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MILITARY LAW REVIEW

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THE DEPARTMENT OF THE NAVY'S EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT DISPUTE RESOLUTION PROCESS PILOT PROGRAM: A BOLD EXPERIMENT THAT DESERVES FURTHER EXPLORATION

MAJOR MICHAEL B. RICHARDSON[1]

Time is neutral and does not change things. With courage and initiative, leaders change things.[2]

I. Introduction

The Department of the Navy (DON) recently completed the first phase of testing on an innovative pilot program (Pilot Program) designed to improve the way equal employment opportunity (EEO) workplace complaints are processed. The Pilot Program was the result of over a year of thorough research by the DON into complaints by employees and managers regarding perceived problems with the current EEO complaint system.[3]

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2. About: The Human Internet, *Quotations*, *at* http://quotations.about.com (last visited Aug. 22, 2001) (quoting Jesse Jackson, date and location of statement unknown).

Designed to offer a voluntary-participation alternative to the traditional EEO complaint procedure, the Pilot Program offers DON employees a significantly revamped procedure that dramatically reduces complaint processing time and encourages cooperative resolution of complaints in an attempt to build and maintain working relationships.[4] To achieve these benefits, the Pilot Program requires that participants voluntarily waive their right to "opt-out" of the program, and limits the participants' appeal rights. Testing of the Pilot Program yielded dramatic improvements in processing times for EEO complaints, and was widely regarded by those utilizing the Pilot Program as a success.[5]

The Pilot Program was not, however, universally applauded, and met significant resistance from the Equal Employment Opportunity Commission (EEOC).[6] The first phase of testing ended with the EEOC ordering the DON to suspend the use of the Pilot Program, citing concerns with the legality of a number of the Pilot Program's innovative procedures.[7] Among the concerns cited were the requirements to waive the right to opt-out of the Pilot Program, the manner in which investigations are conducted under the Pilot Program, and the waiver of certain EEOC appeal rights.[8] Undeterred, the DON initially attempted to rework the Pilot Program to address the EEOC's concerns[9] and formulated a Revised Pilot Program. The Revised Pilot Program allowed participants to opt-out of the Program and return to the traditional EEO complaint-processing procedure at any time, and issued amplifying guidance addressing other concerns of the EEOC.[10]

Before DON implemented testing of the Revised Pilot Program, Congress initiated legislation that would have allowed a further three-year test-

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3. *See infra* notes 13-14 and accompanying text.

4. *See infra* Section II.B.2 (discussing in detail the Pilot Program's procedures); *infra* Section II.B.1.a (discussing Pilot Program goals); *infra* Section II.B.1.c (discussing the Pilot Program's advantages).

5. *See infra* notes 130–37 and accompanying text.

6. *See infra* Section II.C.1 (discussing the EEOC's concerns).

7. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110, at *11-12 (June 8, 2000).

8. *Id.*

9. *See Alternative Dispute Resolution—Navy Proceeds with ADR Pilot Program Despite EEOC Order*, FED. HUM. RES. WK., Aug. 14, 2000 [hereinafter *Proceeds Despite EEOC Order*] ("The Navy is proceeding with phase two of its pilot civilian alternative dispute resolution program despite an Equal Employment Opportunity Commission order to suspend it.").

10. *See infra* text accompanying note 196.

ing period of the DON's Pilot Program in its original form.[11] In its final version, however, the legislation that passed authorized the Secretary of Defense to select "at least three agencies" to institute pilot programs in the equal employment opportunity arena, but did not specifically mandate that the DON's Pilot Program be one of these programs.[12] To date, no selections have been made, and the DON Pilot Program is currently on hold awaiting the Secretary of Defense's decision.

This article argues that the time has come to continue testing of this worthwhile Pilot Program in its original form. Background material is provided in Section II explaining the traditional EEO complaint procedure and the ongoing effort to improve this cumbersome process. Next, the article explores DON's Pilot Program and compares it to the traditional EEO complaint procedure; it further examines the conflict between the DON and the EEOC over the Pilot Program's legality. The Navy's reaction to the EEOC's ruling to suspend the program, and the subsequent introduction of legislation mandating the establishment of DOD pilot programs are then detailed. Section III addresses the legal arguments surrounding the Pilot Program, examining first other longstanding legal procedures that allow similar waivers of rights in exchange for legal consideration, and then the countervailing arguments put forth by the EEOC against the Pilot Program. Section III then moves from legal considerations to policy considerations, examining whether such a dramatic change as is involved in the Pilot Program is necessary instead of continuing with the current, less controversial course of gradual improvements. The section lastly addresses the potential effects of the recent legislation requiring the establishment of EEO pilot programs by the Secretary of Defense. The article concludes in Section IV that the nation's leadership has been presented with an ideal opportunity to take the initiative and allow the continued testing of a courageous experiment in the EEO complaint-processing arena. As the article will fully explain, the current EEO system is flawed beyond the point of being fixed by minor changes. The time has come to legislatively approve the DON's Pilot Program and allow the DON to fully explore the Program's potential.

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11. *See infra* Section II.D.
12. *See infra* notes 210-15 and accompanying text.

II. Background

To understand fully the DON's Pilot Program, a comparison between the traditional EEO complaint-processing procedure and the DON's Pilot Program is necessary. This section first explores the traditional EEO complaint procedure, its complexities and problem areas, and the limited success to date of ongoing government efforts to improve it. Additionally, as the DON's Pilot Program relies heavily on the use of alternative dispute resolution (ADR), this section specifically examines the increased use of ADR in federal employment relations to improve the traditional EEO complaint procedure. It then examines DON's Pilot Program, looking at why it was developed, its history, and its processes. Next it explores the conflict that arose between the EEOC and the DON over the legality of the Pilot Program, and specifically where the EEOC found the Pilot Program to be faulty. This background section concludes by addressing the results of the EEOC's ruling suspending the Pilot Program, looking at both the DON's reaction and legislation introduced to continue the Program.

A. The Traditional EEO Complaint Process and the EEOC's Efforts to Improve It

The DON's move to improve its EEO complaint process is part of a larger push by the federal government to fix an unpopular federal EEO complaint process.[13] Throughout the federal government, employees and managers commonly view the traditional EEO complaint system as unnecessarily cumbersome, tedious, and disruptive to the work environment.[14] There has been a continuing government effort to improve this process, backed by both the executive[15] and legislative branches, but this effort has

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13. *See, e.g.*, *Federal Agencies Must Comply With New EEO Regulations*, FED. EEO ADVISOR, Dec. 16, 1999 ("Employee groups complained the old system was unfair and inefficient and put pressure on the EEOC to make changes.").

14. *See, e.g.*, K. C. Swanson, *No Way Out—The Discrimination Complaint Process is a Bureaucratic Maze that Often Punishes the Innocent and Lets the Guilty Go Free*, GOV'T EXEC., Nov. 1996.

> Both management and employees are equally dissatisfied with the current EEO system. On the employee side, federal employees are 10 times more likely than nonfederal employees to file complaints because of the ease of filing, lack of any cost to do so, and increased knowledge of their rights. However, the resolution process is lengthy, expensive (nearly $100 million in fiscal 1994 in the federal government), confusing, and perceived as weighted against employees due to the investigation being

yet to yield significant overall results, leading to popular and congressional dissatisfaction with the rate of improvement.[16]

1. The "Traditional EEO Complaint Process"—29 C.F.R. Part 1614

To understand the current dissatisfaction with the complicated and burdensome Part 1614[17] EEO complaint process, as well as the conflict

14. (continued)

> being conducted by the agency. On the management side, there is a consensus of feeling trapped by frivolous complaints, often adversely constraining managers attempting to correct or fire under-working employees. Additionally, many management decisions are done simply to appease complainants in an effort to avoid damaging publicity regardless of the merit of the claim . . . . The spiraling number of EEO complaints has increased the amount of time it takes to resolve cases. Between fiscal 1991 and fiscal 1994, the backlog of requests for EEOC hearings increased by 65 percent. The most recent statistics reveal the average time from the filing of a complaint to the commission's decision on an appeal was more than 800 days.

Id. at 46. *See also* Brian Friel, *EEOC Asserts Itself*, GOV'T EXEC., Oct. 8, 1997 (EEOC's part 1614 revisions were "developed in response to complaints by federal agencies, employees, and civilian rights groups that the federal discrimination complaint process is unfair and inefficient."), *available at* http://www.govexec.com.

15. *See, e.g.*, Kellie Lunney, *Navy EEO Overhaul Saves Time, Money*, GOV'T EXEC., Aug. 1, 2000 (discussing President Clinton's October 1999 task force initiative to study and recommend ways to improve the federal EEO complaint process), *available at* http://www.govexec.com; Susannah Zak Figura, *Power Shift*, GOV'T EXEC., Nov. 1, 1999 (discussing EEOC Chairperson Ida Castro's August 1999 Comprehensive Enforcement Program establishing a task force in conjunction with the National Partnership for Reinventing Government that will examine various aspects of the federal complaint process), *available at* http://www.govexec.com.

16. *See, e.g.*, Kellie Lunney, *EEOC Gets Grilled For Slow Complaint Processing*, GOV'T EXEC., Mar. 30, 2000 (discussing House subcommittee meetings on ways to reform the EEO complaint process and legislative dissatisfaction with the current process), *available at* http://www.govexec.com (last visited Feb. 2, 2001).

17. Equal Employment Opportunity Commission Regulations on Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1999). The Part 1614 regulations establish the processes by which federal EEO complaints are governed. These processes are commonly referred to as the "Part 1614 process."

between the EEOC and the DON over the legality of the Pilot Program, an exploration of the Part 1614 EEO complaint process is required.[18]

The EEO complaint procedure is actually comprised of two distinct processes. One is referred to as a "pure EEO complaint process," where the complainant's primary remedy is sought through the EEOC.[19] The other is commonly referred to as a "mixed case complaint process," where the complainant may have a remedy via either the EEOC or the Merit Systems Protection Board (MSPB).[20] A thorough understanding of the very complicated mixed complaint process is beyond the scope of this article, and unnecessary as the Pilot Program is not being used for mixed complaints. In comparing the EEO Part 1614 complaint process to the DON's Pilot Program, this article focuses on the processing of a pure EEO complaint.

In a pure EEO complaint processed under the EEOC's Part 1614 process, a complainant has forty-five days from the date of an alleged act of discrimination to contact an equal employment opportunity counselor with a complaint.[21] Once contact is made, an initial meeting is held between the complainant and the EEO counselor wherein the EEO counselor informs

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18. As an aid in exploring this process, the reader may find it useful to refer to a flow-chart depiction developed by the "*The Administrative EEO Complaint Process*", Air Force Central Labor Law Office, entitled The Administrative EEO Complaint Process Flow(continued) Chart, version 5.0 (Mar. 2000), *available at* https://aflsa.jag.af.mil (Labor/Equal Employment Opportunity Commission/EEO Flowchart) (Air Force FLITE Electronic Database).

19. *See, e.g.*, AIR FORCE CENTRAL LABOR OFFICE, 2001 EEO DISMISSAL PRIMER 3 (2001), *available at* http://www.af.adr.mil (last visited Jan. 9, 2001).

20. *See generally* Equal Employment Opportunity Commission Regulations on Federal Sector Employment Opportunity, 29 C.F.R. § 1614.302(a)(1) (1999). This provision defines a mixed complaint as "a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board." *Id.*

21. *Id.* § 1614.105(a)(1). The period begins on the date of the discriminatory conduct, or when the complainant knew or should have known of the conduct. The period may be tolled, however, if the complainant can show they were not notified or otherwise aware of the time limits, or were unaware of the discriminatory event. *Id.* The forty-five day time limit may be extended by the agency or the EEOC for good cause. *Id.* § 1614(a)(2).

the complainant of his rights and responsibilities.[22] If ADR is offered by the agency, the counselor will explain this procedure to the complainant as well.[23] The complainant then chooses between ADR and the traditional counseling procedure.[24] Should the complainant elect ADR, he has ninety days in which to resolve the complaint.[25] If the complainant chooses the traditional counseling procedure, he has thirty days[26] to resolve the complaint, with a sixty-day extension possible.[27] At the end of the ADR or counseling period, if the matter is unresolved, the counselor conducts a final interview,[28] during which the complainant receives notice of the right to file a formal complaint.[29] At any point in the process, the complainant may also choose to withdraw the complaint.

Once the complainant receives notice of the final interview, he has fifteen days to file a formal complaint.[30] If a formal complaint is filed, the agency must dismiss the complaint in whole,[31] investigate the entire complaint, [32] or notify the complainant that it will not investigate some portions of the complaint but will investigate the remainder of the complaint.[33]

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22. *Id.* § 1614.105(b)(1). At this meeting the counselor will inform the complainant of the investigative process, the complainant's right to a hearing or an immediate final decision at the investigation's conclusion, the complainant's right to file a notice of intent to sue, the complainant's duties to mitigate damages and to keep the agency informed of their current address, and the fact that only matters raised during this counseling or related to the same issues may be alleged in a subsequent complaint filed with the agency. The counselor will also gather facts and names of primary witnesses from the complainant.

23. *Id.* § 1614.105(b)(2). An agency is required to have an ADR program or to have one available to its employees, but the agency is not required to offer the use of ADR in every case.

24. *Id.*

25. *Id.* § 1614.104(f).

26. *Id.* § 1614.105(d).

27. *Id.* § 1614.105(e).

28. *Id.* § 1614.104(f) (ADR process); *id.* § 1614.105(d) (counseling process).

29. *Id.* § 1614.106. A formal complaint: must be based upon some act of discrimination; must be filed with the agency that committed the discrimination; must contain a statement describing the actions that were the basis for the alleged discrimination; and can be amended at any time prior to the conclusion of the agency's investigation.

30. *Id.* § 1614.106(b) (complainant or his attorney must sign the formal complaint).

31. *Id.* § 1614.107(a); *see also id.* § 1614.110(b) (requiring that a dismissal of a complaint by an agency contain an explanation for the dismissal).

32. *Id.* § 1614.108.

33. *Id.* § 1614.107(b). This procedure replaces what was formerly known as a "partial dismissal." The agency is now required simply to notify the complainant that it believes some portions of the complaint qualify as dismissible, their rationale, and that they will not investigate this matter. This decision is not immediately appealable, but is later subject to review by the administrative judge (AJ) if the case ultimately involves a hearing. *Id.*

Agencies can dismiss complaints for a number of reasons. Common reasons include failure to state a claim or to comply with applicable time limits, filing a complaint that is already a pending civil action, or filing a complaint that is also being considered by the MSPB. [34] Additional reasons include mootness, failure to prosecute the complaint or to cooperate in the EEO process, filing a frivolous claim or abusing the EEO process, and filing complaints about the EEO process itself.[35] The complainant can appeal a dismissal of its complaint to the Office of Federal Operations (OFO),[36] then the EEOC itself,[37] and ultimately to federal district court,[38] any of which can reverse the agency's decision to dismiss the complaint and order the agency to conduct an investigation.

For any accepted complaints, the agency has 180 days to complete an impartial and appropriate investigation.[39] Should the complainant file an amendment to their complaint, the agency's 180-day clock is restarted, but in no case may the investigation take more than 360 days from the date of the original complaint.[40] At the conclusion of the investigation, the complainant is provided a copy of the investigative file.[41]

The complainant then has thirty days to choose one of three options: (1) drop the complaint; (2) request a final decision from the agency; or (3) request a hearing with the EEOC.[42] If the complainant chooses option 2, to request a final decision, the agency must issue a final decision within sixty days.[43] After the final decision has been issued, if the complainant is unhappy with the decision, he has thirty days to appeal to the OFO, and

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34. *Id.* § 1614.107.

