upon receiving a report, the contracting officer must decide if the alleged violation has any impact on the pending award.<sup>4</sup> If the contracting officer finds no impact, he or she forwards that decision and supporting documentation to "an individual designated in accordance with agency procedures."<sup>5</sup> The contracting officer can proceed with the procurement should that individual agree.<sup>6</sup>

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<sup>1</sup> 41 U.S.C. § 423 (2006).

<sup>2</sup> *Id.* § 423(g). Moreover, the contractor must report the information the contractor believes constitutes evidence of a violation to the contracting officer within 14 days of discovering the possible violation in order to preserve its right to protest an award of the contract at the U.S. Government Accountability Office. *See id.*; *see, e.g., SRS Techs., Comp. Gen. B-277366*, Jul. 30, 1997, 97-2 CPD ¶ 42 (dismissing protest as untimely because it was filed more than 14 days after the discovery of the possible Procurement Integrity Act violation). This 14-day requirement enables the agency to investigate the allegation to determine if remedial action is appropriate. *See id.* However, the 14-day requirement does not apply to protests filed at the U.S. Court of Federal Claims. *See McKing Consulting Corp. v. United States*, 78 Fed. Cl. 715, 722 n.12 (Fed. Cl. 2007).

<sup>3</sup> *See* Federal Procurement Report FY 2007 at 10, available at [http://www.fpds.com/downloads/FPR\\_Reports/Fiscal%20Year%202007/Total%20Federal%20View.pdf](http://www.fpds.com/downloads/FPR_Reports/Fiscal%20Year%202007/Total%20Federal%20View.pdf).

<sup>4</sup> GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 3.104-7(A) (May 2010) [hereinafter FAR].

<sup>5</sup> *Id.*, pt. 3.104-7(a)(1). Both the Navy and Army have designated the chief of the contracting office to review this decision; the Air Force's designee depends on the type and amount of the contract. *See* U.S. DEP'T OF NAVY, NAVY-MARINE CORPS ACQUISITION REG. SUPP. [hereinafter NMCARS] pt. 5203.104-7(a)(1); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. [hereinafter AFARS] pt. 5103.104-7(a)(1); U.S. DEPT. OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. pt. 5303.104-7 [hereinafter AFFARS]; AFFARS MANDATORY PROCEDURES [hereinafter AFFARS MP] pt. 5303.104-7; AFFARS

If, however, the agency's designated individual does not agree with the contracting officer's decision of no impact on the procurement, then the head of the contracting activity (HCA) must review the information and take appropriate action "in accordance with agency procedures."<sup>7</sup> Appropriate action could include allowing the procurement to continue, initiating an investigation, referring the information for criminal investigation, concluding a violation occurred, or recommending that the head of the agency determine an offense under the Procurement Integrity Act occurred for the purpose of voiding or rescinding the contract.<sup>8</sup>

The HCA's ability to initiate an investigation may give the contractor cause for concern.<sup>9</sup> The contractor's allegation of a Procurement Integrity Act violation likely involves the contracting activity's personnel, affects its processes, or concerns a regular vendor. The contractor may question the fairness and thoroughness of any investigation the contracting activity conducts. Moreover, if the contracting activity's investigation concludes that no Procurement Integrity Act violation occurred, the United States Court of Federal Claims (CoFC) and the United States Government Accountability Office (GAO) give deference to that determination in reviewing any protest based on the alleged violation.<sup>10</sup>

As noted previously, the HCA may, in accordance with agency procedures, initiate an investigation. Understanding what those procedures are, therefore, is important. Although each service has promulgated regulations concerning procurement fraud and procurement irregularities, nothing in those regulations prohibits a contracting activity from conducting internal investigations upon receiving reports of Procurement Integrity Act violations. One possible reason is that the military services promulgated their procurement fraud regulations prior to the enactment of the Procurement Integrity Act.<sup>11</sup> And the services have not amended their regulations to accommodate the Procurement Integrity Act. This article

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MP 5301.9001(1) and (2). All three services' FAR supplements are available at <http://farsite.hill.af.mil>.

<sup>6</sup> FAR, *supra* note 4, pt. 3.104-7(a)(1)(i).

<sup>7</sup> FAR, *supra* note 4, pt. 3.104-7(a)(1)(ii). Likewise, if the contracting officer decided that the violation or possible violation did impact a pending award, then he or she bypasses the agency designated individual and must forward the issue to the head of the contracting activity directly for appropriate action. See 41U.S.C. § 423(a)(2)(b) (2006).

<sup>8</sup> FAR, *supra* note 4, pt. 3.104-7(b)(1)-(5).

<sup>9</sup> This concern certainly exists in the bid protest system, where the agency that awarded a contract can decide an aggrieved contractor's protest of that award. Many have asserted the disadvantage of such a system is "the appearance (and perhaps the reality) of a lack of independence and impartiality. . . . Protesting vendors may fear that the contracting agency will not be willing to admit that the procurement was not handled properly." Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 433 (2006).

<sup>10</sup> *Cf. Caelum Research Corp. v. Dep't of Transp.*, GSBCA No. 13139-P, 95-2 BCA ¶ 27,733 (noting that "an agency's conclusion that no procurement integrity violation existed [is a] . . . decision to which the Comptroller General affords deference").

<sup>11</sup> See *infra* notes 47-48 and accompanying text.



proposes that military services should amend their procurement fraud regulations to include addressing reports of Procurement Integrity Act violations, and in doing so, proscribe internal investigations. An internal investigation may raise appearance of impropriety issues, test personal and institutional loyalties, and risk overlooking systemic problems. These concerns may undermine procurement integrity, discourage highly qualified contractors from competing for government contracts, and impugn the reputation of the armed services.

The military, as the federal government's largest procurer of goods and services,<sup>12</sup> should set the standard for other government agencies to follow. And that standard should include regulations and procedures that require outside, independent investigations upon agency officials learning of a potential Procurement Integrity Act violation. Outside investigations will only enhance the procurement system's objective of integrity.<sup>13</sup> As the Federal Acquisition Regulation (FAR) asserts, "government business shall be conducted in a manner above reproach" and [t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct."<sup>14</sup> Outside investigations preserve the public trust by offering independence, uniformity, consistency, and competence.

This article examines the military services' regulations in light of the Procurement Integrity Act. In Section II, this article provides a brief overview of the Procurement Integrity Act, its purpose, provisions, and penalties, and FAR 3.104-7 requirements for addressing violations or possible violations of the Act. Section III sets out each service's procurement fraud regulations, analyzing their strengths and weaknesses as they pertain to the Procurement Integrity Act. Section IV explains why outside, independent investigations may be the preferred course of action to resolve alleged Procurement Integrity Act violations. This article concludes in Section V by recommending the military services amend their applicable regulations to require agency personnel to refer reports of Procurement Integrity Act violations to an independent agency for investigation, such as the GAO or to the department's inspector general or criminal investigative service.

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<sup>12</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, COMMITTEE ON ARMED SERVICES, U.S. SENATE, IMPROVED KNOWLEDGE OF DOD SERVICE CONTRACTS COULD REVEAL SIGNIFICANT SAVINGS 4 (2003) (stating that "DOD is historically the federal government's largest purchaser").

<sup>13</sup> Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 104 (2002) (recognizing integrity as one of three "core" objectives of a public procurement system).

<sup>14</sup> FAR, *supra* note 4, pt. 3.101-1.

## II. BACKGROUND: THE PROCUREMENT INTEGRITY ACT AND FAR 3.104-7

The military's response to reported Procurement Integrity Act violations is important not only because of the large number of private contractors with which it does business,<sup>15</sup> but also because the statute came about as a direct result of improprieties in military contracting. In September 1986, a defense contractor contacted the Naval Investigative Service<sup>16</sup> (NIS) claiming that a consultant, John Marlowe, offered to sell him a competitor's bid proposal information for a pending Marine Corps contract.<sup>17</sup> As a result of this tip, NIS teamed with the Federal Bureau of Investigation and recruited Marlowe to share his knowledge of other contracting improprieties.<sup>18</sup> Marlowe cooperated with investigators and led them to "a netherworld of corrupt consultants."<sup>19</sup> And thus began Operation Illwind,<sup>20</sup> "the largest procurement fraud investigation in . . . history,"<sup>21</sup> which ultimately showed that on a large scale, "consultants and industry marketers could acquire classified information regarding what the Pentagon planned to buy, when it planned to buy it, and how much money was available to buy it, well in advance of the data being publicly available."<sup>22</sup>

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<sup>15</sup> In fiscal year 2007, the military services relied on more than 77,000 contractors. See U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL CONTRACTORS: BETTER PERFORMANCE INFORMATION NEEDED TO SUPPORT AGENCY CONTRACT AWARD DECISIONS 4 (2009).

<sup>16</sup> The Naval Investigative Service became the Naval Criminal Investigative Service in 1992. See U.S. Naval Criminal Investigative Service, About NCIS, History, <http://www.ncis.navy.mil/about/history.asp> (last visited May 31, 2010).

<sup>17</sup> *How the Feds Broke the Case*, FORTUNE, Jan. 11, 1993, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/1993/01/11/77356/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1993/01/11/77356/index.htm).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Most media reports and literature write Illwind as two words. However, the investigators actually intended the operation's code name to be one word. See ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 187-88 (1995) (writing that agents "got a rise years later, amid the media frenzy, when reporters mistakenly identified the investigation's code name as two separate words"). FBI Special Agent Debbie Pierce came up with the name Illwind, based on the proverb, "'Tis an ill wind that blows no man good." *Id.*

<sup>21</sup> Richard Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 289 (2003). Senator John Warner called the situation "'the most serious case' ever of improper conduct by Pentagon officials and military contractors." 44 CONG. Q. ALMANAC 449 (1988).

<sup>22</sup> Debbie Eytchison, *The Procurement Integrity Act: Is the Government Promoting Unethical Business Practices and Unfair Competition?*, 6 J. CONT. MGMT. 27, 28 (2008) (citation omitted); see also Bednar *supra* note 20, at 289 (explaining that Operation Illwind showed Pentagon procurement executives stealing companies' information and then "sell[ing] it to corrupt 'consultants' outside the Pentagon who, in turn, would resell that precious procurement information to defense contractors"); Ed Magnuson et al., *The Pentagon Up For Sale*, TIME, June 27, 1988, available at <http://www.time.com/time/magazine/article/0,9171,967780,00.html>. The article stated that Operation Illwind revealed a system where "rent-a-general agencies" would "hire former Pentagon brass [with] close contacts with their former colleagues. They [knew] both the procedural intricacies of how contracts [were] processed and the technical needs of the services." *Id.*

Operation Illwind resulted in more than ninety convictions and over \$250 million in fines.<sup>23</sup>

#### A. The Act

Five months after learning about the investigation, Congress passed the Procurement Integrity Act<sup>24</sup> and did so with the stated purpose to restore the public's confidence in public procurement.<sup>25</sup> The statute currently<sup>26</sup> addresses three areas: 1) disclosing and obtaining of confidential procurement information; 2) employment discussions between contractors and agency officials; and 3) former officials' acceptance of compensation from contractors.

First, the statute prohibits "any person" (defined as any present or former United States official or advisor, to include contractor employees) from knowingly disclosing contractor bid or proposal information or source selection information prior to the award of a contract to which that information relates.<sup>27</sup> It also prohibits a person, other than as provided by law, from knowingly obtaining contractor bid or proposal information or

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<sup>23</sup> See Bendar, *supra* note 20, at 289; see also George Cahlink, *Closing Doors*, GOV'T EXECUTIVE, July 15, 2004, at 52. Those convicted included a former assistant secretary of the Navy, deputy assistant Secretary of the Air Force, and the Assistant Air Force Secretary of Acquisition for Tactical Systems. See *Litton Fined \$3.9 Million as Pentagon Fraud Case Comes to Close*, CHI. TRIB., Jan. 15, 1994, at 2.

<sup>24</sup> Julian S. Greenspun, *1988 Amendments to Federal Procurement Policy Act: Did the 'Ill Wind' Bring an Impractical Overreaction That May Run Afoul of the Constitution?*, 19 PUB. CONT. L.J. 393, 394 (1990).

<sup>25</sup> See 134 CONG. REC. S17071 (Oct. 20, 1988) (statement of Sen. John Glenn).

<sup>26</sup> The statute has been amended several times since its 1988 enactment. Originally, it applied to "competing contractors" and "procurement officials." Also, it contained prohibitions on giving and receiving gratuities and soliciting confidential procurement information, and required contractors and contracting officers to certify in writing that no known violation of the Act had occurred during the procurement, or if one had, it had been disclosed. See generally Pub. L. No. 100-679, §27, 102 Stat. 4063 (1988). For a more detailed overview of the original statute and criticisms of it, see generally Elizabeth Dietrich, *The Potential for Criminal Liability in Government Contracting: A Closer Look at the Procurement Integrity Act*, 34 PUB. CONT. L.J. 521, 524-25, 531-35 (2005); Sharon A. Donaldson, *Section 6 of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?*, 20 CUMB. L. REV. 421, 438-44 (1990).

<sup>27</sup> 41 U.S.C. § 423(a) (2006). The statute protects: cost or pricing data; indirect costs and direct labor rates; proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; information marked by the contractor as "contractor bid or proposal information"; proposed costs or prices submitted in response to a Federal agency solicitation; source selection plans; technical evaluation plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; rankings of bids, proposals, or competitors; the reports and evaluations of source selection panels, boards, or advisory councils; other information marked as "source selection information." See *id.* § 423(f)(1) and (f)(2).

source selection information prior to the award of a contract to which the information relates.<sup>28</sup>

Second, the statute requires agency officials to report to a supervisor and ethics official “contacts” regarding non-federal employment with offerors competing for a contract that the agency official is personally and substantially participating in.<sup>29</sup> The agency official then must either reject the possibility of non-federal employment or disqualify himself or herself from further personal and substantial participation in the procurement.<sup>30</sup> Furthermore, the Procurement Integrity Act prohibits contractors from engaging in employment discussions with an agency official if they know that the agency official has not reported the discussions or disqualified himself or herself.<sup>31</sup>

Finally, the Procurement Integrity Act limits specified acquisition officials from accepting compensation from a contractor upon leaving government service under specific circumstances for contracts in excess of \$10 million. The statute provides that the procuring contracting officer, source selection authority, member of the source selection evaluation board, and chief of a financial or technical evaluation team for the procurement, and the program manager, deputy program manager, or administrative contracting officer for the contract may not accept compensation from the contractor for one year.<sup>32</sup> The same prohibition applies to those who personally decided to award a subcontract, contract, modification, or task or delivery order exceeding \$10 million to the contractor, to establish overhead rates for contracts exceeding \$10 million to the contractor, to approve the issuance of contract payments exceeding \$10 million to the contractor, or to pay or settle a claim exceeding \$10 million to the contractor.<sup>33</sup> Despite the Procurement Integrity Act’s limitation on post-government employment, it does not forbid a former agency official from working for a division or affiliate of the contractor, so long as that division or affiliate is not producing the same or similar products or services as the entity of the contractor involved in the \$10 million procurement.<sup>34</sup>

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<sup>28</sup> *Id.* § 423(b).

<sup>29</sup> *Id.* § 423(c)(1)(A).

<sup>30</sup> *Id.* § 423(c)(1)(B). Thus, in *Guardian Techs. Int’l*, B-270213, B-270213.2, B-270213.3, Feb. 20, 1996, CPD 96-1 ¶ 104 the U.S. Government Accountability Office found a Procurement Integrity Act violation when a former FBI procurement official who had worked on the FBI’s procurement for bulletproof vests became the president of Guardian Technologies International, the company to which the FBI ultimately awarded the contract. See also *Express One Int’l, Inc. v. United States Postal Serv.*, 814 F. Supp. 93 (D.D.C. 1992) (finding a Procurement Integrity Act violation where a Postal Service acquisition consultant did not adequately reject an offer of employment from a contractor competing for a delivery service contract).

<sup>31</sup> 41 U.S.C. § 423(c)(4) (2006).

<sup>32</sup> *Id.* § 423(d)(1)(A) and (d)(1)(B).

<sup>33</sup> *Id.* § 423(d)(1)(C)(i)-(iv).

<sup>34</sup> *Id.* § 423(d)(2).

Officials and contractors who violate the Procurement Integrity Act face a range of potential administrative, contractual, civil, and criminal penalties.<sup>35</sup> However, the criminal penalties apply only those who knowingly obtain or disclose confidential procurement information, and then only if the knowing disclosure or receipt was for the purpose of exchanging the information for anything of value or obtaining or giving anyone a competitive advantage in the award of a contract.<sup>36</sup> In addition, an unsuccessful offeror who makes the required notice to the contracting officer may protest the contract award to a competitor who wrongfully obtained the offeror's or the Government's confidential procurement information.<sup>37</sup> The aggrieved contractor may seek relief from the awarding agency, the GAO, or the CoFC.<sup>38</sup>

## B. FAR 3.104-7

Congress left many of the details of implementing the Procurement Integrity Act to the FAR Council.<sup>39</sup> The Council responded by adding Section 3.104 to the FAR in May 1989, with Subsection 3.104-7 establishing the procedures for handling violations and possible violations. The original version of FAR 3.104-7 compares very closely to the current one, as it has always permitted heads of contracting activities (HCAs) to direct internal investigations.<sup>40</sup> Interestingly, as indicated below, the regulatory history of FAR 3.104-7 does not suggest significant opposition to this idea.

When the FAR Council published the original version of FAR 3.104-7, the public response made no mention of the section allowing internal investigations. However, at least one public comment did express concern about the propriety of an HCA deciding the appropriate course of action to dispose of a reported Procurement Integrity Act violation.<sup>41</sup> Public comments reflected a belief that the agency head should be the action

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<sup>35</sup> *Id.* § 423(e). The maximum criminal penalties are five years confinement and a fine as provided for under Title 18 of the United States Code. *Id.* For an individual, the civil penalties are \$50,000 for each violation “plus twice the amount of compensation . . . received or offered for the prohibited conduct.” *Id.* For an organization, the civil penalties are \$500,000 for each violation, “plus twice the amount of compensation . . . received or offered for the prohibited conduct.” *Id.*

<sup>36</sup> *Id.* § 423(e)(1)(A) and (e)(1)(B).

<sup>37</sup> *Id.* § 423(g).

<sup>38</sup> See Major Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 144 n.162 (2005); see also *supra* note 2 (discussing 14-day timeframes for filing protests at GAO).

<sup>39</sup> Procurement Integrity Act, Pub. L. No. 100-679, § 6(m), 102 Stat. 4063 (1988) (requiring “[g]overnment-wide regulations and guidelines deemed appropriate to carry out” the statute).

<sup>40</sup> Compare Procurement Integrity, 54 Fed. Reg. 20,488 (May 11, 1989) (stating the head of the contracting activity could “cause an investigation to be conducted”) with 48 C.F.R. 3.104-7 (2009) (stating the head of the contracting activity can “begin an investigation”).

<sup>41</sup> See Fed Reg. 20,488 (May 11, 1989).

authority instead.<sup>42</sup> The council disagreed, reasoning that the designation of the HCA or designee of flag, SES, or equivalent rank as the action authority ably reflected that “any action taken is taken only after careful review by senior level officials of the agency.”<sup>43</sup>

The FAR Council amended the rule in 1997, 2000, and 2002.<sup>44</sup> Again, the public did not object to the rule permitting internal investigations. However, whereas previously the public comments indicated a belief that the authority deciding the course of action should be higher than the HCA, responses to the amendments requested that the deciding authority be someone at a lower level.<sup>45</sup> Public comments asked the council to relax the requirement that the HCA could only delegate his authority to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.<sup>46</sup> The council declined, stating “The issues being addressed are very significant, i.e., violations or possible violations of the Act; therefore relaxation of the restriction is not appropriate.”<sup>47</sup>

Thus, internal investigations into alleged Procurement Integrity Act violations, consistent with agency procedures, are permissible. Though such investigations appear logical in their efficiency and are arguably consistent with “the Government’s policy to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level,”<sup>48</sup> Congress passed the Procurement Integrity Act specifically to restore public confidence in the procurement system.<sup>49</sup> As such, all aspects of the Act should be directed towards achieving that end. To allow an affected contracting activity to investigate itself, despite its possible or even apparent connections to the alleged violation, raises risks of at least an appearance of impropriety.

The FAR, by allowing internal investigations, does little to counter the observation that “the agency contracting officer usually wants to move the procurement forward, often sees misunderstandings and mistakes rather than fraud, and is culturally oriented toward working issues out with its ‘partners’ in the private sector.”<sup>50</sup> One incident of the procuring agency

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 62 Fed. Reg. 226 (Jan. 2, 1997); 65 Fed. Reg. 16,758, 16,763 (Mar. 29, 2000); 67 Fed. Reg. 13,057 (Mar. 20, 2002).

<sup>45</sup> *See, e.g.*, 67 Fed. Reg. 13,057.

<sup>46</sup> 62 Fed. Reg. 226 (Jan. 2, 1997); 65 Fed. Reg. 16,758, 16,763 (Mar. 29, 2000); 67 Fed. Reg. 13,057 (Mar. 20, 2002).

<sup>47</sup> 67 Fed. Reg. 13,057, 13,058.

<sup>48</sup> FAR 33.204. As GAO has observed, the FAR “affords the agency an opportunity to investigate alleged improper action during the conduct of an acquisition and, in appropriate circumstances, to take remedial action before completing the tainted procurement.” *See SRS Techs.*, Comp. Gen. B-277366, July 30, 1997, 97-2 CPD ¶ 42.

<sup>49</sup> *See supra* note 25.

<sup>50</sup> Michael Davidson, *Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations*, ARMY LAW., Sept. 2002, at 21.

even appearing to “sweep a problem under the rug” in the interest of expediency could have devastating consequences. The public confidence in the procurement system might wane and there could be calls for terminations, investigations, and prosecutions.<sup>51</sup> Moreover, the mere failure to properly investigate a Procurement Integrity Act violation could provide a basis for protest, irrespective of whether a violation even had occurred.<sup>52</sup> It is vital that the military have sound procedures in place to ensure that it does not promote a culture that “sees misunderstandings rather than fraud.”<sup>53</sup>

### III. THE MILITARY’S PROCUREMENT FRAUD PROCEDURES

All military services have supplemented FAR 3.104-7, but only the Army specifically addresses an HCA’s responsibilities concerning a Procurement Integrity Act violation.<sup>54</sup> That guidance allows for internal investigation of reported violations. Army Federal Acquisition Regulation Supplement (AFARS) 5103.104-7(b) merely instructs the HCA to take action following consultation with “the contracting officer and legal counsel.”<sup>55</sup> The Air Force’s and Navy’s FAR supplements do not preclude internal investigations, as they do not provide any guidance to their HCAs on investigation of alleged Procurement Integrity Act violations.

Each military service has its own specific procurement fraud regulations. The services issued these regulations pursuant to a 1978 presidential order requiring each executive department and agency to develop comprehensive plans to use audit and investigative functions to eliminate fraud, waste, and abuse in government programs.<sup>56</sup> As a result, the Secretary of Defense required the military services to identify a single

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<sup>51</sup> Just recently, President Barack Obama opined that the Government procurement system has “lost the public trust.” Paul Debolt, et al., *Feature Comment: President Obama Issues Memo on Government Contracting to the Heads of Executive Departments and Agencies*, 51 GC ¶ 77. A recent Army case, in which an initial internal investigation concluded that no Procurement Integrity Act violation had occurred but a subsequent investigation did, is now being reviewed by Congress. *See infra* notes 128-137 and accompanying text.

<sup>52</sup> *See, e.g.*, Health Net Fed. Servs., LLC, B-401652, Oct. 13, 2009, 2009 U.S. Comp. Gen. LEXIS 2009 (noting that Health Net’s protest was based on the procuring agency’s failure to adequately investigate Health Net’s complaint that a Procurement Integrity Act violation had occurred); Lockheed Martin Mar. Sys. & Sensors, B-299766, B-299766.2, Aug. 10, 2007, 2007 U.S. Comp. Gen. LEXIS 255 (describing Lockheed Martin’s protest as that “the Navy’s consideration of the [alleged Procurement Integrity Act] violation did not meet the procedural requirements of FAR § 3.104-7”); *cf.* Caelum Research Corp. v. Dep’t of Transp., GSBCA No. 13139-P, 95-2 BCA ¶ 27,733 (finding that agency had failed to conduct any investigation into an alleged Procurement Integrity Act violation).

<sup>53</sup> *See supra* note 51 and accompanying text.

<sup>54</sup> *See AFARS, supra* note 5, 3.104-7(b).

<sup>55</sup> *See id.*

<sup>56</sup> U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5430.92B, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT ACQUISITION, FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY, ¶ 3.c. (30 Dec. 2005) [hereinafter SECNAVINST 5430.92B].

point-of-contact for procurement fraud issues.<sup>57</sup> Military services' procurement fraud regulations mark the likely starting point for military HCAs in determining the "appropriate action" required by FAR 3.104-7.<sup>58</sup> While they are a good starting point, they have not been amended expressly to include the Procurement Integrity Act.<sup>59</sup>

Each service's regulation purports to establish "policies, procedures, and responsibilities for reporting and resolving allegations of procurement fraud or irregularities."<sup>60</sup> Without question, a Procurement Integrity Act violation constitutes a procurement irregularity, since it involves the improper disclosure or receipt of confidential information or prohibited relationships and interests that tend to prejudice fair competition.<sup>61</sup> Likewise, a Procurement Integrity Act violation amounts to procurement fraud because in the long run, contractors will not want to participate in a process that does not value protecting confidential information or fair and objective decision-making. The decline in the number of competing contractors ultimately will prevent the government from obtaining the best value for the public's money in its purchases.<sup>62</sup>

The services' regulations specifically define fraud to include actions prohibited by the Procurement Integrity Act.<sup>63</sup> Although none of the regulations expressly mention the Procurement Integrity Act, they define procurement fraud to include conflicts of interest and the unauthorized

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<sup>57</sup> *Id.*; see generally U.S. DEP'T OF DEFENSE DIRECTIVE 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (28 June 1985); Captain Vincent Buonocore, *Implementing a Procurement Fraud Program: Keeping the Contractors Honest*, ARMY LAW., Jun. 1987, at 14.

<sup>58</sup> See SECNAVINST 5430.92B.

<sup>59</sup> See *infra* note 61 and accompanying text.

<sup>60</sup> U.S. DEP'T OF ARMY REGULATION 27-40, LITIGATION ¶ 8-1 (19 Sept. 1994) [hereinafter AR 27-40]; see also SECNAVINST 5430.92B at ¶ 1; U.S. DEP'T OF AIR FORCE, INSTR. 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM 1 (21 Oct. 2003) [hereinafter AFI 51-1101].

<sup>61</sup> See 41 U.S.C. § 423 (2006).

<sup>62</sup> See *SAI Indus. Corp. v. United States*, 60 Fed. Cl. 731, 747 (Fed. Cl. 2004) (explaining that "[h]ealthy competition ensures that the costs to the taxpayer will be minimized"); Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 PUB. CONT. L.J. 803, 806 (2009) (discussing the adverse impact that the lack of procurement integrity can have on the Government's objective to obtain the best value for its purchases); see also Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 710 (2001) (explaining that "when competing firms lack confidence that they stand on equal footing with incumbent contractors, the system suffers").

<sup>63</sup> AR 27-40, *supra* note 60, at fig. 8-1, ¶ 3.d. (listing as a procurement fraud indicator contractors appearing to have received advance notice of information related to proposed procurement), ¶ 2.c. (information concerning requirements and pending contracts is released only to preferred contractors); AFI 51-1101, *supra* note 60, atch. 1, at 27 (defining significant case of procurement fraud to include "all cases" involving conflicts of interest and improper sharing or confidential procurement information); SECNAVINST 5430.92B, *supra* note 60, ¶ 4.d (defining fraud to include the "unauthorized disclosure of official information, which is, connected with acquisition and disposal matters.").



disclosure of procurement-related information, precisely the conduct the Procurement Integrity Act proscribes.<sup>64</sup> Thus, the service's procurement fraud regulations should figure prominently in the military's response when a procurement professional discovers or reports a possible Procurement Integrity Act violation.

#### A. Common Features in the Services' Regulations

All three regulations contain similarities concerning coordinating with other agencies and procurement personnel training. These similarities raise important discussion points.

First, all the services require coordination with the U.S. Department of Justice (DoJ) for all procurement fraud matters.<sup>65</sup> Such guidance is necessary, since DoJ would be the office responsible for enforcing the Procurement Integrity Act's criminal and civil penalties.<sup>66</sup> The Procurement Integrity Act's deterrent effect would be greatly compromised if the DoJ were unaware of possible violations of the statute, and therefore unable to pursue penalties for offenders.<sup>67</sup>

Second, all three regulations require regular training for agency procurement personnel.<sup>68</sup> Public procurement is a complex practice, and information, knowledge, and resources provide procurement personnel with the tools to succeed. Because public procurement can be so complex, every individual involved in the process, regardless of experience, can benefit from more knowledge and information. A commitment to training the procurement workforce thus equips contracting office personnel to be able to identify procurement fraud indicators, which include possible Procurement Integrity Act violations.<sup>69</sup> Moreover, training enhances

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<sup>64</sup> AR 27-40, *supra* note 60, at fig. 8-1, ¶ 3.d. (listing as a procurement fraud indicator contractors appearing to have received advance notice of information related to proposed procurement), ¶ 2.c. (information concerning requirements and pending contracts is released only to preferred contractors); AFI 51-1101, *supra* note 60, atch. 1, at 27 (defining significant case of procurement fraud to include "all cases" involving conflicts of interest and improper sharing or confidential procurement information); SECNAVINST 5430.92B, *supra* note 56, ¶ 4.d (defining fraud to include the "unauthorized disclosure of official information, which is, connected with acquisition and disposal matters.").

<sup>65</sup> AR 27-40, *supra* note 60, ¶ 8-7; SECNAVINST 5430.92B, *supra* note 56, ¶ 6.a.(15); AFI 51-1101, *supra* note 60, ¶ 1.1.1.1.

<sup>66</sup> The Department of Justice has established the National Procurement Fraud Task Force in October 2006 in order to "promote the prevention, early detection, and prosecution of procurement fraud." See <http://www.justice.gov/criminal/npftf>.

<sup>67</sup> See *Cent. Ark. Maint., Inc. v. United States*, 68 F.3d 1338, 1343 (Fed. Cir. 1995) (noting that the Government has "substantial administrative, civil, and criminal enforcement authority under the Procurement Integrity Act").

<sup>68</sup> AR 27-40, *supra* note 60, ¶ 8-2.h.; SECNAVINST 5430.92B, *supra* note 56, ¶ 6.a.(13); AFI 51-1101, *supra* note 60 ¶ 1.1.9.1.

<sup>69</sup> *Cf. generally See* REPORT OF ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 343-48 (2007) (discussing the importance of a well-trained acquisition workforce).

accountability. When procurement fraud occurs, personnel cannot claim ignorance because of a lack of information, training, or resources. In other words, personnel cannot argue that they were not aware of what conduct was prohibited, as superiors can point to the resource or training session that set forth the relevant guidance. On the other hand, when the training is deficient or nonexistent, the regulations' training requirement provides a means to hold leadership accountable. Ultimately, training helps build a competent, knowledgeable procurement workforce, an important tool in combating procurement fraud and protecting procurement integrity.<sup>70</sup>

Each service defines responsibilities for their respective investigative agencies—the Army Criminal Investigative Division (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigation (AFOSI).<sup>71</sup> In turn, these agencies have specific procurement fraud missions under their own regulations.<sup>72</sup> Indeed, according to Department of Defense Instruction 5505.2, *Criminal Investigations of Fraud Offenses*, the military investigative agencies have primary investigative responsibility over contract and procurement actions.<sup>73</sup>

Finally, so that each service is aware of particular procurement frauds that may impact other DoD components, all three regulations require coordination with the Defense Investigative Service and the other DoD component criminal investigative organizations when investigations affect that component.<sup>74</sup> Not only does this requirement serve to contain particular frauds, it should also motivate the services to stay vigilant with its procurement fraud program. Should the Army, for example, give notice that it has been victimized by procurement fraud, the Navy and Air Force have an opportunity to inspect their processes and personnel to make sure they are not the victim of similar conduct.

Despite the foregoing similarities, the services' regulations are not identical. Examining the differences and highlighting the strengths and weaknesses of the existing anti-fraud procedures may enable the creation of

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<sup>70</sup> *See id.*

<sup>71</sup> Should include source

<sup>72</sup> AFI 51-701 vol. 1, CRIMINAL INVESTIGATIONS ¶ 1.11 (1 Dec. 1999); AR 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS ¶ 17-2 (4 Sept. 2007); SECNAVINST 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE ¶ 6.a.(7) (28 Dec. 2005).

<sup>73</sup> U.S. DEP'T OF DEFENSE INSTRUCTION 5505.2, CRIMINAL INVESTIGATIONS OF FRAUD OFFENSES, enc. 3.2 (6 Feb. 2003) [hereinafter DODI 5505.2]. However, DODI 5505.2 also indicates that military investigative services will not investigate all procurement fraud matters, and the Secretaries must “[e]stablish procedures for the investigation of fraud allegations when [military criminal investigative agencies] neither investigate the matter nor refer the allegations elsewhere for investigation. (Examples of alternative investigative resources include, but are not limited to, military or security police elements, other DoD investigators, or command authorities.)” *Id.* ¶ 5.2.3.

<sup>74</sup> AR 27-40, *supra* note 60, ¶¶ 8-3.b, 8-6; SECNAVINST 5430.92B, *supra* note 56, ¶ 6.a.(9); AFI 51-1101, *supra* note 60, ¶ 1.1.8.7.

effective procedures to investigate and resolve Procurement Integrity Act violations.

#### B. Department of the Army

Army Regulation (AR) 27-40, *Litigation*, centralizes procurement fraud matters in the Army's Procurement Fraud Division. AR 27-40 requires the Procurement Fraud Division to receive and monitor all reports of procurement irregularities.<sup>75</sup> Army personnel must report a procurement irregularity to the Procurement Fraud Division "if there is a reasonable suspicion of procurement fraud or irregularity or the procuring agency refers the matter for investigation."<sup>76</sup> Moreover, MACOM (major Army command) commanders and HCAs must ensure that "[s]ubstantial indications of fraud or corruption relating to Army contracts or Army administered contracts are reported promptly to the supporting [CID] element and the Procurement Fraud Division."<sup>77</sup>

The Army's regulation also creates the positions of Procurement Fraud Adviser (PFA) and Procurement Fraud Irregularity (PFI) Coordinator, lawyers whose responsibility is to manage the procurement fraud program.<sup>78</sup> In addition, PFAs and PFIs must coordinate with the local CID element regarding all procurement fraud cases at the local level.<sup>79</sup>

Army Regulation 27-40 makes no reference to the inspector general, even though the inspector general's area of responsibility includes procurement fraud matters.<sup>80</sup> Inspectors general "must analyze the substance of complaints and requests for assistance from contractors and their employees who are involved in commercial, procurement, or contracting activities on behalf of the Army."<sup>81</sup> Although Army inspectors general may not have authority to investigate criminal matters, not all Procurement Integrity Act violations are crimes, and would require some form of inquiry.<sup>82</sup>

#### C. Department of the Navy

Secretary of the Navy (SECNAV) Instruction 5430.92B, *Assignment of Responsibilities to Counteract Acquisition Fraud, Waste, and Related Improprieties within the Department of the Navy*, places overall responsibility in the Department of the Navy Acquisition Integrity Office

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<sup>75</sup> AR 27-40, *supra* note 60, ¶ 8-3(a)(1)-(11).

<sup>76</sup> *Id.* ¶ 8-5(a).

<sup>77</sup> *Id.* ¶ 8-3(d)(1). Substantial indications of fraud could include conflicts of interest or unauthorized sharing of confidential procurement information. *See id.* at fig. 8-1.

<sup>78</sup> *Id.* ¶ 8-4(a)-(f).

<sup>79</sup> *Id.* ¶ 8-4(f).

<sup>80</sup> AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES ¶ 4-4.b.1 (1 Feb. 2007).

<sup>81</sup> *Id.* ¶ 7-3.a.

<sup>82</sup> *See generally* 41 U.S.C. § 423(e) (2006).

(AIO) to monitor all acquisition fraud matters throughout the Navy.<sup>83</sup> The AIO has the authority to task investigative agencies to “inspect, investigate and inquire into acquisition fraud matters . . . .”<sup>84</sup>

As for NCIS, the Navy’s instruction describes its role as conducting “criminal investigations” and “acquisition fraud surveys” at the direction of the AIO.<sup>85</sup> But again, some Procurement Integrity Act violations could never trigger a “criminal investigation.” Thus, when the alleged Procurement Integrity Act violation does not involve a crime, the question may arise as to what organization is responsible for investigating the alleged violation.

The Navy’s instruction also specifies responsibilities for judge advocates.<sup>86</sup> Those responsibilities include providing counsel to all Department of Navy officials regarding acquisition fraud matters.<sup>87</sup> Moreover, judge advocates advise the AIO and others concerning investigations conducted under the Manual of the Judge Advocate General (JAGMAN).<sup>88</sup> JAGMAN investigations are internal, administrative investigations.<sup>89</sup> Thus, the Navy’s instruction expressly recognizes a contracting activity’s ability to conduct its own investigations into procurement fraud, to clearly include conduct implicating the Procurement Integrity Act.

The Navy instruction does not mention HCAs nor does it recognize specially recognized procurement fraud counsel. It does, however, recognize the role of the inspector general in identifying and disposing of procurement fraud allegations.<sup>90</sup>

#### D. Department of the Air Force

The Air Force establishes its procurement fraud guidance in Air Force Instruction (AFI) 51-1101, *The Air Force Procurement Fraud Remedies Program*. AFI 51-1101 states that the Deputy Air Force General Counsel for Contractor Responsibility (SAF/GCR) shall be the centralized authority for procurement fraud matters.<sup>91</sup> The instruction requires chiefs of contracting offices to refer to SAF/GCR “evidence of all suspected significant procurement fraud matters.”<sup>92</sup> Chiefs of contracting offices also

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<sup>83</sup> SECNAVINST 5430.92B, *supra* note 60, ¶¶ 3.d, 6.a.

<sup>84</sup> *Id.*, *supra* note 60, ¶ 6.a.17.

<sup>85</sup> *Id.*, *supra* note 60, ¶¶ 6.b.2, 6.b.3.

<sup>86</sup> Judge advocates are the uniformed lawyers for each of the military services.

<sup>87</sup> *Id.*, *supra* note 60, ¶ 6.g.

<sup>88</sup> *Id.*, *supra* note 60, ¶ 6.g.3.

<sup>89</sup> See U.S. DEPT’ OF NAVY, JUDGE ADVOCATE GENERAL MANUAL 5800.7E, Chapter 2 (20 Jun. 2007) [hereinafter JAGMAN]; see also *infra* notes 101-02.

<sup>90</sup> SECNAVINST 5430.92B, *supra* note 60, ¶ 6.h.

<sup>91</sup> AFI 51-1101, *supra* note 60, at 1.

<sup>92</sup> *Id.* ¶ 1.1.9.3. The AFI defines “significant procurement fraud” to include “[a]ll corruption cases related to the Air Force procurement process, regardless of the dollar amount of loss

are responsible for making sure procurement personnel receive adequate training in procurement matters.<sup>93</sup>

In addition, AFI 51-1101 provides that each level of command shall have an Acquisition Fraud Counsel (AFC).<sup>94</sup> The AFI recommends that the AFC be a civilian attorney, for continuity purposes, and confers significant responsibility on the AFCs in terms of coordinating procurement-related activities within their respective commands.<sup>95</sup> For example, the AFCs are to provide “advice and support to DOJ and AFOSI and other investigative agents in all procurement fraud cases on a continuing basis throughout the investigation.” This “includes, but is not limited to, a detailed assessment of the contractual and evidentiary issues which may affect the successful criminal and civil prosecution of the case and the identification of applicable criminal, civil, contractual, and administrative remedies.”<sup>96</sup> Likewise, AFCs shall “[e]ngage in continuous communication with contracting officers, DOJ, AFOSI and [Defense Logistics Agency] regarding the subject and coordination of the investigation.”<sup>97</sup> Like AR 27-40, AFI 51-1101 does not discuss the Air Force’s inspector general. However, also like the Army, the Air Force’s inspectors general have responsibilities when it comes to procurement fraud. Air Force inspectors general “serve their commanders and their assigned organizations . . . by proactively training all members of the organization about . . . Fraud, Waste, and Abuse (FWA) issues.”<sup>98</sup>

The Air Force also has an ombudsman program pursuant to the Air Force Federal Acquisition Regulation Supplement (AFFARS). Under this guidance, the ombudsman is “independent of the contracting officer” whose “function . . . is to hear concerns about specific issues in acquisitions, to communicate these concerns to senior management personnel responsible for oversight and to assist in the resolution of the concerns.”<sup>99</sup> Importantly, the ombudsman has the authority to establish “independent review teams.”<sup>100</sup> However, the AFFARS does not require a contracting officer or HCA to use the ombudsman program should a contractor report a Procurement Integrity Act violation.<sup>101</sup> Similarly, the ombudsman cannot exercise his or her authority if an aggrieved contractor never enlists his or her services.

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involved. Corruption includes such fraudulent acts as . . . the unauthorized disclosure of procurement-related information.” *Id.* at atch. 1.

<sup>93</sup> *Id.* ¶ 1.1.9.1.

<sup>94</sup> *Id.* ¶¶ 1.1.3, 1.1.6.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* ¶ 1.1.7.8.

<sup>98</sup> AFI 90-301, INSPECTOR GENERAL COMPLAINTS RESOLUTION ¶ 1.2 (15 May 2008).

<sup>99</sup> AFFARS, *supra* note 5, 5301.9101, 5301.9102(a).

<sup>100</sup> *Id.* at 5301.9102(b).

<sup>101</sup> *See generally id.* at 5301.9102.

E. Best Practices and Suggested Changes

The foregoing illustrates a number of best practices every federal agency should emulate with their procurement fraud procedures. For example, the commonalities of the services’ regulations—centralizing procurement fraud matters in one office within the agency, requiring training, establishing communication with the Department of Justice, and including investigative agencies—all are necessary components of any effective procurement fraud program.<sup>102</sup> As discussed below, each service’s regulation sets forth additional unique practices also worth considering. At the same time, none of the three regulations are perfect. The following chart summarizes the main provisions of the services’ respective procurement fraud regulations, and the discussion that follows identifies best practices and suggestions for change.

Provision	Army	Navy	Air Force
Centralized Procurement Fraud Point of Contact	Procurement Fraud Division	Acquisition Integrity Office	SAF/GCR
Training	Yes	Yes	Yes
Coordination with DoJ	Yes	Yes	Yes
Coordination with DoD	Yes	Yes	Yes
Defined role for criminal investigative agency	Yes	Yes	Yes
Specific responsibilities for HCAs	Yes	No	Yes
Defined role for Inspector General	No	Yes	No
Specialized procurement counsel	Yes	No	Yes
Ombudsman program	No	No	Yes
Specific reference to Procurement Integrity Act	No	No	No

<sup>102</sup> See *supra* notes 76 - 108 and accompanying text.

## 1. *Specific Best Practices*

One practice that stands out is the Army's Procurement Fraud Adviser and Procurement Fraud and Irregularities attorneys and the Air Force's Acquisition Fraud Counsel. By specifically creating and identifying such a position, the Army's and Air Force's regimes recognize the benefits of specialized legal advice for procurement matters.<sup>103</sup> As a result, any person with a procurement-related issue knows exactly who to contact. That individual can give advice to commanders, contracting officers, HCAs, investigators, and others about the complex issues that can arise during the procurement process in light of the complicated legal framework that governs it. Moreover, the agency's legal point of contact can develop institutional knowledge, practices, and a familiarity with the process and people to make communication more efficient. In this regard, the Air Force's specific suggestion that the AFC be a civilian attorney rather than a military officer who would rotate to a new assignment every two to three years may make sense. Since most procurement matters can take time, continuity of personnel "to assure long-term stability to [an agency's] procurement fraud remedies program" would be a key advantage.<sup>104</sup>

Another best practice is the Army's and Air Force's specific guidance to HCAs. FAR 3.104-7 insists HCAs follow agency procedures in taking appropriate action.<sup>105</sup> Thus, HCAs may benefit from more direct guidance as to how to proceed when trying to resolve an alleged Procurement Integrity Act violation.

The Air Force's ombudsman program would make another excellent contribution.<sup>106</sup> That program presents an opportunity to have an individual with no apparent significant connection to the affected contracting activity bring a fresh perspective to the situation. This untainted view could go a long way in identifying improper conduct under the Procurement Integrity Act. The ombudsman's competence and independence could help alleviate any concern on the part of the aggrieved contractor or the public that the contracting activity would be unwilling to find that it or one of its customers did anything wrong during a procurement.

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<sup>103</sup> See Jacqueline Wood, *Government Contractor Standards of Ethical Conduct: The Need for a More Detailed Regulatory Scheme*, 36 PUB. CONT. L.J. 437, 447 (2007) (noting "the intricacies of public procurement"); Buonocore, *supra* note 48, at 16 (observing that procurement issues require individuals who "understand . . . the procurement process").

<sup>104</sup> AFI 51-1101, *supra* note 60, ¶ 1.1.3.

<sup>105</sup> See FAR, *supra* note 4, pt. 3.104-7.

<sup>106</sup> Note, though, that the Air Force's ombudsman program is not unique. For example, NASA has a similar program, and requires all of its solicitations to inform prospective offerors of the ombudsman's ability to, *inter alia*, "hear concerns from offerors, potential offerors, and contractors during the preaward and postaward phases" of the acquisition. 60 Fed. Reg. 47,099, 47,100 (Sept. 11, 1995).

Finally, the Navy's express inclusion of the inspector general in its procurement fraud framework is worthwhile. Inspectors general are independent from the contracting activity, and exist in part to combat fraud, waste, and abuse.<sup>107</sup> Like the Air Force's ombudsman, the inspector general can bring a different outlook to a particular situation, untainted by preexisting relationships. A 1997 GAO bid protest case is illustrative. In *Oceaneering International, Inc.*,<sup>108</sup> Oceaneering alleged that its competitor committed a Procurement Integrity Act violation by improperly obtaining Oceaneering's confidential proposal information. As a result of the allegation, the Navy initiated an investigation. Although it concluded Oceaneering's allegations lacked proof, the Navy nevertheless asked the department's inspector general to conduct further inquiry because of the "severity of the charges and conflicting testimony offered."<sup>109</sup> Thus, inspectors general have a role to play in procurement fraud matters, and Procurement Integrity Act cases in particular, which an agency's procedures should recognize.

## 2. *Specific Suggested Changes*

One shortcoming common to all three regulations is that none specifically reference the Procurement Integrity Act. This omission is significant, given that FAR 3.104-7 appears to presume that federal agencies will develop procedures to deal with alleged Procurement Integrity Act violations, to include allowing internal investigations.<sup>110</sup>

A notable shortcoming with the Navy's regulations is that it does not have a specialized procurement counsel like the Army's Procurement Fraud Counsel and the Air Force's Acquisition Fraud Counsel. Instead, the Navy regulations leave legal advice to a judge advocate, without requiring that that judge advocate have procurement law experience.<sup>111</sup> The Navy should consider creating a specific procurement fraud counsel position for lower levels of command, since agency personnel might receive different advice and have different experiences based on which judge advocate they consult. The procurement process and those who work in it, however, would benefit from consistency and continuity, which a single legal adviser trained and experienced in procurement matters could offer.

The Army and Air Force should define a role for the inspector general, as the Navy does. As discussed above, inspectors general can contribute to the fight against procurement fraud. Given the independence of the inspector general and its express anti-fraud mission, any procurement

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<sup>107</sup> See, e.g. AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES ¶ 4-4.b.1 (1 Feb. 2007).

<sup>108</sup> *Oceaneering International, Inc.*, Comp. Gen. B-278126, Dec. 31, 1997, CPD ¶ 133.

<sup>109</sup> *Id.*

<sup>110</sup> See FAR, *supra* note 4, pt. 3.104-7

<sup>111</sup> See generally SECNAVIST 5430.92B, *supra* note 60.



fraud regime is incomplete without that office's involvement. Moreover, recently the FAR Council promulgated a rule requiring government contractors to disclose to the agency's inspector general credible evidence of fraud.<sup>112</sup> As this rule expressly recognizes the relevance of an inspector general, so perhaps too should an agency's procedures for inquiring into alleged Procurement Integrity Act violations.<sup>113</sup>

Finally, potentially the most significant shortcoming of the services' procedures regarding alleged Procurement Integrity Act violations is that they do not set forth specific guidance as to how to process an alleged Procurement Integrity Act violation. As such, contracting activities retain the ability to conduct internal investigations upon learning of the alleged violation if they so desire. For example, the Army's regulations direct the HCA to take action after consulting with legal counsel and the contracting officer.<sup>114</sup> This guidance clearly authorizes an internal investigation, even if ultimately the result of that internal investigation is to refer the matter to CID because the alleged violation amounts to a crime. Nevertheless, if the alleged violation implicates one of the Procurement Integrity Act's noncriminal provisions, or if the alleged violation does not clearly indicate a violation of the statute's criminal provision, an internal investigation may proceed. In addition to the Army's FAR supplement, nothing in AR 27-40 prohibits the HCA from pursuing an internal investigation either.<sup>115</sup>

The Air Force's and Navy's procedures likewise contain no express prohibitions against internal investigations.<sup>116</sup> In fact, the Navy's instruction explicitly allows such investigations. Heads of contracting activities can conduct investigations under the Manual for the Judge Advocate General—investigations that are by their nature internal.<sup>117</sup> The Air Force instruction references a number of different investigative capabilities, which presumably would include an internal investigation conducted by the contracting activity.<sup>118</sup>

Although it is DoD policy to refer procurement fraud and contract improprieties investigations to the criminal investigative agency, the Secretaries of the military departments also must establish procedures for

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<sup>112</sup> See 73 Fed. Reg. 67,064, 67,065 (Nov. 12, 2008). Interestingly, the rule, on its face, does not appear to apply to the Procurement Integrity Act. See *id.* (noting contractors must disclose a “violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act (31 U.S.C. 3729-3733)”).

<sup>113</sup> To be fair, the FAR Council promulgated the rule only a year ago such that the services likely have not yet made a final determination as to what changes, if any, they should make to their procurement fraud procedures in light of the new rule.

<sup>114</sup> See AFARS, *supra* note 5, 5103.104-7.

<sup>115</sup> Importantly, a key element of the Army's program is “decentralized responsibility for operational matters, such as . . . remedial action,” which seems to implicitly encourage internal investigations. AR 27-40, *supra* note 60, ¶ 8-2.d.

<sup>116</sup> See generally AFFARS, *supra* note 5, 5303.104-7; NMCARS, *supra* note 5, 5203.104-7.

<sup>117</sup> See *supra* note 73 and accompanying text; see also *infra* notes 101-102.

<sup>118</sup> See generally AFI 51-1101, *supra* note 60.

investigating fraud allegations when the criminal investigative agencies do not assume investigative responsibility.<sup>119</sup> In the absence of providing those procedures, internal investigations become a distinct possibility. However, internal investigations risk raising appearances of impropriety and concerns of favoritism. A Procurement Integrity Act violation, more likely than not, implicates the contracting activity—its personnel, its procedures, or the like—in some way, or involves a regular vendor of the government.<sup>120</sup> External investigations, therefore, can bolster the integrity of the procurement system by removing the opportunity for appearances of impropriety and concerns of favoritism.

The military services should amend their regulations to ensure internal investigations are not an approved course of action. As discussed below, investigations into Procurement Integrity Act violations should be independent and conducted by an entity not affiliated with the affected contracting activity.

#### IV. A NEED FOR OUTSIDE, INDEPENDENT INVESTIGATIONS

The Procurement Integrity Act applies “to every procurement conducted by Federal agencies regardless of dollar value,”<sup>121</sup> but as the military services’ regulations currently exist, CID, NCIS, and AFOSI will not investigate every allegation occurring within the military. They might not be able to spare the resources, time, or manpower to investigate an allegation that an agency official’s wife worked for an eventual awardee, or that an awardee’s representatives and an agency official spent time together at a trade show, or that an agency engineer met with a bidder’s employee on multiple occasions.<sup>122</sup> Investigating these types of allegations, however, is important and must be pursued. Under the current regulations, a HCA may pursue an internal investigation upon learning of a Procurement Integrity Act violation, although such a course of action may not be the best course.

In the military, commanders possess the well-established tool of internal investigations to resolve issues within their commands, to maintain good order and discipline, and to ensure personnel comply with relevant law, regulations, and policies.<sup>123</sup> These commander-directed investigations

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<sup>119</sup> See *supra* note 73.

<sup>120</sup> Cf. 41 U.S.C. § 423 (2006).

<sup>121</sup> 54 Fed. Reg. 20,488 (May 11, 1989).

<sup>122</sup> See Donald P. Arnavas, *The Procurement Integrity Act/Edition II*, 97-12 BRIEFING PAPERS COLLECTION 1, 9 & nn.99-109 (1997) (an interesting look at the types of Procurement Integrity Act violations contractors have alleged); see also *Accent Services Co., Inc.*, Comp. Gen. B-299888, Sep. 14, 2007, CPD ¶ 169 (finding no violation of the Procurement Integrity Act where the agency official escorted a potential competitor to the protester’s work site and disclosed the protester’s staffing).

<sup>123</sup> *United States v. Ezell*, 6 M.J. 307, 318 (C.M.A. 1979); *United States v. Staggs*, 23 U.S.C.M.A. 111, 114, 48 C.M.R. 672, 675 (1974); 1 Report of the Advisory Board on the Investigative Capabilities of the Department of Defense 92-93 (1995) [hereinafter Report of

(CDIs) target such subjects as maltreatment, discrimination, harassment, adultery, and other minor offense not warranting CID, AFOSI, or NCIS involvement.<sup>124</sup> Those focused primarily on efficiency would contend an agency's ability to conduct an internal investigation of an alleged Procurement Integrity Act violation is a strength rather than a shortcoming.

No matter how ingrained such investigations may be in the military, traditional rules and ways of doing business must give way to the greater good of procurement integrity. One report declared that "commander-directed investigations . . . are, as a class, the type of investigations most subject to abuse."<sup>125</sup> The same report indicated that commanders unfortunately have used their authority to conduct such investigations in order to "whitewash or cover up an incident."<sup>126</sup> Additionally, the report criticized the fact that commanders often appointed inadequately-trained individuals to conduct investigations.<sup>127</sup> To avoid these problems, whether real or perceived, one possible solution is therefore external investigations, conducted by trained and qualified personnel.

#### A. The Raymond Affair

A recent Army case involving the Procurement Integrity Act illustrates some of the concerns that may weaken the credibility of CDI in procurement-related cases. George Raymond, an Army technology center director, developed a close relationship with Catherine Campbell, a corporate liaison for Enterprise Integration Incorporated (Enterprise).<sup>128</sup> They frequently lunched together, went sailing with associates, and

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the Advisory Board]. The Army and Navy and Marine Corps have published regulations providing guidance for CDIs. See AR 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS ¶ 1-5 (2 Oct. 2006) (providing for "administrative fact-finding procedure"); JAGMAN, Chapter 2 (setting forth procedures for administrative, noncriminal investigations). Although the Air Force does not have a specific regulation, it does publish a CDI guide.

<sup>124</sup> As the Navy's regulations explain, "Navy and Marine Corps commands maintain an organic investigative capability. Use of command investigators for criminal and security investigations shall be limited to minor offenses (punishable by one year or less confinement), purely military offenses as defined herein, or cases that NCIS has declined to investigate." SECNAVINST 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE ¶ 6.a.(5) (28 Dec. 2005) (emphasis added).

<sup>125</sup> See Report of the Advisory Board, *supra* note 123, at 94.

<sup>126</sup> *Id.*; see also Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 22, 25 (noting that commanders can abuse their power to conduct internal investigations).

<sup>127</sup> See Report of the Advisory Board *supra* note 123, at 94.

<sup>128</sup> Robert O'Harrow Jr., *A \$191 Million Question: How a Relationship Between an Army Official and a Private Contractor Led to Allegations of Collusion and Impropriety*, WASH. POST, at A1 (August 7, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080603918.html?hpid=topnews&sid=ST2009080700067>.

exchanged late night e-mails.<sup>129</sup> Enterprise received a number of Army contracts over the course of Raymond's and Campbell's four-year relationship.<sup>130</sup> Prior to the award of one of those contracts, Raymond sent Campbell an email labeled "EYES ONLY" containing the government's cost estimates for the solicitation.<sup>131</sup> Raymond claimed he wanted to help Campbell understand the procurement process.<sup>132</sup> His email, however, implicated the Procurement Integrity Act.

When Raymond's supervisor learned of Raymond's possible misconduct, he reportedly did not believe Raymond would have done anything improper. According to one employee, the supervisor was reluctant to pursue the matter because Raymond was "one of [his] top employees."<sup>133</sup> An Army lawyer ultimately convinced the supervisor to initiate a CDI under AR 15-6.<sup>134</sup> He appointed a 71-year-old physicist without any training or experience in investigations or government contracts.<sup>135</sup> The physicist concluded Raymond had not done anything improper and recommended no adverse action.<sup>136</sup> The physicist went one step further, offering to speak on Raymond's behalf should the Army pursue any disciplinary action against him.<sup>137</sup>

The Raymond investigation illustrates the need for independent, outside investigations. If an investigation like that happened once, it can happen again, and all the problems associated with CDIs can manifest themselves, whether real or perceived. As a result, not only does a possible Procurement Integrity Act violation erode the system's integrity, but a CDI might worsen the erosion. Procurement irregularities simply undermine the government's legitimacy in ways that harassment claims, adultery allegations, discrimination complaints, or the minor offenses normally the subject of CDIs do not.<sup>138</sup> Thus, the choice of investigation may be significantly important, and independent, outside investigation of Procurement Integrity Act violations may be a better course of action. At

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> O'Harrow, *supra* note 128.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The investigator's report did not mention the "EYES ONLY" email, and, in a later interview, the investigator did not recall seeing it. *Id.*

<sup>137</sup> *Id.* The Army ultimately allowed Raymond to retire with full benefits and without any sanction. In fact, he found subsequent employment with a government contractor, using his Army superiors as references. The House of Representatives Oversight and Government Reform Committee is currently reviewing the Raymond-Campbell case. The Committee Chairman, Congressman Edolphus Towns, has said, "Unfortunately, I think this case is an example of the failed accountability process within DOD that is in desperate need of reform." *Id.*

<sup>138</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 694 (2000) ("A failure to control [corruption] undermines the very legitimacy of democratic government").

the very least, the Government avoids the appearance of quashing the problem. External oversight of procurement irregularities enhance the competitive procurement process.<sup>139</sup>

## B. Outside, Independent Investigations Are More Credible

An outside, independent investigation is a better course of action primarily because it will enhance the credibility of the results of the investigation.<sup>140</sup> Potentially aggrieved contractors and the public at large should expect that an impartial individual not connected with the organization conducted the interviews, reviewed the documents, and consulted the rules and regulations. Free from any preexisting relationships with the contracting activity's personnel or customers, the investigator can make conclusions and have insights uncolored by any personal or institutional loyalties.<sup>141</sup> Thus, whether the outside investigator finds a violation occurred or did not occur, observers can have more faith in the outcome if for no other reason, it appears fairer.<sup>142</sup>

In this regard, corporate investigations prove instructive. When allegations of improper conduct arise, corporations must embrace the notion that they must "reassure a number of constituencies . . . regarding . . . remediation of the problem."<sup>143</sup> A biased investigation "can have devastating consequences for the company: valuable employees distrustful of management may leave, investors may pull their support, and regulators may disregard the results of the internal investigation and decide to conduct

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<sup>139</sup> Schooner, *supra* note 62, at 710 (asserting that "[l]ess external oversight also erodes the competitive underpinnings of the procurement system").

<sup>140</sup> Kenneth L. Sovereign, PERSONNEL LAW 100 (4th ed. 1999) (noting that the use of outside investigators "makes [the investigation] more impartial."); Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel*, 59 BUS. LAW. 1389, 1392 (2004). "The best that can reasonably be expected is an audit process that produces information, findings, and recommendations that are as objective as possible under the circumstances." William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON IND. L. REV. 97, 121 (1993).

<sup>141</sup> See Dan W. Reicher, *Conflicts of Interests in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975, 977-78 (1983) (explaining an investigator can have personal (such as friendships, close working relationships, and own conduct) and professional interests (such as allegiance to the organization he is investigating) - both actual and apparent - that impact public perception of the investigation).

<sup>142</sup> Cf. Stephan O. Kline, *Heal It, Don't Bury It! Testimony on Reauthorization of the Independent Counsel Act*, 1999 L. REV. M.S.U.-D.C.L. 51, 59 (1999) (positing that an independent investigation revealing no wrongdoing engenders credibility and public confidence just as much as finding wrongdoing).

<sup>143</sup> Marjorie J. Peerce & Peggy M. Cross, *Independent Corporate Investigations*, BUS. CRIMES BULL., Jan. 2007, at 6.

their own, disrupting the company and further undermining the investing public's faith in it."<sup>144</sup>

Government agencies face the same issues by allowing even a perceived incomplete and biased investigation. Notably, highly qualified and reliable contractors might become discouraged and no longer offer their services to the government.<sup>145</sup> More importantly, the public might question the agency's ability to manage the public treasury.<sup>146</sup> If having a credible investigative process and obtaining credible investigation results rank as important objectives in resolving Procurement Integrity Act violations, outside, independent investigations further that objective more readily than internal ones.

### C. Other Benefits of Independent, Outside Investigations

Independent, outside investigations offer additional benefits as well. First, knowing that an outside agency may enter its workspace to investigate a potential Procurement Integrity Act violation should encourage the contracting activity to become more vigilant in ensuring no violations occur in the first place. Arguably, supervisors may prefer to protect their personnel and organization from the inquiring eyes of outsiders to judge and evaluate processes and procedures. The specter of outside organizations coming to perform investigations should incentivize supervisors to create a culture of compliance, to include increased training, sporadic internal audits, and encouraging employees to report problems as they arise.<sup>147</sup> In this way, supervisors can deter potential violations.

Second, the possibility of an independent investigation may encourage the contracting activity to take more immediate corrective action when a contractor alleges a violation.<sup>148</sup> Even with an independent investigation ongoing, nothing should prohibit the activity from deciding to alleviate any potential problems or to minimize any negative impact caused by a possible violation by, for example, starting the procurement anew or disqualifying an offeror.<sup>149</sup> While the corrective action does not directly hold the violator accountable, it should promote competition.<sup>150</sup> A

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<sup>144</sup> *Id.*

<sup>145</sup> *Cf.* Troff, *supra* note 38, at 121.

<sup>146</sup> *Cf.* FAR, *supra* note 4, pt. 3.101-1.

<sup>147</sup> Buonocore, *supra* note 48, at 15 (recognizing “[p]ersonnel involved in the procurement process . . . are . . . in the best position to detect and report potentially fraudulent conduct”).

<sup>148</sup> *See* Universal Automation Labs, Inc. v. Dep’t of Transp., GSBICA No. 12370-P, 94-1 BCA ¶ 26,475 (finding a Procurement Integrity Act violation can be ameliorated such that the acquisition does not need to be canceled). *But see* Superlative Techs., Inc., Comp. Gen. B-310489.4, Jun. 3, 2008, CPD ¶ 123 (sustaining protest where agency official notified the contracting officer of having provided the awardees with confidential information to prepare proposal; agency’s cancellation of the solicitation did not cure violations).

<sup>149</sup> *See generally* FAR, *supra* note 4, pt. 3.104-7.

<sup>150</sup> Schooner, *supra* note 13, at 104 (recognizing competition as one of the three “core” objectives for any public procurement system).

competing contractor who sees the agency re-compete a solicitation, for example, would be encouraged to continue to participate in a procurement system rather than be dissuaded by the perception of favoritism, cheating, and lack of accountability.

Third, an independent look at the reported violation may help identify systemic issues. Internal investigations, looking to resolve the issues efficiently and expediently, risk limiting their focus to the specific allegations.<sup>151</sup> Internal investigators may know the people and the process so well he or she overlooks something. As a result, such an investigation may miss the big picture and not recognize when the violation represents only a part of a larger problem. An outsider, on the other hand, might be in a better position to know whether and how to expand the inquiry.

Fourth, an independent, outside investigation will allow the contracting activity to continue to perform its mission of acquiring goods and services for the federal government. An internal investigation would require the commander to task one or more of her personnel to conduct the investigation. This tasking results in fewer personnel to work procurement and acquisition matters. Every office, including a contracting activity, has goals, suspenses, and deadlines to meet. The loss of even one body should not be underestimated.<sup>152</sup> As military criminal courts have recognized, it tends to result in the unit being “short-handed and heavily tasked,” “requir[ing] everyone else to work harder, reduc[ing] efficiency, and lower[ing] morale.”<sup>153</sup>

Fifth, an outside, independent investigation is more likely to be more competent and thorough.<sup>154</sup> Procurement personnel are not investigators. They may have experience and specialized knowledge that helps in any procurement fraud investigation, but they still lack experience and specialized knowledge necessary for a credible investigation.<sup>155</sup> Trained investigators employ strategies and techniques for the purpose of identifying key personnel to be interviewed and relevant documents to be produced. In addition, investigators must not only know what the applicable laws and

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<sup>151</sup> The George Raymond affair provides an example of an internal investigation that missed important facts. *See supra* notes 128-137 and accompanying text.

<sup>152</sup> *See* REPORT OF ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 343-48 (2007) (discussing the problem of shrinking acquisition workforce).

<sup>153</sup> *Cf., e.g.,* United States v. Key, 55 M.J. 537, 538-39 (A.F. Ct. Crim. App. 2001).

<sup>154</sup> *See* R. William Ide III & Douglas H. Yarn, *Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust*, 56 VAND. L. REV. 1113, 1141-42 (2003). This is especially so in the procurement setting, where the issues can be highly complex. *See* Wood, *supra* note 103, at 447 (noting “the intricacies of public procurement”); Buonocore *supra* note 48, at 16 (observing that procurement investigations require investigators who “understand . . . the procurement process”).

<sup>155</sup> *Cf., e.g.,* U.S. DEP’T OF DEFENSE DIRECTIVE 7200.1, ADMINISTRATIVE CONTROL OF APPROPRIATIONS ¶ 3.3 (4 May 1995) (requiring the appointment of “trained investigating officers” to conduct Anti-Deficiency Act violation investigations) [hereinafter DoDD 7200.1].

regulations are, they also must understand how the facts and evidence relate to those laws and regulations. In short, investigations require a skill not easily mastered. But, procurement officials probably go an entire career without conducting any procurement fraud investigations such that the risk they might not get it right their first time is too great, no matter how much assistance other organizations may be able to provide.

Finally, an outside, independent investigation would be consistent with the Department of Defense's position regarding the appropriate response to alleged Anti-Deficiency Act violations.<sup>156</sup> The Anti-Deficiency Act exists to ensure federal government officials do not make a payment or commit the United States to make a payment at some future time for goods or services unless Congress has appropriated funds for the payment.<sup>157</sup> The Procurement Integrity Act and Anti-Deficiency Act are part of the arsenal of laws "governing government contracts . . . enacted for the protection of the public welfare."<sup>158</sup> In particular, both statutes seek to promote the proper use of the public treasury. Accordingly, if it is Department of Defense "policy" that investigations of actual and possible violations of the Anti-Deficiency Act be conducted by "trained investigating officers . . . appointed from an organization outside the organization being investigated,"<sup>159</sup> instituting a similar policy for investigations of actual and possible Procurement Integrity Act violations makes sense.