35. *Id.*

36. *Id.* § 1614.404 (providing that the OFO's review is de novo, but based solely on the record and without a hearing).

37. *Id.* § 1614.405. The OFO decision is considered final unless a party requests reconsideration by the full EEOC. The EEOC has discretion in requests for reconsideration. The requesting party must show that there was a clearly erroneous interpretation of material fact or law; or will substantially impact on the policies or operations of the agency. *Id.*

38. *Id.* §§ 1614.407-.408.

39. *Id.* § 1614.106(e).

40. *Id.*; *see also id.* § 1614.108(e) (allowing a ninety-day extension to complete the investigation if mutually agreed upon).

41. *Id.* § 1614.108(g). The agency must also provide notice of the complainant's right to request a hearing by an EEOC AJ or to request an immediate agency decision at this point. *Id.*

42. *Id.* §§ 1614.108(f)-.108(g).

43. *Id.* § 1614.110(b).

then request reconsideration of the OFO's decision by the EEOC.[44] After the EEOC decides the appeal, or fails to decide the issue within 180 days, the complainant may file suit in federal district court within ninety days of receipt of the EEOC's decision or the lapsing of the 180-day period.[45]

If the complainant chooses option 3, to request a hearing with the EEOC, the agency has fifteen days from notification to get the agency file to the EEOC.[46] The EEOC will appoint an administrative judge (AJ) to hear the case[47] and then issue a decision.[48] The AJ must issue this decision within 180 days of receiving the agency file, or the complainant may proceed directly to federal district court.[49] Where the EEOC decision makes a finding of no discrimination, the agency then issues a final order[50] implementing the AJ's decision within forty days.[51] The complainant may appeal this final order to the OFO within thirty days, request reconsideration of the OFO's decision by the EEOC, and ultimately file suit in federal district court within ninety days.[52] The complainant may also choose to skip the OFO-EEOC appeal and go directly to federal district court.[53]

Where the AJ makes a finding of discrimination, within forty days the agency must either accept the decision and issue a final order implementing the decision, or issue a final order not fully implementing the decision, grant interim relief,[54] and appeal the AJ's decision to the OFO.[55] If the OFO rules against the agency, the agency may also request reconsideration

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44. *Id.* §§ 1614.404-.408.

45. *Id.* §§ 1614.407-.408.

46. *Id.* § 1614.108(g).

47. *Id.* § 1614.109(a). The AJ may review any agency decision to dismiss any portions of the complaint; dismiss a complaint on his or her own initiative; dismiss a complaint pursuant to an agency motion; make a decision on the merits without a hearing; or hold a hearing prior to issuing a decision. *Id.*

48. *Id.* § 1614.109(i).

49. *Id.* § 1614.407(d).

50. Note that a "final order" is an agency's final action on an AJ decision, while a "final decision" is the final action taken in all cases not involving a hearing. Both are final agency actions.

51. *Id.* § 1614.110(a); *see also id.* § 1614.109(i) (indicating that a failure to issue a final order within forty days by an agency results in the AJ's decision automatically becoming the final action of the agency).

52. *Id.* §§ 1614.404-.408.

53. *Id.* §§ 1614.407-.408.

54. *Id.* § 1614.505.

55. *Id.* § 1614.110(a).

from the EEOC.[56] If either the OFO or the EEOC reverses the AJ, the complainant may again appeal to the EEOC (if the OFO reversed), or take the case to federal district court. An agency, on the other hand, may not appeal beyond the EEOC, and is bound by the decision at this point.

Processing a complaint under the Part 1614 process from start to finish, including federal court and appeals, can lead to total processing times which are often measured in years rather than months.[57] This inordinate delay in bringing closure to a complaint was the impetus behind the EEOC's recent modifications to the Part 1614 process, and the development of the DON's more aggressive attempt to correct the problem: its Pilot Program.[58]

2. EEOC's Effort to Improve the Part 1614 Process

As part of an ongoing government effort to improve the Part 1614 EEO complaint process, the EEOC[59]—the federal government's executive agency responsible for implementing and supervising the federal com-

56. Under the old Part 1614 process, an agency unhappy with an AJ decision could simply issue a final decision that was contrary to the AJ's decision. One of the significant changes to Part 1614 was making the AJ decision final, though appealable. *See infra* notes 64-65 and accompanying text.

57. For example, a complaint might result in the following time frame: forty-five days for the complainant to file an informal complaint; ninety days for ADR and counseling; fifteen days for complainant to file a formal complaint; 180 days for the agency investigation (up to 360 days if complaint is amended); thirty days for the complainant to request an EEOC hearing; AJ issues a decision within 180 days of receipt of file from the agency; the final order is issued by the agency within forty days; the complainant has thirty days to appeal the final order to the OFO/EEOC; there is no limit on potential delay for the EEOC to issue a decision on appeal; ninety days for the complainant to file suit in federal district court after the EEOC appeal is decided; unknown delay in awaiting a federal court hearing; and ultimately the possibility of further delay in pursuing a federal appeal. In total, this example case could take over 700 days, *not including* the delays in awaiting the EEOC appeal decision, the federal court hearing, or any federal appeal. *See also infra* notes 104-05 and accompanying text (describing the DON's experience in averaging 781 days to the issuance of a final decision, with the possibility of an average of 540 additional days for appeals to the EEOC).

58. *See infra* note 61 and accompanying text (discussing the EEOC's rationale for modifying the process); *infra* Section II.B.1.a (discussing the DON's rationale for developing its Pilot Program).

59. *See generally* Equal Employment Opportunity Commission, *About the EEOC*, *at* www.eeoc.gov (last visited Aug. 24, 2001). The EEOC was established by Title VII of the Civil Rights Act of 1964 and began operating on 2 July 1965. It is comprised of five com-

plaint resolution process—issued new regulations on 9 November 1999.[60] These regulations were designed to address problems commonly appearing under the former Part 1614 process, and to streamline the way federal agencies handle EEO complaints.[61] In revising the Part 1614 EEO complaint process, the EEOC made some significant improvements. The

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59. (continued) missioners and a general counsel, each of whom is appointed by the President and confirmed by the Senate. Its mission is to "promote equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance." *Id.* In doing this, the EEOC:

> [E]nforces the principal federal statutes prohibiting employment discrimination by providing a forum for individuals to bring charges alleging discrimination by an employer. If the charges are substantiated, the EEOC first attempts to reach a voluntary resolution between the charging party and the respondent. If unsuccessful, the EEOC may bring suit in federal court against the discriminating party, or the discriminating party may bring suit on their own behalf. The EEOC also issues regulatory and other guidance interpreting the laws it enforces, and is responsible for the federal sector employment discrimination program. In this capacity, in 1998 the EEOC conducted 12,218 administrative hearings and 7494 appeals of final agency decisions for federal employees. Lastly, the Commission also ensures that federal departments and agencies maintain required EEO programs, and provides leadership and coordination to all federal departments and agencies on EEO law.

Id.

60. 64 Fed. Reg. 37,644, 37,655 (July 12, 1999) (codified at Equal Employment Opportunity Commission Regulations on Federal Sector Employment Opportunity, 29 C.F.R. pt. 1614 (1999)).

61. *See generally* Press Release, Equal Employment Opportunity Commission, EEOC Issues Regulations Streamlining the EEO Complaint Process for Federal Employees (July 12, 1999), *available at* http://www.eeoc.gov. The push to revise the Part 1614 procedure was part of a broader effort to improve the effectiveness of the EEOC's operations, implemented in conjunction with Vice President Gore's National Partnership for Reinventing Government initiative. The EEOC lauded the improvements in Part 1614 for making the complaint process "more efficient, expedient, and fair for federal employees and agencies alike. In particular, we have improved and streamlined the process by eliminating unnecessary layers of review and addressing perceptions of unfairness in the system." *Id. See also* Press Release, Equal Employment Opportunity Commission, EEOC Chairwoman Announces Comprehensive Efforts to Improve Federal Government EEO Process (Aug. 10, 1999), *available at* http://www.eeoc.gov. The revised Part 1614 procedures are part of the EEOC's overarching Comprehensive Enforcement Program initiative designed to improve overall agency operations. *Id. See also* Press Release, Equal Employment Opportunity Commission, EEOC Proposes Regulations To Streamline the EEO Complaint Process For Federal Employees (Feb. 20, 1998) (discussing the two year effort in revising Part 1614 to remove unnecessary layers of review and delegate decision-making to front-line employees), *available at* http://www.eeoc.gov.

improvements involved all aspects of the EEO complaint process and were designed primarily to speed the process and avoid redundancy.[62]

The most significant change gave more weight to the AJ's decision in cases involving a hearing.[63] Under the old Part 1614 process, an agency could issue a final decision that was contrary to the AJ's recommended decision, making the AJ's recommended decision merely advisory in nature.[64] Under the revised Part 1614 procedure, the AJ's decision is now binding on the agency, though appealable.[65] The agency must either adopt the AJ's decision and issue its final order within forty days—down from the previous sixty days—or, if the agency does not fully implement the AJ's decision, the agency must appeal the decision concurrently with issuing its final order.[66]

A second important change, and one of particular interest for comparison of the traditional and Pilot Program processes, is the increased importance placed on the use of ADR. As addressed in more detail below, the DON's Pilot Program relies exclusively on various forms of ADR to resolve complaints. The EEOC, Congress,[67] and the executive branch

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62. *See, e.g.*, Figura, *supra* note 15 (the Part 1614 revisions are designed to create a fair and efficient process and were motivated in part by the fact that federal complaints take nearly five times as long as private-sector cases to resolve (paraphrasing EEOC Chairwoman Ida Castro)).

63. *See generally EEOC's Reform Proposal Gets Flak From All Sides*, FED. EEO ADVISOR, May 1998 (discussing some of the controversy surrounding the various proposed changes to the Part 1614 process, and specifically the proposal to give the AJ decision's binding authority); Friel, *supra* note 14 (most significant change in new Part 1614 regulations would eliminate agencies' power to make final decisions in discrimination cases by giving AJs' decisions binding authority); Zak Figura, *supra* note 15, at 2 ("Of the changes, the most significant—and controversial—is the new power of administrative judges to issue final decisions").

64. *See, e.g.*, Friel, *supra* note 14 (part of the EEOC's rationale for changing this rule was agencies' perceived abuse of this power, citing the rate of agency reversal of administrative judge decisions as 62.7% when the decision is adverse to the agency vice only 10% when favorable to the agency); Figura, *supra* note 15, at 2 ("[F]rom fiscal 1996 to 1998, agencies rejected about two-thirds of EEOC administrative judge decisions against them . . . .").

65. 29 C.F.R. § 1614.110; *see also id.* § 1614.109(i) (AJ decision not adopted by the agency within forty days automatically becomes the agency's final action). To date, agency appeals of AJ decisions have been very limited. For example, as of 31 January 2001, the Department of the Army had only appealed one such decision in the previous two years. Interview with Mr. James Szymalak, Labor and Employment Division, Office of the Judge Advocate General, United States Army, in Charlottesville, Va. (Jan. 31, 2001).

66. 29 C.F.R. § 1614.110.

have been pushing for the increased use of ADR to avoid cases reaching the formal complaint stage.[68] Building on the trend in the civilian[69] and federal[70] sectors toward the increased use of ADR to minimize the use of unwieldy formal complaint systems, the EEOC sought to adapt the lessons-learned in this field to its revised EEO complaint process.[71] The

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67. *See, e.g.*, The Administrative Dispute Resolution Act of 1996, 5 U.S.C.A. § 571 (West Supp. 1996). In promulgating this Act, Congress specifically found ADR to be a prompt, expert, and inexpensive means of resolving disputes that is more efficient and less contentious than costly and lengthy administrative proceedings. It further cited ADR's success in the private sector; its wide applicability; and the widespread availability of experts in the area that can be easily used by the federal sector. Further, Congress intended that its "explicit authorization of the use of well-tested dispute resolution techniques . . . eliminate ambiguity of agency authority under existing law . . . ." *Id.* Congress also intended that federal agencies not only receive the benefit of techniques that developed in the private sector, but take the lead in further developing and refining such techniques. *Id.* (citing Congressional Findings for Pub. L. No. 101-552, § 2 (1996)).

68. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MANAGEMENT DIR. 110, app. H (1999) [hereinafter EEOC MD-110].

> The . . . EEOC is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminate working discrimination, as well as in Commission operations.

Id.

> Agencies and complainants have realized many advantages from utilizing ADR. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes. . . . The agency can avoid costs . . . [and] employee morale can be enhanced . . . through ADR.

Id. ch. 3. *See also* Memorandum, President William J. Clinton, to Agencies, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (1 May 1998) (standing up interagency committee to study ADR uses in the federal sector).

69. *See, e.g.*, *Alternative Dispute Resolution Programs in the Federal Sector*, DIG. OF EEO L., Jan. 2000 (outlining the revised EEOC regulatory requirements), *available at* http://www.eeoc.gov/digestxii-13.html. The EEOC employed ADR in private-sector cases with great success during Fiscal Year 1999, when it successfully resolved 4833 private sector charges of discrimination through voluntary mediation, amounting to a 65% success rate. *Id.*

revised complaint process mandated the establishment or accessibility of ADR in each federal agency for both the pre-complaint and the formal complaint process, where no ADR program was required at all under the old rules.[72] While the EEOC has been pushing since 1994 to increase ADR use in resolving workplace complaints, *mandating* ADR availability to all federal employees is one of the most significant changes made to the Part 1614 process.[73] The revised regulations required agencies to establish or make available an ADR system by 1 January 2000.[74] To date, federal agencies have employed different means of complying with this requirement, with varying degrees of success.[75] The DON has tested and

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70. *See id.* (The EEOC, in providing guidance to federal agencies seeking to establish ADR programs, specifically cites the dramatic increase in the use of ADR in the federal sector EEO process, and the congressional encouragement of such ADR use exemplified in the Civil Rights Act of 1991); *see also* U.S. ATT'Y GEN., REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP 6 (2000) (reporting that in the federal government 410 employees now work full time on ADR, and ADR programs receive $36 million in dedicated funds annually, plus an indiscernible amount from general operating budgets), *available at* http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm

71. *See generally* Captain Drew Swank, Note from the Field: *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., 1998, at 46 (tracking the growing use of ADR in the federal government); Swanson, *supra* note 14, at 46 (discussing growing momentum for change from both sides of the complaint process, and initiatives underway to improve the EEO complaint process: twelve congressional hearings held between 1986 and 1996; task force at the EEOC studying issue; President Clinton's February 1996 executive order for agencies to review their adjudicatory processes with an eye to speeding up resolution and to encourage the use of alternative dispute resolution (ADR); and yearly proposals for changes in EEO complaint processing regulations).

72. 29 C.F.R. § 1614.102.

73. For a more complete history of the EEOC's push toward implementing ADR, see Press Release, Equal Employment Opportunity Commission, Commission Adopts Policy on Alternative Dispute Resolution as First Step In Implementing Agency ADR Programs (July 17, 1995), *available at* http://www.eeoc.gov. The EEOC began studying ADR in 1994 with a Task Force on Alternative Dispute Resolution as part of the EEOC's push to reinvent and streamline the EEOC's operating procedures. The Task Force's findings were unanimously approved by the full EEOC in April 1995. In July 1995, the EEOC issued a policy statement publicly pledging its commitment to the use of ADR. The statement indicated that the Commission found ADR to be fair, effective, timely, and innovative. Further, the EEOC was to be a leader among federal agencies seeking to implement ADR programs. *Id.*

74. *Id.*

75. *See, e.g.*, *infra* Section III.C (*Policy Issues*) for an analysis of the successful Post Office and Air Force ADR programs. While all federal agencies have not been as proactive and successful as these two programs, the author is unaware of any enforcement action taken to date by the EEOC against a federal agency for failure to comply with this deadline. *See also* REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP, *supra* note 70 (discussing the status of various federal agency ADR programs).

employed various ADR programs in addition to the Pilot Program to fulfill this requirement.[76]

Other significant changes appear throughout the Part 1614 process. The new rules allow the complainant to amend a complaint at any time before the investigation is finished to include issues or claims that are like or related to the original complaint, even allowing the complainant to ask the AJ to amend the complaint after the hearing has begun.[77] Under the old rules, a new complaint was required for each new allegation, resulting in duplicitous complaints.