#### D. The Disadvantages of Outside, Independent Investigations

Despite the possible benefits, independent investigations pose certain disadvantages. First, they sacrifice efficiency and increase costs.<sup>160</sup> The contracting activity personnel know the individuals involved better, where relevant information might be located, and the background behind the relationship with the aggrieved contractor. As such, it can resolve the matter faster and cheaper. One concern about allowing internal investigations, however, may be the possibility of a perception that the system is dishonest, largely because the system loses transparency when matters are resolved internally and in the absence of documented

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<sup>156</sup> See 31 U.S.C. §§ 1341-42, 1344, 1511-17 (2000). An Anti-Deficiency Act violation occurs when an agency obligates or expends funds in excess of amounts available in an appropriation or formal subdivision of funds, obligates funds in advance of an appropriation, or accepts voluntary services. See DoDD 7200.1, *supra* note 155, ¶ 3.3.

<sup>157</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOLUME II 6-3 (2006).

<sup>158</sup> Michael T. Janik & Margaret C. Rhodes, *Gould, Inc. v. United States: Contractor Claims for Relief Under Illegal Contracts with the Government*, 45 AM. U.L. REV. 1949, 1977 (1996).

<sup>159</sup> DoDD 7200.1, *supra* note 155, at ¶ 4.4.

<sup>160</sup> See Steven L. Schooner & David J. Berteau, *Emerging Policy and Practice Issues* (2009), available at <http://ssrn.com/abstract=1562842> (noting that "there are significant costs associated with sophisticated rule-based procurement regimes").



procedures.<sup>161</sup> Yet, “[f]or federal procurement to succeed, it must be open to public view and inspire public confidence.”<sup>162</sup> Procurement irregularities will occur, and when they do, the Government’s response should be one that is transparent and assures observers that it can effectively cure the problem. An external investigation is more likely to achieve these objectives than an internal one. In the absence of transparency, observers may perceive the public procurement system as dishonest. Unfortunately, the public and other external observers, right or wrong, may already perceive the system as less than honest. As Dr. Steven Kelman, former Administrator for the Office of Federal Procurement Policy, has observed, there is “a general public that perceives corruption to be a major problem in government procurement.”<sup>163</sup> This perception certainly may worsen when the Government’s response to procurement corruption and irregularities like a Procurement Integrity Act violation is not open to public view. Accordingly, the Government can take a step forward, even if small, in correcting a negative public perception regarding the procurement system by requiring transparent and open external investigations into Procurement Integrity Act violations. While such external investigations may come with a cost, the cost of having even a perceived dishonest system is higher and should not be worth the savings.

A second possible disadvantage is that an independent investigation requirement may encourage aggrieved contractors to file claims for the purpose of prompting the contracting activity to consider corrective action just to avoid an outside inquiry. However, “suspicion and concern [of Procurement Integrity Act violations] . . . are hardly standards” by which to grant relief.<sup>164</sup> Moreover, contractors whose livelihood may depend on doing business with the government risk ruining their relationships with contracting activities by making unfounded allegations. Thus, the possibility this disadvantage could become a reality seems remote at best.

Finally, requiring outside, independent investigations necessarily conflicts with the military’s aim to resolve issues at the lowest possible level.<sup>165</sup> Commanders rightfully will want to retain decision-making

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<sup>161</sup> Schooner, *supra* note 13, at 104 (listing transparency as one of the three main objectives for a public procurement system).

<sup>162</sup> Lani A. Perlman, *Guarding the Government’s Coffers: The Need For Competition Requirements to Safeguard Federal Government Procurement*, 75 *FORDHAM L. REV.* 3187, 3229-30 (2007).

<sup>163</sup> See Steven Kelman, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* 96 (1990). One reason that the public may have the perception that the federal procurement system is dishonest is the occurrence of procurement-related scandals throughout history. See Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 *PUB. CONT. L. J.* 443, 443 (2005) (noting that the “U.S. system of government contracting has seen its share of corruption over the years, dating back to the inception of the nation”).

<sup>164</sup> *Kola Nut Travel, Inc., v. United States*, 68 *Fed. Cl.* 195, 199 (2005).

<sup>165</sup> See Major David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 *MIL. L. REV.* 37, 72 n.189 (1992) (stating “[a]ll service regulations make this same point of resolution at the lowest possible level”).

authority regarding how to resolve matters occurring within their commands. However, Procurement Integrity Act violations impact more than unit welfare and morale. They directly and immediately impact the public's perception of government officials and their ability to properly handle the public's money.<sup>166</sup>

## V. CONCLUSION

The comment of a procurement law author more than a decade ago still rings true today: "The susceptibility of federal contracts to fraud is not the recent invention of Congress or the Inspectors General, but an historic and unfortunately continuing reality."<sup>167</sup> Because of this reality, the procurement system's integrity may suffer when violations of the Procurement Integrity Act occur. It is therefore vital that executive agencies such as the military services set forth clear guidance for HCAs to resolve alleged Procurement Integrity Act violations. An internal investigation, while appropriate in some circumstances, may not be the best course of action concerning Procurement Integrity Act violations. Such investigations may be plagued by biases such that the results of those investigations undermine the public's confidence in the procurement system and contractors' desire to participate in it.<sup>168</sup>

As currently written, the regulatory regime governing Procurement Integrity Act violations for the military services is not clear. Although the regime, in general, establishes a number of best practices in addressing procurement irregularities, it may benefit from more guidance for HCAs to apply when an alleged Procurement Integrity Act violation occurs. Importantly, the FAR contemplates that executive agencies will have procedures to assist contracting officers and HCAs determine an appropriate course of action when notified of a potential Procurement Integrity Act violation.<sup>169</sup> Those procedures, however, should not include internal investigations.

To avoid a repeat of an incident like that involving George Raymond, and the media and congressional attention that followed, it would be appropriate to include Procurement Integrity Act investigatory procedures in the military's procurement regulations. Because not all Procurement Integrity Act violations involve criminal misconduct, and because all must be resolved, any guidance regarding investigatory responsibility into the allegations should prohibit internal investigations. Consolidating the investigative responsibility of alleged Procurement Integrity Act violations in an entity wholly independent of the affected

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<sup>166</sup> Cf. *Litton Sys., Inc.*, Comp. Gen. B-234060, May 12, 1989, CPD ¶ 450

<sup>167</sup> Howard W. Cox, *FASA and False Certifications: Procurement Fraud on the Information Superhighway*, 25 PUB. CONT. L.J. 1, 46 (1995).

<sup>168</sup> See *supra* notes 141, 142 and accompanying text; see also Troff, *supra* note 38, at 121.

<sup>169</sup> See FAR, *supra* note 4, pt. 3.104-7.

contracting activity should yield valuable benefits: uniformity, consistency, and competence.<sup>170</sup> Consequently, requiring external investigations would result in the military furthering procurement integrity on all levels.

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<sup>170</sup> See *supra* notes 138-61 and accompanying text.

TILTING AT WINDMILLS? THE COUNTERPOSING POLICY  
INTERESTS DRIVING THE  
U.S. COMMERCIAL SATELLITE EXPORT CONTROL REFORM  
DEBATE

MAJOR MATTHEW D. BURRIS\*

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## I. INTRODUCTION

United States (U.S.) strategic export controls—which treat commercial satellite technologies, related technical data, and defense services as munitions subject to the strictest export control criteria—have been under fire for decades.<sup>1</sup> Critics argue that in attempting to bolster national security by limiting the transfer of space technologies to adversaries and potential adversaries, the United States has unintentionally and paradoxically harmed national security by undermining the space industrial base and the international partnerships that drive scientific and technological advancement.<sup>2</sup>

“At the most basic level, the export control debate represents the age-old tension between commercial and national security concerns.”<sup>3</sup> Ideally, export controls seek to strike the appropriate balance between economic and national security interests.<sup>4</sup> These counterposing policy interests are not static and so the balance tends to shift as the primacy of national security ebbs and flows.<sup>5</sup> The national security interests implicated involve keeping space technologies out of the hands of adversaries or potential adversaries; the economic interests implicated involve the financial health of the indigenous space industrial base.<sup>6</sup> It follows that barring the

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, EXPORT CONTROLS, VULNERABILITIES AND INEFFICIENCIES UNDERMINE SYSTEM'S ABILITY TO PROTECT U.S. INTERESTS, REPORT NO. GAO-07-1135T (Jul. 26, 2007); JOHN HEINZ, U.S. STRATEGIC TRADE: AN EXPORT CONTROL SYSTEM FOR THE 1990S (1991) (the late Senator Heinz' book includes many of the same complaints levied against the current export control regime—including the failure to recognize that the strength of the U.S. industrial base is tied to national security).

<sup>2</sup> See generally COMMITTEE ON SCIENCE, SECURITY, AND PROSPERITY ET. AL. BEYOND “FORTRESS AMERICA” NATIONAL SECURITY CONTROLS ON SCIENCE AND TECHNOLOGY IN A GLOBALIZED WORLD (2009) [hereinafter BEYOND “FORTRESS AMERICA”]; GEORGE ABBEY & NEAL LANE, UNITED STATES SPACE POLICY: CHALLENGES AND OPPORTUNITIES GONE ASTRAY (2009), <http://www.amacad.org/publications/spaceUS.aspx>; GUY BEN-ARI ET. AL. NATIONAL SECURITY AND THE COMMERCIAL SPACE SECTOR, INITIAL ANALYSIS AND EVALUATION OF OPTION FOR IMPROVING COMMERCIAL ACCESS TO SPACE, A REPORT OF THE CSIS DEFENSE-INDUSTRIAL INITIATIVES GROUP, DRAFT FOR COMMENT (Apr. 30, 2010), [http://csis.org/files/publication/100430\\_berteau\\_commercial\\_space.pdf](http://csis.org/files/publication/100430_berteau_commercial_space.pdf).

<sup>3</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, Hearing Before the H. Comm. on Foreign Affairs, 111th Cong. 10 (2010) [hereinafter *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*].

<sup>4</sup> See e.g. Nat'l Security Presidential Directive (NSPD) 49, U.S. Nat'l Space Pol'y 8 (June 28, 2010).

<sup>5</sup> As one Department of Defense Official testifying before Congress described it, “[s]ometimes there is an inherent tension in them, but we need to do our best job to balance these goals.” *Export Controls: Are We Protecting Security and Facilitating Exports?* Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs, 110th Cong. 13 (2007) [hereinafter *Export Controls: Are We Protecting Security and Facilitating Exports?*]. A Department of State Official, testifying at the same hearing used more pointed language, describing the goals as, “often in opposition.” *Id.* at 14.

<sup>6</sup> *Id.* at 2.

export of space technologies *in toto* would harm the space industrial base because it would limit sales to U.S. customers only. As one U.S. congressman put it, “[i]f we are not able to sell...products to the broadest possible market, the global market, then our competitors will rise up, meet those needs and suddenly their innovations are outpacing ours.”<sup>7</sup> Conversely, in the absence of export controls, space technologies would undoubtedly end up in the hands of adversaries or potential adversaries.<sup>8</sup> While such a policy would inure to the benefit of the space industrial base, at least in the short term, it would clearly be detrimental to national security—hence the need for a balance.

While the “balancing” analogy is useful for describing the interests at stake, the implementation of export controls are perhaps better understood this way: the greater the national security interest implicated by the export

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<sup>7</sup> *The Export Administration Act: A Review of Outstanding Policy Considerations, Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 111th Cong. 36 (2009) [hereinafter *The Export Administration Act: A Review of Outstanding Policy Considerations*].

<sup>8</sup> How might an adversary or potential adversary exploit these technologies? A DoD pamphlet from the mid-1980s framed the issue thusly,

By acquiring our critical technology, the Soviets are able to develop countermeasures to our existing and even anticipated defense systems at a much faster rate and lower cost than would otherwise be possible... Acquisition of U.S. technology significantly shortens their research and development cycle and reduces the risks associated with the design of new weapons and defensive systems.<sup>8</sup>

Department of Defense (DoD) 5230.25—PH, Control of Unclassified Technical Data with Military or Space Application (May 1985), <http://www.dtic.mil/whs/directives/corres/pdf/523025ph.pdf>. Though specifically relating to technology acquisition by the Soviet Union, the current imperative to guard against the transfer of technology critical to national security rings true for these same reasons. Firstly, acquisition of technology allows an adversary to reverse engineer the technology in order to identify weaknesses and vulnerabilities. Secondly, technology acquisition reduces research & development (R&D) time and costs for potential adversaries. In other words, a potential adversary is able to field the same technologies, with few or none of the costs associated with developing that technology. The strategic advantage here is obvious. Most importantly, technology acquisition allows a potential adversary to utilize that technology. In this regard, it is important to recognize that space technologies are not just fully-formed systems (i.e. various types satellites and rockets), but rather the components, parts, accessories, and attachments that make up those systems—from solar cells, to circuitry, to fuel, to materials, to antennae. Many of these individual components, parts, accessories, and attachments also have terrestrial applications. While the National Aeronautics and Space Administration (NASA) is famous for commercial “spin-offs”, it is increasingly prevalent that technologies “spin-in” to the space technology realm. Jing-Dong Yuan, *The Future of Export Controls: Developing New Strategies for Nonproliferation*, 30 INT’L POL. 131, 141 (Jun. 2002). In this instance, a technology developed for commercial application is adapted to a purpose in a space system. This raises the question: do commercial technologies transform into munitions worthy of the strictest of export controls when a space application is adapted or discovered? This is a quandary and the source of much consternation among detractors of the current export control regime.

of a given technology, the higher the regulatory hurdles associated with export of that technology (See Figure 1, *infra*). For space technologies, these regulatory hurdles include registration of the exporting entity with the U.S. government (USG) regulator and pre-export licensure of the exported technology by the USG. If the national security threat is sufficiently high, the export is prohibited, irrespective of the potential economic interest at stake.

Striking the balance between national security interests and economic interests during the Cold War, which was marked by U.S. and Soviet hegemony in space and nonexistent, then nascent commercial space markets, was fairly straightforward: best the Soviets at all costs.<sup>9</sup> With the exception of détente in the 1970's, the nation's resolve was solidified by the threat of nuclear holocaust.<sup>10</sup> As a result, national security prerogatives—namely, space and arms superiority—were at the fore, with economic interests playing only a minor role.<sup>11</sup> Ronald Reagan's 1988 National Space Policy, which coincided temporally with the Space Shuttle Challenger disaster, the emergence of *Glasnost* and *Perestroika* in the Soviet Union, and the maturation of the relevant space technologies, was the first to not only recognize a distinct commercial space sector, but to offer it support.<sup>12</sup> However, that support has not been unfettered in the intervening decades. Globalization and other emerging threats quickly filled the void left by the threat of nuclear holocaust. As the U.S. hegemonic reign in space waned and robust multi-billion-dollar international commercial space markets emerged, striking the balance between national security interests and economic interests proved increasingly difficult for U.S. law- and policy-makers. This difficulty is evident in the retrograde legislation and piecemeal statutory and regulatory reforms made to the export control regime during this time, none of which have squarely addressed the paradigm shift that has occurred. As Brad Sherman, the Chairman of the House Subcommittee on Terrorism, Nonproliferation, and Trade put it, “[o]ur current export control policy was designed decades ago. Since then

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<sup>9</sup> See Roger D. Launius, *Historical Dimensions of the Space Age* in SPACE POLITICS AND POLICY, AN EVOLUTIONARY PERSPECTIVE 3, 16 (Eligar Sadeh, ed., 2002); Roger Handberg, *Rationales of the Space Program* in SPACE POLITICS AND POLICY, AN EVOLUTIONARY PERSPECTIVE 27, 34 (Eligar Sadeh, ed., 2002); Christopher J. Bosso & W.D. Kay, *Advocacy Coalitions and Space Policy* in SPACE POLITICS AND POLICY, AN EVOLUTIONARY PERSPECTIVE 43, 53 (Eligar Sadeh, ed., 2002).

<sup>10</sup> Handberg, *supra* note 9, at 35.

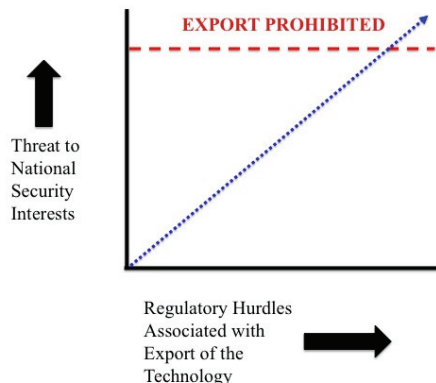
<sup>11</sup> Indeed, “[o]nly after...the ending of the Cold War and collapse of the Soviet Union, did the original national security rationale for a national civil space program become secondary, allowing for fuller articulations of other rationales. National security has never faded out of the picture, but the emphasis has become less military and more concerned with economic competitiveness.” *Id* at 34.

<sup>12</sup> James A. Vedda, *Space Commerce* in SPACE POLITICS AND POLICY, AN EVOLUTIONARY PERSPECTIVE 201, 213 (Eligar Sadeh, ed., 2002).



technologies have changed, the Cold War is over, and yet our export control regime remains pretty much unchanged.”<sup>13</sup>

Figure 1



The U.S. Department of State (DoS), which assumed responsibility for regulating the munitions trade in 1935, is charged with ensuring that strategic exports support both national security and foreign policy prerogatives.<sup>14</sup> As early space technologies were treated as munitions,<sup>15</sup> the DoS was therefore responsible for controlling the export of those technologies.<sup>16</sup> The DoS maintained this responsibility throughout the Cold War. In 1992, with the Cold War over, responsibility for the export of *some* “dual-use”<sup>17</sup> commercial communication satellites (COMSATs) was

<sup>13</sup> *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 2.  
<sup>14</sup> U.S. DEPARTMENT OF STATE DIRECTORATE OF DEFENSE TRADE CONTROLS, DEFENSE TRADE CONTROLS OVERVIEW (2006), [http://www.pmdtcc.state.gov/reports/documents/defense\\_trade\\_overview\\_2006.pdf](http://www.pmdtcc.state.gov/reports/documents/defense_trade_overview_2006.pdf).  
<sup>15</sup> Dennis J. Burnett, *United States of America* in EXPORT CONTROL LAW AND REGULATIONS HANDBOOK, A PRACTICAL GUIDE TO MILITARY AND DUAL-USE GOODS TRADE RESTRICTIONS AND COMPLIANCE 339, 346 (Yann Aubin & Arnaud Idiart, eds., 2007).  
<sup>16</sup> Ryan J. Zelnio, *Whose jurisdiction over the US Commercial satellite industry? Factors affecting international security and competition*, 23 SPACE POL’Y 221, 222 (2007).  
<sup>17</sup> There is no precise definition for the term “dual-use”—perhaps because the term belies a precise definition. Generally, “[d]ual-use technology consists of products and know how—both tangible and intangible technology—that have potential military use, but that are primarily commercial in design, and are in fact widely traded and used for non-military purposes.” *Hearing on the Reauthorization of the Export Administration Act and Managing Security Risks for High Tech Exports Before the S. Subcomm. on Int’l Trade and Finance of the S. Comm. on Banking, Housing and Urban Affairs* (1999) (testimony of R. Roger Majak, Ass’t Sec. for Export Admin., Department of Commerce). The lack of precision in this definition arguably lies at the heart of the export control reform debate and stems from the fact that nearly every space technology having a useful commercial application has a concomitantly useful military application and visa versa. The *key* is determining which of these useful dual-use technologies to protect using export controls. The question is, how

transferred from the DoS to the U.S. Department of Commerce (DoC).<sup>18</sup> These COMSATs were placed on the DoC's Commerce Control List (CCL), within the Export Administration Regulations (EAR),<sup>19</sup> promulgated pursuant to the *Export Administration Act (EAA)*.<sup>20</sup> Then, from 1996 to 1999, all COMSATs were placed on the CCL.<sup>21</sup> The presumption under the EAR was to approve proposed exports of commercial satellites, components, and related services.<sup>22</sup> This presumption aligned with the DoC's charter to promote and regulate U.S. economic interests abroad.<sup>23</sup> It also arguably reflected the policy decision to regulate these items as dual-use commodities rather than as munitions.

The dual-use moniker does not mean the technologies exported are innocuous. A commercial satellite, for example, can be used for non-military purposes such as imaging the surface of the earth for Google Maps or for military purposes such as imaging an adversary's military installations for intelligence, surveillance, and reconnaissance (ISR) purposes. It follows that the transfer of *certain* advanced commercial satellite technology to *certain* countries may give rise to national security concerns.<sup>24</sup> Such was

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does one do that when the commercial and military space sectors share many of the same essential technologies, to include: "sensors, propulsion, guidance, satellite control, space-rated electronics, encrypted communication links, and antenna design?" Vedda, *supra* note 12, at 216.

<sup>18</sup> Jason A. Crook, *National Insecurity: ITAR and the Technological Impairment of U.S. National Space Policy*, 74 J. AIR L. & COM. 505, 510 (2009).

<sup>19</sup> Export Administration Regulations, 15 C.F.R. § 730 *et. seq.* (2009) [hereinafter *EAR*].

<sup>20</sup> Export Administration Act of 1979, 50 U.S.C. § 2401 *et. seq.* [hereinafter *EAA*]; Crook, *supra* note 18, at 510. The EAA officially expired in 1989, but has been continued through various stopgap measures—most recently by Executive Order 13222, which is renewed yearly, under the International Emergency Economic Powers Act. IAN F. FERGUSON, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE 3 (Jul. 15, 2009), available at: <http://www.fas.org/sgp/crs/secretary/RL31832.pdf>.

<sup>21</sup> Crook, *supra* note 18, at 510.

<sup>22</sup> U.S. DEPARTMENT OF COMMERCE, INTRODUCTION TO U.S. EXPORT CONTROLS FOR THE COMMERCIAL SPACE INDUSTRY (Oct. 2008), <http://www.space.commerce.gov/library/reports/2008-10-intro2exportcontrols.pdf>.

<sup>23</sup> Zelnio, *supra* note 16, at 221.

<sup>24</sup> Indeed, strategic export controls exist in large part to advance a simple yet enduring maxim: *do not arm your enemies*. See e.g., H. PETER VAN FENEMA, THE INTERNATIONAL TRADE IN LAUNCH SERVICES: THE EFFECTS OF U.S. LAWS, POLICIES AND PRACTICES ON ITS DEVELOPMENT 110 (1999) ("thou shall not arm thy (tomorrow's) enemy!"). To do otherwise—to grant an enemy a military advantage he might not otherwise have, however slight—would be inimical to self-preservation. In a complex and ever-evolving world, this is often easier said than done. As a result, the *do not arm your enemies* maxim is often difficult for countries to put into practice—particularly for a country like the U.S., which trades in arms and related technologies so aggressively. "According to the Department of State's fiscal year 2008 budget justification to Congress, commercial export licensed or approved under the AECA exceeded \$30,000,000,000"—with over \$6,000,000,000 in AECA controlled items going to counties *other than* NATO allies and other major non-NATO allies. (emphasis added) Defense Trade Controls Performance Act of 2007, H.R. 4246, 110th Cong. § 2, para. 11. To put those figures into perspective, in 2008 only eight countries in the world reported military expenditures of more than \$30,000,000,000. SIPRI YEARBOOK 2008: ARMAMENTS,

case in the mid-1990s. At that time, two U.S. firms, Hughes Electronics (Hughes) and Loral Space (Loral), transferred technology to the People's Republic of China (PRC) as part of the launch of U.S. COMSATs without first seeking the appropriate export licenses (i.e. the approval of the USG).<sup>25</sup> The transfers, which may have improved the capabilities of the PRC's intercontinental ballistic missile (ICMB) fleet,<sup>26</sup> occurred as a result of several failed launches of the PRC's Long March Rocket—the vehicle set to deliver the U.S. COMSATs into orbit. In transferring the technology, Hughes and Loral improved the chances of a successful launch of their satellites, but arguably damaged U.S. national security in the process.<sup>27</sup>

As a result of these incidents and the recommendations of the Cox Committee, which produced a report on the activities of Hughes and Loral, Congress passed the *Strom Thurmond National Defense Act for Fiscal Year 1999 (STNDAA for FY 1999)*,<sup>28</sup> which transferred regulatory responsibility

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DISARMAMENT AND INTERNATIONAL SECURITY Appendix 5A (2008). As such, the value of U.S. AECA exports exceeded the individual military expenditures of 96.5% of the world's countries.

<sup>25</sup> See generally, THE COX REPORT: THE UNANIMOUS AND BIPARTISAN REPORT OF THE HOUSE SELECT COMMITTEE ON U.S. NATIONAL SECURITY AND MILITARY COMMERCIAL CONCERNS WITH THE PEOPLE'S REPUBLIC OF CHINA (Kenneth deGraffenreid ed., 1999) [hereinafter THE COX REPORT].

<sup>26</sup> A launch vehicle capable of putting a commercial satellite into orbit is also capable of deploying a nuclear warhead into the territory of an adversary. See generally, VAN FENEMA, *supra* note 24.

<sup>27</sup> Hughes' incentive to act as it did was twofold: first, the failures of the Long March rockets and the failure to remedy the fairing problem which caused those failures could have made it more difficult or, at the very least, more expensive to obtain insurance for future launches. THE COX REPORT, *supra* note 25, at 265. Second, the PRC was slated to launch additional Hughes satellites and continued launch failures were clearly not in the company's best interests. Additionally, Hughes was aware of the fact that had it sought the appropriate DoS licenses for the transfer of the technical data necessary to address the fairing problems, the license applications would have been denied. By avoiding the DDTC licensing process, the national security interests of the U.S. were therefore subjugated to the economic interests of Hughes. To be sure, improving the reliability of PRC rockets, which included nuclear-tipped ICBMs pointed at the U.S., was decidedly not in the national security interests of the U.S., irrespective of the potential economic gain to Hughes. The technical data transfer involving Loral occurred under similar circumstances and was motivated by similar economic concerns.

<sup>28</sup> Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261 (1998) 112 Stat. 1920 [hereinafter STNDAA for FY 2009]. The Act reaffirmed the notion that the "business interests must not be placed above United States national security interests." *Id.* at § 1511(1). Moreover, it indicated that because of the national security interests at stake and the sensitivity of the technologies in question, that satellites and related items should be subject to the same export controls as munitions. In furtherance of these statements of policy, the Act transferred "all satellites and related items that were on the Commerce Control List of dual-use items on the Export Administration Regulations on the date of enactment of this Act" from the USML to the CCL. *Id.* at § 1513. The Act also placed a *de facto* embargo on PRC launch services by making the justifications required for utilizing those services impossibly high. *Id.* at § 1515(a). In order to justify the use of PRC launch services the President, in a report submitted to the Congress, must explain, *inter alia*, "[t]he reasons why the proposed satellite launch is in the national security interests of the United States." *Id.* at § 1515(a)(4). It is important to note here that there is no outright

for COMSATs and related components back to the DoS. Once again designated as munitions, these items were regulated by the United States Munitions List (USML), under the International Traffic in Arms Regulations (ITAR),<sup>29</sup> promulgated by the DoS pursuant to the *Arms Export Control Act (AECA)*.<sup>30</sup> And so it remains today. The current statutory and regulatory framework is detailed in figure 2, *infra*.

Unlike the EAR, the presumption under the ITAR is to disapprove proposed exports of commercial satellites, components, and related services<sup>31</sup>—though, as we shall see, this rarely occurs in reality. Nearly

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prohibition against the utilization of PRC launch services, but it is telling that no U.S. President has sought congressional authorization to do so since the passage of the STNDAA for FY 1999. Finally, the Act requires the President to promulgate regulations mandating technology control plans coordinated with the DoD; improved monitoring by DoD personnel at foreign launch sites; and mandatory licenses for crash investigations. *Id.* at § 1514.

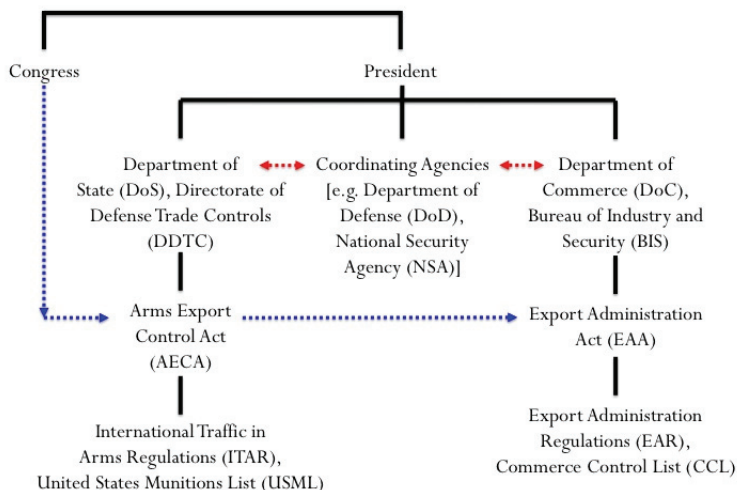
<sup>29</sup> International Traffic in Arms Regulations, 22 C.F.R. § 120 *et. seq.* (2009) [hereinafter ITAR]. Generally speaking, the ITAR prescribes the means by which a person may seek permission from the USG to export or temporarily import defense articles and services listed on the USML. The ITAR does not, however, prescribe the means by which the DDTC makes licensing decisions. So while the policy prerogatives for licensing decisions are described in broad terms by the AECA, the ITAR sheds no further light on how these decisions are actually made. This is important in the sense that the means of obtaining a license to export or temporarily import are transparent, yet the decisions made in furtherance of the ends those means seek to protect (i.e. national security) are not. The questions underlying the DDTC's licensing officers decisions are surely more nuanced than, for example, *will this export contribute to an arms race?* Yet those nuanced questions are not made public. That said, the apparent lack of transparency in the U.S. export control regime is arguably nothing more than a tempest in a teapot considering the DDTC's license denial rate is apparently around one percent. DEFENSE TRADE CONTROLS OVERVIEW, *supra* note 14, at 5. Were the DDTC denying licenses in droves, this would clearly be a bigger issue. A second somewhat surprising aspect to the ITAR licensing process is its near total dependence on industry to regulate itself. The requirements to register and seek licenses under the ITAR detailed below are instigated by the regulatees. THE COX REPORT, *supra* note 25, at 25. The incidents involving Hughes and Loral in the 1990s epitomize the inherent conflicts with industry self-regulation. Indeed, "U.S. satellite manufacturers are on the honor system, to a large extent...in ensuring that no licensable technical data is exchanged in the absence of a Defense Department monitor." *Id.* at 294. When faced with a scenario that pits the company's interests against the national security interests of the U.S., can these companies be trusted to prioritize the latter? In the case of Hughes and Loral, the answer to that question is an unequivocal no. There is little reason to believe the answer would be any different for companies today.

<sup>30</sup> Arms Export Control Act, 22 U.S.C. § 2751 *et. seq.* (2009) [hereinafter AECA].

<sup>31</sup> INTRODUCTION TO U.S. EXPORT CONTROLS FOR THE COMMERCIAL SPACE INDUSTRY, *supra* note 22, at 12. As the current head of the DDTC, Robert Kovac, told Congress in December 2009, "[t]he State Department is not in the trade advocacy business." *A Strategic and Economic Review of Aerospace Exports, Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs, 111th Cong. 24* (2009) [hereinafter *A Strategic and Economic Review of Aerospace Exports*]. But what about dual-use items, such as COMSATs, which currently fall under the AECA and, by extension, the ITAR? Should the same policy prerogatives apply to those items? These questions are particularly difficult considering the purported paradoxical effects of controlling such items as munitions: (1) that doing so acts to drive technological innovation offshore; and (2) that national security is actually harmed because the manufacturers of dual-use space technologies are not able to compete on a level playing field in the global marketplace.

every transfer of technology related to commercial satellites requires a license from the Directorate of Defense Trade Controls (DDTC) within the DoS.<sup>32</sup> This is true of transfers of tangible items (i.e. export or temporary import), as well as any communication (i.e. oral or written) related to the affected technologies.<sup>33</sup>

Figure 2 – U.S. Export Control Statutory and Regulatory Framework



In addition to being a relic of the Cold War, critics of the current export control regime claim it is overly broad in the satellite technologies it regulates, including items widely available on the commercial market.<sup>34</sup> For example, an oft-repeated anecdote made by proponents of export control reform is that the U.S. is the only country that regulates commercial satellites as munitions—that the controls are *sui generis*.<sup>35</sup> As we shall see, however, this is a demonstrably false notion. It is also argued that the USML and the bureaucratic mechanisms in place to update it are inflexible and therefore unsuited to regulate technologies that are considered “high”

Notably, at the same December 2009 congressional hearing, Mr. Kovac’s counterpart at the DoC’s Bureau of Industry and Security (BIS) indicated, “on the dual-use side the economic impact of a proposed transaction is always part of the equation.” *Id.* at 24. Were dual-use space technologies, such as COMSATs, controlled under the EAA as opposed to the AECA, the economic impact of the export would therefore be considered. That economic impact would undoubtedly include the effect of license denial or delay on the space industrial base.

<sup>32</sup> ITAR, *supra* note 29, at § 120.20.

<sup>33</sup> *Id.* at § 120.10.

<sup>34</sup> See e.g., *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 29-30 (indicating that “Radio Shack”-comparable technologies are currently being controlled by the ITAR).

<sup>35</sup> See e.g., Congresswoman Ellen O. Tauscher, Commercial Satellites and Export Controls: Are Things Getting Better? Address at the Center for Strategic and International Studies (Sept. 19, 2006) [transcript on file with the author].

today and “low” tomorrow;<sup>36</sup> the DDTC’s licensing process is burdensome and, for some companies, cost prohibitive;<sup>37</sup> the regime is not reflective of the realities of globalization or technological advancement;<sup>38</sup> and that the ITAR undermines international cooperation in space by failing to adequately distinguish between allies and adversaries in its application.<sup>39</sup>

As a result of these criticisms, the regime has been called “broken,” “anachronistic,” “self-defeating,” “pernicious,” “toxic,” “regulation run amok,” “obsolete, arrogant, and counterproductive,” and a “byzantine amalgam” of bureaucracies.<sup>40</sup> The Government Accountability Office (GAO) has designated export controls as a “high-risk area” that “warrants a strategic re-examination of existing programs to identify needed changes and ensure the advancement of U.S. interests.”<sup>41</sup> The Department of Defense’s (DoD) 2010 Defense Quadrennial Review Report indicates the current export control regime “poses a national security risk” for being

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<sup>36</sup> See e.g., BEYOND “FORTRESS AMERICA” *supra* at note 2.

<sup>37</sup> See e.g., Mike N. Gold, *Lost In Space: A Practitioner’s First-Hand Perspective on Reforming the U.S.’s Obsolete, Arrogant, and Counterproductive Export Control Regime for Space-Related Systems and Technologies*, 34 J. SPACE L. 163 (2008).

<sup>38</sup> As John Engler, President of the National Association of Manufacturers, indicated to Congress,

Our export control system was—and to a large extent still is—based on the philosophy that if the United States won’t let countries have our technology, they can’t get it anywhere else because no one else has it. To a degree not recognized by our export control system, those days are gone...No longer is the United States the only country able to develop, design and manufacture cutting-edge technology. This is the reality of the globalized world and of the 21st century and these trends will accelerate.

*Export Administration Act: A Review of Outstanding Policy Considerations*, *supra* note 7, at 13.

<sup>39</sup> See *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 22.

<sup>40</sup> BEYOND “FORTRESS AMERICA”, *supra* note 2, at vii (“broken”); Broad, William J., *For U.S. Satellite Makers, a No-Cost Bailout Bid*, N.Y. TIMES, Apr. 2, 2009, <http://www.nytimes.com/2009/04/02/science/space/02export.html> (last visited on Jun. 28, 2010) (“anachronistic”); *Washington, We Have a Problem*, ECONOMIST, Aug. 21, 2008, [http://www.economist.com/node/11965279?story\\_id=11965279](http://www.economist.com/node/11965279?story_id=11965279) (last visited on Jun. 28, 2010) (“self-defeating”); Crook, *supra* note 18, at 505 (“pernicious”); George S. Robinson, *Impact of the U.S. International Traffic in Arms Regulations (ITAR) on International Collaboration Involving Space Research, Exploration, and Commercialization*, 58 Z.L.W. 23, 24 (2009) (“toxic”); Jeffrey P. Nosanov, *Viewpoint: International Traffic in Arms Regulations—Controversy and Reform*, 7 ASTROPOLITICS 206, 219 (2009) (“regulation run amok”); Gold, *supra* note 37, at 163 (“obsolete, arrogant, and counterproductive”); Craig Whitlock, *Gates calls for overhaul of export licensing controls*, WASH. POST, Apr. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042005104.html> (last visited on Jun. 28, 2010) (a “byzantine amalgam” of bureaucracies).

<sup>41</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, HIGH RISK SERIES: AN UPDATE REPORT NO. GAO-07-310 (Jan. 2007).

overly complicated, excessively redundant, and attempting to protect too much.<sup>42</sup> By any objective standard, the regime has been pilloried.

Critics of the current export control regime and those calling for reform include: the President and relevant members of his Cabinet,<sup>43</sup> a bipartisan coalition of House Congressional Representatives,<sup>44</sup> the space industrial base,<sup>45</sup> think tanks,<sup>46</sup> and foreign allied space interests.<sup>47</sup> There are few, if any, unequivocal supporters of the regime as it stands. As a result, both legislative and regulatory reform initiatives have recently been introduced. The proposed legislative reforms include, *inter alia*, granting the President the authority to remove COMSATs from the USML.<sup>48</sup> The ambitious reform agenda being pursued by the Obama Administration, which includes both regulatory and legislative reforms, would dismantle the

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<sup>42</sup> DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT (February 2010), [http://www.defense.gov/qdr/images/QDR\\_as\\_of\\_12Feb10\\_1000.pdf](http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf). The departments and agencies of the U.S. government, to include the DoD, are obliged per U.S. policy to “[u]se U.S. commercial space capabilities and services to the maximum practical extent.” U.S. Nat’l Space Pol’y, *supra* note 4, at 10. Reportedly, ninety-five percent of U.S. military communications “travel over commercial telecommunications networks, including satellite systems.” P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 200 (2009). How might military operations be effected if those networks—currently supporting ninety-five percent of military communications—were subject to attack (kinetic, cyber or otherwise) by an adversary? It does not take a seasoned military strategist to answer this question. Indeed, degrading the lines of communication between U.S. forces, particularly when those forces have come to rely so heavily upon them, could have a devastating effect on operations. U.S. Joint Military Space Doctrine acknowledges that U.S. national security is critically and increasingly dependent upon space capabilities. Department of Defense, Joint Pub. 3-14, Space Operations ix (Jan. 6, 2009). Moreover, “this dependence is a potential vulnerability.” *Id.* at 1. The U.S. national security infrastructure’s dependence on the implements of network-centric warfare is no secret and thus any adversary would naturally seek to exploit this apparent Achilles’ heel.

<sup>43</sup> Amy Klamper, *Obama ITAR Reform Could Move Satellites Back to Commerce*, 20 SPACE NEWS 6 (Jul. 6, 2009); Amy Klamper, *Official Reaffirms White House Support for ITAR Reform*, 20 SPACE NEWS 20 (Sept. 14, 2009).

<sup>44</sup> Foreign Relation Authorization Act, Fiscal Years 2010 and 2011, H.R. 2410, Title VIII, Export Control Reform and Security Assistance, 111th Cong. (2009) [hereinafter H.R. 2410] (Bill includes changes to the current ITAR regime, among them, authorization for the President to remove commercial satellites and related components from the USML; it passed in the House of Representatives and was forwarded to the Senate in June 2009 where it has yet to be acted upon).

<sup>45</sup> See e.g., *Export Controls on Satellite Technology: Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 111th Cong. 40 (2009) [hereinafter *Export Controls on Satellite Technology*] (written Testimony of Patricia Cooper, President of the Satellite Industry Association).

<sup>46</sup> See e.g., CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), BRIEFING OF THE WORKING GROUP ON THE HEALTH OF THE U.S. SPACE INDUSTRIAL BASE AND THE IMPACT OF EXPORT CONTROLS (Feb. 2008), [http://csis.org/files/media/csis/pubs/021908\\_csis\\_spaceindustryitar\\_final.pdf](http://csis.org/files/media/csis/pubs/021908_csis_spaceindustryitar_final.pdf) [hereinafter 2008 CSIS STUDY].

<sup>47</sup> See generally, *Export Controls on Satellite Technology*, *supra* note 45.

<sup>48</sup> H.R. 2410, *supra* note 44, at § 826.

current export control regime and replace it with something quite unlike the statutory and regulatory framework detailed in Figure 2, *supra*.<sup>49</sup>

Yet this begs the question: if the problems are *and have been* so apparent, why have the regulations and concomitant organic legislation not been subject to reform before now? What has been the cause of this decades long paralysis? The probable answer brings to mind a quote by H.L. Mencken, who wrote, “there is always a well-known solution to every human problem: neat, plausible, and wrong.”<sup>50</sup> The interests invoked in this reform debate are independently complex and inextricably interconnected. Indeed, national security and economic interests necessarily invoke military and strategic imperatives, foreign policy concerns and obligations, industrial and technology base issues, and domestic political considerations. Add to this litany the unknowns—such as the present and future capabilities and intentions of enemies or potential enemies and the unpredictability of second, third and fourth-order effects—and it is easier to see why reform, meaningful or otherwise, has yet to take shape. An admittedly imperfect status quo may simply be easier to countenance than an uncertain future marked by change. To be sure, “[t]he tendency in a bureaucracy is to play it safe.”<sup>51</sup>

Stasis aside, identifying the parts of the regime that are actually in need of reform is critical to the debate. To paraphrase the allegory of the windmills from *Don Quixote*<sup>52</sup>—it is necessary, *before* identifying the appropriate way forward, to distinguish the windmills from the giants. For example, is the U.S. space industrial and technology base really in danger of forfeiting its dominant position in the space arena if reforms are not made or is its Pavlovian response to calls for deregulation wholly predicable of industry in general and minimally related to its future viability? If it is in danger of forfeiting its dominant position, is that wholly or partially

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<sup>49</sup> White House, Office of the Press Secretary, Fact Sheet on the President’s Export Control Reform Initiative (Apr. 20, 2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative> (last visited Jun. 28, 2010).

<sup>50</sup> HENRY LOUIS MENCKEN, PREJUDICES: SECOND SERIES 158 (1st ed. 1921).

<sup>51</sup> So said Congressional Representative Edward Royce during a hearing on satellite export controls before the House Subcommittee on Terrorism, Nonproliferation and Trade. *Export Controls on Satellite Technology*, *supra* note 45, at 4.

<sup>52</sup> To wit: “In the midst of this conversation, they discovered thirty or forty windmills all together on the plain, which the knight no sooner perceived, than he said ‘Chance has conducted our affairs even better than we could either wish or hope for: look over there, friend Sancho, and behold thirty or forty outrageous giants with whom I intend to engage in battle, and put every one of them to death, so that we may begin to enrich ourselves with their spoils; for it is a meritorious warfare, and serviceable both to God and man to extirpate such a wicked race from the face of the earth.’ —‘What giants do you mean?’ said Sancho Panza in amaze. ‘Those you see over yonder,’ replied his master, ‘with vast extended arms; some of which are two leagues long.’ —‘I would your worship would take notice,’ replied Sancho, ‘that those you see yonder are no giants, but windmills; and what seem arms to you are sails, which being turned with the wind, make the millstone work.’ MIGUEL DE CERVANTES SAAVEDRA, THE HISTORY AND ADVENTURES OF THE RENOWNED DON QUIXOTE, VOL. I 51-52 (Dr. Smollett trans., London 1799) (1605).



attributable to the ITAR? Are the compliance costs and administrative hurdles associated with obtaining a DDTC license to export really that onerous under the current export control regime? If one accepts that the compliance costs and administrative hurdles are sufficiently onerous as to necessitate reform, would the reforms suggested in the current debate make these hurdles discernibly less onerous? And what of the Chinese? What is to be made of their dramatic and, in some respects, ominous advances in space? Is the emergence of a putative near-peer space power, whose intentions are for the most part unknown, enough to derail export control reform?<sup>53</sup> Is “ITAR-free” really a long-term strategy the Europeans want to pursue considering the dependence of the European defense industry on DoD contracts?

In recent years there have been no shortage of assessments (polemics, really) purporting to separate the windmills from the giants. Nevertheless, questions remain. Are these assessments and the conclusions therein based on hard and attributable empirical data or merely anecdotal evidence? What is being measured and what is the measuring stick? Are the assessors themselves making pure intellectual judgments about the export control regime or are they constituent parts of an advocacy coalition pursuing a similar reform agenda? While many of the assessments offer seemingly straightforward fixes to readily identifiable problems, given that this is a “high-risk area”, it is necessary to ask whether these are the types of solutions Mencken warned against—neat, plausible and wrong. What are the possible second, third, and fourth-order effects of these policy decisions? Is there an echo chamber effect occurring—in that a few potentially unrepresentative examples of the regime producing absurd outcomes are repeated often enough to give the impression of the regime’s utter dysfunctionality?<sup>54</sup> In other words, conflating windmills with giants.

In this article, I will attempt to deconstruct the current discourse (keeping in mind its historical underpinnings) and challenge the orthodoxies of the export control reform debate in order to determine, to the extent possible, the merits of individual arguments and claims—i.e. distinguishing

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<sup>53</sup> As one Department of Commerce Official put it,

...our relationship with emerging powers are not as simple or black and white as our relationship was with the Soviet Union. There is no better example of this than China, which is neither our adversary nor our ally. And to reflect this, our export controls on China seek to permit legitimate civilian trade while prudently hedging against the uncertainties of a significant Chinese military expansion.

*Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 19.

<sup>54</sup> See e.g., *Freedom to Fly*, *ECONOMIST* (Apr. 22, 2009), [http://www.economist.com/node/13525115?story\\_id=13525115](http://www.economist.com/node/13525115?story_id=13525115) (last visited on Jun. 28, 2010) (discussing an incident involving Bigelow Aerospace; this incident is examined in section II.B.2.a, *infra*).

the windmills from the giants. My primary focus will be on the intersection of law, policy, and politics. To be sure, to understand the law and improve it, it is imperative to examine fully the underlying policies and politics relating thereto.

## II. ON THE BATHWATER WE AGREE, BUT WHAT OF THE BABY? THE CURRENT DEBATE OVER U.S. COMMERCIAL SATELLITE EXPORT CONTROL REFORM

In his 1991 book, *U.S. Strategic Trade: An Export Control System for the 1990s*, the late Senator John Heinz called for the wholesale reform of the U.S. export control regime claiming, “[t]his country can no longer afford the *status quo*.”<sup>55</sup> Calling on assessments from both inside and outside the USG, Senator Heinz concluded that the U.S. national security export control system, developed in response to the hegemonic struggle between the U.S. and the Soviet Union, was ill-suited for the challenges of the future—specifically, the 1990s.<sup>56</sup> The following considerations are among those which led the Senator to this conclusion: the loss of U.S. dominance in the high technology marketplace;<sup>57</sup> globalization, commoditization, and foreign availability of advanced technologies;<sup>58</sup> the paradoxical national security threat posed by export controls which do not take into consideration the health of the technology and industrial bases (which Senator Heinz called “economic security”);<sup>59</sup> the “designing out” of U.S. parts and components (a foreshadowing of today’s ITAR-free movement); the need to reduce unilateral controls, while strengthening multilateral controls;<sup>60</sup> the failure of the export control regime to keep pace with ever-evolving technological developments;<sup>61</sup> export licensing delays and an unpredictable interagency review process;<sup>62</sup> the more favorable export control policies of foreign governments;<sup>63</sup> the notion that the U.S. export control system is the most restrictive in the world;<sup>64</sup> and the fact that, due to U.S. export controls, the U.S. is seen as an “unreliable exporter.”<sup>65</sup> These conditions, Senator Heinz opined, rendered obsolete the U.S. export control regime and portended the need for reform.

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<sup>55</sup> HEINZ, *supra* note 1, at 4 (Senator Heinz’ proposals for wholesale reform of the export control system are remarkably similar to the wholesale reform effort currently being offered by the Obama Administration).

<sup>56</sup> *Id.* at 1, 45.

<sup>57</sup> *Id.* at 103.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 37, 104.

<sup>60</sup> *Id.* at 36.

<sup>61</sup> *Id.* at 37.

<sup>62</sup> *Id.* at 26, 27, and 32.

<sup>63</sup> *Id.* at 105.

<sup>64</sup> *Id.* at 113.

<sup>65</sup> *Id.* at 114.

This rather lengthy recitation of a 20-year-old book on the topic of U.S. export controls is offered to foreshadow the fact that very little about the export control reform debate has changed in the last two decades. Neither were Senator Heinz' views unique at the time. Indeed, the National Academy of Science, in a 1987 book entitled, *Balancing the National Interest: U.S. National Security Export Controls and Global Economic Competition*, reached many of the same conclusions.<sup>66</sup> As will become clear in the coming pages, the export control reform debate is rhetorically frozen in time. None of this is to suggest that Senator Heinz' conclusions, or the assessments underlying those conclusions, have been proven erroneous simply by the passage of time. But what of the Senator's assertion, "this country can no longer afford the *status quo*?" The *status quo* of 1991, by and large, remains the *status quo* today. This begs the question: is there evidence to suggest that the U.S. paid a price during the last 20 years as a result of the *status quo*? For example, have ITAR-controlled space technologies fallen into the hands of enemies or potential enemies as a result of the export control regime? Has the capacity of the U.S. to produce cutting-edge space technologies diminished? How has the space sector of the technologic and industrial base fared during this period? How have U.S. competitors in space fared during this period? When present day claims reminiscent of Senator Heinz' are made, such as, "the committee's findings confirm the urgent need for fundamental policy change to counteract the harm that is being done to national security and economic prosperity by national security controls adopted in the 1960s and 1970s that reflect Cold War-era policies,"<sup>67</sup> the urgency of the claims must be weighed against the reality that the *status quo* has faced the same attacks for more than two decades.

#### A. The Players

The export control reform debate is perhaps best summed up by the following headline, which appeared in the online journal *The Space Review*: "Boring but important policy developments."<sup>68</sup> Indeed, "...export controls are not issues that provoke the attention of the nation's citizens, and for that reason, have a seemingly 'quiet' impact."<sup>69</sup> As a result, those involved in the debate are a relatively small group of interested and affected parties, including: the Congress, the Administration (including the national security and foreign policy infrastructure), affected industry, think tanks, and

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<sup>66</sup> See COMMITTEE ON SCIENCE, ENGINEERING, AND PUBLIC POLICY ET. AL., *BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION* (1987).

<sup>67</sup> BEYOND "FORTRESS AMERICA", *supra* note 2, at viii.

<sup>68</sup> Jeff Foust, *Boring but important policy developments*, SPACE REVIEW (Nov. 2, 2009), <http://www.thespacereview.com/article/1503/1> (last visited on Jun. 28, 2010).

<sup>69</sup> BEYOND "FORTRESS AMERICA", *supra* note 2 at 81.

national security and space commentators. The confluence of several of these groups has resulted in the formation of an advocacy coalition. The role of each of these groups is discussed in turn below.

### 1. *The Congress*

Since July 2007, the relevant committee and subcommittee of the U.S. House of Representatives have held no fewer than six hearings on the topic of export controls.<sup>70</sup> The emphasis placed on this subject by the House Committee on Foreign Affairs is likely due in part to the fact that its Chairman, Representative Howard Berman, is both a staunch advocate of export control reform and also represents a congressional district in California, a state home to “61,000 exporting firms and an increasing number of...academic and research establishments [with] significant compliance responsibilities.”<sup>71</sup> The Chairman of the Subcommittee of Terrorism, Nonproliferation and Trade, Representative Brad Sherman of California, is also a staunch supporter of export control reform and an adherent to the notion that a robust space industrial base that is competitive in the international marketplace is critical to U.S. national security.<sup>72</sup> For its part, the U.S. Senate appears content to allow the House to lead the debate on these issues. However, the Senate did recently hold a hearing on two as yet ratified export control treaties with the U.K. and Australia which, if ratified by the Senate, would ease U.S. export control controls with these two countries.<sup>73</sup> Congress’ role in export control reform is obviously not

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<sup>70</sup> *Are We Protecting Security and Facilitating Exports?* *supra* note 5; *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31; *Export Controls on Satellite Technology*, *supra* note 45; *The Export Administration Act: A Review of Outstanding Policy Considerations*, *supra* note 7; *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3; *Export Compliance: Ensuring Safety, Increasing Efficiency, Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 110th Cong. (2008) [hereinafter *Export Compliance: Ensuring Safety, Increasing Efficiency*].

<sup>71</sup> Howard L. Berman, Editorial, *U.S. Export Control Policy in Dire Need of an Update*, SAN JOSE MERCURY NEWS (Jan. 15, 2010), [http://www.hcfa.house.gov/111/press\\_011510.pdf](http://www.hcfa.house.gov/111/press_011510.pdf) (last visited on Jun. 28, 2010).

<sup>72</sup> See e.g. *Export Controls on Satellite Technology*, *supra* note 41, at 3-4 (what Senator Heinz dubbed “economic security”).

<sup>73</sup> Press Release, Office of Senate Foreign Relations Committee Chairman John Kerry, Chairman Kerry Opening Statement For U.S. Defense Trade Treaties Hearing (Dec. 10, 2009), <http://kerry.senate.gov/press/release/?id=ffdde81f-51c7-4b87-97f5-8b741801b153> (last visited on Jun. 28, 2010). The Treaties, which are substantively the same, would authorize the President to promulgate regulations under the ITAR to authorize the export or transfer of certain defense articles and defense services between the U.S. and the U.K. and between the U.S. and Australia without a DDTC license when in support of: (1) Combined military operations; (2) Cooperative security and defense research, development, production, and support programs; (3) Mutually agreed security and defense projects where the end-user is the Government of the [U.K.] or the Government of Australia; or (4) [USG] end-use.” *Defense Trade Cooperation Treaties, Hearing Before the S. Foreign Relations Comm. 5* (Dec. 10, 2009) (statement of Assistant Secretary Andrew Shapiro). While some aspects of

limited to debate. Comprehensive reform, like that being called for by the Obama Administration, would require legislative changes to both the *AECA* and the *EEA*. It should also be noted that the GAO, the watchdog of the Congress, has weighed in on the issue of exports control on a number of occasions over the past decade.<sup>74</sup>

## 2. *The Administration*

President Obama has made clear his intention to reform strategic export controls relating to space technologies. Even before his election, Candidate Obama identified ITAR reform as one of his stated policy goals, indicating that “[o]utdated restrictions have cost billions of dollars to American satellite and space hardware manufacturers as customers have decided to purchase equipment from European suppliers.”<sup>75</sup> In his 2010 State of the Union Speech, the President announced a National Export Initiative that will, among other things, increase exports through the reform of export controls consistent with national security.<sup>76</sup> The President’s

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these Treaties may tangentially benefit the U.S. commercial space sector, it does not appear that COMSATS or other dual-use commercial satellites would be eligible for the license exemptions under the regulations promulgated pursuant to either Treaty. The strictures of the Treaties, each of which relate to national security issues, would appear to require such a result. As such, one commentator has indicated that, “the positive effects of the Treat[ies] on the aerospace industry could be negligible. P.J. Blount, *The ITAR Treaty and its Implications for U.S. Space Exploration Policy and the Commercial Space Industry* 73 J. AIR L. & COM. 705, 720 (2008). It appears, therefore, that for now Canada will remain the only country with a broad exemption under the ITAR—to include license exemptions for COMSATS. A very broad reading of the Treaties *could* produce a different result. As indicated above, ninety-five percent of U.S. military communications reportedly “travel over commercial telecommunications networks, including satellite systems.” SINGER, *supra* note 42 at 200. Presumably, the military forces of both the U.K. and Australia are similarly dependant on commercial communication networks to support their respective operations. In addition, frequent and unfettered communication between coalition partners during combined military operations is a predicate to success. It could be argued, therefore, that the export of a COMSAT from the U.S. to either the U.K. or Australia—both of which are currently engaged in combined operations with the U.S. in Afghanistan—would in fact support combined operations by facilitating communication between the forces of the U.S. and U.K. and the U.S. and Australia (both inside and outside of Afghanistan).

<sup>74</sup> EXPORT CONTROLS, VULNERABILITIES AND INEFFICIENCIES UNDERMINE SYSTEM’S ABILITY TO PROTECT U.S. INTERESTS, *supra* note 1; HIGH RISK SERIES: AN UPDATE, *supra* note 41; U.S. GOV’T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ANALYSIS OF SUPPORT FOR RECENT INITIATIVES, REPORT NO. GAO/NSIAD-00-191 (Aug. 2000); U.S. GOV’T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ARMS EXPORT CONTROL SYSTEM IN THE POST- 9/11 ENVIRONMENT, REPORT NO. GAO-05-234 (Feb. 2005); U.S. GOV’T ACCOUNTABILITY OFFICE, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION, REPORT NO. GAO-02-63 (Mar. 2002).

<sup>75</sup> Candidate Barack Obama, Space Policy Statement, Advancing the Frontiers of Space Exploration (2008), [http://www.barackobama.com/pdf/policy/Space\\_Fact\\_Sheet\\_FINAL.pdf](http://www.barackobama.com/pdf/policy/Space_Fact_Sheet_FINAL.pdf).

<sup>76</sup> President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (last visited on Jun. 28, 2010).

appointment of Ellen Tauscher, a long-time and vocal critic of the ITAR regime, as Undersecretary of State for Arms Control and International Security (under which the DDTC falls), is also a good indication of his policy aims.<sup>77</sup> In yet another foreshadowing of the politics of this debate, the lead spokesperson for reform within the Administration is Defense Secretary Robert Gates. Indeed, Secretary Gates announced the Administration's ambitious export control reform agenda on 20 April 2010—deriding the current regime as a “byzantine amalgam” of bureaucracies.<sup>78</sup> Defense Secretary Gates, at first blush, seems an odd choice to fill this role in light of the fact that DoS and DoC are the lead USG agencies for export controls. However, if the intention of the Administration is to head off the inevitable criticism by national security hawks about the loosening of export controls offense through fundamental reform,<sup>79</sup> what better spokesperson to have out in front on the issue than Secretary Gates, who has led the DoD under both the Bush and Obama Administrations? In this respect, the selection of Secretary Gates appears to be a wise political choice.<sup>80</sup>

### 3. *The U.S. Industrial Base*

Accurately defining the U.S. industrial base for purposes of the export control reform debate is somewhat analogous to defining the term dual-use—the moniker may simply belie a precise definition. The difficulty

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<sup>77</sup> See e.g., Tauscher, *supra* note 35.

<sup>78</sup> Fact Sheet on the President's Export Control Reform Initiative, *supra* note 49; Whitlock, *supra* note 46.

<sup>79</sup> For example, some Republicans are reportedly concerned that “the Obama administration may be preparing to loosen export control regulations, which they see as a dangerous concession to part of the business sector that increases risks of technology and innovation losses to countries such as China.” Josh Rogin, *Team Obama convenes major secret meeting on export controls*, FOREIGN POLICY (Jan. 27, 2010), [http://thecable.foreignpolicy.com/posts/2010/01/27/team\\_obama\\_convenes\\_major\\_secret\\_meeting\\_on\\_export\\_controls](http://thecable.foreignpolicy.com/posts/2010/01/27/team_obama_convenes_major_secret_meeting_on_export_controls) (last visited on Jun. 28, 2010).

<sup>80</sup> It is also helpful that Secretary Gates is supported in his views by the uniform component of the DoD, with the Commander of U.S. Strategic Command, General Kevin P. Chilton, indicating before the House Committee on Armed Services in April 2009,

I remain concerned that our own civil and commercial space enterprise, which is essential to the military industrial base, may be unnecessarily constrained by export control legislation and regulation. Clearly, legitimate national security concerns must continue to underlie the need to restrict the export of certain space-related technologies, equipment, and services. However, appropriate flexibility to permit relevant technology transfers when commercial availability renders their control no longer necessary should be considered to help ensure our space industrial base for the future.

Statement of General Kevin P. Chilton, available at: [http://armedservices.house.gov/pdfs/SF031709/Chilton\\_Testimony031709.pdf](http://armedservices.house.gov/pdfs/SF031709/Chilton_Testimony031709.pdf).

in defining this group is due in part to the changing makeup of its members. For example, one of the assessments detailed below describes the merger over the past few decades of the military technology base and the commercial technology base into one monolithic technology base.<sup>81</sup> This merger reflects the new paradigm of dual-use technologies—that militarily useful technologies are increasingly “spinning in” from the commercial sector. Absent a precise definition, however, there is a risk that affected space interests—for example the COMSAT sector, an oligopoly of several prime contractors and sundry tier-2 subcontractors and tier-3 commodity suppliers—are conflated with non-space interests within the larger reform debate.<sup>82</sup> Arguably, the danger with conflation is that the relative health of one facet of U.S. industry is imputed on another, when in fact those two facets might bear little relation to one another. For example, the interoperability problems the U.S. and its allies have encountered with regard to terrestrial weapons systems<sup>83</sup> may in fact harm the foreign sales of those terrestrial weapons systems and, by extension, the economic viability of its manufactures. Nevertheless, this harm is not necessarily attributable, absent some evidentiary link, to the export of commercial space technologies or the health of manufactures of space technologies. The interoperability problems of terrestrial weapons systems are nonetheless cited as a reason to reform the current export control system as a whole, which necessarily include controls related to commercial space technologies.

Defining the U.S. space industrial base as it exists within the larger U.S. industrial base is apparently no easy feat either. For purposes of its *Defense Industrial Base Assessment* of the U.S. space industry, the DoD, using data collected by the Bureau of Industry Security (BIS), sent surveys to 274 companies that ran the gamut of products and services, from spacecraft, to ground equipment, to others.<sup>84</sup> Why these particular companies were selected for the survey is entirely not evident from the report. More importantly, the *Defense Industrial Base Assessment* offers no

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<sup>81</sup> BEYOND “FORTRESS AMERICA”, *supra* note 2, at 20.

<sup>82</sup> See generally, INDUSTRIAL COLLEGE OF THE ARMED FORCES (ICAF), SPACE INDUSTRY STUDY 2007, <http://www.ndu.edu/icaf/programs/academic/industry/reports/2007/pdf/icaf-is-report-space-2007.pdf>.

<sup>83</sup> In his speech announcing the Obama administrations export control reform agenda, Secretary Gates related the following, “Not too long ago, a British C-17 [a U.S.-manufactured military transport aircraft] aircraft spent hours disabled on the ground in Australia—not because the needed part was unavailable, but because U.S. law required the Australians to seek U.S. permission before doing the repair...These are two of our strongest allies for God’s sake!” *Whitlock*, *supra* note 46.

<sup>84</sup> DEPARTMENT OF DEFENSE, DEFENSE INDUSTRIAL BASE ASSESSMENT: U.S. SPACE INDUSTRY, FINAL REPORT 1 (Aug. 31, 2007), [http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/defmarketresearchrpts/exportcontrolfinalreport08-31-07master\\_\\_3---bis-net-link-version---101707-receipt-from-afri.pdf](http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/defmarketresearchrpts/exportcontrolfinalreport08-31-07master__3---bis-net-link-version---101707-receipt-from-afri.pdf) (The BIS is the DDTC’s counterpart office at the Department of Commerce) [hereinafter DEFENSE INDUSTRIAL BASE ASSESSMENT].

indication as to whether the surveyed group constituted a statistically representative sample of the U.S. space industry. It is noteworthy, and somewhat ironic, that the DoD did not posit a definition for the “space industrial base” in a report ostensibly created to gauge the health of that base. Similarly, the Space Foundation conducted a survey in 2007 in order to gauge the impact of ITAR on the “U.S. Space Industry.”<sup>85</sup> While the makeup of that industry was nowhere defined in the resultant report, the Space Foundation nonetheless acknowledged, “because the survey invitees were not selected randomly from the population of U.S. space industry members, the quantitative results cannot be generalized to that population and inferential statistical tests are unsupported. The survey results should be interpreted as intuitive, non-statistical evidence.”<sup>86</sup> The *Defense Industrial Base Assessment* included no such caveat to its reported findings—despite having neglected to define the U.S. space industry or randomly select companies from its membership for purposes of its survey. Like the Space Foundation survey, the results of the *Defense Industrial Base Assessment* should be viewed as “intuitive, non-statistical evidence.” As we shall see, however, the various assessments citing the *Defense Industrial Base Assessment* do not appear to make this distinction—effectively turning “intuitive, non-statistical evidence” into evidence.

The effects of this failure to distinguish various types of evidence—and the relative certitude of the conclusions to be drawn therefrom—are not innocuous, but pernicious. For example, Ms. Patricia Cooper, President of the Satellite Industry Association (SIA), speaking on behalf of her constituents in industry before the Subcommittee on Terrorism, Nonproliferation and Trade on the issue of export controls reform, testified that ITAR compliance cost the space industrial base \$50 million per year and that licensing issues cost as much as \$600 million per year in lost revenues.<sup>87</sup> The source Ms. Cooper cited for these figures was a 2008 Center for Strategic & International Studies (CSIS) study entitled, *Health of the U.S. Space Industrial Base and the Impact of Export Controls (2008 CSIS Study)*.<sup>88</sup> The figures cited in the *2008 CSIS Study* originated in the *Defense Industrial Base Assessment* which, as has been shown, produced “intuitive, non-statistical evidence.”<sup>89</sup> This scenario brings to mind a quote from the Lewis Carroll’s poem *The Hunting of the Snark*, namely: “I have said it thrice: What I tell you three times is true.”<sup>90</sup> The fallacy of this logic is evident, as the simple act of repeating something does not make what is said true. However, in practical effect, the veracity of Ms. Cooper’s claims

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<sup>85</sup> SPACE FOUNDATION, ITAR AND THE U.S. SPACE INDUSTRY (2008), [http://www.spacefoundation.org/docs/SpaceFoundation\\_ITAR.pdf](http://www.spacefoundation.org/docs/SpaceFoundation_ITAR.pdf).

<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 45.

<sup>88</sup> *Id.*; 2008 CSIS STUDY, *supra* note 46.

<sup>89</sup> 2008 CSIS STUDY, *supra* note 46 at 33.

<sup>90</sup> LEWIS CARROLL, THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS 146 (New York, MacMillan 1891) 46.



were likely buoyed by the multiple sourcing.<sup>91</sup> In the end, the Congress was undoubtedly left with the impression that the \$50 million and \$600 million figures cited were more than mere intuitive non-statistical evidence. To be sure, one congressman cited the same \$600 million figure in his opening statement at that very hearing.<sup>92</sup> All of this to say that the difficulty in defining and distinguishing affected industry within the export control debate and the failure to distinguish anecdotal evidence from non-anecdotal evidence adds yet another layer of complexity and uncertainty.<sup>93</sup>

#### 4. *Think Tanks, National Security and Space Commentators*

There are no shortage of assessments relating to the current export control regime. There is also no shortage of criticism. That is not to say that all of the criticism is as hyperbolic as the litany offered above. Rather, by and large, the assessments deliver a sober set of findings and recommendations for improving the regime. The sphere of influence of at least two such assessments includes policy makers both within the Congress and the Administration.

##### a. 2008 CSIS Study

The first of these assessments is the above mentioned *2008 CSIS Study*.<sup>94</sup> On 2 April 2009, Mr. Pierre Chao, a former senior associate at CSIS was called to testify before the Subcommittee on Terrorism, Nonproliferation and Trade, concerning the Study's findings. The chairman of that subcommittee, Representative Berman, sat on a CSIS commission in 2002 that produced a report which also called for the reform of the export

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<sup>91</sup> The \$50 million in compliance cost figure is also cited in BEYOND "FORTRESS AMERICA." *Supra* note 2, at 27.

<sup>92</sup> *Export Controls on Satellite Technology*, *supra* note 45 at 11.

<sup>93</sup> Again, this is nothing new. In attempting to determine whether the economic costs of export controls were adversely affecting industry in the early 1990s, one author concluded:

...based on admittedly sketchy macroeconomic and microeconomic data, high technology trade and market share data, and government data on licensing patterns and the regulatory process, the economic cost of controls is not excessive. *Much contrary anecdotal evidence is available from the private sector concerning the damage controls cause U.S. high-technology producers.* However, unless concrete and quantifiable data showing an exclusive and causal link between controls and lost sales over a sustained period is publically released by exporters, their claims remain suspect. (emphasis added)

DOUGLAS E. MCDANIEL, UNITED STATES TECHNOLOGY EXPORT CONTROL: AN ASSESSMENT xv (1993).