The new rules no longer have a "partial dismissal."[78] Where formerly the agency dismissed part but not all of the complaint, under the new rules the agency now notifies the complainant in writing of: its determination that some portion of the complaint is not appropriate and would rate a dismissal if filed alone; its rationale; and that this portion of the complaint will not be investigated.[79] A copy of this notice is placed in the investigative file and is reviewable by an AJ at any subsequent hearing.[80]

The revised Part 1614 process also gives AJs the power to dismiss a complaint on their own initiative,[81] removes their power to remand issues that are like or related (replacing it with the power to amend the complaint at the hearing),[82] and requires an AJ decision within 180 days of receipt of the file from the agency.[83]

Lastly, the new process also allows the OFO to accept witness statements or parties' briefs not longer than ten pages by fax[84] and to draw adverse inferences or take other evidentiary actions where either party fails, without good cause, to comply with the appellate provisions of Part

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76. *See, e.g.*, U.S. DEP'T OF NAVY, REGION SOUTHWEST DISPUTE RESOLUTION CENTER, AN ADR SUCCESS STORY (1999) (discussing the success of San Diego Mediation Program within DON), *available at* http://www.bop.gov/hrmpg/lmr/hrmlmryx.pdf.

77. 29 C.F.R. § 1614.106.

78. *Id.* § 1614.107(b).

79. *Id.*

80. *Id.*

81. *Id.* § 1614.109(b).

82. Formerly found in 29 C.F.R. § 1614.109.

83. *Id.* § 1614.109(i).

84. *Id.* § 1614.403(f).

1614.[85] Together these changes act to reduce some of the unnecessary delays and redundancy practiced under the old rules.[86]

These changes also have a second—less obvious, but nonetheless significant—effect on federal sector EEO complaint processing that is important to consider as background for the current conflict between the EEOC and the DON. By making AJs' decisions binding on agencies, the new rules shift power away from federal agencies to the EEOC.[87] This shift of power was very controversial, and many federal agencies opposed it as unnecessary and illegal.[88]

The revised EEO Part 1614 complaint process, while improved, remains confusing, elaborate, time-consuming, and unwieldy. The latest available statistics, covering fiscal year 2000, show some improvements over fiscal year 1999 levels, with the number of pending federal sector EEOC appeals decreasing by 14%, and the number of federal sector cases awaiting hearings decreasing by 13%.[89] Given the gravity of the problems with the traditional system, however, where total processing times have been known to extend to over three years,[90] these improvements are just minor tweaks to a system in need of a major adjustment. Even with the significant changes to the Part 1614 process, processing times can still be measured in years rather than days.[91] To truly fix the EEO complaint pro-

85. *Id.* § 1614.404(c).

86. *See supra* note 61 and accompanying text (discussing the EEOC's rationale for reducing delays).

87. *See generally* Figura, *supra* note 15 (discussing the shift of control to the EEOC that the new rules create).

88. *Id.* at 3. *See also EEOC's Reform Proposal Gets Flak From All Sides*, FED. EEO ADVISOR, May 1998. The Council of EEO and Civil Rights Executives voiced concern to the EEOC during the comment stage of the proposed 1614 modifications that the EEOC is not granted original decision authority under Title VII and therefore has no authority to have administrative judges issue final decisions.

89. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2002 BUDGET REQUEST AND ANNUAL PERFORMANCE PLAN tbl. 4 (2001), *available at* http://www.eeoc.gov.

90. *See infra* Section II.B.1.a for an examination of the typical processing times in the DON under the Part 1614 process.

91. Under the revised Part 1614 process, most of the significant timeframes responsible for the overall length of the processing time remain unchanged. *See supra* note 57 and accompanying text.

cess, a more substantial step was needed. The DON's Pilot Program took such a step.

B. The Department of the Navy Pilot Program

In 1997, three years before ADR became required for federal agencies, and two years before the EEOC implemented its revised Part 1614 process, the DON took the initiative in attempting to improve the EEO complaint processing system. It did so by developing a dramatically different complaint process as an alternative to the Part 1614 process. The Pilot Program employed ADR techniques and significantly shortened and strictly enforced processing times, to create a dramatically shortened process. The objective was resolution of a dispute within ninety days.

At four test locations within DON, employees were given the option of voluntarily using the Pilot Program or following the traditional EEO complaint route found in Part 1614. If electing to use the Pilot Program, a participating complainant waived his right to an EEOC hearing before an AJ, his right to opt-out of the program, his right to remain anonymous, and his right to a formal agency investigation.[92] In exchange, the employee benefited from a significantly quicker resolution of their complaint, and a process designed to build and maintain working relationships rather than the often-combative environment caused by Part 1614.[93]

On its face, the Pilot Program appeared to be a "win-win" program, and it enjoyed significant success in its initial testing.[94] The program was not universally applauded, however, and the first phase of testing ended when the first two appeals of cases handled under the Pilot Program were decided by the EEOC.[95] Using these cases as an opportunity to review the Pilot Program itself, the EEOC cited numerous concerns with the program's legality, and the EEOC ordered the DON to suspend the Program immediately.[96]

Shortly thereafter, Congress passed legislation originally intended to allow the continued testing of the Pilot Program, thus legislatively bypass-

92. *See* Appendix C for an example of the contract entered into by a complainant electing the Pilot Program.

93. *See infra* notes 135-36.

94. *See infra* Section II.B.1.c.

95. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

96. *Id.* at *11.

ing the EEOC's order.[97] In its final version, however, the language of the legislation failed to specifically name the DON's Pilot Program, and instead merely required that the Secretary of Defense select at least three agencies to establish EEO pilot programs.[98] The controversy is thus currently unresolved, but the opportunity for further testing still exists.

1. History of the Pilot Program

The mission of the DON is to "maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas."[99] Given its war-fighting mission, the DON is not normally looked to as a leader in innovative employment law procedures. Nonetheless, currently the DON finds itself embroiled in a controversy with a sister executive agency, the EEOC, over just such an innovation. The history of the Pilot Program, and the controversy it has generated, requires close examination to understand better the current status and the potential future of the Pilot Program.

a. Rationale for Developing the Program[100]

In February 1997, before the revision of Part 1614, the DON, lead by the Deputy Assistant Secretary of the Navy for Civilian Personnel and Equal Employment Opportunity, undertook a major review of its personnel programs, including its handling of EEO complaints.[101] In reviewing the EEO complaint process, a consensus among those who were involved in various aspects of the process became immediately apparent: The EEO complaint process did not work to anyone's satisfaction.[102] Many personnel within the DON viewed the traditional EEO complaint process as labor-intensive, time-consuming, and inordinately lengthy.[103] The average

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97. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106-398, 114 Stat. 1654A-144, § 1111 (2000) [hereinafter 2001 Defense Authorization Act].

98. *See infra* Section II.D (*Legislative Intervention*) for a complete examination of this legislation.

99. 10 U.S.C. § 5062 (2000). *See also* U.S. Dep't of Navy, *Navy Organization: Mission of the Navy, at* http://www.chinfo.navy.mil/navpalib/organization/org-top.html (last visited 24 Aug. 2001).

100. Like all federal agencies, the DON is required to have ADR programs established or available to its employees. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.13, ALTERNATIVE DISPUTE RESOLUTION (11 Dec. 1996).

processing time to issue a DON final agency decision on a formal complaint under the traditional process was 781 days.[104] Add to that the possibility of an average 540 days of processing time for appeals to the EEOC, and the total processing time was more than three and a half years.[105] Recognizing the seriousness of the problem, the DON created a Reengineering Project Team (RP Team) to explore the underlying problems with the EEO complaint process and to recommend improvements.

The RP Team gathered data and information for development of the Pilot Program through a survey of 1,400 DON employees that included managers, non-supervisory personnel, human resource professionals, and union representatives. The team also conducted over 100 interviews with senior military and civilian managers.[106] The data collected confirmed the initial DON determination that there was a general opinion among all participants in the complaint process that the system needed streamlining.[107]

There was a clear consensus that the number of formal EEO complaints needed to be reduced, as did the processing time for filed complaints.[108] The data indicated support for eliminating redundancy in the process, reinforcing local management and chain-of-command accountability, and providing the parties involved in disputes with early

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101. Telephone Interview with Mr. Adalberto Bernal, Director, Department of the Navy EEO Reengineering Project (Feb. 1, 2001) [hereinafter Interview with Mr. Bernal]. Mr. Bernal is the DON's official spokesman for the Pilot Program, and has been involved in the development and testing of the program since its inception. Mr. Bernal is a labor and personnel specialist with thirty-two years of government service, including thirty years specifically in the labor and personnel field. He has served as an EEO complaint investigator, and has been involved in various stages of EEO complaint appeals for four different federal agencies. Attempts to interview other personnel within the DON on this program were redirected to Mr. Bernal as the spokesman. *Id.*

102. *See generally* Figura, *supra* note 15, at 1-2. Throughout the federal sector, complaints rose nearly 60% from 1991 to 1998 despite 300,000 jobs being cut. Requests for EEOC administrative judge hearings went up 112%, appeals to the commission rose 61%, and the caseload of administrative judges jumped from 133 to 192. In fiscal year 1998, the crushing backlog had reached the point where a case took almost 1200 days to work from complaint to final appeal. *Id.*

103. Interview with Mr. Bernal, *supra* note 101.

104. U.S. Dep't of Navy, *Civilian Human Resources*, *at* http://www.donhr.navy.mil (last visited Aug. 24, 2001) [hereinafter The DON Civilian Human Resources Web page].

105. Interview with Mr. Bernal, *supra* note 101.

106. The DON Civilian Human Resources Web page, *supra* note 104.

107. *Id.*

108. *Id.*

opportunities to attempt resolution.[109] The program's lengthy delays often fostered distrust between management and employees, with managers complaining of the burdens that a repetitive, frivolous filer could create, and employees fearing reprisals for initiating complaints.[110] Additionally, due to the extraordinary burden the lengthy complaint processing time put on the agency, there was added incentive to settle cases regardless of merit, a clear indication that the process needed overhauling.[111]

Based upon this research, the RP Team concluded that the concerns of both the supervisors and the complainants could only be met by radically redesigning the complex, multi-step procedure found in Part 1614.[112] The RP Team's goal was to create a more effective, efficient program that reduced the redundant layers, and used various forms of ADR procedures to give DON employees several alternatives.[113]

Remaining within the bounds of the applicable DOD regulations,[114] the RP Team proposed significant changes to, and compression of the EEO complaint process. These changes included reducing the seven steps in the traditional process to four steps: an intake stage (ten days); a dispute resolution and fact-finding stage (forty-five days); a request for final agency decision stage (five days); and an issuance of a final agency decision (thirty days).[115]

By compressing this process, the RP Team also proposed eliminating duplicative layers found in the counseling, investigation, and hearing stages of the traditional EEO process.[116] Additionally, the RP Team proposed delegating authority to the lowest level by giving the local com-

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109. *Id. See also* Interview with Mr. Bernal, *supra* note 101 (citing as a clear indication of the dissatisfaction a number of responses to a focus group question of, "On a scale of 1 to 6 how would you rate the EEO complaint Program?," responses that included "0" and even negative numbers).

110. *Id*.

111. *Id.*

112. The DON Civilian Human Resources Web page, *supra* note 104.

113. Interview with Mr. Bernal, *supra* note 101.

114. *See* U.S. DEP'T OF DEFENSE, DIR. 1440, DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM (21 May 1987) (requiring that the EEO complaint process be fair and impartial, provide timely investigations and resolution, and meet EEOC requirements).

115. The DON Civilian Human Resources Web page, *supra* note 104. *See infra* Section II.B.2 and Appendices A and B (providing an in-depth explanation of the process).

116. *Id.*

manding officer or commanding general the authority to issue a Final Agency Decision for the DON.[117]

b. Liaison with EEOC During Development and Testing of the Pilot Program

Recognizing the importance of its groundbreaking change in EEO complaint processing, the DON attempted to work closely with the EEOC throughout the development and later testing of the Pilot Program.[118] The DON wanted to ensure that the EEOC was aware of what the DON was testing.[119] The DON requested the EEOC's input on the legality of the Pilot Program and any modifications that were needed to ensure compliance with the applicable employment laws.[120] Additionally, during later testing, the DON wanted to keep the EEOC aware of the success rate of the program.[121]

The Director of the OFO, Ronnie Blumenthal, and her policy manager were briefed on the Pilot Program on 25 March 1998.[122] Ms. Blumenthal indicated her belief that the Pilot Program could proceed so long as the employees were in fact making a fully informed election of their rights when choosing between the Part 1614 and the Pilot Program processes.[123] In April 1999, Ms. Blumenthal also attended a mid-stream evaluation of the program.[124] The DON additionally briefed the Interagency Council on

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117. *Id. See also* Interview with Mr. Bernal, *supra* note 101. Under the traditional Part 1614 process, all final agency decisions that found discrimination were signed at the Deputy Assistant Secretary of the Navy (Civilian Personnel/Equal Employment Opportunity) level. Allowing a local commander, closer to the scene but often without a significant background in employment law, to sign the FAD was viewed by the Pilot Program as one of the more significant revisions to the process. It was deemed an important change as it significantly sped up the system, and ensured that the complainant saw that the local commander was involved in the decision-making process instead of some unknown person at a higher headquarters. *Id.*

118. Interview with Mr. Bernal, *supra* note 101.

119. *Id.*

120. The DON also had the Pilot Program reviewed for legality by the Office of General Counsel for the Department of the Navy itself. *See* Memorandum, Mr. John E. Sparks, Principal Deputy Designee, Office of the General Counsel, for the Deputy Assistant Secretary (Civilian Personnel/Equal Employment Opportunity) (Apr. 19, 1999) (copy on file with author) ("It is my opinion that this [Pilot Program] complies fully with law and regulation, and it has the complete and unequivocal support of this office.").

121. *Id*.

122. A copy of the slide presentation presented to the EEOC is on file with the author.

Administrative Management (ICAM) in March 1998, with the EEOC legal counsel present, again ensuring that all relevant agencies were aware of what the DON was doing.[125] No objections to the program were voiced, though there was some discussion about how to ensure that case files developed during the process were adequate.[126] Labor unions at the test sites were also contacted and briefed on the process, and all approved of the test.[127]

c. Testing the Program

The Pilot Program went into effect on 29 June 1998, with participating sites at the Marine Corps Air Station, Cherry Point, North Carolina; the Naval Medical Center, Portsmouth, Virginia; and the Norfolk Naval Shipyard, Portsmouth, Virginia.[128] In March 1999, an additional site was added

123. The DON elaborated that these concerns are fully discussed between the Dispute Resolution Specialist and the employee before the employee makes the election to participate in the Pilot Program and before signing the Agreement to Use DON Pilot Dispute Resolution Procedures form. Interview with Mr. Bernal, *supra* note 101. *See also* Appendix C (reproducing a copy of this form).