<sup>94</sup> *Supra* note 46.

control regime.<sup>95</sup> Then Representative Tauscher, now Undersecretary of State Tauscher, was also a member of that commission.<sup>96</sup>

In its 2008 Study, the CSIS found that the overall health of the space industry was good, but that assessment was accompanied by several caveats, including: (1) industry's dependence on national security-related USG contracts for 60% (95% if civil government contracts are included) of its revenue—which the CSIS described as “arsenalizing” the industry; and (2) 2nd and 3rd tier manufactures (i.e. smaller companies, as opposed to the major prime contractors like Boeing) are losing global market share due to the “friction” created by U.S. export controls.<sup>97</sup> The latter caveat is supported by the fact that smaller companies typically do not have the resources to maintain an ITAR compliance staff, as do the prime contractors. As Representative Berman lamented in an editorial to *The San Jose Mercury News*, “[y]ou practically have to have a law degree or Ph.D to keep from running afoul of the increasingly complex export control regime.”<sup>98</sup> The assumption, therefore, is that smaller companies are less able to navigate the complexities of U.S. export controls in a manner that satisfies foreign customers and are losing global market share as a result. The follow-on argument, which is also the primary contention of The National Academies' *Beyond “Fortress America”* (discussed below), is that a drop in global market share means less revenue for the 2nd and 3rd tier companies; less revenue, in turn, threatens innovation—the 2nd and 3rd tier being “the source of much innovation;” innovation is a strategic imperative for the U.S. national security; *ipso facto*: reduced revenue for 2nd and 3rd tier companies threatens national security.<sup>99</sup>

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<sup>95</sup> CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), PRESERVING AMERICA'S STRENGTH IN SATELLITE TECHNOLOGY 39 (Apr. 2002), [http://csis.org/files/media/isis/pubs/081023\\_lewis\\_satellitetechnology.pdf](http://csis.org/files/media/isis/pubs/081023_lewis_satellitetechnology.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 21-23. (Study's author explaining its findings before a House Subcommittee hearing)

<sup>98</sup> Berman, *supra* note 71.

<sup>99</sup> 2008 CSIS STUDY, *supra* note 46, at 10.

b. Beyond “Fortress America”

The second such assessment is a 2009 National Research Council (NRC) of the National Academies<sup>100</sup> book entitled, *Beyond “Fortress America”: National Security Controls on Science and Technology in a Globalized World (Beyond “Fortress America”)*.<sup>101</sup> The influence of this work is also evident from the congressional record. Not only did Dr. John Hennessy, the co-chair of the committee that produced the book, testify before the Committee on Foreign Affairs with regard to ITAR reform, but Chairman Berman indicated the book was in part responsible for the Committee’s reform initiatives.<sup>102</sup> In addition, Brent Scowcroft, Dr. Hennessy’s co-chair on the committee, was invited to a “secret meeting” in January 2010 on the topic of export control reform.<sup>103</sup> The meeting was reportedly organized by Chairman Berman and attended by, among others, Defense Secretary Gates, Commerce Secretary John Locke, National Security Advisor Jim Jones, Undersecretary of State Tauscher, and Mr. Scowcroft.<sup>104</sup> It is noteworthy that Mr. Scowcroft appears to be the only attendee at this meeting of principles not currently affiliated with either the Congress or the Administration.

The NRC’s thesis is that the “national security controls that regulate access to and export of science and technology are broken.”<sup>105</sup> The controls are broken not because of the ends the controls seek to achieve, rather because the current unilateral means of achieving those ends does not reflect the “world is flat” reality of modern geopolitics.<sup>106</sup> According to the NRC, the new approach to export controls must recognize the interdependence of national security and economic competitiveness—or what the late Senator

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<sup>100</sup> The National Academies (under which the NRC falls) have been involved in the export control reform debate since at least 1987. In fact, *BALANCING THE NATIONAL INTERESTS: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION*, *supra* note 66, published by the organization that year, shares much in common with *BEYOND “FORTRESS AMERICA”*, published some 22 years later. Most notably, the books juxtapose the U.S. export control regime with the new realities imposed by globalization, as well as the deleterious effects on national security when economically deprived companies fail to innovate technologically. *Id.* at 9. Interestingly, the 1987 book offers a caveat in its preface, to wit: “...we determined that reliable quantitative data regarding the effectiveness of controls—and the impact of controls on economic development and trade—continue to be very difficult to obtain.” *Id.* at viii. *BEYOND “FORTRESS AMERICA”* includes no such caveat. Whether the National Academies profess a higher degree of certitude with regard to its more recent findings is unclear, but that can certainly be implied by the decision, whether conscious or unconscious, *not* to include a caveat to those findings.

<sup>101</sup> *BEYOND “FORTRESS AMERICA”*, *supra* note 2.

<sup>102</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3, at 25.

<sup>103</sup> Rogin, *supra* note 79.

<sup>104</sup> *Id.*

<sup>105</sup> *BEYOND “FORTRESS AMERICA”*, *supra* note 2, at vii.

<sup>106</sup> *Id.* at 61.

Heinz called “economic security.”<sup>107</sup> Again, the argument here is that industry prosperity spurs innovation; innovation is a key to developing technologies more advanced than your enemy or potential enemy, *ipso facto*, industry prosperity is essential to national security. In order to accomplish this, economic interests should begin to weigh more heavily in determining what should be subject to export controls.<sup>108</sup> The question that should be asked in determining *what* should be controlled is: “do security interests outweigh the harm?”<sup>109</sup> In application, this would result in the control of “a very narrow and limited set of goods, technology, and know-how.”<sup>110</sup>

### 5. *The Advocacy Coalition*

Marion Blakely, president and chief executive of the Aerospace Industries Association, in response to the announcement of the Obama Administration’s export control reform initiative, indicated, “I think it’s actually unprecedented that we have this top-down commitment to an issue that is often pushed to the periphery.”<sup>111</sup> Indeed, it would appear that the “stars have aligned”<sup>112</sup> and that all of the stakeholders—including the President and relevant members of his Cabinet,<sup>113</sup> a bipartisan coalition of House Congressional Representatives,<sup>114</sup> and the space industrial base<sup>115</sup>—in the current reform debate are critics of the current regime. Arguably, these stakeholders have formed an advocacy coalition that “consists of actors from a variety of governmental and private organizations at different levels of government who share a set of policy beliefs and seeks to realize them by influencing the behavior of multiple governmental institutions over time.”<sup>116</sup> Advocacy coalitions are critical to progressing political agendas from conception to policy—whether that policy is implemented via regulation or statute.<sup>117</sup>

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<sup>107</sup> *Id.* at 59; HEINZ, *supra* note 1, at 37, 104.

<sup>108</sup> BEYOND “FORTRESS AMERICA”, *supra* note 2, at 61.

<sup>109</sup> *Id.* at 62.

<sup>110</sup> *Id.* at 81.

<sup>111</sup> Whitlock, *supra* note 46.

<sup>112</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3, at 45.

<sup>113</sup> Klamper, *Obama ITAR Reform Could Move Satellites Back to Commerce*, *supra* note 43; Klamper, *Official Reaffirms White House Support for ITAR Reform*, *supra* note 43.

<sup>114</sup> *H.R. 2410*, *supra* note 44.

<sup>115</sup> See e.g., *Export Controls on Satellite Technology* *supra* note 45, at 40 (written Testimony of Patricia Cooper, President of the Satellite Industry Association).

<sup>116</sup> Bosso & Kay, *supra* note 9, at 46.

<sup>117</sup> Eligar Sadeh & Brenda Vallance, *The policy process in SPACE AND DEFENSE POLICY* 125, 128 (Damon Coletta & Fances T. Pilch eds., 2009).

## B. On This We Agree: Common Ground in the Reform Debate

### 1. *The Need For Reform*

The criticisms levied thus far should not lead the reader to believe the current export control regime is above reproach. To the contrary, these criticisms and those to follow are simply efforts to keep the reform debate honest—to distinguish the windmills from the giants. As will become clear in the coming pages, the export control regime in relation to space technologies is indeed in need of reform. The real issue relates to the extent of the reform and the form taken by it.

#### a. Globalization

The stated goal of the Obama Administration's export control reform effort is “to build high walls around a smaller yard’ by focusing our enforcement efforts on our ‘crown jewels.’”<sup>118</sup> These metaphors, however, do not capture entirely the complexity of the modern export control environment. Given the exponential rate of technological advancement—described above as “the law of accelerating returns”<sup>119</sup>—it has become increasingly difficult to distinguish the crown jewels from the proverbial costume jewelry. For example, the resolution of commercial imaging satellites has gone from 1 kilometer in 1997 (Orbview-2), to .05 meter in 2008 (GeoEye)—with .25 meter projected for 2011 (GeoEye-2).<sup>120</sup> Will today's crown jewel, GeoEye, become costume jewelry when GeoEye-2 comes online? Undersecretary of State Tauscher framed the issue thusly: “you cannot protect everything for its life cycle. You can only protect it while it is important to national security.”<sup>121</sup> This begs the question: when does a technology transition from important to national security to no longer important to national security? The current export control regime does not reach questions this nuanced—at least with regard to its regulatory reach. Instead, high walls are built around *all* space technologies. This “fortress” approach to controlling exports, in which virtual walls (i.e. export controls) are constructed in order to prevent others from gaining access to those technologies, is only effective as long as the state constructing the walls has a monopoly on the technologies and the know-how to produce those

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<sup>118</sup> Fact Sheet on the President's Export Control Reform Initiative, *supra* note 49. The issue has also been framed thusly: “[i]f you guard your toothbrushes and diamonds with equal zeal, you'll probably lose fewer toothbrushes and more diamonds.” Michael J. Noble, *Export Controls and United States Space Power*, 6 *ASTROPOLITICS* 251, 298 (2008) (quoting McGeorge Bundy, National Security Advisor to Presidents Kennedy and Johnson).

<sup>119</sup> Whereby “the pace of change of our human-created technology is accelerating and that its powers are expanding at an exponential pace.” SINGER, *supra* note 42, at 97-99.

<sup>120</sup> Noble, *supra* note 118, at 268.

<sup>121</sup> Klamper, *Obama ITAR Reform Could Move Satellites Back to Commerce*, *supra* note 43.

technologies.<sup>122</sup> During much of the Cold War, the U.S. held such a monopoly. As the U.S. was largely self-sufficient in developing technologies, it was therefore able to tightly control those technologies for national security reasons.<sup>123</sup> U.S. export controls reflected this fact. U.S. export controls also reflected the business model of the day, namely “that a company designed the product, made the product, and sold the product to one end user.”<sup>124</sup> However, “over the past 30 years, this model has evolved into a global supply chain, including engineering collaboration over the Internet and distribution partners located in countries close to...customers.”<sup>125</sup> This evolution is indicative of globalization.

Like so many other aspects of this debate, the term “globalization” belies a precise definition. Indeed, “[t]here is no universally accepted definition of what constitutes globalization, which many observers see as primarily an economic phenomenon. But it is more than that—it involves the diffusion (some would say “democratization”) of technology, information, economic power, and international influence.”<sup>126</sup> In spite of

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<sup>122</sup> BEYOND “FORTRESS AMERICA”, *supra* note 2, at 41.

<sup>123</sup> 2010 QUADRENNIAL DEFENSE REVIEW REPORT, *supra* note 38 at 83.

<sup>124</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3, at 43.

<sup>125</sup> *Id.* Some in the Congress have identified the offshoring of U.S. technology jobs and manufacturing capabilities as a threat to U.S. national security. *See generally*, *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31. Offshoring also raises ITAR issues. For instance, if an engineer for a U.S. satellite manufacturer collaborates with an offshore U.S. subcontractor that employs foreign engineers on an ITAR-controlled item, either a metaphorical “Chinese Wall” must be constructed between the foreign engineers and the technical data to be disclosed or a DDTC license must be sought prior to the collaboration occurring. There are clearly inefficiencies inherent in either sequestering foreign persons employed by U.S. manufactures (i.e. reducing the personnel dedicated to working on a particular project) or seeking a DDTC license prior to the occurrence of any collaborative effort (i.e. potentially delaying the collaboration for purposes of obtaining a license) involving an ITAR-controlled item. At the same time and to the extent that this is a problem, it could also be argued that U.S. industry has largely brought this upon itself by moving U.S. aerospace jobs overseas—i.e. offshoring. Indeed, one congressman lamented in a December 2009 House hearing on export controls, “[s]o many American companies are now American in name only, having sent their manufacturing facilities, along with millions of American jobs, overseas.” *Id.* at 6. It follows that if export control reforms include the loosening of restrictions on communications between U.S. and foreign employees of U.S. manufacturers of space technologies, then those reforms will arguably facilitate further outsourcing. This is but one of myriad examples in which ITAR *could* adversely effect the interests of the industry. At the same time, under this scenario, the ITAR has either protected the technical data by denying it to the U.S. subcontractor’s foreign engineers (in the case of a license being denied or the foreign engineers being sequestered from the collaboration), the DDTC has determined the “export” of the technical data is not contrary to the national security interests of the U.S. (in the case of a license being issued), or the ITAR has not facilitated the offshoring of U.S. high technology jobs and manufacturing capabilities. Of course, whether the ITAR has succeeded or failed in this scenario is almost entirely dependant on one’s perspective and the relative importance placed on the interest implicated—and thus the counterposing interests of the export control reform debate are exposed.

<sup>126</sup> David A. Turner & James Vedda, *The impact of foreign space development on US defense*

this trend towards globalization, until very recently, the U.S. was still able to effectuate its restrictive export control policies on other space competitors. The U.S. possessed a *de facto* export veto due to the fact that virtually every satellite launched contained a U.S. component or subsystem—thereby subjecting the entire satellite to U.S. export controls (there is no *de minimis* exception in the ITAR based on minimal U.S. content). For example, a European-built satellite utilizing an ITAR-controlled U.S. antennae could not launch on a Long March Rocket, because the U.S. has effectively embargoed PRC space launch since the passage of the *STNDAA for FY 1999*. The Europeans viewed this “contamination by American technology” as running counter to their policy interests and thus set about to bust the U.S. space technology monopoly by developing ITAR-free products and satellites.<sup>127</sup>

Currently, European manufacturers EADS Astrium and Thales Alenia both offer ITAR-free space products—with Thales Alenia offering ITAR-free satellites.<sup>128</sup> Seeing this as a harbinger, Congressman Michael E. McMahon of New York indicated, “I am concerned that if other countries, our allies even, were to develop ITAR-free satellites and become as competitive [as] the United States in this market we would most certainly reach a whole new frontier in global terrorism.”<sup>129</sup> One commentator has predicted that by 2020, “[n]o matter what the United States does, multipolar space [described as “several global players shaping core space capabilities”] will create new policy realities.”<sup>130</sup> He continues, “[a]nd as states such as Iran add access to or engagements in mutipolar space capabilities, one gets the sense of how the world will be different a decade out.”<sup>131</sup> The ITAR-free movement and the prospect of the new policy realities resulting therefrom have clearly made an impact politically. Indeed, a senior staffer for the House Committee on Foreign Affairs told a satellite conference in March 2010 that the ITAR-free movement, “has changed the environment...significantly.”<sup>132</sup> This significantly changed environment may, in fact, lead to the export control reform discussed in Chapter 3. Any such reform will likely begin with the make-up of the USML. To be sure, the current head of the DDTC, Robert Kovac, indicates that “separating the

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*policy* in SPACE AND DEFENSE POLICY 312, 324 (Damon Coletta & Fances T. Pilch eds., 2009).

<sup>127</sup> Benjamin Sutherland, *Why America is Lost in Space*, NEWSWEEK (Jan. 31, 2009), <http://www.newsweek.com/2009/01/30/why-america-is-lost-in-space.html> (last visited on Jun. 28, 2010).

<sup>128</sup> Noble, *supra* note 118, at 279.

<sup>129</sup> *The Export Administration Act: A Review of Outstanding Policy Considerations*, *supra* note 7 at 7.

<sup>130</sup> Robin F. Laird & Alain Dupas, *U.S. Strategy 2020: Facing a Multipolar Future*, 21 *Space News* 19, 19 (Mar. 1, 2010).

<sup>131</sup> *Id.* at 21.

<sup>132</sup> Foust, *supra* note 68.

wheat from the chaff” on the USML is the key to improving the U.S. export control regime.<sup>133</sup>

b. The USML

One of the chief complaints about the way space exports and temporary imports are currently regulated is that the ITAR is a blunt instrument that “fails to distinguish between militarily sensitive hardware that should be controlled and widely available commercial technologies, such as lithium-ion batteries and solar cells.”<sup>134</sup> Indeed, the USML indicates that “spacecraft, including communications satellites, remote sensing satellites, scientific satellites, research satellites, navigations satellites, experimental and multi-mission satellites,” as well as “[a]ll specifically designed or modified systems or subsystems, components, parts, accessories, attachments, and associated equipment” and “all technical data and defense services” related thereto, are all regulated as munitions.<sup>135</sup> There is no real distinction, for example, between military-grade components and commercially available components. As a result, when the manufacturer of a space qualified lithium-ion battery seeks to export that product to a foreign buyer, the manufacturer must first go through the ITAR registration and licensing process. During this administrative process, license examiners at the DDTC determine whether the item to be exported is, in essence, a “crown jewel” or “costume jewelry.” Critics of the ITAR argue this registration and licensing process is hurting portions of the U.S. space industrial base by adding expense and delay to what might otherwise be a simple transaction involving an internationally available commodity.<sup>136</sup> The fact that many space technologies *are* available internationally is a testament to the fact that “R&D and technological innovation are now global in nature.”<sup>137</sup> A nimble and narrowly tailored regulatory regime would reflect this reality and, in so doing, continue to protect those technologies that need to be protected, while not unduly hampering U.S. manufacturers with superfluous administrative processes.

Is it possible to create a regulatory bureaucracy capable of matching the exponential pace of technological change?<sup>138</sup> The answer to this

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<sup>133</sup> *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 29.

<sup>134</sup> *Earthbound*, *ECONOMIST* (Aug. 21, 2008), [http://www.economist.com/node/11965352?story\\_id=11965352](http://www.economist.com/node/11965352?story_id=11965352) (last visited on Jun. 28, 2010).

<sup>135</sup> ITAR, *supra* note 29 at § 121.1, Category XV.

<sup>136</sup> *See e.g.*, 2008 CSIS STUDY, *supra* note 42.

<sup>137</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3, at 43.

<sup>138</sup> The rate of technological change is exponential, rather than linear—so whereas once a stone wheel has been invented, it need not be reinvented to produce it from wood, vulcanized rubber, synthetics, and so on, *ad infinitum*. There is also a cross-pollination effect occurring, in which advances in one field lead to advances in another—so whereas once the wheel has



question will depend almost entirely on the form taken by the USML. It must be acknowledged that while lists are “poorly suited to controlling exports of knowledge or complex systems of vastly different levels of sophistication...lists are also an efficient way—indeed the only way—to keep track of items.”<sup>139</sup> The identification and removal of those technologies from the USML that pose a *de minimis* threat to national security—i.e. the costume jewelry—would appear to be a good starting point for reform. This veritable low-hanging fruit might include items like the aforementioned lithium-ion batteries, solar cells and other items that are widely available on foreign commercial markets. It should come as little surprise, however, that even the low-hanging fruit in this debate offer no simple solutions.

The current language of Category XV of the USML is sufficiently broad so as to capture virtually all space-related technologies.<sup>140</sup> As a result, exporters and temporary importers of these articles know or should know that a license is required prior to export or temporary import in nearly all instances. This knowledge is critical, given the fact that the effectiveness of U.S. export controls is largely dependent on industry self-regulation. Any attempt to carve out certain technologies from that broad language, whether it is a lithium-ion battery or something else, would require a list that either specifically inventories items covered under the USML or specifically inventories items *not* covered by the USML. If the aim of the export control regime is to protect only the crown jewels one might presume the list would include only those items covered under the ITAR, rather than excepting items *not* covered under the ITAR. The former would also arguably result in a shorter list. However, this raises the issue of “the law of accelerating returns” and the concomitant notion of whether a regulatory bureaucracy could ever keep up with rapidly developing technologies. An inclusive list would arguably require constant updating. As the primary mechanism by which industry self regulates is the USML (i.e. checking the list to see if the item or service to be exported or temporarily imported is included on the list), the accuracy of the list is of paramount importance. If the bureaucracy failed to keep up and a new technology not included on the USML was exported without a license or approval by the DDTC, the USG would have little recourse against the exporter or temporary importer. More

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been invented and attached to a barrow, it need not be reinvented to attach it to a cart, carriage, locomotive, aircraft, and so on, *ad infinitum*. This effect has been described as “riding someone else’s exponentials.” SINGER, *supra* note 42, at 99. Why is this important to a policy discussion about export controls? As then Congresswoman Ellen Tauscher put it in 2006, “[t]he United States has not been able to distinguish between those technologies where there is still [an] advantage...that should be protected and those satellite technologies that are routine, commercial, and available from other sources.” *Supra* note 35. Given “the law of accelerating returns” this is not surprising, but it also begs the question: is it possible to create a regulatory bureaucracy capable of matching the exponential pace of technological change?

<sup>139</sup> BEYOND “FORTRESS AMERICA”, *supra* note 2 at, 37.

<sup>140</sup> ITAR, *supra* note 25 at § 121.1, Category XV.

importantly, the U.S. will have potentially lost a valuable piece of technology that could be employed by its enemies or potential enemies. On the other hand, the broad language currently employed by Category XV of the USML “catches” new technologies by virtue of that broad language—no responsive regulatory bureaucracy required. As such, the USML could employ broad language and specifically exclude those items *not* covered by the ITAR. The length of such a list would depend entirely on the breadth and detail of the exclusionary policy. For example, specific items could be listed (e.g. antennae array with certain characteristics); or categories of items could be listed (e.g. mature technologies widely available on foreign commercial markets).

The clear problem with categories is their inherent vagueness. Exporters and temporary importers of space technologies would arguably be less certain as to the applicability of the ITAR under a given set of circumstances if categorical language was employed. As the GAO has pointed out, the effectiveness of export controls “depends on the exporters making the right decisions when interpreting the regulations.”<sup>141</sup> All of this leads to the conclusion that if carve-outs are to be made for certain technologies that do not need to be protected, the most workable solution for accomplishing that goal is to employ broad language that acts to “catch” new technologies and specifically catalogue all items to be excluded from the USML. The problem with this approach is that the list will simply grow as more and more items are excluded. This “fix” would therefore exacerbate another identified problem with the ITAR, namely its length and by extension, its complexity.<sup>142</sup>

This does not appear to be the approach favored by the *2008 CSIS Study*. Indeed, the CSIS recommends that, “critical space technologies should be identified and should remain on the Munitions List...”<sup>143</sup> It further recommends removing “commercial communications satellite systems, dedicated subsystems, and components specifically designed for commercial use.”<sup>144</sup> Finally, it calls for an annual review of the USML based on both the “criticality of items and on their availability outside the U.S.”<sup>145</sup> These recommendations would appear to create an amalgamated list which is both inclusive of the technologies to be protected and exclusive of those *not* to be protected and which is updated annually. How this amalgamated list might work in practice, given the analysis above is not known. For example, such an inclusive list might fail to “catch” new technologies in advance of the annual update. Would the DDTC then issue an interim list to “catch” these technologies pending that update? Would

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<sup>141</sup> DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION, *supra* note 74 at 7.

<sup>142</sup> See e.g., Berman, *supra* note 71 (lamenting the complexity of the current ITAR regime).

<sup>143</sup> 2008 CSIS STUDY, *supra* note 46, at 11.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

this not result in a more complex export control regime, rather than one that is less complex? These unknowns highlight two things: first, it is simple, in the rhetorical sense, to say the USML needs to be reformed; second, creating a USML that, in actual practice, is both workable and serves the national security ends of the U.S. is decidedly more difficult.

The NRC's recommendation in *Beyond "Fortress America"* regarding the reform of the USML is less detailed, but at the same time more radical. Indeed, "[t]he committee recommends a 'sunset' rule under which every item [on the USML] will be taken off the list at a specified time during each calendar year unless a justification can be presented...for maintaining the particular item or category on the list."<sup>146</sup> Although no further details are offered with regard to actual implementation, this approach would appear to suffer from the same problem as the CSIS approach, namely: what happens between annual updates when new technologies are introduced? Suffice it to say that proposed reforms must be workable in practice and not just ring true rhetorically.

### c. With a Little Help From My Friends: Multilateralism, Coercion, and Concession

As one contemplates reforms for the U.S. export control system, one must be aware of the liabilities that result from divergent international practices and priorities as well as the shortcomings of existing international export regimes.<sup>147</sup>

Given that the arms trade occurs internationally and on a truly global scale, one might reasonably assume that international law or the United Nations would play a large role in regulating the import and export of arms. That assumption would be incorrect.<sup>148</sup> While the export of nuclear, biological, and chemical munitions are *strictly prohibited* by binding international agreements,<sup>149</sup> the export of conventional munitions and dual-use technologies are merely *influenced* by a number of voluntary international agreements—to include the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.<sup>150</sup>

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<sup>146</sup> BEYOND "FORTRESS AMERICA", *supra* note 2, at 64.

<sup>147</sup> *The Impact of U.S. Export Controls on National Security*, *supra* note 3, at 29.

<sup>148</sup> See Yann Aubin & Arnaud Idiart, *Overall Introduction* in EXPORT CONTROL LAW AND REGULATIONS HANDBOOK, A PRACTICAL GUIDE TO MILITARY AND DUAL-USE GOODS TRADE RESTRICTIONS AND COMPLIANCE 1, 10 (Yann Aubin & Arnaud Idiart, eds., 2007).

<sup>149</sup> Art I of the Treaty on the Non-Proliferation of Nuclear Weapons, Washington D.C., London, Moscow, 1 July 1968; Art III of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Washington D.C., London, Moscow, 10 April 1972; Art I, 1(a) Chemical Weapons Convention, Paris, 13 January 1993.

<sup>150</sup> Missile Technology Control Regime (MTCR), <http://www.mtc.info>; Hague Code of Conduct Against Ballistic Missile Proliferation (HCOCP),

Due to the voluntary nature of these agreements, the export of conventional munitions and dual-use technologies are grounded primarily in the domestic legal regimes of individual states. When multilateral agreements are not seen as adequately protecting the interests of individual states, those states tend to implement unilateral controls that do protect those interests.<sup>151</sup> This is due in part to notions of state sovereignty related to trade.<sup>152</sup>

Unilateral export controls are only effective as long as the state controlling those exports has a monopoly on the technologies and the know-how to produce them.<sup>153</sup> If the technologies and/or know-how are available and uncontrolled elsewhere, then unilateral export controls are not an effective nonproliferation tool. Multilateral export controls, on the other hand, are only effective as long as the countries possessing those technologies and/or the know-how to produce them agree that the technologies and know-how should be controlled. The stronger the degree of consensus among these countries, the greater the legitimacy of the multilateral export control regime.<sup>154</sup> Currently, there is a lack of consensus among the parties to the Wassenaar Arrangement with regard to certain commercial satellites and related technologies. The Wassenaar Arrangement is a multilateral agreement governing the export of munitions and dual-use items.<sup>155</sup> Forty countries are party to the Arrangement, among them, a majority of NATO and major non-NATO allies of the U.S.<sup>156</sup> The Wassenaar Arrangement Dual-Use List includes COMSATS and some remote sensing satellites (below certain thresholds, remote sensing technologies are controlled as dual-use commodities; above a certain threshold, as munitions).<sup>157</sup> The U.S., although a party to the Wassenaar Arrangement, controls all of these technologies as munitions. The lack of consensus regarding these technologies has only recently become an issue for the U.S. With the advent of ITAR-free COMSATS, the ability of the

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<http://www.un.org/News/Press/docs/2004/gadis3286.doc.htm>; The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, <http://www.wassenaar.org>.

<sup>151</sup> FRANCIS LYALL & PAUL B. LARSEN, *SPACE LAW: A TREATISE* 462 (2009).

<sup>152</sup> Aubin & Idiart, *supra* note 148 at 10.

<sup>153</sup> BEYOND "FORTRESS AMERICA", *supra* note 2, at 41.

<sup>154</sup> Yuan, *supra* note 8, at 144 (the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention, and the Chemical Weapons Convention are examples of multilateral export control regimes which enjoy a high degree of consensus).

<sup>155</sup> The Wassenaar Arrangement, *supra* note 150.

<sup>156</sup> *Id.* Wassenaar Arrangement members are (countries appearing in bold are not considered NATO or major non-NATO allies of the U.S.): Argentina, Australia, **Austria**, Belgium, Bulgaria, Canada, **Croatia**, Czech Republic, Denmark, Estonia, **Finland**, France, Germany, Greece, Hungary, **Ireland**, Italy, Japan, Latvia, Lithuania, Luxembourg, **Malta**, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, **Russian Federation**, Slovakia, Slovenia, **South Africa**, Spain, **Sweden**, **Switzerland**, Turkey, **Ukraine**, United Kingdom and United States. NATO and major non-NATO allies of the U.S. not party to The Wassenaar Arrangement are: Bahrain, Egypt, Iceland, Israel, Jordan, Kuwait, Morocco, Pakistan, the Philippines, Thailand, and Taiwan. *Ibid.*

<sup>157</sup> *Id.* at Dual-Use Goods Control List, Categories 5, 6, and 9.

U.S. to impose its restrictive view on Europe and others—particularly the embargo on the use of PRC launch services—diminished.<sup>158</sup> That does not mean the U.S. is without options. Indeed, “[t]he radical concentration of the world’s defense industrial sector...allows the United States a powerful role within the larger international system.”<sup>159</sup> This concentration affords the U.S., the most prodigious defense spender in the world, a tremendously large carrot with which to dangle before potential antagonists to U.S. export control policy. For example, both EADS and Thales, whose subsidiary companies EADS Astrium and Thales Alenia produce ITAR-free products, bid for DoD contracts. EADS has bid on the U.S. Air Force’s aerial refueling tanker contract (Airbus is a subsidiary of EADS), said to be the largest U.S. defense contract of the next several years with a projected value of at least \$35 billion.<sup>160</sup> If EADS won the contract, the initial order would include 179 Airbus A330 aerial tanker aircraft. For its part, Thales Communication, a subsidiary of Thales, “makes military communications equipment at its plant in Maryland, including radios for US troops in Iraq and Afghanistan.”<sup>161</sup> The U.S. could therefore leverage its defense spending to coerce these companies into acting in accordance with U.S. policy ends by threatening to deny them future DoD contracts. Contracts could be denied on the grounds that the parent company and/or its subsidiaries, by defying U.S. export control policy, contravene U.S. national security interests. In fact, this has already occurred. In 2008, the Congress included a proviso in a defense spending bill<sup>162</sup> that could effectively punish European ITAR-free manufacturers who side step the U.S. embargo on the use of PRC launch services, by allowing the Secretary of Defense to deny future or suspend current U.S. defense contracts to those manufactures.<sup>163</sup> While it does not appear this proviso has affected any DoD contracts to date, coercive measures such as this may be a harbinger.<sup>164</sup> In the near-term, this

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<sup>158</sup> That is not to say the U.S.’ *de facto* veto is no longer viable in all instances. To the contrary, as the vice president of EADS North America puts it, “[y]ou cannot build a big sophisticated satellite without US parts and components, you just cannot do it...[Those components might comprise no more than five percent of the satellite], but it’s a very important five percent.” Jeff Foust, *The uphill battle for export control reform*, SPACE REVIEW (Dec. 1, 2008), <http://www.thespacereview.com/article/1259/1> (last visited on Jun. 28, 2010).

<sup>159</sup> Stephanie G. Neuman, *Power, Influence, and Hierarchy: Defense Industries in a Unipolar World*, 21 DEFENCE AND PEACE ECONOMICS 105, 127 (2010).

<sup>160</sup> Christopher Drew, *Airbus’s Parent Gambles on Tanker Contract*, N.Y. TIMES (Apr. 20, 2010), <http://www.nytimes.com/2010/04/21/business/21tanker.html> (last visited on Jun. 28, 2010).

<sup>161</sup> Newman, *supra* note 159, at 124.

<sup>162</sup> Duncan Hunter National Defense Authorization Act of 2009, Pub.L. No. 110-417, § 1233, 122 Stat. 4639 (Oct. 14, 2008).

<sup>163</sup> Michael C. Mineiro, *New Paradigms of Export Control: A Case Study of the U.S. Commercial Communication Satellite Export Control Regime* (Jun. 2010) (unpublished D.C.L. Thesis, McGill University) (on file with author).

<sup>164</sup> There is a question as to whether coercive measures such as this might violate the World Trade Organization (WTO) plurilateral Agreement on Government Procurement (GPA), to

type of measure is seemingly the only arrow remaining in the U.S. quiver when it comes to controlling space technologies that are not monopolized by it. It would appear, therefore, that multipolar space has *already* created new policy realities.<sup>165</sup>

A long-term solution is more elusive. What is apparent is that the U.S. must attempt to forge consensus in this realm by another means. Why? Because “[h]istory has proven that hostile regimes have managed to penetrate U.S. export controls network due to the fact that the international community has yet to follow suit with similar export controls of their own”<sup>166</sup> It would appear the U.S. is, at least with regard to COMSATs, opting for a conciliatory approach—forging consensus through concession. Rather than attempting to impose its restrictive view of export controls on a recalcitrant Europe, the U.S. appears poised to comport its export control regime to the European standard (which also largely happens to be the Wassenaar Arrangement standard). One need look no further than *H.R. 2410*, specifically the provision granting the President the authority to remove commercial satellites from the USML, for evidence of this.<sup>167</sup> It remains to be seen whether the President or Congress will propose further steps to bring the U.S. and European export control regimes in line. It also remains to be seen whether this apparent shift will improve U.S. national security or lead to another breach of national security, as occurred with the PRC in the 1990s.

The Canadian ITAR exemption offers a counterpoint to this conciliatory approach. Some ITAR-controlled items—to include COMSATs—are exempt from the licensing process when the export or temporary import involves Canada. “The Canadian exemption is the only country-specific exemption to the [ITAR] licensing requirement.”<sup>168</sup> The exemption, which has existed in various forms since 1954, grew out of the special relationship between the U.S. and Canada, which are not only each other’s largest trading partner, but also share a common interest in the

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which the U.S. is a party. However, the GPA includes a specific carve out for national security issues, namely: “[n]othing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.” *Id.* at Article XXIII Exceptions to the Agreement, [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm) (last visited on Jun. 28, 2010). As such, and if carefully drafted and narrowly applied, such coercive actions arguably would not violate the GPA.

<sup>165</sup> Laird & Dupas, *supra* note 130, at 19.

<sup>166</sup> *The Export Administration Act: A Review of Outstanding Policy Considerations*, *supra* note 7, at 6; *see also* Noble, *supra* note 118 at 300 (“By harmonizing export controls with other potential suppliers...a ‘unified front’ may be presented thereby avoiding a U.S. export ‘Maginot line.’”).

<sup>167</sup> H.R. 2410, *supra* note 44, at § 826.

<sup>168</sup> DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION, *supra* note 74 at 1.

defense of North America.<sup>169</sup> While the relationship with Canada is geographically unique, it is not ideologically unique. In that regard, the U.S. and the U.K. also share a special relationship—a notion first advanced by Winston Churchill following WWII. The same could be said for many other countries, to include, *inter alia*: Australia, New Zealand, Japan and South Korea. This begs the question: why is Canada the only U.S. ally afforded such an exemption? Canada is certainly not the only country singled out by the ITAR. Indeed, NATO and major non-NATO countries receive preferred treatment under various circumstances. However, these countries have not been exempted from the ITAR because of the *AECA* requirement that their respective export control regimes be brought in line with the ITAR.<sup>170</sup> The need for an alignment of export control regimes was highlighted in the late 1990s when multiple instances of “re-export” and diversion occurred under the Canadian exemption.<sup>171</sup> This occurred when items exported under the Canadian exemption were subsequently re-exported or diverted to countries like China, Iran, and Pakistan, because doing so was not proscribed by Canadian law.<sup>172</sup> Clearly, U.S. policy was subverted in those instances. Canada subsequently aligned its export controls with those of the U.S. and the exemption was allowed to stand.<sup>173</sup>

## 2. *Absurd Outcomes Make a Fool of the Law*

One reason the U.S. export control regime is so easily criticized is as a result of the truly absurd outcomes it can sometimes produce. Because absurd outcomes are interesting simply by virtue of being absurd, they are often repeated. This repetition can in turn produce the impression of the regime’s utter dysfunctionality. An utterly dysfunctional regime is more likely to be deemed in need of fundamental reform, when in fact, it may only be in need of minor reforms. Indeed, absurdities make for particularly compelling strawman arguments. For example, in the 1980s, U.S. public opinion concerning defense spending was galvanized by the revelation that the DoD procured individual toilet seats and hammers for \$640 and \$435, respectively.<sup>174</sup> The absurdity of these figures painted a picture of excess

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<sup>169</sup> *Id.* at 3.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 4.

<sup>172</sup> *Id.* The following is an example offered by the GAO: a Chinese national established a Canadian company and used the Canadian exemption to acquire a focal plane array-long-range infrared camera. The camera was shipped to China from Canada without DoS approval. The same individual subsequently ordered an additional 400 cameras. As in the first instance, the Chinese national specified that the Canadian exemption could be used. *Id.* at 21.

<sup>173</sup> *Id.* at 5.

<sup>174</sup> Opinion, *The Candidates and the World: II; The Military Consensus, Undone*, N.Y. TIMES (Oct. 23, 1988), <http://www.nytimes.com/1988/10/23/opinion/the-candidates-and-the-world-ii-the-military-consensus-undone.html> (last visited on Jun. 28, 2010).

and waste that no \$2 billion B-2 bomber procurement could. To be sure, putting a dollar value on a B-2 is beyond most people, but everyone knows that a hammer costs no more than a few dollars at any hardware store. As no one inside or outside of the USG could defend the procurement of a \$640 toilet seat or a \$430 hammer, it became the perfect strawman argument for those advocating across the board cuts in defense spending. For this reason absurd outcomes can become rallying cries for those with a reform agenda. That was true in the 1980s with regard to defense spending and it is also true today with regard to export controls.

a. ITAR's \$640 Toilet Seat

...*U.S. Regulation Requires Spacecraft Stand, Indistinguishable From Common Coffee Table, to be Placed Under Armed Guard in Russia...* While this headline is fictitious, it reflects actual events, and is an example of the absurd outcomes the ITAR can produce. The events involved Bigelow Aerospace, a U.S. manufacturer of inflatable spacecraft. Bigelow's attorney, in response to this requirement, responded sarcastically, "[o]ne can only imagine the repercussions of Russian agents gaining access to the [spacecraft stand]. Its secrets could have easily been sold to Iran or North Korea, where America's enemies could someday use such technology to serve sandwiches *or even tea on*."<sup>175</sup> The story was subsequently picked up by *The Economist* (on multiple occasions) and *Newsweek*—and has since been repeated in academic journals.<sup>176</sup> Indeed, it is arguably ITAR's version of the \$640 toilet seat—in that the outcome produced is indefensible from both a policy perspective and a logical perspective. The question must therefore be asked: Why did this occur?

The Bigelow spacecraft, along with the spacecraft stand, was exported to Russia for launch by ISC Kosmotras, a commercial space launch venture.<sup>177</sup> The requirement to guard the spacecraft stand stemmed from the fact that it was specifically designed to hold Bigelow's inflatable spacecraft in a vertical position.<sup>178</sup> As a result of the broad language of USML Category XV(e), namely "[a]ll specifically designed or modified systems or subsystems, components, parts, accessories, attachments, and associated equipment" the spacecraft stand/tea table became a munitions regulated under the ITAR.<sup>179</sup> Moreover, the technical assistance agreement associated with the export of the spacecraft stand required that it be placed under armed guard around the clock. The expense associated with the armed guards was borne by Bigelow Aerospace. Perhaps the only thing that might have made

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<sup>175</sup> Gold, *supra* note 37, at 172.

<sup>176</sup> *Freedom to Fly*, *supra* note 54 (ECONOMIST); *Earthbound*, *supra* note 134 (ECONOMIST); Sutherland, *supra* note 127 (NEWSWEEK); Gold, *id.* (J. SPACE L.).

<sup>177</sup> Gold, *supra* note 37, at 168.

<sup>178</sup> *Id.* at 172.

<sup>179</sup> ITAR, *supra* note 29, at § 121.1, Category XV.



matters worse, was if those hired by Bigelow to guard the spacecraft stand were found, “sleeping on the job,” “[r]eporting to work under the influence of alcohol,” and taking “routine trips into town to meet prostitutes,” as those in the Hughes case of the 1990s were.<sup>180</sup> While Bigelow was ultimately granted a waiver by the DDTC regarding the requirement to guard the spacecraft stand,<sup>181</sup> the case nevertheless brings to life Defense Secretary Gates’ admonition, “he who defends everything, defends nothing.”<sup>182</sup> Inverted coffee tables are certainly not among the “crown jewels” the U.S. should seek to protect via export controls. At the same time, this absurd outcome does not, without more, necessitate the wholesale reformation of the export control regime. Instead, excluding items like Bigelow’s spacecraft stand from the USML would arguably be sufficient to remedy this absurdity.

#### b. Absurdity’s Effect on Policy Makers

The scenario involving Bigelow Aerospace is not unique. The following excerpt from a 26 March 2007 hearing before the Subcommittee on Terrorism, Nonproliferation and Trade is illustrative:

Mr. MANZULLO (Congressman from Illinois): ...Let me give you an example of the problems. This connecting cable is ITAR regulated [holding up a cable]. This one is not [holding up another cable]...the bad guy is 1 inch shorter. There has to be a way to export these things without going for a license. These are two fasteners, the one on the right is ITAR regulated the one on the left is not even on the CCL list. This is absurd. This is why you have so many licenses. *This is why there has to be a complete reorganization and restructuring of the system by which American manufacturers can be competitive, because if our guys have to go through all the licensing to sell this, foreign buyers will say I can get this somewhere else.*<sup>183</sup> [emphasis added]

Though effective rhetorically, the logic of Congressman Manzullo’s argument is faulty on two counts. First, the claim that “a complete reorganization and restructuring” of the ITAR is required does not logically flow from the evidence presented (i.e. two similar connecting cables and

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<sup>180</sup> THE COX REPORT, *supra* note 22, at 296.

<sup>181</sup> Gold, *supra* note 37, at 173.

<sup>182</sup> A Good Start, DEFENSE NEWS (Apr. 26, 2010), <http://www.defensenews.com/story.php?i=4597779> (last visited on Jun. 28, 2010).

<sup>183</sup> *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 10.

two similar fasteners). Indeed, the apparent absurdity of having two similar items treated differently could be remedied by a USML that either treats both items similarly or simply excludes both items. Updating the USML would not require a complete reorganization and restructuring of the ITAR, but would arguably achieve the same ends. Second, the leap from licensing to the resulting lack of competitiveness of U.S. manufacturers is made without any supporting evidence. This is common in the export control reform debate—claims about the adverse effects of ITAR are made, without evidence being offered to support those claims.<sup>184</sup> Alternatively, when evidence is presented, it often turns out to be anecdotal—as in the case of the DoD’s *Defense Industrial Base Assessment*.<sup>185</sup>

Later in the same congressional hearing the actual complexity of the debate was revealed in an exchange between Congressman Manzullo and Ambassador Stephen Mull, then Acting Assistant Secretary of the DoC’s Bureau of Political-Military Affairs:

Mr. MANZULLO. Another question is when you have something as simple as this fiber optic cable, which is really a wiring harness, which has many applications, how does something like this end up being on the ITAR list in the first place? Anybody know?

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Ambassador MULL. I will try to answer it. Of course, the examples that you showed are very, very compelling [i.e. the two similar connecting cables and two similar fasteners]. And it does suggest that maybe these on the surface appear that these decisions might be made capriciously or without very much thought. But, in fact, the ITAR is very much driven by parts, by things, and so when something goes on the ITAR list, it is because it is useful in a particular part, so that I am not dealing with that particular piece of equipment, but one could imagine a situation where that specific wire fits exactly on an F-14—

Mr. MANZULLO. But do you know what—

Ambassador MULL [continuing]. Which are only used by Iran.

Mr. MANZULLO [continuing]. If you put the longer version on it also, it will still fit with just a little slack.

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<sup>184</sup> See INSTITUTE FOR DEFENSE ANALYSIS, EXPORT CONTROLS AND THE U.S. DEFENSE INDUSTRIAL BASE 30 (Jan. 2007), <http://www.dtic.mil/cgibin/GetTRDoc?AD=ADA465592&Location=U2&doc=GetTRDoc.pdf> (a USG contracted export control study in which an “emphasis was placed on employing quantitative metrics of [impacts on the space industrial base], getting ‘beyond anecdotes’” determined that quantifiable data on business health and trends “did not reveal major impacts of export controls.”) [hereinafter 2007 IDA STUDY].

<sup>185</sup> DEFENSE INDUSTRIAL BASE ASSESSMENT, *supra* note 84.

Ambassador MULL. But if a piece of equipment is designed for an airplane, a fighter plane, that in today's world only Iran is using, we have an obligation according to our interpretation of the law to restrict that.

Mr. MANZULLO. But that is the problem. I mean, this is bread- and-butter stuff. I mean, this is Radio Shack stuff. I mean, this is the stuff that is made in America, and these manufacturers really don't know how to sell this. I can't defend what you just said; I really can't, because this is not controlled at all [holding up a connector cable]. This is—take out 1 inch, and it fits [holding up a connector cable]. Can you explain that?

Ambassador MULL. But the one that is shorter...is designed only for use in sensitive military technology that our enemies could use.

Mr. MANZULLO. No, it is just the length of it. I mean, this is the same thing. You measure it off, and you put it in there. If you want to, you know, you could just snip off an inch here and just move it up. I mean, this is the problem. I mean, this is why there is so much angst. I can't see how you can defend this, Ambassador. For the life of me it is the same thing. What happens if it is on a spool that is 100 feet long; what do you do in that case?

Ambassador MULL. Again, sir, we look at the item. If it is designed specifically for use in sensitive equipment, we believe the law requires us to regulate that.<sup>186</sup>

This exchange highlights several key facets of the export control reform debate. First, it highlights the complexity of controlling dual-use technologies when the distinction between the military version of the technology and the commercial version of the technology is, by all appearances, a distinction without a difference. From a common sense perspective it is difficult to disagree with Congressman Manzullo's point. From a philosophical perspective, the issue is less clear. Is the U.S., as part of its foreign policy, prepared to countenance the arming of its enemies or potential enemies simply by virtue of the fact that a similar piece of technology is available on the commercial market—whether foreign or domestic? For example, would the actions of Hughes and Loral in the 1990s, which potentially improved the reliability of the Chinese ICBMs, have been acceptable if the information they provided to the PRC had, at the time, been available *sans* license from France? There is something deeply unsettling about the notion of U.S. indigenous technology coming back to

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<sup>186</sup> *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 29-30.

harm Americans. This notion should not be far from the minds of policy makers when decisions are made concerning the makeup of the USML.

Second, the exchange highlights how effectively absurdity can obfuscate the important issues at stake. For someone not cognizant of those issues, the demonstrative aids employed by Congressman Manzullo were likely effective at driving home his point. Indeed, much like the \$640 toilet seat that everyone knows represents little more than a fleecing of taxpayers, anyone could look at the two connecting cables and see that there was only a one-inch difference between them. At the same time, much like the valuation of a B-2 bomber, which very few people are able to pinpoint, most people do not have the expertise to determine whether the tolerances of U.S.-built Iranian F-14s are such that both wires would function similarly in the aircraft. It is unlikely Congressman Manzullo does either—but that expertise is not a prerequisite for rhetorical victory.

### 3. *Space Capabilities Are Developing Elsewhere—Why?*

There is no disputing the fact that other nations are making significant advances in the realm of space technologies. Indeed, “there are at least 43 states that possess their own satellites and 12 spacefaring states with the indigenous capacity to launch their own satellites.”<sup>187</sup> The relevant question, for purposes of the export control reform debate, is the degree to which ITAR is responsible for this turn of events. Several arguments have been advanced in support of the notion that the ITAR is partially responsible.

During a hearing before the House Subcommittee on Terrorism, Nonproliferation and Trade, Congressman Gerald Connolly put the following question to the panel of witnesses called to testify on the effect of export controls on U.S. satellite technology: “in 1997, U.S. companies controlled 65.1 percent of the world satellite manufacturing market. By 2007 that was down to 41.4 percent. To what do you attribute the decline?”<sup>188</sup> In response to Congressman Connolly’s query, Pierre Chao, former Senior Associate for the CSIS, posited, “[t]here are a lot of factors and people will just push back and just say you can’t blame export controls,

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<sup>187</sup> Noble, *supra* note 118, at 253.

<sup>188</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 54. Imprecision in the defining of quantitative data and the comparison of differing temporal periods leads to different statistics being bandied about. For example, Futron reports that between 1999-2008, the U.S. manufacturers produced 47% (461) of the world’s satellites (the 1999-2008 time-period actually covers more of the post-STNDAA for FY 1999 than the 1997-2007 time-period quoted by Congressman Connolly and yet the U.S. gained market share, rather than lost it); Russia, a distant second, produced 21% (212). FUTRON CORPORATION, FUTRON’S 2009 SPACE COMPETITIVENESS INDEX: A COMPARATIVE ANALYSIS OF HOW COUNTRIES INVEST IN AND BENEFIT FROM SPACE INDUSTRY 10 (Jun. 2009), [http://www1.futron.com/resource\\_center/store/Space\\_Competitiveness\\_Index/Futron's%202009%20SCI%20-%20Executive%20Summary.pdf](http://www1.futron.com/resource_center/store/Space_Competitiveness_Index/Futron's%202009%20SCI%20-%20Executive%20Summary.pdf).

and that is a true statement... But if we didn't find the smoking gun [in the 2008 CSIS Study<sup>189</sup>], we at least got a whiff of gun powder...to the extent that in specific cases you saw customers saying that I will not buy from America now because of ITAR."<sup>190</sup> The ITAR-free movement in Europe would seem to lend support to this contention.<sup>191</sup> The Prime Minister of India has also indicated that the ITAR's "anachronistic restrictions" has spurred his country's space industry to new heights.<sup>192</sup> The analysis should not rest on these anecdotes, however. Rather, it is necessary to examine what some of the other reasons countries might have for developing indigenous space capabilities, and for that matter, the reasons some countries might have for perpetuating the notion that ITAR is "toxic."<sup>193</sup>

#### a. Market Changes

The change in U.S. policy towards COMSAT exports, epitomized by the *STNDAA for FY 1999*, coincided temporally with several major changes in the global COMSAT market. Prior to the bursting of the telecom bubble in the late-1990s, there was an expectation that advances in space technology would increasingly be fueled by the commercial space sector, thereby allowing the USG to scale-back its investment in this realm.<sup>194</sup> When the bubble burst those expectations were dashed. Somewhat paradoxically, while the reliance on commercial technologies enabled by space has continued to increase, the industry has nonetheless been plagued by overcapacity across all sectors.<sup>195</sup> Overly optimistic predictions of future bandwidth requirements as well as a nine-fold improvement on the capabilities of new satellites over those launched in the mid-1990s (e.g. law of accelerating returns), led to this overcapacity.<sup>196</sup> Other market changes occurring during this time period include: (1) the spin off of COMSAT operators from COMSAT manufacturers around the year 2000 (manufacturers now compete for contracts from those operators, rather than having a "captured customer"); (2) privatization and consolidation of satellite operators, also occurring around the year 2000 (orders have been scaled back or cancelled and contracts are not "spread around" as when they were "captured customers"); (3) an increase in the number of foreign COMSAT customers; (4) an increasing number of states with indigenous

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<sup>189</sup> 2008 CSIS STUDY, *supra* note 42.

<sup>190</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 54.

<sup>191</sup> *See* Noble, *supra* note 111, at 279.

<sup>192</sup> Broad, *supra* note 46.

<sup>193</sup> Robinson, *supra* note 46, at 24.

<sup>194</sup> Bruce Linster, *Space and the economy*, in *SPACE AND DEFENSE POLICY* 51, 52-53 (Damon Coletta & Fances T. Pilch eds., 2009).

<sup>195</sup> *Id.* at 53.

<sup>196</sup> *Id.* at 53, 60.

COMSAT manufacturing capabilities (i.e. more foreign competitors),<sup>197</sup> and (5) a downturn in the global economy resulting in the COMSAT market “hitting rock bottom” in 2002, when only nine contracts were awarded.<sup>198</sup> Prior to 1999, the U.S. won an average of 80% of the 15-25 competitive<sup>199</sup> COMSAT contracts awarded per year; that number dropped to around 60% by 2006.<sup>200</sup> Because this drop coincided temporally with the change in U.S. policy toward COMSAT exports, ITAR has shared a portion of the blame.<sup>201</sup> However, a 2007 USG-commissioned study of the impact of export controls on the U.S. space industry determined that an analysis of the quantitative data on the industry revealed that “a compelling case could not be made that differential application [as compared to foreign competitors] of US export controls account for loss in US market share.”<sup>202</sup> Instead, the study pointed toward rising foreign competency and natural market cyclicality as the likely cause of the loss.<sup>203</sup>

Given the complexity of the market factors at play, as well as the other factors discussed below, an accurate apportionment of blame for the drop in U.S. market share remains elusive. This, in turn, perpetuates the argument that the ITAR is toxic as such an argument is difficult to rebut. Indeed, to do so requires an opponent to engage in a counterfactual debate (i.e. what would the market look like in the absence of the ITAR?).<sup>204</sup> Putting that aside, the U.S. is still the competitive leader in commercial

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<sup>197</sup> Put simply, customers now have more options. Those who want to avoid the issues associated with ITAR, whether real or perceived, or have unstable relations with the U.S., can go elsewhere to meet their COMSAT needs. For example, the PRC built and launched Venezuela’s first satellite in 2008. See U.S. FEDERAL AVIATION ADMINISTRATION, 2008 COMMERCIAL SPACE TRANSPORTATION YEAR IN REVIEW 14, [http://www.faa.gov/about/office\\_org/headquarters\\_offices/ast/media/2008%20Year%20in%20Review.pdf](http://www.faa.gov/about/office_org/headquarters_offices/ast/media/2008%20Year%20in%20Review.pdf).

<sup>198</sup> See Zelnio, *supra* note 16, at 228-229.

<sup>199</sup> Zelnio distinguishes between “contracts awarded to bidders existing within their own countries’ borders by their national governments...and those considered intra-company sales” (i.e. non-competitive) and those that are open to foreign competition on the open market (i.e. competitive). *Id.* at 223-224.

<sup>200</sup> See *id.* at 227.

<sup>201</sup> See generally, *id.*

<sup>202</sup> 2007 IDA STUDY, *supra* note 184, at 3.

<sup>203</sup> *Id.* at 3. The 2007 IDA STUDY also cited the following as potential contributors to the market drop: “firm-specific issues such as R&D investment, manufacturing efficiency, and market strategies, as well as macroeconomic issues such as skilled labor availability and cost, exchange rate policy, tariffs and legal barriers.” *Id.* at 2.

<sup>204</sup> The debate is not entirely counterfactual. For example, a 2009 Futron analysis found that, “European commercial competitiveness remained largely unchanged between 2008 and 2009, providing a statistical counterpoint to perceptions that the European market has gained dramatically from efforts to develop alternatives to satellites and equipment controlled by U.S. export regulations.” FUTRON’S 2009 SPACE COMPETITIVENESS INDEX, *supra* note 188, at 6.

space by a wide margin—this “despite perceived export control burdens” and major market changes.<sup>205</sup>

b. Independence from the U.S.

“Commitment toward independence from the U.S. in space is a common thread across all sectors.”<sup>206</sup> The Galileo project—Europe’s answer to the Global Positioning System (GPS)—exemplifies this commitment.<sup>207</sup> At stake is strategic independence from the U.S., both economically and militarily.<sup>208</sup> Indeed, the fielding of the Galileo constellation will quell long-held European fears that the U.S. might restrict or otherwise disrupt GPS services should the strategic interests of the U.S. compel that result. The desire for independence, whether in Europe or elsewhere, should come as no surprise to the U.S. In fact, the U.S. is currently embroiled in a debate about its own lack of independence from foreign sources of space technologies. For example, the Atlas V rocket—the only U.S. commercial launch vehicle in its class—is powered by a Russian RD-180 engine.<sup>209</sup> Similarly, with the pending retirement of the Space Shuttle, it appears the U.S. will for a time be reliant on Russian space launch to send U.S. astronauts to the International Space Station (ISS).<sup>210</sup> In the event Russia determined that it no longer wished to supply engines for the Atlas V rocket or seats for U.S. astronauts, the capacity of the U.S. to operate in the strategic medium of space would be diminished. That diminished capacity could, in turn, easily be characterized as a national security threat. If U.S. reliance on foreign providers of space technologies and services could be deemed a national security threat, why would the same not be true of other countries? To be sure, the development and maintenance of indigenous space capabilities is not solely a strategic imperative of the U.S.<sup>211</sup>

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<sup>205</sup> FUTRON CORPORATION, FUTRON’S 2008 SPACE COMPETITIVENESS INDEX: A COMPARATIVE ANALYSIS OF HOW COUNTRIES INVEST IN AND BENEFIT FROM SPACE INDUSTRY (Feb. 2008) 3-5 (on file with the author).

<sup>206</sup> Noble, *supra* note 118, at 274.

<sup>207</sup> See Xavier Pasco, *Toward a European military space architecture* in SPACE AND DEFENSE POLICY 294 (Damon Coletta & Fances T. Pilch eds., 2009).

<sup>208</sup> See *id.* at 294.

<sup>209</sup> See Noble, *supra* note 118 at 255; BEYOND “FORTRESS AMERICA”, *supra* note 2, at 25.

<sup>210</sup> See *Feathering the Falcon’s nest* ECONOMIST (Jun. 5, 2010), [http://www.economist.com/blogs/babbage/2010/06/space\\_flight](http://www.economist.com/blogs/babbage/2010/06/space_flight) (last visited on Jun. 28, 2010).

<sup>211</sup> See Noble, *supra* note 118, at 278; ICAF SPACE INDUSTRY STUDY 2007, *supra* note 82, at 1 (“The U.S. and other spacefaring nations clearly understand the security advantages that accrue from the ability to exploit the space domain and, accordingly, have created national policies that emphasize the development and preservation of such abilities...often independent of cost.”).

### c. Pride and Profit

On 25 May 1961, President John F. Kennedy declared, “I believe that this nation should commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to the earth.”<sup>212</sup> This was an exceedingly bold declaration given the fact that the Mercury capsule carrying Alan Sheppard, the first American in space, had successfully returned to Earth less than three weeks prior. President Kennedy continued, “[n]o single space project in this period will be more impressive to mankind...”<sup>213</sup> When Neil Armstrong uttered the immortal words, “[t]hat’s one small step for a man, one giant leap for mankind” on 20 July 1969, President Kennedy’s sentiment was realized. Indeed, putting a man on the moon is without question one of the greatest accomplishments in the history of mankind—and a tremendous source of pride for the U.S. as a nation. No less a sense of national pride is experienced by other nations’ forays into space.<sup>214</sup> This is arguably true of the PRC becoming only the third country, behind the former Soviet Union and the U.S., to place an astronaut into orbit;<sup>215</sup> India sending a unmanned spacecraft to orbit the moon;<sup>216</sup> and the indigenous launch capacity developed by Japan and Israel,<sup>217</sup> to name but a few. In addition to pride, becoming a spacefaring nation signals a nation’s arrival on the world scene—technologically, economically, and militarily—in a way that few other things can. Put simply, entry into the realm of space signals legitimacy. Even 53 years removed from the launch of *Sputnik*, the allure of space is in no danger of becoming passé. It is little wonder then that rogue nations like Iran and North Korea have also attempted to become spacefaring nations—the former recently meeting with some success.<sup>218</sup> In this regard, is there any doubt that these rogue nations, as well as others, might have made greater or

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<sup>212</sup> President John F. Kennedy, Special Message to the Congress on Urgent National Needs, delivered before a joint session of Congress (May 25, 1961).

<sup>213</sup> *Id.*

<sup>214</sup> See FUTRON’S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205, at 1 (“Nations invest in space partly for the pride associated with the technological advances that participation in space requires”).

<sup>215</sup> Jim Yardley, *China Sends a Man Into Orbit, Entering the U.S.-Russian Club*, N.Y. TIMES (Oct. 15, 2003), <http://www.nytimes.com/2003/10/15/world/china-sends-a-man-into-orbit-entering-the-us-russian-club.html> (last visited on Jun. 28, 2010).

<sup>216</sup> Somini Sengupta, *India Launches Unmanned Orbiter to Moon*, N.Y. TIMES (Oct. 21, 2008), <http://www.nytimes.com/2008/10/22/world/asia/22indiamoon.html?8br> (last visited on Jun. 28, 2010).

<sup>217</sup> Noble, *supra* note 118, at 256.

<sup>218</sup> *See id.* at 258. In 2009, “Iran conducted its first successful orbital launch... The payload was a small scientific satellite called Omid, the Farsi word for ‘hope’. The launch vehicle was a Safir three-stage orbital rocket. The non-commercial flight reached orbit and successfully deployed its small payload into LEO.” U.S. FEDERAL AVIATION ADMINISTRATION, 2009 COMMERCIAL SPACE TRANSPORTATION YEAR IN REVIEW 17, [http://www.faa.gov/about/office\\_org/headquarters\\_offices/ast/media/year\\_in\\_review\\_2009.pdf](http://www.faa.gov/about/office_org/headquarters_offices/ast/media/year_in_review_2009.pdf).



earlier gains in space had the U.S. not controlled the export of space technologies so closely for the last 53 years?

The allure of profits can also lead to the development of indigenous space capabilities. This profit motive, in turn, leads one to question the motives of foreign space concerns that disparage the ITAR regime. Are European criticisms about the ITAR pretext for garnering a larger share of the commercial space market through the sale of its ITAR-free products? Is ITAR simply a scapegoat for increased European protectionism? Moreover, are European criticisms about the ITAR pretext for employing inexpensive PRC launch services for those ITAR-free products without giving the appearance of open defiance of the *de facto* U.S. embargo on those services? These scenarios are not beyond the realm of possibilities—and yet some advocates of ITAR reform appear to take European criticisms at face value without examining the vested interests of those critics. There is no doubt, the more of a pariah U.S. export controls become in the eyes of international customers, the more effective the ITAR-free advertising campaign becomes.<sup>219</sup>

As indicated in Mr. Chao's testimony, there are any number of factors contributing to the decline in U.S. market share for satellite sales worldwide. Among these factors are changing markets, foreign purchasers' perceptions about the ITAR, independence from the U.S., the national security concerns of other nations, the national pride associated with becoming a spacefaring nation, and the potential for profit as a result of the development of indigenous space technologies. The common thread with these factors is that all, with the exception of the ITAR, are effectively outside the control of the U.S. Indeed, while the U.S. might be able to exert soft power and influence the decisions or direction of some nations, the ITAR is the only factor that is immediately within the control of the U.S. Therefore, the urge might be to reform it in the hope that doing so turns out to be the proverbial silver bullet. This issue, however, is clearly larger than just U.S. export controls.

### C. Points of Contention in the Reform Debate

#### 1. *Export Control Reform: Deregulation Wrapped in the Flag*

“Virtually all current reform efforts start with the premise that this is a national security issue—versus primarily an economic problem.”<sup>220</sup> In terms of the balancing of commercial and national security interests

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<sup>219</sup> To that point, it is curious that the ITAR's U.S. critics—which include some of those purportedly acting in the best economic interests of the U.S. space industry—are so hyperbolic in their criticisms of the regime. In attempting to achieve reform, these critics may in fact be doing little more than driving potential customers of U.S. space technologies into the arms of its competitors.

<sup>220</sup> 2008 CSIS STUDY, *supra* note 46, at 7.

described in the Introduction, this singular focus on national security gives one the distinct impression that there is no balancing occurring at all—and, indeed, that there is a thumb on the national security side of the scale. But is this accurate or simply an unchallenged orthodoxy? One recent commentator on the export control reform debate opened his discussion on the topic with the following excerpt from *The Prince*:

It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage, than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institutions and merely lukewarm defenders in those who may do well under the new.<sup>221</sup>

The impression given is that entrenched and/or moneyed interests stand to lose under a reformed export control regime. However, the application of this Machiavellian notion to the export control reform debate misses the mark by fundamentally mischaracterizing the interests of those involved in it. This mischaracterization is arguably a testament to how successfully the narrative associated with the debate has been framed in terms of national security. The enactment of the export control reform initiatives described in Chapter 3 will result in deregulation—i.e. the opening of heretofore closed or otherwise obstructed markets to U.S. manufacturers. U.S. manufacturers stand to benefit, not from the preservation of the “old institution,” but from the creation of a new one, which has fewer controls over fewer items and services. The advocacy coalition (which includes industry) pushing for reform for the last two decades has successfully wrapped export control reform in the flag by tying reform to the advancement of national security imperatives—i.e. the economic health of the industrial base. The narrative advanced by the advocacy coalition therefore aligns with the end industry seeks to achieve (i.e. deregulation), without ever actually mentioning deregulation. As Bill Reinsch, president of the National Foreign Trade Council, an industry trade organization with the goal of opening markets,<sup>222</sup> told *The Space Review*, “[y]ou can’t win an export control reform fight talking about jobs and exports...[t]he only way you can win an export control fight is talking about national security.”<sup>223</sup> In introducing the President’s export control reform initiative, a senior DoD official echoed this sentiment, “by casting [export control reform] appropriately as a national security issue, where change...is important to our national

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<sup>221</sup> Noble, *supra* note 118, at 251.

<sup>222</sup> National Foreign Trade Council Mission Statement (adopted February 2001), 2010 Priorities, <http://www.nftc.org/default/general%20information/2010NFTCgoalsandprioritiesWV.pdf> (last visited on Jun. 28, 2010).

<sup>223</sup> Foust, *supra* note 68.

security...rather than this being about increasing exports...I think that the politics are a little bit different.”<sup>224</sup> Despite the national security-centric rhetoric, industry “is strongly committed to the ideal of free market capitalism, and regards government involvement in space as a constraint to the commercial development of space.”<sup>225</sup> So while other industries are facing new regulations under the Obama Administration and others are facing additional scrutiny (e.g. oil, mining, health care, finance) the ITAR-affected industrial base is in the rather enviable position of having their industry deregulated.<sup>226</sup>

This is not to suggest that export control reform is simply pretext for deregulation. Rather, it is only to shed light on the fact that reform will inure to the benefit of industry’s bottom line. That fact is otherwise hidden in the current debate by the manner in which the debate has been framed. Why is it important to expose the fact that ITAR-affected industry stands to benefit from reform? Because, as described below, much of the evidence cited by proponents of reform is garnered from industry itself. Certainly, one need not be a skeptic to be skeptical of industry responses to questions relating to government regulation and oversight.

## 2. *The Space Industrial Base: Burdened, Opportunistic, or Both?*

### a. “Arsenalizing” an Industry?

The U.S. space industrial base is supported in large part by U.S. defense and national security budgets.<sup>227</sup> As a result, the CSIS argues that, “the national security community ‘owns’ the U.S. space industrial base, and must either provide for the health of the industry (‘arsenal strategy’) or encourage it (and enable it) to participate more in the global market place to broaden its economic base.”<sup>228</sup> This contention raises an array of issues. First, it would appear to present a false choice by making this an “either/or” proposition. Clearly, the industry can be, and in fact *is*, supported by both the USG and the commercial market (foreign and domestic) simultaneously. That the ratio of government contract to commercial contract revenue is so high is arguably due to the fact the U.S. spends several times more on military space than all other nations combined.<sup>229</sup> Second, the contention

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<sup>224</sup> Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), DoD Background Briefing with Senior Defense Officials from the Pentagon (Apr. 19, 2010), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4610> (last visited on Jun. 28, 2010).