124. Interview with Mr. Bernal, *supra* note 101.

125. *Id.* Among other speakers present at this ICAM meeting was Ms. Ellen Vargyas, Legal Counsel to the EEOC. During this presentation, the DON speaker used a slideshow that graphically and clearly depicted the Pilot Program's complaint process, including its timelines, as well as the significant changes made to the complaint process under the Pilot Program. *Id.*

126. *Id.* The concerns voiced with the development of the case file revolved primarily around the potential problems that might result from no longer having investigations conducted by the Office of Command Investigations, and what steps would be taken to ensure that the case file developed would include all relevant and required materials. These concerns were later echoed in the EEOC's *Philips and Littlejohn* opinion. 2000 EEOPUB LEXIS 4110 (June 8, 2000). See Section II.C.1 for a more complete examination of the EEOC's concerns regarding the investigation and development of the case file.

127. *Id*. *See also* Memorandum of Agreement Between the Commander, Navy Region Southeast, and Affiliated Labor Council, subject: Regional EEO Pilot and Alternative Dispute Resolution Programs (Jan. 21, 2000) (copy on file with author) (written agreement between commanding officers of naval bases utilized as Pilot Program test locations and local unions).

128. The DON Civilian Human Resources Web page, *supra* note 104.

at Marine Corps Base, Camp Lejeune, North Carolina.[129] Testing was conducted until June 2000.

The field-testing results were favorable in each category examined, including process selection rates, case resolution rates, processing times, and cost savings.[130] Field-test data indicated wide acceptance of the new process, with eligible participants choosing the Pilot Program over the Part 1614 process by a margin of 60% to 39%.[131] Case resolution rates improved under the Pilot Program to 89%, with the Part 1614 process continuing to average only 58%.[132] Case processing times for Final Agency Decisions were shortened from an average of 781 days under the Part 1614 process to an average of only 111 days for the Pilot Program.[133] Cost savings under the Pilot Program included a drop of an average of $40,000 per case from the Part 1614 process, to a mere $5,800.00 per case.[134]

Additionally, testing indicated improved workplace morale where the Pilot Process was used, with better lines of communication and feelings of trust fostered by the Pilot Program.[135] Commanding officers, managers, supervisors, unions, and non-supervisory personnel from the installations where the program was tested soundly endorsed the program.[136] Based

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129. *Id.* The DON is comprised of both the United States Navy and the United States Marine Corps, so testing was designed to include bases belonging to each service.

130. *Id.*

131. *Id.*

132. *Id.* Some test locations experienced tremendous results using the Pilot Program. *See, e.g.*, Letter, Brigadier General T. A. Bratten, U.S. Marine Corps, Commanding General, to Equal Employment Opportunity Reengineering Pilot Team (1999) (copy on file with author) (during the first six months of testing at the Marine Corps Air Station, Cherry Point, the resolution rate was 100% for the Pilot Program versus 33.3% for complaints processed under the Part 1614 process, with ten of thirteen complaints choosing the Pilot Program over the Part 1614 process); Letter, Captain M. Balsam, U.S. Navy, Commander, Naval Medical Center (Mar. 31, 1999) (copy on file with author) (during the first six months, the Portsmouth Navy Hospital reported a resolution of 100% for the Pilot Program).

133. The DON Civilian Human Resources Web page, *supra* note 104.

134. *Id.*

135. *Id*. *See also* Letters, Brigadier General Bratten and Capt. Balsam, *supra* note 132 (both specifically citing increased morale, and better communication between management, supervisors, and employees).

136. The DON Civilian Human Resources Web page, *supra* note 104. *See also* Letter, Brigadier General Bratten, *supra* note 132. The Commanding General, Marine Corps Air Station, Cherry Point, stated, "[t]he Pilot Process has resulted in improved communications between management, supervisors and employees, and raised morale in a non-adversarial setting, much to the satisfaction of all parties involved, thereby saving the Command both time, money, and lost productivity." *Id.*

upon the overall input received from field offices, the DON believed the Pilot Program process was a huge success.[137]

2. How the DON's Pilot Program Works[138]

The Pilot Program is a purely voluntary program.[139] DON employees may choose to pursue their complaint through the Part 1614 process or the Pilot Program. Upon initially contacting an EEO counselor, DON employees are briefed in detail on the differences between the two processes, are allowed to ask questions, and then choose a process.[140] If they choose the Pilot Program, the employees must sign an agreement waiving their rights to remain anonymous, to request a hearing before an EEOC AJ, and to "opt out" of the Pilot Program (in other words, they must stay with the program once started).[141] An *Agreement to Use DON Pilot Dispute Resolution Procedures* form is then completed, recording the employee's election.[142]

Once in the program, the individual meets with a Dispute Resolution Specialist (DRS) to begin the intake process stage. The development of the case file then begins with a clear definition of the issues involved and an immediate attempt to resolve the dispute. If the case is resolved, it is documented and copies are provided to each party.[143] If resolution attempts fail, the complainant is notified within eight days of his right to request a dispute resolution option from four forms of ADR: conciliation,

137. The DON Civilian Human Resources Web page, *supra* note 104; *see also* Interview with Bernal, *supra* note 101.

138. A *Time Schedule For Processing under the Pilot Program* is included at Appendix B, and a graphical comparison between the Part 1614 process and the Pilot Program is included at Appendix A. These documents are provided to assist the reader in understanding the Pilot Program's processes, and may be useful during the reading of this section of the article.

139. The DON Civilian Human Resources Web page, *supra* note 104.

140. *Id.*

141. *Id.* Note that this agreement to waive these rights is where the EEOC finds primary fault with the Pilot Program. *See infra* Section II.C.1 for a more complete examination of the EEOC's position regarding this waiver of rights.

142. An *Agreement to Use DON Pilot Dispute Resolution Procedures* form is appended to this article at Appendix C.

143. The DON Civilian Human Resources Web page, *supra* note 104.

mediation, early neutral inquiry, or a settlement conference.[144] By the tenth day, the complainant must make an election or withdraw the case.[145]

The dispute resolution stage follows the election. The Pilot Program

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144. The DON's Draft Pilot Dispute Resolution Guidelines define the types of ADR processes as:

> 1. Conciliation. An informal process in which a neutral third party facilitates agreement between disputants by strengthening relationships, lowering tension, improving communications, interpreting issues and providing technical assistance. There are no specific rules of engagement with regards to conciliation. The parties set the pace with the assistance of the third party. DRS will keep a written record of conciliation efforts and outcomes.
>
> 2. Mediation. The intervention into a dispute of a neutral impartial third party that has no decision-making authority. The objective of the intervention is to assist the parties in voluntarily reaching an acceptable resolution to the issues in dispute. This is a facilitative process and the mediator makes primarily procedural suggestions regarding how parties can reach agreement. The mediator role is that of a catalyst which enables the parties to discuss issues and progress toward a mutually acceptable resolution. No written record is kept of what transpires during this process except whether or not an agreement was reached. If agreement is reached, the agreement is written and copies provided only to those which a need to know, i.e., the parties and agency personnel who are involved in ensuring the terms of the agreement are carried out.
>
> 3. Early Neutral Inquiry. An internal inquiry that utilizes a neutral third party to provide a non-binding evaluation of the facts in dispute. The neutral provides the parties an objective perspective of the strength and weaknesses of their respective cases. The neutral may facilitate settlement by clarifying truly disputed areas and identifying non-essential issues. The DRS will keep a written record and prepare a summary report, which addresses the facts in dispute, and include documentation collected during the inquiry.
>
> 4. Settlement Conferences. The DRS conducts a conference attended by opposing parties and/or their representatives. The purpose of the conference is to reach a mutually acceptable settlement of the matter in dispute prior to litigation or formal proceeding. The DRS will keep a written record of the proceedings and prepare a summary report that addresses the facts in dispute, includes relevant documentation and settlement options explored during the conference.

U.S. DEP'T OF NAVY, DRAFT PILOT DISPUTE RESOLUTION GUIDELINES app. B (1999) [hereinafter DRAFT PILOT DISPUTE RESOLUTION GUIDELINES] (copy on file with author).

145. The DON Civilian Human Resources Web page, *supra* note 104.

provides for a thirty-day period to achieve resolution, during which a DRS will concurrently develop a "factual record." The parties are not limited to any one type of ADR, and may in fact use all four means (conciliation, mediation, early neutral inquiry, or a settlement conference), or any combination of these means if deemed appropriate by the DRS. The goal of the Pilot Program is to resolve the dispute during this phase.[146]

If the parties fail to resolve satisfactorily the dispute during the dispute resolution stage, the agency must collect and incorporate any documentation to complete the record upon which a Final Agency Decision (FAD) can be made should the individual request one. The complainant is notified of the right to request a FAD by the thirty-fifth day after initiation of the dispute resolution stage. Once notified of his right to request a FAD, the complainant has five days from receipt of notice to request a FAD or withdraw the allegation. Failure to request a FAD results in dismissal of the complaint. During the request for FAD stage, the local Human Resources Office (HRO) compiles the case file and decides, on behalf of the agency, whether the complaint will be accepted or dismissed. Notes, settlement offers, or any other information obtained during the ADR proceedings are not included in the file unless the complainant agrees. The HRO office then notifies the complainant within five days whether his claim has been accepted or dismissed.[147]

Accepted complaints then move into the investigation and case-file development stage in preparation for the issuance of the requested FAD. During this stage, fourteen days are allotted for the HRO to conduct a thorough and objective investigation. The complainant may request within the first seven days that specific items of evidence be obtained as part of the investigation's evidence. By the fifteenth day, the investigation is sent to the Naval Complaints and Administrative Review Division (NAVCARD), with a copy to the complainant. The NAVCARD drafts a proposed FAD, which is returned to the command for review by the commanding general or commanding officer. The command may approve the proposed FAD as drafted, modify it, or rewrite the FAD locally. The command then issues the FAD. If dissatisfied with the FAD, the individual may appeal to the EEOC to review the case, or may choose to file a civil action in federal dis-

146. *Id.*
147. *Id.*

trict court.[148] If the complainant elects an EEOC appeal, the appeal is limited to the record and does not include an AJ hearing.[149]

As discussed above, the Pilot Program significantly changes the EEO Part 1614 process.[150] These changes involve all aspects of the process, including: a shortened and strictly enforced timeline; a different form of investigation and construction of a pre-FAD case-file; and an agreement waiving the employee's rights to remain anonymous, to request a hearing before an EEOC AJ, and to "opt out" of the Pilot Program. Despite the DON's attempts to maintain coordination with the EEOC throughout the development and testing phase of the Pilot Program, and the success demonstrated during the Program's field-testing, significant opposition arose over some of the changes.

C. The Conflict Between the EEOC and the DON Comes to a Head

In *Philips and Littlejohn v. Danzig*,[151] the EEOC held that the DON's Pilot Program failed to comport with the Part 1614 process and ordered the DON to suspend its use.[152] *Littlejohn* was the EEOC's first opportunity to comment formally on the DON's Pilot Program, but it was not the first time the EEOC told the DON that it believed there were problems with the program.[153] Though the DON had repeatedly included the Director of the OFO in its planning and evaluation of the Pilot Program, this attempt at interagency cooperation met serious resistance when a new Director took the helm of the EEOC in the fall of 1999.[154]

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148. *Id.*; *see* Appendix A.

149. The DON Civilian Human Resources Web page, *supra* note 104.

150. For a graphical comparison of the differences between the Pilot Program and the Part 1614 process, refer to Appendix A.

151. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

152. *Id.* at *11.

153. *See supra* note 59. Given its mission and practice, the EEOC is commonly regarded as a "watchdog agency" for EEO law, often assisting in training and assisting federal agencies with their EEO programs, and always on the alert for violations of EEO law. *See generally* Major Michele E. Williams, *Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions*, ARMY LAW., July 1999, at 13 (detailing analysis of the EEOC's mission, role, statutory powers, origins, and whether it has the power to change regulations and make these changes binding on other agencies).

154. Interview with Mr. Bernal, *supra* note 101.

By November 1999, Carlton Hadden had become the new acting OFO Director. Mr. Hadden requested a meeting with the DON to discuss what he perceived as problems with the Pilot Program.[155] Over the next few months, various meetings and correspondence took place between Mr. Hadden and DON personnel, during which the DON attempted to brief Mr. Hadden fully on the Pilot Program and its history to get his approval, as DON had for Mr. Hadden's predecessor. Mr. Hadden, in turn, continued to point out perceived problems in the Pilot Program's process.[156] By March 2000, Mr. Hadden told the DON that he believed the Pilot Program process failed to comply with the requirements of the newly revised Part 1614.[157]

Meanwhile, another significant change in federal EEO law occurred that also adversely impacted the DON and its Pilot Program. In April 2000, the Interagency ADR Working Group[158] published its Core Principles of ADR.[159] The Department of Defense, and thus the DON, signed on to these principles.[160] These newly published principles created more problems for DON's Pilot Program as the program's process appeared to conflict with several of these core principles.[161] Specifically, the core principles of confidentiality, neutrality, and preservation of rights all raised problems when the Pilot Program was evaluated.[162] Due to the combined effects of the rising EEOC opposition to the Pilot Program and the newly discovered problems derived from the publication of the Working Group's Core Principles, the controversy over the Pilot Program was increasing.[163] By this time, the first two appeals of Pilot Program cases were about to be decided by the EEOC,[164] and the conflict between the EEOC and the DON over the Pilot Program's legality had come to a head.[165]

Littlejohn involved two complaints brought by disgruntled DON employees who had volunteered to participate in the Pilot Program at the pre-complaint counseling stage, and had ultimately appealed the FAD issued upon failure to reach resolution through ADR. The EEOC, finding that the Pilot Program failed to comport with 29 C.F.R. Part 1614, vacated the FAD in both employees' cases, remanded both complaints for further

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155. *Id.*

156. *Id.*

157. *Id. See also* Letter, Carlton Hadden, Acting Director, Office of Federal Operations Equal Employment Opportunity Commission, to Betty S. Welch, Deputy Assistant Secretary of the Navy (Civilian Personnel/EEO) (Mar. 31, 2000) (expressing opinion that original Pilot Program does not conform with critical requirements of federal sector complaint processing regulations) (on file with author).

processing, and ordered the DON to suspend the use of its Pilot Program.[166]

1. Where the EEOC Sees the Pilot Program as Deficient

In *Littlejohn*, the EEOC held that the Pilot Program actually serves as a substitute procedure for the federal sector EEO process, and as such violates the policies, procedures, and guidance the EEOC set out in its management directive EEO MD-110, which implements the revised 29 C.F.R. Part 1614.[167] The EEOC explained that the Pilot Process is fundamentally flawed as an ADR system because it detracts from, rather than augments a

158. The Interagency ADR Working Group was established to coordinate, promote, and facilitate the effective use of dispute resolution processes within federal agencies as mandated by the Administrative Dispute Resolution Act of 1996 and the White House Memorandum For Heads of Executive Departments and Agencies, dated May 1, 1998. The Working Group consists of representatives of the heads of all participating federal agencies. Its mission is to:

> [F]acilitate, encourage, and provide coordination for agencies in such areas as development of programs that employ alternative means of dispute resolution; training of agency personnel to recognize when and how to use alternative means of dispute resolution; development of procedures that permit agencies to obtain the services of neutrals on an expedited basis; and record keeping to ascertain the benefits of alternative means of dispute resolution.

Memorandum, President William J. Clinton, to Heads of Executive Departments and Agencies, subject: Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998), *available at* http://www.financenet.gov/financenet/fed/iadrwg.

159. INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, CORE PRINCIPLES (2000) [hereinafter ADR WORKING GROUP CORE PRINCIPLES], *available at* http://www.financenet.gov/financenet/fed/iadrwg/coreprin.htm. The Working Group defined the following as the core principles of ADR:

> Confidentiality: All ADR processes should assure confidentiality consistent with the provisions in the Administrative Dispute Resolution Act. Neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask neutrals to reveal confidential communications. Agency policies should provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

person's rights guaranteed under Part 1614.[168] The EEOC stated that,

159. (continued)

> Neutrality: Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. For example, they should not also serve as counselors or investigators in that particular matter. Participants in an ADR process should have the right to reject a specific neutral and have another selected who is acceptable to all parties.
>
> Preservation of rights: Participants in an ADR process should retain their right to have their claim adjudicated if a mutually acceptable resolution is not achieved.
>
> Self-determination: ADR processes should provide participants an opportunity to make informed, uncoerced, and voluntary decisions.
>
> Voluntariness: Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be given appropriate information and guidance to decide whether to use ADR processes and how to use them.
>
> Representation: All parties to a dispute in an ADR process should have a right to be accompanied by a representative of their choice, in accordance with relevant collective bargaining agreements, statutes, and regulations.
>
> Timing: Use of ADR processes should be encouraged at the earliest possible time and at the lowest possible level in the organization.
>
> Coordination: Coordination of ADR processes is essential among all agency offices with responsibility for resolution of disputes, such as human resources departments, equal employment opportunity offices, agency dispute resolution specialists, unions, ombuds, labor and employee relations groups, inspectors general, administrative grievance organizations, legal counsel, and employee assistance programs.
>
> Quality: Agencies should establish standards for training neutrals and maintaining professional capabilities. Agencies should conduct regular evaluations of the efficiency and effectiveness of their ADR programs.
>
> Ethics: Neutrals should follow the professional guidelines applicable to the type of ADR they are practicing.

Id.

160. Interview with Mr. Bernal, *supra* note 101.

while its revised Part 1614 regulations pushed for the development of ADR programs, the ADR programs were meant to operate within the Part 1614 process, not to replace that process.[169] The EEOC cited three primary problems with the Pilot Program: voluntariness, neutrality, and confidentiality.[170] Interestingly, each of these problem areas is also one of the core principles defined two months earlier by the Interagency ADR Working Group.[171]

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161. ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159. At the time of the development and implementation of the Pilot Program the core principles had not yet been agreed upon. When the Interagency Working Group, with DOD participation, signed on to these as core principles, the DON found itself having to re-evaluate its program in light of this change. Interview with Mr. Bernal, *supra* note 101.

162. *See infra* notes 167-89 and accompanying text (providing more in-depth analysis of these conflicts).

163. Interview with Mr. Bernal, *supra* note 101.

164. Phillips filed his appeal in February of 1999. Littlejohn filed his appeal in November of 1999. Philips and Littlejohn v. Danzig, 2000 EEOPUB LEXIS 4110 (June 8, 2000).

165. *See generally Proceeds Despite EEOC Order*, *supra* note 9 (discussing the conflict between the DON and the EEOC).

166. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *11. *See also infra* note 192 (discussing the EEOC's order).

167. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *1. Note that EEO MD-110 is not a statute, but rather is the EEOC's interpretation of the requirements set forth in 29 C.F.R. Part 1614. EEOC MD-110, *supra* note 68. There is a great deal of debate, beyond the scope of this article, about how binding or persuasive such an interpretation is on federal agencies.

168. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *4. A basic premise of ADR in EEO law is that it is always designed as a means of augmenting, rather than detracting from a person's rights. *See generally* ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159 and accompanying text. One of the core ADR principles is that of "preservation of rights." Under this principle, participants in an ADR process retain their rights to have their claim adjudicated via the customary resolution process if a mutually acceptable resolution is not achieved via ADR. *Id.*

169. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2.

170. *Id.* These three problem areas are also among the core principles defined by the Interagency ADR Working Group. *See supra* notes 158-59 and accompanying text.

171. *See supra* notes 158-59 and accompanying text. With these core principles being adopted in April 2000, and the *Philips and Littlejohn* decision following in June 2000, the similarities do not appear coincidental. In the author's opinion, the evidence indicates that the EEOC was well aware of the ADR Working Group's Core Principles, and incorporated them into their *Philips and Littlejohn* rationale.

a. Voluntariness

In Littlejohn, the EEOC held that the Pilot Program unlawfully diminished an individual's rights by requiring that an individual agree not to opt-out of the program and by taking away many of the procedural safeguards found in the traditional Part 1614 process.[172] The EEOC stated that the Pilot Program's fundamental requirement that employees give up their right to opt-out of the program runs contrary to the very spirit and intent of ADR in that it detracts from, rather than adds to a complainant's rights.[173] The EEOC's primary concern was not the actual election of the Pilot Program as a voluntary choice, but rather what happens when a failed ADR complainant is interjected back into the EEO complaint process.[174]

The EEOC reasoned that Part 1614 mandates that, should ADR fail, the complainant retains all Part 1614 rights, including an EEO counselor's final interview and report, an agency investigation, and a hearing before an AJ or to request a FAD.[175] The EEOC's rationale was that the ADR process is intended to be an additional step in the revised 1614 process.[176] If

172. *Id*. Additional support for this position also exists. *See, e.g.*, Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 (1996) (ADR is to be voluntary and "supplement rather than limit other available agency dispute resolution techniques"); Letter from Carol Houk, Deputy Dispute Resolution Specialist, Department of the Navy, to Principal Deputy General Counsel, Department of the Navy, at 10, (Apr. 2, 1999) (on file with author) (The legislative history of this act indicates that some congressmen had specific concerns about ADR being employed to "railroad" EEO disputants through a process outside the normal EEO complaint process and without its safeguards.).

173. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2 (June 8, 2000). *See supra* note 159 and accompanying text.

174. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *10. *See also* Telephone Interview with Ms. Carol Houk, Deputy Dispute Resolution Specialist, Dep't of Navy (Nov. 29, 2000). The whole idea behind using ADR in workplace disputes is that a voluntary, cooperative spirit often resolves workplace issues that oftentimes are not "true" discrimination issues, but are rather communication problems that can be worked out in the proper environment. *Id.*

175. *See generally* EEO-MD-110, *supra* note 68, app. H ("The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court.").

176. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *2 - 5.

ADR fails, all other rights should be retained, and the complainant should be interjected back into the 1614 Process at the EEO counseling stage.[177]

The EEOC cited additional specific problems associated with voluntariness, including the lack of a developed EEO counselor's report, the lack of an impartial and appropriate agency investigation, the lack of notification of the right to request a hearing before an EEOC AJ, and the avoidance by the agency of a binding decision by such an AJ.[178] *Littlejohn* states clearly the EEOC's position that a complainant may not voluntarily waive these rights because they are mandated by the EEOC's regulations.[179]

b. Neutrality

The EEOC noted that the role of the DRS crosses many boundaries and inherently cannot be done with full neutrality, thus violating another of the core principles of ADR.[180] According to the EEOC's analysis of the Pilot Program,[181] the DRS is responsible for conducting the pre-complaint counseling and may subsequently participate in three of the four forms of ADR (conciliation, early neutral inquiry, and settlement conference, but not mediation). Ultimately, the DRS conducts the investigation and development of the record should ADR fail.[182] The EEOC noted that, while

177. *Id* at *10. *See also* Interview with Ms. Houk, *supra* note 174 (the EEOC's rationale is consistent with the historical underpinnings of ADR in that ADR was developed from the very start to function as an addition to, rather than an alternative for, rights afforded to an individual under another process). In the author's opinion, part of the controversy surrounding the DON's Pilot Program could have been avoided by characterizing the Pilot Program's process as something other than ADR. Given the historical underpinnings of ADR—requiring, *inter alia*, that ADR always act as an addition to underlying rights, adopted by both the Interagency ADR Working Group's Core Principles and the EEOC's *Philips and Littlejohn* opinion—the phrase "alternative dispute resolution" carries with it certain expectations that the Pilot Program never intended to meet. Had the Pilot Program been characterized as an alternative complaint resolution procedure more similar to a settlement procedure, *see infra* note 254 and accompanying text, some of the controversy generated would likely have been avoided. The fact that the Pilot Program labels itself ADR leads inevitably to negative evaluations applying the fundamental criteria of ADR, and thereby prevents a broader scope of analysis of the program as done in Section III (*Discussion*) below.

178. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *4 5 (*citing* EEO MD-110, *supra* note 68, at 3-2).

179. *See infra* note 256 and accompanying text (providing an in-depth explanation of the EEOC's position regarding non-waiverable employee rights).

180. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6. *See supra* note 159 (discussing neutrality as a core principle).

conducting the pre-complaint counseling, the DRS is supposed to be assisting the complainant in resolving the problem. During ADR, the DRS should be neutral and assist each side in coming to a mutual agreement. Then ultimately, during the investigation and development of the record, the DRS answers to the agency, having literally jumped the fence to the opposing side.[183] In the EEOC's view, these roles are inherently contradictory, and do not promote trust between the parties.[184]

c. Confidentiality

Lastly, the EEOC cited the DRS's multiple roles as inevitably breaching the confidentiality principle.[185] The EEOC reasoned that, under the Pilot Program, mediation is the only form of ADR that is done strictly by a third-party neutral without a record or notes generated from the proceeding.[186] The other three forms of ADR involve various degrees of record building by the DRS.[187] In conciliation, early neutral inquiry, and settlement conferences, the DRS is *responsible* for ensuring that a written record is built.[188] The EEOC's reasoning continued that this process of requiring that the DRS be present during three of the four ADR proceedings and then personally completing the investigation and factual record, inevitably

181. Note that this is an area of contention with the DON, as the DON believes strongly that the EEOC misread the *Philips and Littlejohn* case files in this regard. According to the DON, under the Pilot Program, the DRS that conducts the intake and develops the case file was never intended to be the same DRS that acts as the neutral or is present in the dispute resolution process, nor were they the same person in these two actual cases. There were two different individuals acting as DRS for the intake and case file stage vice the neutral stage in both the *Philips and Littlejohn* cases. It would appear from the EEOC ruling, however, that this fact went unnoticed. Interview with Mr. Bernal, *supra* note 101.

182. *Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6.

183. *Id*.

184. *Id*. at *7.

185. *Id*. *See also* ADR WORKING GROUP CORE PRINCIPLES, *supra* note 159 and accompanying text. It should be noted that the Pilot Program makes no attempt to hide this lack of confidentiality. Complainants electing to participate in the Pilot Program are told that there is no confidentiality in the program by the very nature of the way the program works, and are again told when selecting their type of ADR process that three of the four processes are not confidential. DRAFT PILOT DISPUTE RESOLUTION GUIDELINES, *supra* note 144 (unpaginated).

186. *Philips and Littlejohn*, 2000 EEOPUB LEXIS 4110, at *6 - 7.

187. *Id.*

188. *Id*.

leads to the disclosure of information that the confidentiality principle is meant to protect.[189]

2. EEOC's Littlejohn Order

In *Littlejohn*, the EEOC remanded both complaints for processing in accordance with Part 1614.[190] The ruling also required that the DON notify all affected employees of their right to file a formal complaint under Part 1614 procedures.[191] The EEOC went further, however, and ordered the DON to suspend immediately the Pilot Program.[192] This suspension

189. *Id.*

190. Interestingly, to date neither Philips nor Littlejohn has filed a formal complaint with the Navy via the Part 1614 process. Interview with Mr. Bernal, *supra* note 101.

191. *Philips and Littlejohn*, 2000 EEOPUB LEXIS 4110, at *12.

192. *Id*. The Commission ordered the DON to take the following action:

> (1) The agency shall process the remanded claims separately in accordance with 29 C.F.R. § 1614.105(d). Each complainant shall be informed in writing by an EEO Counselor, no later than the thirtieth day after this decision becomes final, of his right to file a formal EEO discrimination complaint. The notice shall inform complainant of the right to file his complaint within fifteen days of receipt of the notice, of the appropriate official with whom to file a complaint and of complainant's duty to inform the agency if he retains counsel or a representative.
>
> (2) Upon receipt of this decision, the agency shall immediately suspend the Pilot Program. The agency shall deem all complaints which are currently being processed through the Pilot Program as unresolved, and no later than the thirtieth day after this decision becomes final, the agency shall notify all affected individuals whose complaints are currently being processed through the Pilot Program of their right to file a formal EEO discrimination complaint pursuant to 29 C.F.R. § 1614.105(d).
>
> (3) Any ADR program which the agency establishes pursuant to 29 C.F.R. § 1614.102(b)(2) must satisfy the requirements of 29 C.F.R. Part 1614 and comport with EEO MD-110, Chapter 3 (November 9, 1999).
>
> (4) The agency is directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include evidence that the corrective action in paragraphs (1) and (2) has been implemented.

order brought the controversy between the EEOC and the DON to a critical juncture.

3. DON's Response to Littlejohn

After the *Littlejohn* ruling, the DON indicated that it intended to proceed with the second phase of its Pilot Program despite the EEOC's cease and desist order.[193] The DON maintained its belief that the program fully complied with the EEOC's regulations and guidelines and "does not work to disadvantage employees."[194] Further, the DON claimed it was surprised at the EEOC ruling because the DON had worked with the EEOC throughout the development of the program.[195] However, and perhaps most importantly, the DON clarified and modified the Pilot Program's procedural guidance since *Littlejohn* to emphasize three important points: (1) employees will be allowed to opt-out of the Program if they are dissatisfied; (2) employees are assured of confidentiality in the Pilot Program; and (3) the DRS must and will remain neutral at all times.[196] Thus, in effect, the most controversial provision, the no opt-out provision, was conceded. The DON sent the EEOC this clarifying information, requesting that the EEOC review the program with this clarification to see if the revised program complied fully with EEOC regulations.[197]

Shortly thereafter, the DON suspended the Pilot Program altogether while it awaited clarification from the EEOC.[198] The EEOC reviewed the

193. *See Proceeds Despite EEOC Order*, *supra* note 9.

194. *Id*.

195. *Id*. The EEOC does not share this view, however. *See, e.g.*, *Diligence on Disputes*, FED. TIMES, Oct. 16, 2000 (letter to the editor from Carlton M. Hadden, Director, Office of Federal Operations, Equal Employment Opportunity Commission) ("We shared our concerns with the Navy [about the Pilot Program] in the hope we could reach an agreement on how the program could be configured to address our concerns. However, this was to no avail."); Tim Kauffman, *Navy Amends Complaint Process to Mollify EEOC*, FED. TIMES, Aug. 28, 2000 ("[T]he EEOC flatly denies any involvement in the Navy's program. 'EEOC did not bless this program,' the EEOC spokesman said. 'They pretty much did this on their own despite out concerns.'").

196. *Proceeds Despite EEOC Order*, *supra* note 9.

197. *Id*. *See also* Kellie Lunney, *EEOC Challenges Navy On Discrimination Complaints*, GOV'T EXEC., Aug. 3, 2000, *available at* http://www.govexec.com. "Phase two addresses the recommendations made by the EEOC and complies with the federal requirements noted by EEOC. Our goal is to press ahead with the pilot and continue to improve upon the success we experienced in phase one" *Id.* (quoting Navy spokesperson Lt. Jane Alexander).

198. Interview with Mr. Bernal, *supra* note 101.

newly revised program, recommended a number of minor changes in September 2000, and in October 2000 gave the DON approval to restart the program.[199] Under this revised Pilot Program process (Revised Pilot Program), the timing of complaint processing was increased from ninety to 115 days, still a significant shortening of the process, but the employee is allowed at any point in the process to opt-out of the Program and return to the Part 1614 process at the agency investigation stage. As such, the Revised Pilot Program offers the employee a more traditional ADR program that adds a stage to the 1614 process, but from which they may withdraw at any time and still maintain all of their Part 1614 rights.

To date, the DON has chosen not to implement this Revised Pilot Program.[200] According to the DON, while the Revised Pilot Program may appear to be a reasonable compromise, the fact that the DON employees may return to the Part 1614 process at any time means that, in effect, the Revised Pilot Program has lost many of its teeth, and may in fact do little to shorten the backlog of cases.[201] As such, the DON has chosen instead to await implementation of recent groundbreaking legislation that may resanction the original Pilot Program.[202]

D. Legislative Intervention

During this ongoing controversy between the DON and the EEOC, Congress took note of the events.[203] Congress expressed concern over the EEOC's backlog of cases and inefficient processing of complaints, and was pushing the EEOC to streamline the system.[204] By August 2000, the House version of the Defense Authorization Act for fiscal year 2001 contained a provision that would have specifically authorized the DON's Pilot Program.[205] Members of Congress who believed that the EEOC's revisions to the 1614 process were simply not a big enough step toward fixing the problem, drove this legislative event.[206] The acting OFO Director was

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199. Letter from R. Edison Elkins, Director, Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission, to David Neerman, Staff Director, Civilian Personnel and Equal Employment Opportunity, Dept. of the Navy (Oct. 23, 2000) (copy on file with author).

200. Interview with Mr. Bernal, *supra* note 101.

201. *Id.*

202. *Id.*

203. *See generally* Lunney, *supra* note 16.

204. *Id.*

205. *See infra* notes 212-13 and accompanying text.

questioned in March 2000 regarding the EEOC's efforts to fix the complaint process system, and apparently failed to satisfy many concerns.[207] The House Government Reform Subcommittee on the Civil Service had heard testimony from the Associate Director of Federal Management and Workforce Issues at the General Accounting Office. The official testified that the rise in discrimination complaints had "overwhelmed the capabilities of the EEOC and federal agencies to process cases in a timely fashion," citing the EEOC's backlog as getting worse rather than better.[208]

During this same period, the Assistant Secretary of the Navy for Civilian Personnel and Equal Employment Opportunity was asked to testify before congressional subcommittees about the Navy's personnel programs, including the Pilot Program.[209] Touting the Pilot Program's significant success both in open sessions and in private conferences, the Assistant Secretary was ultimately asked by staff members of both the House Armed Services Committee and the House Government Reform Committee's Civil Service Subcommittee to propose legislation that would specifically authorize the DON's Pilot Program.[210] In effect, members of Congress proposed a legislative bypass of the EEOC's concerns with the Pilot Program's legality, one that specifically gave congressional

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206. Interview with Bernal, *supra* note 101.

207. *See generally* Lunney, *supra* note 16 (describing Congresswoman Eleanor Holmes-Norton, a former head of the EEOC, as "interrogating" the OFO Director, and blasting his agency for not doing more to fix the fatally flawed EEO process).

208. *Id.*

209. *See* Testimony of Ms. Betty Welch Before the Military Readiness and Civil Service Subcommittee of the House Armed Services Committee (Mar. 9, 2000), *available at* http://www.house.gov/hasc/testimony/106thcongress/00-03-09welch.htm. Ms. Welch testified:

> [T]he pilot process has already saved the [DON] more than three million dollars, and we are just beginning to see the savings. Perhaps more important than the dollar savings, the real result of the EEO Reengineering pilot is the empowerment of employees to take an active role in the resolution of their complaints—the opportunity for participants to state their cases in a neutral forum, which protects employee rights and saves the taxpayers' money.

Id.

210. Interview with Mr. Bernal, *supra* note 101.

approval to the Pilot Program, and ended the EEOC-DON controversy by legislative intervention.[211]

Ultimately, the legislative bypass was only partly effected, as the House bill was modified before passage. The bill passed as proposed in the House,[212] but no matching provision was included in the Senate version.[213] After the conference committee met to merge the House and Senate bills, the final version of the Defense Appropriations Act of 2001 (Act) contained only a watered-down version of the initial congressional support.[214] Section 1111 of the Act required that the Department of Defense select a "minimum of three agencies" to set up and test EEO pilot programs for a period of three years and then report back the results, but the section failed to specifically name the DON's Pilot Program as one of those to be selected.[215] To date, the testing agencies have not yet been selected, and the DON is awaiting word on whether its Pilot Program will be one of the programs congressionally approved.[216]

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211. 2001 Defense Authorization Act, *supra* note 97.

212. H.R. 4205, 106th Cong. (2000).

213. H.R. 5408, 106th Cong. (2000). On 13 July 2000, the Senate approved their version of the bill without a Pilot Program clause. On 27 July 2000, the Speaker of the House appointed conferees to resolve discrepancies between the House and Senate bills. The conference report dated 6 October 2000 indicates:

> The House bill contained a provision (sec. 1106) that would authorize the Secretary of the Navy to carry out a five-year pilot program to demonstrate improved processes for the resolution of equal employment opportunity complaints. The Senate amendment contained no similar provision. The Senate recedes with an amendment that would require the Secretary of Defense to conduct a three-year pilot program to demonstrate improved processes for the resolution of equal employment opportunity complaints in a minimum of one military department and two defense agencies, and would require a report to the Committees on Armed Services of the Senate and the House of Representatives not later than two years after initiation of the pilot program.

H.R. CONF. REP. ON H.R. 5408, FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001, at 1 (2000).

214. 2001 Defense Authorization Act, *supra* note 97.

215. *Id*.

216. Interview with Mr. Bernal, *supra* note 101.

III. Discussion & Analysis

The primary issues presented by the Pilot Program can be broken into two categories: legal issues and policy issues. First, from a legal perspective, does the Pilot Program actually conflict with existing law? Is the EEOC correct in its interpretation that the original Pilot Program conflicts with applicable EEO law? And if it does, can selecting the original Pilot Program as one of the legislatively sanctioned test programs correct the problem? Second, from a policy perspective, is there really a need for such a drastic step? Is the EEO complaint system so broken that such dramatic change is necessary? And if so, is the original Pilot Program the best step, or would it suffice to allow the implementation of the EEOC-approved Revised Pilot Program? This discussion section addresses each of these concerns in turn.

A. Legal Issues: Can an Employee Bargain Away EEO Rights?

The starting point in the analysis of the Pilot Program's legality begins with some foundation questions: What is wrong with bargaining away these types of rights in the first place? Is there really anything wrong with offering an employee an opportunity to participate in a program where he knowingly and voluntarily waives some rights in exchange for some benefits? Do not people, in effect, have a right to bargain? Do not employees have a right, in fact, to simply waive rights if they so choose? If an employee may waive the right altogether, why should he be limited in exercising only part of it? On their face these are simple questions, and the evidence explored below points to the inescapable conclusion that, as a general rule, there is nothing wrong with this concept of allowing someone to knowingly and voluntarily waive or bargain their rights in exchange for adequate legal consideration.[217] The issue then remaining is whether some other interest demands an exception to this general principle.

The evidence supporting the general principle that an employee should be able to waive or bargain some rights in exchange for some benefits is plentiful. People bargain away their rights all the time. Examples

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217. Legal consideration is defined as, "Something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee. Consideration . . . is necessary for an agreement to be enforceable." BLACK'S LAW DICTIONARY 300-01 (7th ed. 1999). Under basic contract law, consideration is required prior to an agreement to be considered enforceable. "To constitute consideration, a performance or a return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1998).

that will be discussed below include: (1) defendants entering into plea bargains with the government in criminal trials; (2) employees covered by collective bargaining agreements being forced to choose between the negotiated grievance procedure and the Part 1614 EEO procedure; (3) employees being bound by arbitration agreements they voluntarily entered into but which infringe on their EEO rights; and (4) settlement agreements in EEO complaints where employees waive their rights to pursue their complaints higher in exchange for some consideration.

1. Criminal Trials

Looking first at the criminal law arena, the proposition that people should be allowed to waive and bargain away personal rights in exchange for consideration finds telling support in the plea agreement negotiation process. Criminal defendants regularly waive various rights.[218] Rule 11 of the Federal Rules of Criminal Procedure specifically allows negotiated pleas of guilty in federal courts,[219] and state courts have similar provisions.[220] In military courts, Rule for Courts-Martial 910 specifically allows a plea of guilty.[221] Under the Rules for Courts-Martial, a military judge is required to conduct a somewhat extensive inquiry before accepting the plea of guilty to ensure the accused understands the gravity of a guilty plea.[222] The military judge must address the accused personally and ensure he fully understands the nature and effect of a guilty plea, the maximum penalty for the offenses to which he is pleading guilty, and his rights to plead not guilty and to have a full-blown jury or judge-alone trial.[223] The military judge must also ensure the guilty plea is being done voluntarily, and ask whether a pretrial agreement is involved.[224] Lastly, the military judge must satisfy himself that the accused has in fact committed the offense to which he is pleading guilty.[225] Once satisfied, the plea is

218. *See, e.g.*, Reed Harvey, Note, *Waiver of the Criminal Defendant's Right to Testify: Constitutional Implications*, 60 FORDHAM L. REV. 175 n.4 (1991) (discussing constitutional standards for waiver of a criminal defendant's rights across jurisdictions throughout the country); *see also* Roland Acevedo, Note, *Is a Ban On Plea Bargaining An Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 987 (1995) ("Plea Bargaining is an essential and important component of the American criminal justice system . . . account[ing] for ninety percent of all criminal convictions in the United States.").

accepted and the accused may find himself in the brig for up to life without parole.[226]

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219. Rule 11 of the Federal Rules of Criminal Procedure provides:

> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and
>
> (4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
>
> (5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and
>
> (6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.
>
> (d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

FED. R. CRIM. P. 11.

220. *See, e.g.*, NEB. REV. STAT. § 29-1819 (2000); MD. CODE ANN., CTS. & JUD. PROC., § 4-242 (1999); MASS. ANN. LAWS, RULE FOR CRIMINAL PROCEDURE 12 (2000) (each of these statutes is a rule of criminal procedure which allows guilty pleas with various amounts of judicial inquiry into the basis of the plea).

221. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2000).

222. *Id*.

223. *Id*.

224. *Id.*

225. *Id.*

Persons accused of a crime generally only plead guilty when they believe it is in their best interests, usually hoping for some leniency in sentencing either from the judge or through some sort of plea-bargain.[227] Persons entering into such plea agreements are bargaining away their constitutional rights to a trial by a jury of their peers, to have the government prove the case against them beyond a reasonable doubt, to call witnesses in their own behalf, and other important rights.[228] In exchange, they receive some type of consideration or benefit, usually in the form of a lesser sentence, a lesser charge, or the dismissal of additional charges.[229]

Are these constitutional rights that individuals bargain away somehow less important than a federal employee's statutory rights in being free from workplace discrimination? The question begs the response: No. How can a property interest in one's job be more important than a liberty interest in one's very freedom?[230] The U.S. Constitution imposes procedural safeguards such as proof beyond a reasonable doubt and the requirement of a jury of one's peers for a criminal conviction, yet makes no such provisions for the protection of an individual's job or working environment. Of the two, clearly an individual's rights during a criminal proceeding are more sacred than one's right to be employed fairly. If individuals can waive their most important rights, they should also be allowed to waive less important ones.

Plea agreements in criminal trials are but one example of a situation where a person's rights may be knowingly and voluntarily waived. Similar examples that are more specific to EEO law also exist, including collective bargaining agreements (CBAs), arbitration agreements, and settlement

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226. In capital cases, guilty pleas are not allowed in the military system. *See* UCMJ art. 45(b) (2000); United States v. Wheeler, 28 C.M.R. 212 (C.M.A. 1959).

227. *See generally* Acevedo, *supra* note 218, at 991 ("The popularity of plea bargaining stems from its 'mutuality of advantage' – the process offers advantages to defendants, prosecutors, defense counsel, judges, victims, and the public alike.").

228. *See generally id.*; Harvey, *Waiver of a Criminal Defendant's Right*, *supra* note 218.

229. *See generally* Acevedo, *supra* note 218, at 991-92 ("Plea bargaining allows defendants, in exchange for the surrender of certain constitutional rights, to gain prompt and final disposition of their cases, avoid the anxieties and uncertainties of a trial, and escape the maximum penalties authorized by law.").

230. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (In this cornerstone document, our founding fathers stated, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The right to maintain one's employment is not listed as one of our inalienable rights.).

agreements. Each of these examples further supports the notion that there is nothing wrong with an employee waiving rights, or bargaining rights away in exchange for consideration.

2. Collective Bargaining Agreements

Collective bargaining agreements offer more support for the proposition that a person should be allowed to knowingly and voluntarily waive or bargain with their rights. The Civil Service Reform Act of 1978 ("CSRA") explicitly allows the CBA process.[231] The CSRA was passed as part of an effort to increase the efficiency of the federal government by allowing collective bargaining in the federal workplace.[232] The CSRA requires federal employees covered by a CBA who have a potential EEO complaint to choose between the Part 1614 process and the negotiated grievance procedure under the CBA.[233] Once an option is selected, the employee is strictly bound by the choice.[234] Thus the notion that an employee can be given an option of selecting an alternative to the Part 1614 procedure, which, if selected, forfeits the right to use the Part 1614 procedure as a backup, is not without precedent. In fact, it is done on a daily basis throughout the nation,[235] and is in effect very similar to the option given to employees under the DON Pilot Program.

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231. Pub. L. No. 95-454, 92 Stat. 111 (codified in scattered sections of, *inter alia*, 5 U.S.C.).

232. Facha v. Cisneros, 914 F. Supp. 1142, 1147 (E.D. Penn. 1996) (quoting Cornelius v. Nutt, 472 U.S. 648, 666 (1985) (Marshall, J., dissenting)). *See also* 5 U.S.C. § 7101(a) (2000) (describing the findings and purpose of the Act).

233. 5 U.S.C § 7121(d) ("An aggrieved employee affected by a prohibited personnel practice under . . . this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both."). *See also* Smith v. Kaldor, 869 F.2d 999, 1005 (6th Cir. 1989) (employee must chose either the statutory procedure or the negotiated procedure).

234. 5 U.S.C § 7121(d). *See also Facha*, 914 F. Supp. at 1148 (quoting Vinieratos v. United States, 939 F.2d 762, 768 (9th Cir. 1991)).

235. *See generally* Federal Labor Relations Authority, *Home Page*, *at* http://www.flra.gov (last visited Aug. 27, 2001) (providing background information on the CSRA, the FLRA, CBAs, statutory authority for providing choice of negotiated grievance procedure under the CBA or the Part 1614 process, and case law upholding the legality of allowing such a choice).