<sup>225</sup> Bosso & Kay, *supra* note 9, at 55.

<sup>226</sup> Eric Lipton, *With Obama, Regulations Are Back in Fashion*, N.Y. TIMES (May 12, 2010), <http://www.nytimes.com/2010/05/13/us/politics/13rules.html> (last visited on Jun 28, 2010).

<sup>227</sup> 2008 CSIS STUDY, *supra* note 46, at 16.

<sup>228</sup> *Id.* at 17.

<sup>229</sup> JARED L. FORTUNE & JOSHUA A. MERRILL, IDENTIFYING SPACE INDUSTRIAL BASE ISSUES (2007), available at: <http://www/aiaa.org>. The U.S. also spends more on civil space than any

presupposes that export control reform (i.e. opening markets) will allow U.S. companies greater participation in the global marketplace. Considering the myriad factors affecting foreign buyers decisions discussed above, this is no guarantee. Third, the CSIS study does not posit a guess as to what the appropriate ratio of government contract to commercial contract revenue might be. Indeed, this is the first of several areas in which benchmarking might provide some baseline for determining whether U.S. “ownership” of its space industrial base is unique or whether it is in line with that of other countries. For example, is industry’s dependence on national security-related USG contracts for 60% of its revenue (95% if civil government contracts are included), in line with the ratio of government contract to commercial contract revenue in other countries? Considering the U.S. is still the competitive leader in commercial space by a wide margin,<sup>230</sup> it follows that other countries’ forays into space are likely even more heavily subsidized by their respective governments.<sup>231</sup> This begs the question, is industry’s reliance on USG contracts for revenue such a bad thing? There are two elements to this inquiry.

First, there is the issue of national priorities. The 2010 U.S. National Space Policy indicates that use of outer space is a vital national interest.<sup>232</sup> As such, the USG should be prepared to support the space industrial base, irrespective of its ability to compete in the global marketplace. To be sure, U.S. advances in space during the Cold War were not dependant on the opening of global markets to the space industrial base—and yet the U.S. still managed to outpace its rivals. Moreover, despite the continued existence and application of the purportedly anachronistic export controls, the U.S. is still the leader in commercial space competitiveness. So why the continued doomsaying? Here we return to the idea expressed by Senator Heinz in 1991 that the U.S. can “no longer afford the *status quo*” (i.e. the current export control regime). Regarding the health of the defense industrial and technology base, Senator Heinz offered the following as evidence of the need for reform:

Four recent assessments of the U.S. defense industrial and technology base project a grim picture of the ability of the U.S. economy to support a war effort under current conditions. The Air Force Association concluded that the U.S. and its allies were not prepared to sustain a conventional war much beyond thirty days and that the U.S.

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other country. FUTRON’S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205, at 3. This is important as well in the sense that USG civil space expenditures feed than same space industrial base as military and national security space expenditures.

<sup>230</sup> FUTRON’S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205, at 3.

<sup>231</sup> See *e.g.*, *id.* at 5 (Russia and China are ranked third and fifth respectively in the ability to deliver space products and services despite that fact that “the government sector dominates their national space industries.”).

<sup>232</sup> *Supra* note 3, at 3.

industry today could not meet wartime mobilization requirements in less than eighteen months.<sup>233</sup>

As borne out by history, these assessments had all the prescience of Neville Chamberlain's "peace for our time" pronouncement in advance of Hitler's 1939 invasion of Poland.<sup>234</sup> Indeed, on 17 January 1991 (the same year Senator Heinz' book was published), the U.S. and its allies commenced OPERATION DESERT STORM in response to Iraq's invasion of Kuwait. The U.S. has been involved in sustained military and peacekeeping operations in the Middle East and elsewhere ever since (i.e. nearly 20 years). While a number of the policies and strategies employed in those successive military operations have been called into question, there is no disputing the military superiority displayed by the U.S. in the prosecution of those operations. The grim picture painted by the various assessments cited by Senator Heinz have not only been proved false by history, but also reflect the tendency in Western thought to portend the worst. As Thomas B. Macaulay, a British poet, historian and politician of the mid-1800s wrote, "[w]e cannot absolutely prove that those are in error who tell us that society has reached a turning point, that we have seen our best days. But so said all who came before us, and with just as much apparent reason."<sup>235</sup> So, when the NRC in *Beyond "Fortress America"* now claims that "[o]ver time, the harm to the U.S. military capability caused by export controls has expanded and has now reached substantial proportions,"<sup>236</sup> that claim must be viewed in light of the similar doomsaying assessments that came before it. While the claim cannot be absolutely disproven, neither should it be viewed as the final word on the matter.

Second, the 2008 *CSIS Study* ties innovation to the revenue increases that will purportedly result in the opening of foreign commercial markets.<sup>237</sup> In this regard, the "arsenalization" argument is internally inconsistent with other claims made within the Study. For example, the Study highlights the PRC's strides in space over the last decade, to include: the fielding of an indigenous navigation system (Beidou); the launch of a three meter resolution imaging satellite; manned spaceflight; the successful test of an anti-satellite (ASAT) weapons system; the sale of a Chinese-built satellite to a foreign buyer; and the launch of its first lunar probe.<sup>238</sup> These

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<sup>233</sup> HEINZ, *supra* note 1, at 104.

<sup>234</sup> See Historic Figures, Neville Chamberlain (1869-1940), [http://www.bbc.co.uk/history/historic\\_figures/chamberlain\\_arthur\\_neville.shtml](http://www.bbc.co.uk/history/historic_figures/chamberlain_arthur_neville.shtml) (last visited on 28 Jun. 2010).

<sup>235</sup> John Tierney, *Doomsayers Beware, A Bright Future Beckons*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/science/18tier.html> (last visited on Jun. 28, 2010).

<sup>236</sup> BEYOND "FORTRESS AMERICA", *supra* note 2 at 23.

<sup>237</sup> *Supra* note 46.

<sup>238</sup> *Id.* at 22. Since the study was issued, the PRC has also conducted a successful spacewalk. David Barboza, *Chinese Astronaut Takes Nation's First Spacewalk*, N.Y. TIMES (Sept. 27,

strides were made despite the fact that the PRC is a relatively minor player in commercial space. For example, between 2005-2009, two Chinese-built commercial satellites were launched.<sup>239</sup> During that same time period, seventy-three U.S.-built commercial satellites were launched.<sup>240</sup> All of this to say that China has managed to innovate without being a major player in commercial space (i.e. China's space program is effectively "arsenalized"<sup>241</sup>). Why then is the future so bleak for U.S. innovation despite the fact that, in the commercial satellite sector, it outpaced the PRC by 3,650 percent over the past five years? Put differently, how much better does the U.S. have to be in the commercial realm in order to outpace its rivals—to say nothing of its prodigious defense and national security spending? None of the assessments reviewed for this article posit an answer to this question.

This analysis highlights that where the evidence supporting a claim is difficult to attain and equally difficult to assess, the analysis and conclusions resulting therefrom should be viewed with some skepticism. Indeed, this is the epitome of the aforementioned metaphorical three-dimensional geopolitical chess match in which your moves, as well as your opponents, must be divined through a crystal ball. The "best guess"<sup>242</sup> aspect of such assessments does not obviate the need for such assessments to be made, it simply means that policy makers should view the assessments in light of the quality of the evidence underlying the assessments. To that end, we now turn to an analysis of the evidence in the current export control reform debate.

## b. Where's the Beef? Examining the "Evidence" in the Reform Debate

### (1) *The DoD's Defense Industrial Base Assessment*

I have been in this business for 23 years and can speak from first-hand experience—ITAR is not at the root of any levels of competition in our industry, especially for launchers and spacecraft...I would state that in only a small percentage of cases ITAR has had any significant impact on the numbers

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2008), <http://www.nytimes.com/2008/09/28/world/asia/28china.html?scp=1&sq=chinese%20spacewalk&st=cse> (last visited on Jun. 28, 2010).

<sup>239</sup> U.S. FEDERAL AVIATION ADMINISTRATION, COMMERCIAL SPACE TRANSPORTATION YEARS IN REVIEW (2005-2009), available at: [http://www.faa.gov/about/office\\_org/headquarters\\_offices/ast/reports\\_studies/year\\_review/](http://www.faa.gov/about/office_org/headquarters_offices/ast/reports_studies/year_review/).

<sup>240</sup> *Id.*

<sup>241</sup> FUTRON'S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205, at 5 (In Russia and China "the government sector dominates their national space industries.")

<sup>242</sup> Put differently, "[t]he best economic studies satisfy themselves with 'sizing up' the problem as opposed to making definitive quantitative statements." 2007 IDA STUDY, *supra* note 184, at 3.

of spacecraft units or revenue figures. ITAR just does not have a significant impact...I don't see that compliance is bad at all. At Sea Launch we have learned to work with ITAR as we operate in so many cultures and foreign nations. We all work together in a seamless manner.<sup>243</sup>

– Rob Peckam, Former President and General Manager of Sea Launch

This account—a rare non-condemnation of the ITAR—stands in contrast to the claims of industry with regard to the adverse effects of the ITAR on the international sales of space technologies. Or does it? Indeed, in the DoD's *Defense Industrial Base Assessment* export controls were cited by those surveyed as the number one barrier to foreign markets.<sup>244</sup> These survey results were, in turn, cited in the *2008 CSIS Study*<sup>245</sup> and then offered to the Congress as evidence of the need for reform.<sup>246</sup> However, as pointed out above, the DoD's *Defense Industrial Base Assessment* offers intuitive, non-statistical evidence. While it is indeed intuitive that the companies surveyed would not be keen on government regulation and oversight, without statistically sound evidence, the findings are just that: intuitive. This is true as well of the other findings in the DoD's *Defense Industrial Base Assessment*—including the purported \$50 million in ITAR compliance costs and \$600 million lost revenue figures, as well as the overall financial health of 2nd and 3rd tier companies.<sup>247</sup> Why is this important? In all of discourse reviewed for this article—to include the congressional record—the DoD's *Defense Industrial Base Assessment* is the only current study cited which ostensibly seeks to gauge the health of the U.S. space industrial base. As the health of the U.S. space industrial base is cited by two of the leading studies on export control reform (i.e. the *2008 CSIS Study* and the NRC's *Beyond "Fortress America"*) as evidence of the need to move the current regime toward one that is more profitable for industry, the veracity of the data underlying the DoD's *Defense Industrial Base Assessment* is critically important. This begs the question: why is intuitive, non-statistic evidence deemed sufficient for purposes of this debate? If between 1997 and 2007 U.S. market share in the world satellite manufacturing market dropped from 65.1 percent to 41.4 percent, the "why" question associated with that drop appears important enough to prompt something more than a

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<sup>243</sup> Richard Kusiolek, *ITAR: Balancing the Global Playing Field?* 23 *VIA SATELLITE* 7, 9 (Aug. 1, 2008).

<sup>244</sup> DEFENSE INDUSTRIAL BASE ASSESSMENT, *supra* note 84, at 14.

<sup>245</sup> 2008 CSIS STUDY, *supra* note 46, at 53.

<sup>246</sup> See *Export Controls on Satellite Technology*, *supra* note 45, at 20 (testimony of Pierre Chao).

<sup>247</sup> DEFENSE INDUSTRIAL BASE ASSESSMENT, *supra* note 84, at 34, 48; 2008 CSIS STUDY, *supra* note 46, at 54.

non-statistical survey of industry.<sup>248</sup> The answer may lie in the aforementioned caveat offered in the National Academy's 1987 book, *Balancing the National Interest: U.S. National Security Export Controls and Global Economic Competition*, namely: "...we determined that reliable quantitative data regarding the effectiveness of controls—and the impact of controls on economic development and trade—continue to be very difficult to obtain."<sup>249</sup> There are no indications this caveat is less true today than it was in 1987. The primary difference appears to be that today no such caveats are being offered in connection with the data presented.

## (2) *Unanswered Questions, Untapped Resources*

What is particularly curious about the current reform debate is that the assessments advocating for reform appear to have garnered little or no empirical data from the DDTC (specifically the Space and Missile Technologies Division of the DDTC), the organization in charge of licensing decisions for virtually every U.S. transaction involving a space technology and a foreign entity. Presumably, information garnered from the Space and Missile Technologies Division could inform the debate in a number of areas, as the following eleven questions demonstrate:

- (1) What is the average processing time for license applications processed by the Space and Missile Technologies Division?
- (2) What percentage of applications processed by the Space and Missile Technologies division are referred out to other agencies (e.g. DoD, NSA) before an authorization decision is made?
- (3) What is the average processing time for license applications that are referred out to other agencies for review?

This information could inform the debate on the procedural efficiency of the DDTC with regard to space technologies. One major criticism of the ITAR is that U.S. competitors, "are not subject to the cumbersome multi-agency review process and conditions of approval the U.S. exporters are," theirs is "kind of a one-stop shop."<sup>250</sup> One satellite industry spokesperson claims that as a result,

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<sup>248</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 54.

<sup>249</sup> *Supra* note 66, at viii.

<sup>250</sup> *The Impact of U.S. Export Controls on National Security, Science and Technology*, *supra* note 3, at 44.



U.S. export policy has joined price, quality and technical capabilities as a factor when customers consider buying U.S.-made satellites. Whether for real or perceived reasons, many prospective international satellite customers maintain the belief that U.S. export controls are unpredictable, excessively stringent and time consuming.<sup>251</sup>

The marketplace for space technologies is highly competitive. To be sure, “[t]he world market for satellites and satellite-related components is a tight and highly contested marketplace. In each of the past two years, just 21 satellites were ordered, with prices ranging from \$200-500 million, depending on their technical complexity.”<sup>252</sup> In a competitive international marketplace, these regulatory hurdles can drive buyers to foreign suppliers whose export control regimes are *perceived* to be less onerous—particularly when there is parity or near parity in price and quality of the technologies.

Currently, the DDTC makes available on its website the average processing times for all applications it receives, but does not provide breakouts for particular DDTC divisions or for applications that are referred out to other agencies for review.<sup>253</sup> This information could be used as a benchmark for comparison to the export control regimes of U.S. competitors. Currently no benchmarking in this area has been accomplished. Instead, anecdotal evidence, like the “one stop shop” example offered above, is employed against the ITAR regime. What if the “one stop shop” of the U.S. competitor actually takes longer to process export license applications than the U.S.? Simply by virtue of being a “one stop shop” does not mean that it is necessarily more efficient. In any event, a comprehensive quantitative comparative study of the export control regimes of U.S. competitors could potentially accomplish two things: (1) if the export control regime of competitors are in fact more efficient than the export control regime of the U.S., the processing times of those countries could be used as a aspirational benchmark for the DDTC—i.e. the DDTC could set a goal to match or beat the processing times of competitor nations, while still ensuring the national security standards of the *AECA* are met; and (2) if the export control regimes of competitors are not more efficient than the export control regime of the U.S., that fact could be advertised as a rebuttal to the notion that the U.S. export control regime is fraught with delay. As yet, no such study has been conducted.

(4) How many license applications per year does the Space and Missile Technologies Division of the DDTC process?

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<sup>251</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 38.

<sup>252</sup> *Id.*

<sup>253</sup> Department of State Directorate of Defense Trade Controls, License Processing Times, <http://www.pmdtc.state.gov/metrics/index.html> (last visited on Jun. 28, 2010).

(5) Are these application numbers increasing, decreasing, or flat?

Again, the DDTC makes available on its website the total number of license applications processed per year, but does not provide breakouts for particular DDTC divisions. All else being equal, one would assume that if the ITAR is truly affecting the ability of U.S. companies to compete in the global marketplace—“imposing excessive burdens for businesses and therefore imped[ing] the flow of legitimate trade and technology transfers”<sup>254</sup>—license applications would be decreasing. While the overall number of licenses applications processed by the DDTC increased from 70,000 in 2006 to 84,000 in 2008, that fact cannot necessarily be imputed to the Space and Missile Technologies Division.<sup>255</sup>

(6) Of the license applications processed by the Space and Missile Technologies Division annually, what percentage are denied on substantive grounds?

(7) What percentage of license applications processed by the Space and Missile Technologies Division annually are for the export of space technologies to NATO and major non-NATO allies?

The importance of the answer to these questions for purposes of the export control reform debate cannot be understated. In 2006 for example, the DDTC license denial rate was around one percent.<sup>256</sup> During that same time period, it was reported that the denial rate for exports to the U.K. was just .01%.<sup>257</sup> If denial rates are this low for licenses relating to space technologies, then the debate is not about the USG denying U.S. manufacturers the ability to export or temporarily import those technologies, but rather the regulatory processes and procedures under which those technologies are exported.<sup>258</sup> In this respect, the efficiency of those processes and procedures—particularly as compared to U.S. competitors—is

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<sup>254</sup> Yuan, *supra* note 8, at 145.

<sup>255</sup> *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 16.

<sup>256</sup> See DEFENSE TRADE CONTROLS OVERVIEW, *supra* note 14, at 5.

<sup>257</sup> *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 17 (“In the past two years the [DDTC] has processed roughly 14,000 license applications for the United Kingdom, with only 18 licenses denied, none of which were exports for the U.K. government.”)

<sup>258</sup> It is also possible that some companies are simply not applying for export applications either because: (1) the companies believe the application will be denied; (2) the costs associated with the registration and license processing are too high; or (3) the real or perceived problems with the ITAR licensing process dissuade the companies from applying, irrespective of the high probability of the application being approved. This fact must be kept in mind when extrapolations are made based on DDTC denial rates.

of paramount importance. However, without any benchmarking how can one say how much improvement in this area is needed, if any?

(8) What percentage of license applications processed by the Space and Missile Technologies Division annually are submitted by non-prime contractors? (i.e. tier-2 subcontractors and tier-3 commodity suppliers)

(9) Have the percentages of license applications for tier-2 subcontractors and tier-3 commodity suppliers increased, decreased or remained flat over the years?

Similar to the questions relating to the overall number of license applications processed by the Space and Missile Technologies Division, these questions go to the health of tier-2 and tier-3 companies. Currently, the health of these companies is being gleaned from the DoD's *Defense Industrial Base Assessment* and repeated in the *2008 CSIS Study*.<sup>259</sup> If the tier-2 and tier-3 companies are in fact being adversely affected by the ITAR, as claimed by the CSIS, then one would presume license applications from these companies would be decreasing.

(10) Of the license applications the Space and Missile Technologies Division processes, what percentage is for hardware and what percentage is for defense services?

(11) What are the respective dollar values of the hardware exported and services provided?

These are examples of questions that could either confirm or rebut the DoD's *Defense Industrial Base Assessment*. Indeed, based on the industry survey, the DoD determined that for the years 2003-2006 defense services represented 76% of foreign sales and that hardware (spacecraft and components) accounted for 13% of foreign sales.<sup>260</sup> In this instance and others, there is no need to rely on an industry survey to garner this information, as it should be readily available from the DDTC. That no one has tapped the DDTC wellspring is surprising, to say the least.<sup>261</sup>

The desire for empirical evidence should not be carried to the extreme or preclude smaller-scale reform initiatives. For example, if the DDTC's processes and procedures were such that industry's ability to operate in the global marketplace was obviously and needlessly impaired, then the need for empirical evidence on the health of the space industrial

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<sup>259</sup> 2008 CSIS STUDY, *supra* note 46.

<sup>260</sup> DEFENSE INDUSTRIAL BASE ASSESSMENT, *supra* note 84, at 24.

<sup>261</sup> The author posed several of these questions to the DDTC, but as of this writing, has not received a response.

base would be less critical. Inefficiencies in the DDTC's processes and procedures likely came close to crossing this threshold just four years ago.<sup>262</sup> To be sure, Deputy Assistant Secretary Kovac indicated to the House Subcommittee on Terrorism, Nonproliferation and Trade in December 2009 that,

Several years ago, and not without justification, the [DDTC] had a less than stellar reputation for its processing of license applications. In Calendar Year 2006, the [DDTC] processed 70,000 license applications with an average processing time of 43 calendar days. This does not tell the whole story, however. At one point in September 2006, the [DDTC] had over ten thousand license applications open and awaiting final action. Also during that year, over fifteen thousand applications took over 60 days to be resolved.<sup>263</sup>

Since 2006, the DDTC has significantly improved its metrics.<sup>264</sup> Indeed, the DDTC processed 84,000 license applications in 2008, with an average processing time of 16 calendar days.<sup>265</sup> However, this initial two-week licensure process does not tell the entire story. Depending on the value and sensitivity of the item, technical data or defense service to be exported, authorization to export may require a multi-agency review of the application, including, *inter alia*, review by the DoD and the National Security Agency (NSA); congressional certification;<sup>266</sup> an approved technical assistance agreement for the provision of defense services or technical data;<sup>267</sup> an approved technology transfer control plan and encryption technology control plan for the transfer of space technologies to countries other than NATO allies or major non-NATO allies.<sup>268</sup> Licensing in these more complex cases takes longer than 16 calendar days. In 2008, for example, the DDTC processed 1,100 applications that took more than 60 days to resolve.<sup>269</sup> Even so, these 1,100 applications accounted for just over

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<sup>262</sup> See EXPORT CONTROLS, VULNERABILITIES AND INEFFICIENCIES UNDERMINE SYSTEM'S ABILITY TO PROTECT U.S. INTERESTS, *supra* note 1, at 7.

<sup>263</sup> *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 16.

<sup>264</sup> On 22 January 2008, National Security Policy Directive (NSPD) 56, Defense Trade Reform, was implemented to streamline the DDTC's performance. *Id.* (NSPD-56 is not publically available). It imposed a 60-day limit on the processing of export license applications, unless national security concerns required otherwise. *Id.* Improved metrics occurred as a result of more efficient processes, as well as an improved electronic licensing system (DTrade). *Id.* H.R. 2140, discussed below, would codify the NSPD-56 licensing metrics.

<sup>265</sup> *Id.*

<sup>266</sup> ITAR, *supra* note 29, at § 123.15.

<sup>267</sup> *Id.* at § 120.22.

<sup>268</sup> *Id.* at §124.15(a)(1).

<sup>269</sup> *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 16.

1 percent of the total number of applications processed in 2008. It follows that 99 percent of license applications are processed within 60 days.

This begs the question: are the administrative hurdles associated with obtaining a DDTC license to export really that onerous under the ITAR? In other words, how much process is too much process? This would appear to be a question with no one answer, but again some benchmarking with U.S. competitors would at least provide a reference point to begin the discussion. For the sake of argument, if one accepts that the administrative hurdles are sufficiently onerous as to necessitate reform, would the reforms suggested in the current debate make these hurdles discernibly less onerous? It is here that one of the great ironies of the debate is exposed—where rhetoric meets reality. For example, if COMSATs and related equipment are removed from the ITAR’s USML and returned to the EAR’s CCL, the BIS would be responsible for processing export licenses. In Fiscal Year 2008, the BIS took an average of 27 days to process export license applications—11 days *longer* than the DDTC in calendar year 2008.<sup>270</sup> There is no indication of how long the BIS took to process complex applications, which would undoubtedly include those relating to satellites.<sup>271</sup> For this reason, John Ordway, a U.S. attorney specializing in export licensing, has said that a move from the ITAR to the EAR would simply not make much of a difference for companies seeking licenses.<sup>272</sup> The biggest difference the move would make, in Mr. Ordway’s opinion, “might be in the culture in the Commerce licensing office which...would be more willing to be advocates for the companies than the current system.”<sup>273</sup> The obvious risk here is that advocating for companies and protecting national security are not necessarily well matched, as evidence by Hughes’ interactions with the DoC in the 1990s. Even before the Hughes’ debacle, Senator Heinz described these as “mutually incompatible missions within the principle agencies responsible for carrying out export control policies rendering them unable to balance—much less manage—the natural tension between national and economic security interests.”<sup>274</sup> He further indicated that, “[t]he Department of Commerce is commercially unable to balance trade promotion and trade controls.”<sup>275</sup> Putting that argument aside, if there is near parity in processing metrics between the DDTC and the BIS, then it cannot be said that moving COMSATs from the USML to the CCL would

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<sup>270</sup> DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2008 8, [http://www.bis.doc.gov/news/2009/bis\\_annual\\_report\\_2008.pdf](http://www.bis.doc.gov/news/2009/bis_annual_report_2008.pdf).

<sup>271</sup> In FY 2009, the highest value items processed by the BIS—aero gas turbine engines, valued at approximately \$281 million—enjoyed an average license application processing time of 43 days. *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 11. However, value and complexity are not necessarily synonymous.

<sup>272</sup> Foust, *supra* note 68.

<sup>273</sup> *Id.*

<sup>274</sup> HEINZ, *supra* note 1, at 39.

<sup>275</sup> *Id.*

make the regulatory hurdles associated with obtaining a license discernibly less onerous.

### 3. *Overstatements in the Export Control Reform Debate*

#### a. One Size Fits All

An additional complaint about the ITAR centers on the fact that allies and non-allies are similarly treated, thereby creating a world of “many sticks and few carrots.”<sup>276</sup> The implication is that the ITAR is a “one size fits all” regulatory regime that fails to treat allies as allies should be treated.<sup>277</sup> In other words, the U.S. should offer its allies more carrots. As indicated above, dissimilarities in the export control regimes of the U.S. and its allies can lead to the reexport or diversion of ITAR-controlled technologies. In this regard, and with the exception of Canada, allies and non-allies *are* treated similarly in that DDTC licenses prohibiting the reexport or diversion must be obtained prior to the export or temporary import of ITAR-controlled technologies.<sup>278</sup> This is necessary to achieve the nonproliferation policy aims of the *AECA* and the *STNDAA for FY 1999*.<sup>279</sup> Beyond this reality, there is an additional aspect of the “one size fits all” argument that bears further examination. Even a cursory reading of the ITAR reveals the extent to which allies of the U.S. are advantaged above non-allies in the ITAR licensing process, both in terms of licensing metrics and otherwise.<sup>280</sup> Indeed, among the advantages is a “blanket exception” the

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<sup>276</sup> *Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 22 (comment relates to the notion that allies and adversaries are similarly treated under the current U.S. export control regime and, as a result of that, allies are not incentivized to demonstrate what the U.S. considers to be good export control behavior; the carrots in this metaphor are validate end-user programs—whereby allies are rewarded for good export control behavior through the imposition of fewer controls).

<sup>277</sup> Indeed, at a House hearing on the impact of export controls, Representative Dana Rohrabacher indicated, “I think we had better start discriminating about which countries we treat as our friends because we treat our friends that same way we treat our enemies.” *The Impact of U.S. Export Controls on National Security, Science and Technology Leadership*, *supra* note 3, at 58.

<sup>278</sup> *See e.g.*, ITAR, *supra* note 29, at § 123.10, § 124.10.

<sup>279</sup> For example, U.S. policy with regard to the use of PRC launch services could easily be subverted if COMSATs were exported to allies without a license prohibiting or limiting reexport. Indeed, once a license-free COMSAT is exported, the U.S. would have little recourse against the allied country if it elected to employ PRC launch services.

<sup>280</sup> *See e.g.*, ITAR, *supra* note 29, at § 123.15 (expedited congressional certification for U.S. allies). The ITAR includes a number of provisions, which distinguish NATO and major non-NATO allies, as well as EU and ESA member countries from the rest of the world. *See e.g.*, *id.* at § 120.31, § 120.32. These countries are, without exception, singled out within the ITAR for preferred treatment. In other words, the regulatory hurdles associated with the specific ITAR provisions are lower for these favored countries. Conversely, the ITAR also includes a blacklist—whereby certain countries are presumed to be ineligible to receive U.S. defense articles or defense services. *Id.* at § 126.1. These countries include, *inter alia*: Belarus, Cuba, Eritrea, Iran, North Korea, Syria, Venezuela, Burma, China, Liberia, and

ITAR affords for COMSAT exports to NATO and major non-NATO allies.<sup>281</sup> As should be clear by this point, COMSATs are a major driver of the export control reform debate. Even so, the discourse reviewed for this article—to include the congressional record—does not reveal the extent to which U.S. COMSAT manufacturers are taking advantage of this “blanket exception” or the extent to which it affects the licensing process overall. In fact, this exception is never mentioned. Taking just this one example, how can it be said that the export control regime is a world of “many sticks and few carrots” if it has not been determined the extent to which the existing carrots are being utilized? Arguably, this type of overstatement is a rhetorically effective means of promoting a reform agenda, but that does not necessarily make it true.

b. American Exceptionalism?

Representative Brad Sherman, the aforementioned Chairman of the House Subcommittee of Terrorism, Nonproliferation and Trade recently opened a hearing on the topic of export controls for satellite technology by saying, “we are the only country that controls satellite exports as if they were armaments.”<sup>282</sup> This is a rhetorically powerful claim. It connotes that the U.S. approach to satellite exports is *sui generis*—and presumably out-of-touch with the way the rest of the world is operating. Ellen Tauscher, who is now Undersecretary of State for Arms Control and International Security, similarly indicated, “[u]nlike other nations, the US controls commercial satellites as defense articles.”<sup>283</sup> As mentioned above, the DDTC is currently in Undersecretary Tauscher’s charge. Despite their bona fides in the realm of export controls, both Representative Sherman and Undersecretary Tauscher have advanced a notion that is demonstrably false—that is, the notion that the U.S. is the only nation that controls satellite (qualified as “commercial satellites” in Undersecretary Tauscher’s

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Sudan. *Id.* As such, a license application submitted to the DDTC for a proposed export or temporary import of a USML-controlled defense article or service would almost certainly be denied.

<sup>281</sup> DDTC-registered U.S. persons engaged in the business of exporting or temporarily importing COMSATs, as well as associated equipments and technical data, are allowed to submit multiple DDTC applications without meeting many of the ITAR’s documentary requirements, under certain circumstances. *Id.* at § 123.27. Among these is the requirement that the transaction involve only NATO and major non-NATO ally countries and that the foreign government or foreign company involved is approved by the USG for purposes of this exception. *Id.* This exception—which appears to provide a “blanket license” for certain transactions among allied nations—arguably reflects the national security interest model reflected in Figure 1, *supra*. Indeed, as the national security interests implicated are relatively low, particularly given the closely prescribed circumstances under which the exception is available, so too are the regulatory hurdles associated with the export.

<sup>282</sup> *Export Controls on Satellite Technology*, *supra* note 45, at 1.

<sup>283</sup> *Supra* note 35.

case) exports as munitions.<sup>284</sup> First, it bears mentioning that since the DDTC appears to deny only around one percent of the license applications it receives, regulating commercial satellites and related technologies as munitions as opposed to commodities is, in reality, a distinction without a difference. While the process for obtaining the license may be different, the result is the same—i.e. approval.<sup>285</sup> Putting that fact aside, the French, for example, control commercial remote sensing satellites as munitions.<sup>286</sup> Remote sensing satellites constituted 8 percent of the total worldwide commercial payloads launched between 2005-2009.<sup>287</sup> While COMSATs have been the proverbial cash cow in the commercial space sector since its inception, “[t]here is a significant increase of commercial interest in Earth Observation...”<sup>288</sup> To the extent that U.S. companies are disadvantaged by the “munitions yoke” being placed around remote sensing satellites, so too are the French (Thales Alenia is based in France). Notably, U.S. manufacturers built 4 of the 12 commercial remote sensing satellites launched between 2005-2009; French manufacturers built none.<sup>289</sup> The European Community Regulation governing the export of dual-use goods allows the export of space-qualified remote sensing technologies to certain thresholds, above which the technologies are considered munitions.<sup>290</sup> Again, to the extent that U.S. companies are disadvantaged by the “munitions yoke,” so too are European companies for remote sensing technologies exceeding certain thresholds (EADS Astrium is based in the Netherlands).

The effect of overstatements such as these—whether relating to the treatment of allies under the ITAR regime or the notion that the ITAR is singularly unique in its treatment of commercial satellite technologies—is that the U.S. export control regime appears more dysfunctional than it

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<sup>284</sup> Where Representative Sherman and Undersecretary Tauscher are correct—at least with regard to Europe—is that the U.S. controls COMSATs as munitions, whereas the Europeans do not. *See generally*, Aubin & Idiart, *supra* note 148. COMSATs constituted 88 percent of the total commercial payloads launched between 2005-2009. COMMERCIAL SPACE TRANSPORTATION YEARS IN REVIEW 2005–2009, *supra* note 241. Of the 122 COMSATs launched during that period, 65 were manufactured by U.S. companies (47 percent) and 41 were manufactured by European companies (29 percent). *Id.* The remaining country’s COMSAT percentages were in the single digits—to include the Russian Federation, Canada, Israel, India, Japan, and the PRC. *Id.*

<sup>285</sup> The exception being the handful of countries subject to an absolute arms embargo under the ITAR—and China, which is subject to a *de facto* embargo as a result of the STNDAA for FY 1999.

<sup>286</sup> *See* Arnaud Idiart & Virgile Delaboudiniere, *France* in EXPORT CONTROL LAW AND REGULATIONS HANDBOOK, A PRACTICAL GUIDE TO MILITARY AND DUAL-USE GOODS TRADE RESTRICTIONS AND COMPLIANCE 127, 152 (Yann Aubin & Arnaud Idiart, eds., 2007).

<sup>287</sup> COMMERCIAL SPACE TRANSPORTATION YEARS IN REVIEW 2005–2009, *supra* note 241.

<sup>288</sup> FUTRON’S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205 at 5.

<sup>289</sup> COMMERCIAL SPACE TRANSPORTATION YEARS IN REVIEW 2005–2009, *supra* note 241.

<sup>290</sup> Council Regulation (EC) No. 428/2009, Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (May 5, 2009), available at: [http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc\\_143390.pdf](http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143390.pdf).



actually is. As a result, these statements arguably do a disservice to the reform debate by further obfuscating an already complex set of issues.