3. Arbitration Agreements

Arbitration agreements are a second example of a knowing and voluntary waiver of rights in the employment arena, and offer further support for allowing such waivers and bargaining of rights. Federal courts have repeatedly held that arbitration agreements voluntarily entered into are enforceable. For example, in *United States v. Gilmer*,[236] the Supreme Court heard a challenge to a compulsory arbitration agreement mandated as part of a securities registration application. Gilmer brought suit under the Age Discrimination in Employment Act (ADEA) against his former employer, who in turn moved to compel arbitration under the application provision. The district court denied the motion to compel arbitration, but the court of appeals reversed. The Supreme Court affirmed the appeals court, holding that an ADEA claim can be subjected to compulsory arbitration. The Court reasoned, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[237] The Court found no such legislative intent in the ADEA.[238] The Court looked specifically to the effect that allowing such agreements would have on the ADEA's intent of furthering important social policies, and on the potential effect it might have in undermining the EEOC's role in enforcing the ADEA, and was unpersuaded.[239] The Court noted specifically that such arguments are rebuffed by the fact that an employee can still file a charge (instead of an individual claim) with the EEOC.[240] Additionally, "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement."[241]

An important consideration in the *Gilmer* case that is directly applicable to the DON's Pilot Program is that, due to the parallel or overlapping remedies against discrimination, taking the EEOC out of the process does not leave the employee without a final appeal.[242] The Supreme Court had ruled years before *Gilmer* that, while an employee may choose to vindicate his contractual employee rights through the CBA procedure instead of using the EEOC, the employee nonetheless retains the right to bring suit in

236. 500 U.S. 20 (1991).
237. *Id*. at 26.
238. *Id*.
239. *Id*.
240. *Id*. at 28.
241. *Id*. (citing Coventry v. U.S. Steel Corp., 856 F.2d 514, 522 (3rd Cir. 1988)).
242. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).

federal district court for non-contractual, statutory rights.[243] Under the DON's Pilot Program, employees also retain this same right to bring suit in federal district court.[244]

4. Settlement Agreements

Settlement agreements are yet another example of employees being able to waive or bargain away rights. Further, settlement agreements are perhaps the most important of the examples explored in this section, as they can be compared directly to the rights bargained away under the DON's Pilot Program. In both the Pilot Program and a typical settlement agreement, employees agree to resolve their complaint with the agency. In a settlement agreement, the terms of the resolution are usually already defined. In the Pilot Program, the employee is one step removed from this final settlement agreement, and has agreed to enter the Pilot Program as a *means* of achieving the final settlement. The Pilot Program can thus be viewed as a settlement mechanism, and by participating in the various forms of ADR offered under the program, the employee is simply attempting to negotiate and formalize the terms of the settlement.

The EEOC has long maintained a policy of encouraging the voluntary settlement of cases concerning rights under Title VII.[245] Federal courts have also upheld such voluntary settlements.[246] Settling a Title VII claim does not violate public policy, which favors the voluntary settlement of such claims.[247] The courts have limited this policy in two ways. First, only

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243. 500 U.S. 20, 28 (1991).

244. *See, e.g.*, *Part 1614 Procedure Versus Pilot Program* flowchart at Appendix A (showing that the Pilot Program process retains the identical right to file a civil action in a U.S. District Court following a FAD found under the Part 1614 process).

245. *See infra* note 281 and accompanying text.

246. *See, e.g.*, Runyan v. Nat'l Cash Register, 782 F.2d 1039, 1040 (6th Cir. 1986) (holding that a privately negotiated, unsupervised settlement agreement waived an employee's right to a private action under the Age Discrimination in Employment Act so long as it was a voluntary and knowing waiver of rights); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986) (absent a showing of fraud, deceit, or overreaching, no public policy issue against settlement of an ADEA claim); *Coventry,* 856 F.2d at 518 ("[S]ubject to a close evaluation of 'knowing' and 'willful' waiver, employees may execute valid waivers of their ADEA claims.").

247. *See, e.g.*, Rogers v. Gen. Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (upholding EEOC dismissal of charge of an employee who had settled a claim "based on its conclusion that [the employee], by signing the release, had waived all Title VII claims against General Electric.").

claims for actions that already occurred may be properly released, meaning that an employee cannot prospectively waive such claims.[248] Second, the release must be knowing and voluntary.[249] Absent violations of these two conditions, settlements are looked upon favorably.[250]

In applying these two judicially fashioned limitations on settlement agreements to the Pilot Program, no significant problems are apparent. First, all Pilot Program claims are by their very nature for actions which have already occurred and which therefore led to the complaint. Second, the DRS addresses the "knowing and voluntary" prong at significant length in the initial intake stage, thereby ensuring any consent garnered has the prerequisite qualifications.[251] The only foreseeable problem is that the employee may be unaware of the overall scope of the discrimination, and is therefore waiving a right that, if investigated deeper, might uncover more significant issues than are initially apparent.[252] For example, an employee may believe his case is merely a single incident, without realizing the agency has a more widespread or systematic problem, of which the employee is but one victim.[253]

An employee entering the Pilot Program can thus be analogized to an employee entering into a settlement agreement.[254] Upon entering the Pilot Program, the employee is simply agreeing to settle his claim in a different forum, though without the certainty of a finalized outcome. Since it is the

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248. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989).

249. *See, e.g.*, Shaheen v. B.F. Goodrich Co., 873 F.2d 105 (6th Cir. 1989) (employee who received approximately $22,000 in consideration for electing a severance plan which waived rights over plan which did not waive rights made knowing and voluntary choice). *See generally* Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995) (delineating factors to be considered in determining whether waiver is knowing and voluntary); Livingston v. Adirondack Bev. Co., 141 F.3d 434 (2d Cir. 1998) (knowing and voluntary is determined using a totality of the circumstances test).

250. *See, e.g., Coventry*, 856 F.2d at 522.

251. *See* Appendix C and background *supra* Section II.B.2.

252. *See* Interview with Ms. Houk, *supra* note 174 and accompanying text.

253. Decisions on when and how deeply to investigate allegations inherently involve the amount of an agency's limited resources that will be dedicated to conducting investigations. Every incident in the workplace need not be the subject of a full, formal investigation. Such a rule, if it existed, would lead to an inordinate strain on agencies being able to accomplish their mission. Some judgment must be employed on whether an incident rates an investigation, and how deep that investigation must go. Such judgment calls are implicit in both the Part 1614 process as well as the Pilot Program. Neither process requires full investigation of every incident, and allows agencies to dismiss meritless or untimely complaints. As such, the problem created by limited investigations not uncovering every potentially greater problem is not uncommon, and is unavoidable under either process.

employee's right to choose whether to settle and what to accept as a settlement, including simply dropping the case, should not the employee also be allowed to take this rationale a step further and agree to enter into a specific *process* to settle? And if this process of bargaining and waiving rights is accepted in other areas of the law, including criminal trials, as well as in EEO law (as evidenced by collective bargaining agreements, arbitration agreements, and settlement agreements), what is the countervailing argument that it should not be allowed under the Pilot Program? What considerations or policies require an exception to the general rule that people have a right to bargain? Put in its most simple form, who says a federal employee cannot enter into a knowing waiver of some of his rights in exchange for the benefits of a quicker resolution of his problem?

B. Legal Issues: The EEOC's Arguments Against Allowing the Bargaining or Waiving of These Rights

The answer to the ultimate question posed above, "who says a federal employee cannot enter into a knowing waiver of some of his rights in exchange for the benefits of a quicker resolution of his problem," is the EEOC.[255] Their rationale is explained below.

The EEOC's primary argument against allowing the waiver of rights afforded by the Part 1614 process stems from the EEOC's mission of enforcing employment discrimination law.[256] The EEOC has repeatedly

254. In the author's opinion, use of this analogy and terminology could have prevented much of the controversy surrounding the Pilot Program by avoiding the expectations accompanying the label of ADR. *See supra* note 177.

255. Note that the EEOC is not an impartial party in this matter. Given the EEOC's mission, see *supra* note 59, and its controversial shifting of power from the agencies to the EEOC by making AJ decisions binding under the revised Part 1614 regulations, see *supra* notes 63, 87-88 and accompanying text, any procedure which would diminish the EEOC's role in EEO procedures could be expected to meet resistance from the EEOC. Procedures such as the Pilot Program, which effectively settle EEO complaints without EEOC involvement, undermine the EEOC's importance, and are unlikely to be viewed favorably by the agency losing its importance.

256. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES (Apr. 10, 1997) [hereinafter ENFORCEMENT GUIDANCE], *available at* http://www.eeoc.gov/docs/waiver.html ("An employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding" filed under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act.).

stated its belief that employees have certain rights that cannot be waived under the federal civil rights laws, and this position is supported by case law.[257]

To understand the EEOC's position, the very reasons for the EEOC's existence must first be examined. In passing and later modifying Title VII, Congress established the EEOC and gave it the mission of enforcing the nation's employment discrimination laws.[258] The EEOC's functions were diverse. They included investigating claims and charges[259] of employment discrimination; attempting to resolve problems amicably, where possible, through cooperation and voluntary compliance; and, filing suit in federal court against private sector employers with whom no resolution was reached.[260] For federal agencies such as the DON, the EEOC does not bring suit in federal court, but rather refers the case to the Attorney General, who may bring such a suit, though this is highly unusual in practice.[261]

The EEOC was given only limited investigatory[262] and enforcement[263] powers, however.[264] It can only investigate matters brought to its attention through a complaint by either an individual or a class action suit,

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257. *Id.*

258. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2005, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.).

259. There is a significant difference between a "claim" and a "charge." A claim is an individual's action, usually seeking some type of relief such as back pay, reinstatement, or damages. A charge, on the other hand, is an allegation of discrimination that warrants investigation but is not tied to an individual. In fact, someone other than the aggrieved individual can file a charge. A charge therefore goes beyond the individual's rights, and merits investigation for law enforcement purposes. A useful analogy can be made to other types of law enforcement by comparing this process to an assault: the victim may bring a tort suit against the assailant in civil court seeking damages, medical fees, etcetera. Likewise, a prosecutor may then charge the assailant in criminal court for his crime. The fact that the victim chooses to settle the tort suit will not affect the criminal proceeding. *See generally* EEOC v. Cosmair, 821 F.2d 1085, 1089 (5th Cir. 1987) (discussing the difference between charges and claims, and the functions they serve); EEOC v. Shell Oil, 466 U.S. 54, 68 (1984) (discussing functions of charges and claims under Title VII).

260. *See* 42 U.S.C. § 2000e-5 (1964); *see also* Gen. Tel. Co. v. EEOC, 446 U.S. 318, 325 (1980) (In enacting Title VII, Congress had hoped to encourage employers to comply voluntarily with the Act. By 1971, however, Congress had realized that its 1964 Title VII Act lacked the teeth necessary to enforce it. Accordingly, the power to bring suit in federal court by the EEOC was passed in 1972 as part of the amendments to Title VII aimed at more effectively enforcing its provisions. (citing S. REP. NO. 92-415, at 4 (1971)).

261. 42 U.S.C. § 2000e-5(f)(1).

or through its own findings that an employer was statistically discriminating based on data derived from reports the EEOC requires annually.[265] The EEOC is thus a law enforcement agency, but one that relies primarily on employees coming forward with complaints of discrimination before initiating an investigation.[266] Therefore, any agreement or policy that seeks to quiet an employee from notifying the EEOC of an alleged discriminatory act inevitably interferes to some extent with the EEOC's law enforcement capacity.[267]

The EEOC's formal position is fully laid out in their *Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes* (*Enforcement Guid-*

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262. *See, e.g.*, EEOC v. Astra, 94 F.3d 738, 746 (1st Cir. 1996) ("The EEOC has no authority to conduct an investigation based on hunch or suspicion, no matter how plausible that hunch or suspicion may be. The reverse is true: the Commission's power to investigate is dependent upon the filing of a charge of discrimination.").

263. *See, e.g.*, Alexander v. Gardner-Denver, 415 U.S. 36, 44 (1974) ("Title VII does not provide the Commission with direct powers of enforcement . . . . Rather, final responsibility for enforcement of Title VII is vested with federal courts . . . [because] federal courts have been assigned plenary powers to secure compliance with Title VII.").

264. *See, e.g.*, *Editorial*, FED. TIMES, Sept. 18, 2000 (Pat McKee) (providing an example of public recognition that the EEOC's reaction in *Littlejohn* was at least partially motivated out of a fear of losing some of its own limited powers). "[T]he EEOC summarily dismissed the Navy process out of fear that the EEOC role in dispute resolution would be reduced." *Id.*

265. *See* EEOC v. Shell Oil, 466 U.S. 54, 70-71 (1984) (discussing EEOC procedure for checking statistical records for evidence of systematic discrimination).

266. *See Alexander*, 415 U.S. at 34 ("Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendments to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.").

267. *See, e.g.*, *Astra*, 94 F.3d at 744 ("[A]ny agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest."); *Cosmair*, 821 F.2d at 1089 ("an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest").

ance).[268] As this position appears to have been the underlying rationale in the *Littlejohn* ruling, it deserves further attention.

In *Enforcement Guidance*, the EEOC states that certain rights are non-waivable based on its rationale that allowing these rights to be waived is contrary to public policy, and prohibited by the statutes themselves.[269]

First, from a public policy perspective, the potential negative effects that such waivers have on the EEOC's role as the federal law enforcement and investigatory agency for violations of EEO law is evident; if the EEOC is not aware of a problem, it cannot investigate and correct it.[270] The EEOC does more than simply protect aggrieved workers; it is also a watchdog agency enforcing the overriding public interest in EEO law enforcement.[271] Thus, individuals who waive their EEO rights may deprive the EEOC of notice and the opportunity to correct and enforce EEO law, interfering with their role as a law enforcement agency.

Second, looking to the statutes themselves, such agreements to waive these rights violate provisions commonly found in federal employment laws that prohibit reprisals.[272] Agreements to waive these rights generally impose penalties on someone should they choose to break the agreement and exercise a right they previously agreed to waive, but which is also a protected right under one of the federal statutes.[273] Therefore, any penalty

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268. *See supra* note 256.

269. *Id; see also* Press Release, *supra* note 73. In adopting its ADR policy the Commission "reaffirmed its long-held view that mandatory binding arbitration imposed as a condition of employment is contrary to civil rights laws and does not promote the principles of a sound ADR program." *Id.*

270. *See, e.g.*, *Shell Oil*, 466 U.S. at 69 (stating that the EEOC *depends* on the filing of charges to notify it of possible discrimination).

271. *See* ENFORCEMENT GUIDANCE, *supra* note 256, at 2 ("[T]he EEOC is not merely a proxy for the victims of discrimination . . . . Although [it] can secure specific relief, such as hiring or reinstatement . . . on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement . . . . '" (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (quoting 118 CONG. REC. 4941 (1972))).

272. *Id.*

273. ENFORCEMENT GUIDANCE, *supra* note 256, at 3.

imposed by such an agreement is violative of these anti-reprisal provisions, regardless of the agreement's intent.[274]

While the *Enforcement Guidance* paper was geared primarily toward EEO law in the civilian sector, it is equally applicable to the federal sector according to the EEOC.[275] This point, however, is subject to debate.[276]

In considering the EEOC's law enforcement mission, and the effect that an agreement limiting contact by employees with the EEOC might have on this mission, the courts have emphasized the difference between the EEOC's role as a public watchdog rather than its role as a spokesperson for individuals.[277] "[E]very charge filed with the EEOC carries two potential claims for relief: the charging party's claim for individual relief, and the EEOC's claim 'to vindicate the public interest in preventing employment discrimination.'"[278] The EEOC thus protects two sets of interests or rights; one may be properly waived as an individual right, and the other may not be waived, as it is part of a public interest. The EEOC's *Enforcement Guidance* recognizes this difference, citing *EEOC v. Cosmair*[279] for the proposition that an employee may not waive his right to file a charge with the EEOC, but may waive the right to recover in his own lawsuit or one brought by the EEOC on his behalf.[280] The *Enforcement Guidance* indicates that in recognizing this difference, the EEOC furthers its position

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274. *Id.* at 5. ("By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.").

275. *See Alternative Dispute Resolution Programs in the Federal Sector*, *supra* note 69 (Guideline document for federal agencies setting up ADR programs specifically indicates such ADR programs must comply with EEOC's *Enforcement Guidance on Non-Waivable Employee Rights*, though it cites no statutory authority for this proposition.).

276. Given the extensive protections available to federal employees that do not exist in the private sector, the EEOC's reliance on the paramount importance placed on ensuring employees are able to bring charges to the EEOC's attention to ensure it can carry out its law enforcement functions seems less applicable to the federal sector.