III. “WHEREOF WHAT'S PAST IS PROLOGUE,  
WHAT TO COME, IN YOURS AND MY DISCHARGE”<sup>291</sup>:  
THE FUTURE OF THE U.S. COMMERCIAL SATELLITE EXPORT CONTROL  
REGIME

Having examined the export control reform debate, we now turn to an examination of current reform efforts—both regulatory and legislative. It should be noted that this is a fertile and evolving field with concurrent reform efforts afoot in both the Executive branch and the Congress. What legislation the Congress will pass, if any, is unknown. Similarly, while the Obama Administration will undoubtedly promulgate regulatory changes to the ITAR, the fundamental reform it seeks may not be fully realized if the Congress does not make the necessary statutory changes to the current export control regime.

A. Pending Reform Legislation Before The Senate

H.R. 2410, *Foreign Relations Authorization Act, Fiscal Years 2010 and 2011* appears to have a very good chance at becoming law.<sup>292</sup> Moreover, if *H.R. 2410* passed in its current form, it would arguably constitute the most significant reform of the U.S. strategic export control regime since the *STNDAA for FY 1999*. It passed the House by a vote of 235 ayes, to 187 nays on 10 June 2009. With its passage, the House indicated that, “[i]n a time of international terrorist threats and dynamic global economic and security environment, United States policy with regard to export controls is in urgent need of a comprehensive review in order to ensure such controls are protecting the national security and foreign policy interests of the United States.”<sup>293</sup> The bill is currently with the Senate Committee on Foreign Relations; the Senate is expected to pass a version of the bill in the summer of 2010; a reconciled bill is likely to be completed by September 2010.<sup>294</sup> This section will detail the major export control reforms contained in Title VIII of *H.R. 2410, Export Control Reform and Security Assistance*, namely: (1) improving license processing metrics; (2) ensuring adequate staffing for license offices; (3) periodic review of the USML; (4) transparency in the DDTC licensing process; and (5) granting the President the authority to remove commercial satellites from the USML.

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<sup>291</sup> WILLIAM SHAKESPEARE, *TEMPEST*, act 2, sc. 1.

<sup>292</sup> H.R. 2410, *supra* note 44.

<sup>293</sup> *Id.* at § 802(1).

<sup>294</sup> See Foust, *supra* note 68.

## 1. *Improving License Processing Metrics*

*H.R. 2410* codifies NSPD 56, which set the processing metric for export licenses at 60 days.<sup>295</sup> The legislation requires that 93 percent of applications annually are processed within that metric; a 60-day metric also applies to commodity jurisdiction applications.<sup>296</sup> The legislation requires the DoS to brief the appropriate congressional committees when the established metrics are not being met.<sup>297</sup> The legislation also establishes a processing goal of 7 days when the item to be exported is to go to U.S. allies in direct support of combat operations; a 30-day processing goal is established for NATO allies and major non-NATO allies, irrespective of involvement in coalition combat operations.<sup>298</sup> Interestingly, *H.R. 2410* also requires the DDTC to submit to the Congress, on 31 December 2011 and 31 December 2012, several of the quantitative metrics discussed in the last Chapter, to include, *inter alia*: (1) the average license processing time and the number of applications for NATO and major non-NATO allies, Australia, New Zealand, Japan, South Korea, Israel, as well as “all other countries”; and (2) the average processing time and number of applications by USML category.<sup>299</sup> The latter would necessarily include a breakout for USML category XV space technologies. In this regard, it would appear the Congress is also interested in getting beyond the anecdotes currently driving the export control reform debate and is instead interested in hard quantitative data.

## 2. *Ensuring Adequate Staffing for the DDTC*

It is said that the DDTC is a chronically understaffed organization.<sup>300</sup> A review of the DDTC website reveals there are currently 44 licensing officers on staff and 6 licensing division chiefs.<sup>301</sup> Between March 2009 and March 2010, the DDTC processed approximately 82,000 export license applications.<sup>302</sup> If the 6 division chiefs and 44 licensing officers reviewed an equal share of license applications, each reviewed approximately 1,640 applications in the last year; if just the 44 licensing officers reviewed an equal share of license applications, each reviewed approximately 1,860 applications in the last year. To put those numbers into perspective, each licensing officer at the DDTC’s DoC counterpart, the BIS,

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<sup>295</sup> *H.R. 2410*, *supra* note 44, at § 804(a)(1).

<sup>296</sup> *Id.* at § 804(a)(2)-(3).

<sup>297</sup> *Id.* at § 804(b)(2)(B).

<sup>298</sup> *Id.* at § 804(c)(1)(A)-(B).

<sup>299</sup> *Id.* at § 804(d)(1)(A)-(B).

<sup>300</sup> See e.g., *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5.

<sup>301</sup> Department of State Directorate of Defense Trade Controls, Key Personnel, [http://www.pmdtc.state.gov/about/key\\_personnel.html](http://www.pmdtc.state.gov/about/key_personnel.html) (last visited on Apr. 9, 2010).

<sup>302</sup> *Id.*

reviewed approximately 400 applications in 2007.<sup>303</sup> *H.R. 2410* establishes a requirement that the DDTC staff at least 1 licensing officer for every 1,250 license applications it expects to receive per fiscal year.<sup>304</sup> For the March 2009 to March 2010 timeframe, that would have imposed a requirement that the DDTC staff 65 licensing officers—a 33 percent increase over the 44 licensing officers currently on staff.

### 3. *Periodic Review of the USML*

The *AECA* indicates, “[t]he President shall periodically review the items on the [USML] to determine what items, if any, no longer warrant export controls under this section.”<sup>305</sup> What the *AECA* does not establish is any timeframe for this periodic review. *H.R. 2410* addresses this issue by requiring the Secretary of State to review 20 percent or more of the technologies and goods falling under the USML for each of the next five years; at the end of the five years, the entire list will have been subject to review.<sup>306</sup> The proviso also requires the Secretary of State to submit an annual report to Congress indicating the results of the required review.<sup>307</sup>

### 4. *Transparency in the DDTC Licensing Process*

Here, *H.R. 2410* amends the *AECA* by addition, indicating “the President shall make available to persons who have pending license applications under this chapter and the committees of jurisdiction the ability to access electronically current information on the status of each license application required by this chapter.”<sup>308</sup> This information includes: a case number; the date of receipt for the application; the DDTC disposition date; the interagency review completion date, if applicable; the initial date of congressional consultation concerning the application, if applicable; and the date the license application is sent to the congressional committee of jurisdiction, if applicable.<sup>309</sup> This electronic access requirement comes into force one year after the enactment of the legislation.<sup>310</sup>

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<sup>303</sup> *Export Controls: Are We Protecting Security and Facilitating Exports?* *supra* note 5, at 34.

<sup>304</sup> *H.R. 2410*, *supra* note 44, at § 805(b).

<sup>305</sup> *AECA*, *supra* note 26 at § 2778(f)(1).

<sup>306</sup> *H.R. 2410*, *supra* note 44, at § 808(b). It is somewhat surprising, given both the rapidity of technological development as well as the criticisms levied at the makeup of the USML, that the Congress did not opt for a more ambitious minimum timeframe for this review. Five years seems an inordinately long period to conduct the review, particularly when considering that at least one of the aforementioned assessments recommends the USML be dismantled and rebuilt *in toto* every year. *BEYOND “FORTRESS AMERICA”*, *supra* note 2, at 59.

<sup>307</sup> *H.R. 2410*, *supra* note 44, at § 808(c).

<sup>308</sup> *Id.* at § 810(a).

<sup>309</sup> *Id.* at § 810(b).

<sup>310</sup> *Id.* at § 810(a).

## 5. *Granting the President Authority to Remove Commercial Satellites from the USML*

*H.R. 2410* authorizes the President to remove satellites and related components from the USML.<sup>311</sup> The proviso includes a blanket exception with regard to the PRC. The authority granted the President “may not be exercised with respect to any satellite of related component that may, directly or indirectly, be transferred to, or launched into outer space by the People’s Republic of China.”<sup>312</sup> In practice, this would mean that COMSATs and related components bound for China, either for launch or otherwise, would remain on the USML, while COMSATs and related components bound elsewhere could be transferred to the CCL. This exception arguably represents a political compromise and increases the likelihood of the proviso becoming law. Indeed, at a conference in November 2009, an export specialist for the Senate Foreign Relations Committee indicated, “[i]n the political environment we operate in, China is the third rail...[w]e have members who know China tests weapons in space, and they don’t want to be accused of giving them any assistance.”<sup>313</sup> Moreover, the exception squarely addresses the unauthorized disclosures made by Hughes and Loral that occurred in the 1990s and were the subject of *The Cox Report*.

These proposed legislative reforms will arguably improve the current export control regime. The proposed reforms include both procedural aspects (e.g. metrics, staffing, and process transparency) and substantive aspects (e.g. review of the USML and authority to remove commercial satellites from the USML). The most important and difficult of these reforms is the review of the USML. Distinguishing the crown jewels from the costume jewelry is no easy feat, but the resultant list should provide the cornerstone for a more efficient and effective export control regime. The only question is why the DoS has been given five years to review and update the USML pursuant to the proposed legislation, given the sense of urgency nearly all parties to the reform debate are currently expressing.

### B. The President’s Export Control Reform Agenda

On 13 August 2009, President Obama ordered a “sweeping interagency review” of U.S. strategic export controls. The review was conducted by an interagency taskforce which included all USG departments and agencies with a hand in the current export control regime.<sup>314</sup> On 21

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<sup>311</sup> *Id.* at § 826(a) (these items are on the USML as a result of §1513(a) of the STNDAA for FY 1999).

<sup>312</sup> *Id.* at § 826(b).

<sup>313</sup> Broad, *supra* note 46.

<sup>314</sup> Fact Sheet on the President’s Export Control Reform Initiative, *supra* note 49.

December 2009, President Obama signed Presidential Study Directive 8 (PSD-8), ordering officials within his Administration to recommend the statutory and regulatory steps necessary to overhaul the current export control regime—to include those controlling COMSATS and other commercial satellites—based on the findings of the “sweeping interagency review.”<sup>315</sup> The review, which has not been made public,<sup>316</sup> concluded, “the current U.S. export control system does not sufficiently reduce national security risk based on the fact that its structure is overly complicated, contains too many redundancies, and tries to protect too much.”<sup>317</sup> The PSD-8 officials therefore recommended the regime undergo fundamental reform, to include the creation of: (1) a single control list; (2) a single primary enforcement agency; (3) a single information technology (IT) system; and (4) a single licensing agency.<sup>318</sup> Implementation of this reform agenda will reportedly come in three phases. The first phase includes regulatory reforms to the current system and preparing the legislative proposals necessary to bring the full reform agenda to fruition; the second phase includes further regulatory reforms, to include removal of some items from the USML, as well as increased funding for the future enforcement and IT initiatives to come; phase three includes the passage of legislation required to implement the full reform agenda.<sup>319</sup> Defense Secretary Gates indicated an ambitious timeframe for implementing this reform agenda, to include the passage of necessary legislation, saying all could occur before the end of 2010.<sup>320</sup> While details concerning the Administration’s inchoate reform initiative are still somewhat sketchy, enough information has been

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<sup>315</sup> Amy Klamper, *Obama Memo Puts Export Reform on Front Burner*, SPACE NEWS (Jan. 18, 2010), <http://www.spacenews.com/policy/100115-obama-memo-puts-export-reform-front-burner.html> (last visited on Jun. 28, 2010).

<sup>316</sup> Given President Obama’s pledge of transparency and openness in government, the lack of transparency on this issue is somewhat surprising. Indeed, the President has indicated, “My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.” Barack Obama, *Transparency and Open Government* (undated Memorandum for the Heads of Executive Departments and Agencies), [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/) (last visited on Jun. 28, 2010). Moreover, the President indicated, “[i]nformation maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.” *Id.* Were the Administration to release the review (or at the very least the data considered by the interagency task-force) the public would have a better insight into *why* fundamental reform agenda was chosen over a less ambitious reform agenda. As it is, the public is left to speculate.

<sup>317</sup> Fact Sheet on the President’s Export Control Reform Initiative, *supra* note 49.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Amy Klamper, *White House Seeks to Consolidate Export Licensing*, SPACE NEWS (Apr. 20, 2010), <http://www.spacenews.com/policy/white-house-seeks-consolidate-export-licensing.html> (last visited on Jun. 28, 2010).

released to engage in an analysis of the initiative, albeit somewhat perfunctorily.

It should be noted that these proposals—namely the creation of a single licensing agency and a single export control list—break no new ground. Indeed, Senator Heinz recommended these exact reforms in his 1991 book and also introduced legislation to those ends.<sup>321</sup> He did so, “to confront head-on the interagency difficulties that have crippled the development of coherent policy over the years,” with an emphasis “on the wider idea of economic security.”<sup>322</sup> The fact that the arguments for export reform have not changed in decades (although “economic security” is now being framed in terms of “national security”) and the proposals to “fix” the problem have not changed in decades, does not necessarily mean that those arguments and proposals are fallacious. However, it again calls into question the notion that, “[t]his country can no longer afford the *status quo*.”<sup>323</sup> In the intervening decades since Senator Heinz first made that claim, the sky has not fallen—the U.S. remains the clear leader in commercial space.<sup>324</sup> Absent evidence to the contrary, there is little reason to believe that will not also be true 20 years hence.

### 1. *The Four Singles*

The President’s reform initiative calls for the creation of an entirely new bureaucracy to control the export of munitions, dual-use technologies, and commodities. At the heart of this new bureaucracy are what have been dubbed the four singles: “a single export control list, a single licensing agency, a single agency to coordinate enforcement, and a single unified IT system.”<sup>325</sup> This consolidation would merge the USML and the CCL; merge the regulatory functions currently being carried out separately by the DDTC and the BIS; merge the separate IT systems currently being employed by the DDTC and the BIS (i.e. creating a single point of entry for exporters); and merge the enforcement functions currently being carried out separately but the DDTC and the BIS. A senior defense official providing background on the initiative indicated that the purpose of this consolidation is “to make clear to companies that they have a single place to go, in terms of understanding what restrictions may be, and frankly to avoid situations where people may attempt to either forum shop, by trying to use one list versus the other, or cases where they get captured by two lists and have to go...through more than one export control process.”<sup>326</sup> While this

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<sup>321</sup> HEINZ, *supra* note 1, at 147-149.

<sup>322</sup> *Id.* at 150.

<sup>323</sup> *Id.* at x.

<sup>324</sup> FUTRON’S 2008 SPACE COMPETITIVENESS INDEX, *supra* note 205, at 3.

<sup>325</sup> DoD Background Briefing with Senior Defense Officials from the Pentagon, *supra* note 224.

<sup>326</sup> *Id.*

consolidation might represent a significant change for exporters of some technologies, it would not appear to significantly affect exporters or temporary importers of space-related technologies. As indicated above, the language of Category XV of the USML is sufficiently broad so as to capture virtually all space-related technologies.<sup>327</sup> As a result, the DDTC is already a “one-stop-shop” for exporters and temporary importers of space technologies. Confusion as to restrictions, forum shopping, and duplicative processes are simply not an issue with regard to space technologies. It would appear, therefore, this is another instance in which the space sector is being conflated with the non-space sector within the larger reform debate. That said, consolidation could improve the efficiency of the current licensing process if it obviated the need for multi-agency review of license applications. For example, if the new single licensing agency included elements from the DoD and NSA, among others, then the national security reviews of these various constituent groups could all be conducted “in-house.” It follows that “in-house” reviews *might* be more efficient than the multi-agency staffing occurring under the current export control regime.

What is not known at this time is whether the single licensing agency would fall under a current department (i.e. DoS, DoC, or DoD) or whether an entirely new agency would be created. A senior defense official providing background on the initiative indicated that, “none of the national security agencies involved in this have been ruled out.”<sup>328</sup> This statement would appear to indicate that the DoC is not a potential candidate for overseeing the new agency. It follows too that the DoC would not be the appropriate department to oversee sensitive military technologies—which the new single agency would necessarily oversee. If the DoC is cut out of this process, then the Senate Banking Committee will lose oversight jurisdiction over export controls. If the Administration determines the DoD is the appropriate department to house the new single agency, then each of the Senate and House committees of jurisdiction currently responsible for the oversight of export controls would likely cede jurisdiction to the respective Armed Services committees in the Senate and House. Any such legislation necessary to create the new single licensing agency under the DoD would originate in, pass through, or potentially stall in one or more of these current committees of jurisdiction. As a result, the parochial interests of these committees, which might well lose that jurisdiction under the President’s reform initiative, cannot be underestimated. Within this debate, power politics are a factor.

The single list created under the President’s reform initiative is to be tiered based on the importance of the technology to be exported or temporarily imported. A relatively small number of “crown jewels” would be placed in the top tier and subject to the tightest controls; other

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<sup>327</sup> ITAR, *supra* note 29, at § 121.1, Category XV.

<sup>328</sup> DoD Background Briefing with Senior Defense Officials from the Pentagon, *supra* note 224.

technologies would be tiered and subject to controls based on their relative importance to national security; items such as “lug nuts, screws, bolts...those simple tools” would be deregulated (i.e. could be exported or temporarily imported license-free).<sup>329</sup> Presumably, this would also include items like Bigelow Aerospace’s satellite stand. Yet this begs the question: if the export or temporary import of space technologies—with the exception of the nuts, bolts, and screws holding these technologies together—are still subject to a licensing process under the President’s initiative, would it make the U.S. industrial technology base more competitive in the global marketplace? Is the ability to sell bolts license-free going to save the industrial base? Would reducing license application processing times from 16 days to some shorter period solve the purported problem? Or could it be that doing away with the ITAR, with all of its baggage (real or perceived) and decades of negative treatment, is sufficient in and of itself to make U.S. manufacturers more competitive globally—irrespective of increased efficiency?

## 2. Phases of Implementation

Implementation of the President’s reform initiative is to come in three phases. Phase one is primarily preparatory in nature and includes, *inter alia*: formulating the tiers for the single control list; “determining the enterprise-wide needs” of a single IT infrastructure; and laying the groundwork for the establishment of a single enforcement agency.<sup>330</sup> Phase two would begin to implement some of the preparatory efforts undertaken in phase one, to include, *inter alia*: incorporating tiers within the current lists (i.e. USML and CCL) to ease the transition once a single list is created; standing up the single IT infrastructure; and providing notice to the Congress for those items the President intends to transfer from the USML to the CCL in advance of the merger of the two lists.<sup>331</sup> Phase 3 of the President’s reform initiative would require the Congress to pass the legislation necessary to bring to fruition the four singles.<sup>332</sup> If enacted, the legislation would replace the *AECA* and the *EAA*. For his part, Representative Berman released a statement in response to Defense Secretary Gates’ announcement of the President’s export control reform initiative, indicating, “Secretary Gates...set forth his own vision of how the two export control systems might be fully merged. Should the President propose such a step later this year, I will carefully consider it.”<sup>333</sup>

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*; Fact Sheet on the President’s Export Control Reform Initiative, *supra* note 49.

<sup>332</sup> Fact Sheet on the President’s Export Control Reform Initiative, *supra* note 49.

<sup>333</sup> U.S. House of Representatives Comm. on Foreign Affairs, Berman statement on speech by Defense Secretary Gates regarding President Obama’s Export Control Policy Review (Apr. 20, 2010), available at:



Representative Berman's choice of language is interesting. The notion that this is Defense Secretary Gates' "own vision" rather than the President's vision or the result of interagency consensus, could be read to mean that all of the stakeholders in the debate are not in total agreement on these issues. According to a senior defense official, Defense Secretary Gates is, "the leading champion of export-control reform as a national security issue."<sup>334</sup> It is possible, therefore, that the President allowed Defense Secretary Gates to pursue the reform initiative without it actually representing the views of the entire Administration. The likelihood of passing all or part of the legislation required to bring the initiative to fruition would likely be diminished if it does not have the full weight of the Administration behind it.

It is impossible to say whether the new bureaucracy created under the Administration's reform initiative would constitute an improvement over the existing bureaucracy. Here, the first sentence of the above quoted Machiavellian admonition would appear to ring true, to wit: "[i]t must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage, than the creation of a new system."<sup>335</sup> The question is—are the problems with the current system such that the risks associated with creating a new system are worth taking? In order to justify those risks, policy makers should demand, at a minimum: (1) a clear identification and articulation of problems within the current system; (2) empirical evidence—or at the very least something more than anecdotal evidence—relating to those problems; (3) a clear indication that reforming the existing system would not alleviate those problems; and (4) a clear indication that the new system would alleviate those problems. As argued throughout this article, these issues have not been sufficiently addressed. It follows, therefore, that the risks associated with creating an entirely new export control regime are not justifiable.

#### IV. CONCLUSION

The current U.S. strategic export control reform debate arguably represents an amalgam of enduring paradigms, doomsaying, message marketing, overstatements, absurdities, and anecdotes—all coupled with seemingly legitimate criticisms. On the horizon, some see only giants. Few, if any, see only windmills. In reality, there is insufficient empirical data to make an accurate determination on the ratio of giants to windmills. As a result, and just as the GAO warned with regard to President Clinton's major export control initiative, "[w]ithout a clear and common

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[http://www.internationalrelations.house.gov/press\\_display.asp?id=726](http://www.internationalrelations.house.gov/press_display.asp?id=726) (last visited on Jun. 28, 2010).

<sup>334</sup> DoD Background Briefing with Senior Defense Officials from the Pentagon, *supra* note 224.

<sup>335</sup> Noble, *supra* note 118, at 251.

understanding of perceived versus real problems and their underlying causes and without an appropriate analytical framework to tie changes to desired goals, it will be difficult to anticipate the outcomes of changes and to determine whether progress is being made.”<sup>336</sup> Based on publicly available data, there is no clear and common understanding of real versus perceived problems and their underlying causes; there is not an appropriate analytical framework for tying changes to desired goals. It is possible the interagency taskforce that conducted the “sweeping interagency review” ordered by the President on 13 August 2009 identified the real problems, as well as their underlying causes; it is possible an analytical framework was created for tying changes to desired goals. If so, that information has yet to be made available. As a result, the public (to the extent that it is interested or is even aware of the issue) is left to wonder whether the Administration’s proposals offer just the type of solution H.L. Menken warned against—neat, plausible, and wrong. For example, how will the single licensing agency created under the Administration’s initiative reconcile the counterposing national security and economic interests implicated when export decisions are actually made? While proponents of export control reform have effectively merged these two interests into one for purposes of the debate (i.e. tying the economic health of the space industrial base to national security

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<sup>336</sup> DEFENSE TRADE: ANALYSIS OF SUPPORT FOR RECENT INITIATIVES, *supra* note 74, at 17. In 2000, the Clinton Administration, the U.S. defense industry, and foreign governments were each expressing a high level of concern about the adverse affects of U.S. export controls on cross-border cooperation with allies. *Id.* at 15. As a result, the Administration “unveiled 17 proposals to expedite and reform the U.S. export control system, which it characterized as the first major post-Cold War adjustment to the U.S. system.” *Id.* The 17 proposals were collectively named the Defense Trade Security Initiative (DTSI). Among the 17 proposals was a streamlined license process for COMSAT components and technical data when all parties to the program are NATO or major non-NATO allies. Department of State Directorate of Defense Trade Controls, Seventeen Agreed Proposals to Defense Trade Security Initiative, [http://www.pmdtc.state.gov/licensing/documents/DTSI\\_17proposals.pdf](http://www.pmdtc.state.gov/licensing/documents/DTSI_17proposals.pdf) (last visited on Jun. 28, 2010). Shortly after the unveiling of the DTISI, the GAO concluded that no analysis had been conducted by the Clinton Administration regarding the underlying problems with the export control system and, as a result, was dubious of the Administration’s claim that the DTISI would achieve its stated goals of: “(1) increasing interoperability, (2) enhancing defense capabilities, and (3) promoting transatlantic defense industrial cooperation and competition.” DEFENSE TRADE: ANALYSIS OF SUPPORT FOR RECENT INITIATIVES, *supra* note 74, at 15. In a 2005 report, the GAO concluded that while the DoS claimed the DTISI reforms were successful, the DoS had neither “evaluated the initiatives’ effects on the arms export control system” nor “provided data supporting its contention.” DEFENSE TRADE: ARMS EXPORT CONTROL SYSTEM IN THE POST-9/11 ENVIRONMENT, *supra* note 74, at 4. The GAO’s findings aside, ten years have passed since the DTISI was unveiled and the concerns of 2000 persist. Indeed, the Obama Administration, the U.S. defense industry and foreign governments all continue to express a high level of concern about the adverse effects of U.S. export controls on cross-border cooperation with allies. Does this Administration, unlike the Administration of President Clinton, have “a clear and common understanding of perceived versus real problems and their underlying causes and an appropriate analytical framework to tie changes to desired goals?” If not, it follows that ten years hence, the same concerns with the export control system may persist.

prerogatives), the two interests nonetheless persist as distinct and often competing interests. Will the new agency champion national security or the economic interests of the space industrial base? If it intends to do both, how will it succeed in balancing these interests where the DoC failed to do so?<sup>337</sup> This is an open question. The fact that the “stars have aligned” and all of the stakeholders in the reform debate are ITAR critics, does not justify rash action—particularly when less ambitious reforms may achieve the desired end with less accompanying risk.

To that end, the lack of empirical data should not forestall incremental reforms to the present export control regime when such reforms are warranted. For example, if the DDTC license processing procedure slows to the point that it needlessly or arbitrarily hampers the ability of U.S. manufacturers to compete in the global marketplace, that should be remedied. At present, the DDTC metrics for license processing appear to be outpacing the metrics at the BIS (an average of 16 days versus an average of 27 days), despite the fact that the DDTC processes more license applications.<sup>338</sup> Even so, the Congress appears poised to foster increased efficiency in *H.R. 2410*, by increasing the number of DDTC licensing officers and codifying lower license processing metrics. The insularity of this debate is evident from the fact that there appears to be no benchmarking with U.S. competitors in terms of the administrative or regulatory processes associated with foreign space technology exports. In that regard, how can it be said that 16, 26, or even 60 days is an inordinate amount of time to process export license applications and therefore detrimental to U.S. manufacturers, if it is not known how quickly the competition can accomplish the same? For the sake of argument, what if foreign competitors do accomplish these tasks more quickly than the U.S.? Arguably, if the dictates of U.S. national security require a statutory and regulatory regime that is *in fact* more onerous than those of its competitors, then the answer is not necessarily to tear down that regime. To be sure, U.S. industry is arguably disadvantaged when competing with countries that have no labor or occupational safety laws, but the U.S. response to that competitive disadvantage is not to put children to work, do away with the minimum wage, or eschew workplace safety. There are simply certain “costs of doing business” in the U.S.—to include certain constraints on the ability of private companies to export munitions and dual-use technologies therefrom. Given the tendency of private companies to subjugate higher-level interests in favor of their own short-term profits, these constraints do not appear

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<sup>337</sup> HEINZ, *supra* note 1, at 39 (“[t]he [DoC] is commercially unable to balance trade promotion and trade controls.”).

<sup>338</sup> *A Strategic and Economic Review of Aerospace Exports*, *supra* note 31, at 16 (16 days); DOC ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2008, *supra* note 270, at 8 (27 days); *see e.g.*, H.R. 4246, *supra* note 24, at § 1(7) (“In 2006, the Department of State processed over three times as many licensing applications as the Department of Commerce with about a fifth of the staff of the Department of Commerce.”).

unreasonable. Indeed, the actions of Hughes and Loral in the 1990s fully support this notion. Moreover, the GAO has indicated that, “while exporters and foreign governments have complained about processing time, reviews of arms export license applications require time to deliberate and ensure that license decisions are appropriate.”<sup>339</sup>

Another area in which a dearth of empirical data should not preclude incremental reforms to the current export control regime relates to the makeup of the USML. To be sure, reform of the USML will arguably solve the vast majority of complaints about the ITAR. A nimble and narrowly tailored USML should reflect the fact that certain commercial space technologies are widely available on foreign markets, while at the same time continuing to protect those technologies in which the U.S. maintains an advantage. This would not only allow DDTC licensing officers to spend more time concentrating on the crown jewels, but also afford U.S. manufacturers of costume jewelry technologies a reprieve from superfluous administrative processes. As indicated above, a reformed USML must clearly indicate to exporters and temporary importers of space technologies what items it controls. The most workable solution for accomplishing this goal is to employ broad language that acts to “catch” new technologies and specifically catalogues all items to be excluded from the USML. Again, this level of specificity is critical, given the fact that the effectiveness of U.S. export controls is largely dependent on industry self-regulation.

Arguably, the hardest decision associated with the removal of certain technologies from the USML is whether the U.S. is prepared to countenance the arming of its enemies or potential enemies with technologies that could come back to harm Americans or, at the very least, facilitate the same. Indeed, if the costume jewelry currently controlled under the ITAR is deregulated and allowed to be exported without a license (i.e. also not a licensed export under the CCL), that technology could—and probably will—end up on an Iranian or North Korean satellite at some point in the future. Although there is clearly no right answer to this philosophical quandary, it should nonetheless give pause to policy makers when determining what items should be removed from the USML.

Finding a solution to issues relating to globalization, the development of advanced space technologies elsewhere, and multilateralism are elusive and also highlight the geopolitical complexities of the export control reform debate. In this regard, the ITAR should not be made the scapegoat for the apparent decline in U.S. market share in the realm of space technologies absent empirical evidence to the contrary. Such empirical evidence does not currently exist. Nevertheless, as the ITAR is the one element of this apparent decline in market share that is within the control of U.S. policy makers, the urge might be upend it in the hopes that the U.S.

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<sup>339</sup> EXPORT CONTROLS, VULNERABILITIES AND INEFFICIENCIES, *supra* note 1, at 7.

will regain its hegemonic position in space. That is unlikely, irrespective of the path ultimately chosen by policy makers. As indicated above, “[n]o matter what the United States does, multipolar space will create new policy realities.”<sup>340</sup>

These new multipolar realities do not portend doom for the U.S. in the realm of commercial space. The U.S. is still the leader in commercial space by a wide margin and there is little reason to believe that will not remain the case for years to come. Even so, doomsaying within the export control debate continues. One of the common themes in the export control reform debate is that revenue drives innovation and thus, the impetus for ITAR reform: open up foreign markets to the U.S. space industrial base and the resulting increases in revenue will spur further innovation and guarantee U.S. dominance in space for the future. Yet the fact is, no other government in the world currently invests in space technologies to the extent that the USG does; no other country’s space industrial base currently garners the commercial revenues that are garnered by the U.S. space industrial base. As such, the notion that other countries are somehow going to achieve parity with or outpace the U.S. without a similar investment by their respective governments and/or without similar commercial revenues for their respective space industrial bases, does little more than strain credulity. At the same time, if other countries do manage to achieve parity or outpace the U.S. in the creation of innovative space technologies without making a similar government investment or without a similar commercial revenue stream, then that portends a larger problem—beyond the purported commercial revenue lost or expended as a result of the ITAR. To the extent that this is already true or to the extent that the U.S. space industrial base is failing to meet all of the needs of the USG or commercial sector, criticism of the ITAR may be overshadowing or, at the very least, obscuring an as yet unidentified larger problem with the U.S. space industrial base.

The U.S. can arguably afford the *status quo* for as long as it takes to get this right. To that end, the Congress and the Administration should pursue incremental ITAR reform measures before endeavoring to create an entirely new bureaucracy to control strategic exports. Such incremental measures include the passage of *H.R. 2410* and the regulatory reformation of the USML (i.e. removing the costume jewelry). Should it become law, *H.R. 2410* will arguably improve the ITAR by, *inter alia*: increasing the number of licensing officers at the DDTC; codifying existing export license application metrics; and improving the transparency of the license review process. Granting the President the authority to move all COMSATs and related components to the CCL is also a positive step. However, the President should not exercise that authority immediately. First, it is not entirely clear whether such a move would discernibly improve the efficiency of COMSAT exports considering the DDTC’s average export license

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<sup>340</sup> Laird & Dupas, *supra* note 130.

application metrics are currently lower than those of the BIS. Second, the aim of the ITAR is to protect those technologies in which the U.S. maintains an advantage; therefore, some COMSATs and related components should continue to require the highest controls. As the vice president of EADS North America put it, “[y]ou cannot build a big sophisticated satellite without US parts and components, you just cannot do it...[Those components might comprise no more than five percent of the satellite], but it’s a very important five percent.”<sup>341</sup> The U.S. should not risk losing this “very important five percent” by reducing the regulatory hurdles associated with all COMSATs and related components. As for the remaining 95 percent, the President should consider moving those items to the CCL as part of his larger regulatory reformation of the USML, if doing so would comport with the national security prerogatives of the AECA.

The Senate should also ratify the U.K. and Australia Treaties on Defense Trade Cooperation. While it does not appear doing so would have a tremendous impact on the export or temporary import of space technologies, it would arguably quell some of the criticism that the ITAR fails to adequately distinguish between allies and adversaries in its application.

Finally, after *H.R. 2410* becomes law, the USML is subject to regulatory reform, and the U.K. and Australia Treaties are ratified—and after a period sufficient to determine whether these reforms have had an impact on the export control regime—the USG should commission a comprehensive study, to: (1) determine the impact of these reforms; and (2) determine whether further reforms are necessary to achieve the national security ends of the U.S. The study findings, to the extent possible, should be based on empirical data garnered from industry-independent sources. The Congress should also request a GAO report on the same, as well as continue to hold hearings on the matter. If problems persist, then further reform efforts should be considered.

Challenging the orthodoxy that the U.S. export control regime is toxic gave this author some pause. Indeed, the number and gravitas of export control reform proponents (to say nothing of the dearth of defenders) implicates a powerful logical fallacy—*argumentum ad populum*. With so many believing something is true, it is decidedly uncomfortable voicing dissent—and potentially dangerous. Indeed, as Voltaire wrote, “[i]t is dangerous to be right in matters where established men are wrong.”<sup>342</sup> I will stop well short of saying that I am right. Instead, I will simply say that this is an exceedingly complex and multifaceted issue accompanied by a multitude of open questions and a decided lack of empirical data. As such, and given that the nation’s security is arguably at stake, wisdom counsels a conservative approach to reform above a more radical approach.

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<sup>341</sup> Foust, *supra* note 68.

<sup>342</sup> Originally (in old French), “...il est dangereux d’avoir raïfon dans des chofes où des hommes accrédités ont tort.” VOLTAIRE, *LE SIÈCLE DE LOUIS XIV* 113 (London 1788).