277. ENFORCEMENT GUIDANCE, *supra* note 256, at 4 (citing as support EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (7th Cir. 1993); EEOC v. United Parcel Serv., 860 F.2d 372, 374 (10th Cir. 1988); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975)).

278. ENFORCEMENT GUIDANCE, *supra* note 256, at 3 (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980)).

279. 821 F.2d 1085 (5th Cir. 1987).

in support of "post-dispute agreements entered into knowingly and voluntarily to settle claims of discrimination or utilize [ADR] mechanisms."[281]

The EEOC's law enforcement mission is supported by case law. For example, in *Equal Employment Opportunity Commission v. Astra USA Inc.*,[282] the First Circuit Court of Appeals was confronted directly with a question analogous to this article's topic. The *Astra* court weighed the impact of settlement provisions that disrupted cooperation with the EEOC against the impact that outlawing such provisions would have on private dispute resolution. While settlement provisions are somewhat different from waiving procedural rights, the analogy to the DON's Pilot Program bears consideration. In *Astra*, the court considered Title VII's statutory scheme and found that the EEOC's ability to investigate *charges* of systematic discrimination was crucial and outweighed any potential counterargument in support of allowing interference with this right.[283] The court focused primarily on the potential harm to the EEOC's role of vindicating the public interest instead of protecting private interests, and reasoned that any such agreement that interferes with an employee's right to communicate with the EEOC about a potential charge does fundamental damage to the public interest.[284] The court also recognized the important public policy in favor of encouraging voluntary settlement of employee complaints. But in balancing the competing interests, the court found no plausible argument that allowing such agreements to waive the right to file a charge is required to promote voluntary settlements.[285] Thus, the court essentially found the issues to be non-contradictory.[286] The right to file a charge, or to communicate with the EEOC involving a charge, cannot be interfered with; however, settlement of individual claims is not necessarily tied to

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280. ENFORCEMENT GUIDANCE, *supra* note 256, at 4 (citing EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987)) ("[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf.").

281. *Id.*

282. 94 F.3d 738 (1st Cir. 1996).

283. *Id*. at 744.

284. *Id*.

285. *Id*. at 745.

286. *Id*.

this right to file a charge. Ultimately, waiving an individual claim does not, and cannot, affect the right to file a charge.[287]

The EEOC's emphasis on its law enforcement mission, as set out in the *Enforcement Guidance*, makes it clear that one of the primary considerations in looking at the legality of the DON's Pilot Program must be the effect of the Pilot Program provision requiring that an employee waive his right to opt-out of the program. Does this provision limit only the employee's private right to relief, or all rights under Title VII, including the right to file a charge with the EEOC? The Pilot Program is silent on this issue, but a reasonable interpretation of the program indicates that it only deals with an employee's individual claims. The DON surely never intended that the Pilot Program interfere with the EEOC's law enforcement mission, and it would surely concede that an employee maintains the right to file a charge, or to communicate openly with the EEOC in any ongoing investigation into such a charge. Additionally, given the fact that Pilot Program users maintain the right to appeal to the EEOC, albeit without a hearing, and to file suit in federal court, the right to file a charge appears unencumbered by this waiver.[288] As such, it appears that the EEOC's law enforcement mission is unaffected by the Pilot Program's opt-out provision.

With the EEOC's law enforcement mission thus unaffected by the Pilot Program's waiver of rights, the rationale of the *Enforcement Guidance* then breaks down, returning us to the initial question: If rights can be waived in other areas of the law, and can be waived even in analogous situations in EEO law such as arbitration and settlement agreements, why can't they be waived under the Pilot Program? If there is not a legal impediment, is there perhaps a policy consideration that acts as a countervailing consideration to the general proposition that people should be allowed to waive their rights, or bargain them in exchange for adequate consideration? Our last argument to address is thus a policy issue: Given the controversy over the Pilot Program and its potential pitfalls and legality problems, is the program *worth* it? Are the Program's benefits significantly better than those that could be realized utilizing the employment of a more traditional ADR program interjected into the DON's application of the Part 1614 process? As is common with policy considerations, the

287. *Id. See also* ENFORCEMENT GUIDANCE, *supra* note 256.

288. Nonetheless, for the sake of clarity, this is one area in which that the DON should issue amplifying instructions before moving ahead with the Pilot Program.

question becomes not "can we do this," but rather "should we?" Is it worth it?

C. Policy Issues: Assuming An Employee Can Bargain Away These Rights, Are the Benefits of the Pilot Program Worth the Costs? Should the DON Take Such a Dramatic Step when Other ADR Programs Have Been Successful, and Could Be Adapted to the DON?

Exploring this policy argument requires consideration of the question, "Even if the DON can do this, should it?" The EEOC is not alone in its objections to the Pilot Program. Other resistance has been noted from ADR specialists,[289] political groups,[290] and even the Department of Justice.[291] Thus, the question "should we do it" may in fact be just as important as "can we do it?"

There is no question that making available some type of an ADR program in the EEO complaint process is a good thing, and will help to resolve many EEO complaints quickly, relieving some of the strain on the system.[292] One of the fundamental flaws in the current practice of EEO com-

289. Interview with Ms. Houk, *supra* note 174. Ms. Houk echoed many of the arguments put forth by the EEOC in the *Littlejohn* opinion. Additionally, she added her concern that it is simply unjust that the same agency that bears at least partial responsibility for allowing the backlog of cases in the EEO complaint process to grow to the current unmanageable level is the same one asking employees to waive some of their rights to avoid being caught in this same backlog. Ms. Houk explained that had the agency (DON) acted sooner to fix the problem as it escalated, the need for such a dramatic step as the Pilot Program would now be unnecessary. By asking the employee to waive rights to avoid this backlog, the Pilot Program then penalizes the wrong party—it is the agency, and not the employee, that should bear the burden. *See also* Letter from Ms. Houk to Deputy General Counsel, *supra* note 172, at 1 ("[N]o Navy employee should be asked to give up their due process rights by the same entity that is a primary cause of the current unconscionable delay in the administrative complaint process.").

Note that this is a controversial argument. The DON takes the position that the current backlog of cases is more directly attributable to the Part 1614 process itself, and the delays involved in getting cooperation from DOD and the EEOC for investigations and AJ hearings than anything that the DON has done. Interview with Mr. Bernal, *supra* note 101.

290. *See, e.g.*, Tonya N. Ballard, *Civil Rights Leaders Protest New Defense Complaint Processing*, GOV'T. EXEC., Nov. 13, 2000, *available at* http://govexec.com.

291. Interview with Mr. Jeffrey Senger, Counsel, Department of Justice, at The Judge Advocate General's School of the Army, Charlottesville, Va. (Feb. 2000) (The DOJ opposed the Pilot Program, citing concerns similar to those expressed by the EEOC in the *Philips and Littlejohn* opinion).

292. *See, e.g., infra* notes 301-08 and accompanying text (discussing the successes of the Air Force and Post Office ADR programs).

plaint processing is that employees often use the process as a venting mechanism for complaints that really have nothing to do with EEO law.[293] In the federal sector, much as in the private sector, employees often find themselves working for a boss that they simply do not get along with.[294] However, in the federal sector, the employees have a much higher incidence of filing EEO complaints as a means of attempting to rectify issues that are actually not grounded in discrimination.[295] The reasons for this are unclear, but certainly the ready availability of the EEO counselor, the job security of a tenured federal employee, the reprisal protections once a complaint has been filed, and the military's "chain of command" mentality all contribute to this trend.[296] These "communication-gap" complaints are perhaps where ADR shines brightest in resolving complaints.[297] The ADR gives these employees an opportunity to meet face to face with their boss on equal footing, in a manner requiring the boss to pay attention to their concerns, and for which no reprisal is allowed.[298]

Recognizing that some type of ADR program is a good thing brings us back to the initial question: If we *can, should* we be offering a program that requires employees to "opt-out" of their right to return to the 1614 process and stay in the Pilot Program? Why not use a more traditional ADR program, such as those successfully employed by the Air Force and the Post Office?[299] What is the benefit derived from the Pilot Program, and is it worth the price paid over what is available in some of these less controversial systems? And is the Revised Pilot Program, less controversial and already approved by the EEOC, a reasonable compromise? Alternatively, why not offer a more traditional ADR program as an addition to the Part

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293. *See generally EEOC's Reform Proposal Gets Flak From All Sides*, *supra* note 63. The Council of EEO and Civil Rights Executives reported to the EEOC that much of the overburdening of the current caseload came from complaints that resulted from a lack of supervisor-employee communication. *Id.*

294. Interview with Houk, *supra* note 174.

295. *Id.*

296. *Id*.

297. *Id*; *see also* Interview with Ms. Carole Houk, Deputy Dispute Resolution Specialist, Department of the Navy, and Mr. Joseph M. McDade, Deputy Dispute Resolution Specialist, Department of the Air Force, at The Judge Advocate General's School of the Army, Charlottesville, Virginia (Nov. 29, 2000) Many federal EEO complaints are filed under the EEO system simply because there is no alternative way for an employee to voice displeasure. The ADR processes are an effective addition to the EEO process because they provide such an alternative mechanism for an employee to voice their concerns. *Id.*

298. *Id.*

299. *See infra* notes 301-08 and accompanying (providing more information on these programs).

1614 process, but also offer the Pilot Program as a wholly separate settlement procedure?[300]

The less controversial programs adopted by the Post Office and Air Force have achieved significant praise and success.[301] The Post Office uses a workplace mediation program that has mediated more than 12,000 EEO complaints with 81% being closed without the filing of a formal complaint.[302] Complainants report a satisfaction rate with the program of 88% versus 44% under the Part 1614 process.[303] The workplace has benefited from the increased communication, and new complaints dropped 24% over the previous year.[304] These improvements lead to huge cost benefits, as well as increased worker morale and productivity.[305]

The Air Force has enjoyed similar success.[306] Its workplace ADR program, part of a larger ADR program that also covers contract and environmental disputes, uses mediation, facilitation, early neutral evaluation, ombuds, and other techniques to resolve complaints informally.[307] From 1995 to 1999, the Air Force program has averaged resolution rates of 74%, cost savings of $14,000 per case, and labor hour savings of 276 hours per case resolved.[308]

These two programs have received federal awards, and are looked to as models in this developing field, yet neither of them required the controversial procedures employed in the DON's Pilot Program. The question remaining is whether their ADR programs were a significant enough

300. This procedure would comply with the revised Part 1614 regulations requiring that ADR be made available, *see supra* text accompanying note 74, but would additionally allow the Pilot Program to be offered as an alternative means of settling EEO complaints more akin to a settlement or arbitration procedure. *See supra* note 254 and accompanying text.

301. *See, e.g.*, REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP, *supra* note 70 (citing specifically the successes of the Air Force and Post Office programs).

302. *Id.* at 2.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Information on the Air Force ADR program is available at their Web site, http://www.adr.af.mil.

308. *Id.*

change? Should the DON use more dramatic change to push for more dramatic results?

The Pilot Program makes more significant changes than either of these two systems, and its results are more dramatic. The Pilot Program's statistics are significantly better than those of the Air Force and the Post Office, with 61% of complainants choosing the Pilot Program, resolution rates of 89%, average case processing time of thirty-two days, average cost savings per case of $34,200, and improved workplace morale with better lines of communication and feelings of trust under the Pilot Program process.[309] Comparing the three systems yields the following results:

	Resolution Rate	Processing Time	Cost Savings
Pilot Program	89%	32 days	$34,200/case
Air Force	74%	142 days	$14,000/case
Post Office	81%	unavailable	"significant"

These statistics must be viewed in light of another important factor: In practice, any Part 1614 complaint processed in the DON is usually offered ADR at various levels already.[310] The first question asked by an AJ before an EEOC hearing is often "have you attempted ADR?"[311] This is heard again and again throughout the various stages of the proceedings, including before a hearing in federal district court.[312] It is not uncommon for a case processed under the Part 1614 process to go through up to six levels of ADR.[313] What then would another ADR process that allows the employees to walk out at any time add to the process? The key to the Pilot Program is that the employees entering into it make a serious commitment to resolve their complaints quickly and within the program. They understand that they are giving up some of their formal rights, but do so will-

309. *See supra* notes 130-37 and accompanying text for more details. Note, however, that the Navy itself has successfully tested a more traditional ADR program in the Navy Region Southwest Dispute Resolution Center Model ADR Program. This program employs mediation as an add-on to the Part 1614 process, rather than requiring the Pilot Program's no opt-out provision, and has achieved success rates as high as 90% resolution. Letter from Houk, *supra* note 289, at 9; *see supra* note 76 (providing more information on this program).

310. Interview with Major Pete Delorier, Labor Counselor, U.S. Marine Corps, in Charlottesville, Va. (Dec. 15, 2001).

311. *Id.*

312. *Id.*

ingly, and believe that the benefit of a quick resolution of their complaint is worth the bargain.

A last policy consideration that must be weighed is whether pursuing the Pilot Program is in the DON's overall best interest. Given the DON's mission, it is not required to be a leader in the EEO law arena. While exercising initiative and leadership is generally considered beneficial throughout the federal government, the cost generated by the controversy must be weighed against the impact on an agency's mission. The Pilot Program, as developed, has certainly generated an enormous amount of controversy, and if pushed by the DON, could result in significant additional unwanted negative publicity.[314] Civil rights groups, the EEOC, the Department of Justice, and the previous administration[315] have all indicated that they believe the Pilot Program should not continue. Are the benefits worth the cost in continuing to push ahead with it? The answer to this question lies

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313. *Id. See, e.g.*, Office of Complaint Investigation (OCI), *Rapid Resolution Program*, at http://www.cpms.osd.mil/oci/rrt.htm (last visited Mar. 24, 2001) (making facilitation available during the OCI investigation to speed resolution of the EEO complaint); *see also* American Bar Association, *The American Bar Association and ADR*, *at* http://www.abanet.org/dispute/abapolicy.html (last visited Aug. 27, 2001). The ABA has adopted a resolution calling for the expansion of court-annexed ADR programs:

> RESOLVED, That the American Bar Association supports legislation and programs that authorize any federal, state, territorial or tribal court including Courts of Indian Offenses, in its discretion, to utilize systems of alternative dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration.

Id. (citing ABA House of Delegates, Report 112 (1997)). For an example of a local federal court rule offering the use of ADR, see E.D. WIS. LOCAL R. 7.12, *available at* http://www.wied.uscourts.gov/Local_Rules_New.htm (last visited Aug. 27, 2001) (allowing federal district court judge to refer, in their discretion, appropriate cases to ADR procedure).

314. *See, e.g.*, Ballard, *supra* note 290 (quoting members of Blacks in Government as vehemently opposed to section 1111's pilot program, describing it as "the beginning of the end as far as civil rights are concerned").

315. *See, e.g.*, Tony Kreindler, *White House Opposes Proposed Navy ADR Pilot Program*, ADR WORLD, May 23, 2000 (news release covering White House opposition to proposed legislation to allow Navy Pilot Program based on the Program's interference with EEOC's ability to address complainant concerns and its being inconsistent with the administration's policies for ADR program implementation), *available at* http://www.adrworld.com. Note that since passage of the legislation, the Bush Administration has succeeded the Clinton Administration. To date, the Bush Administration has been silent on the issue.

not only in the statistics and the support of those who have used the system successfully, but perhaps most importantly, from Capitol Hill.

D. Did the Legislation Decide the Issue by Overriding EEOC's Concerns?

As discussed in Section II.D (*Legislative Intervention*), the Defense Appropriations Act of 2001 has a provision allowing the Secretary of Defense to select a minimum of three agencies to develop and implement pilot programs for a period of three years and to report the results. The DON was part of the impetus to get the legislation passed in the first place, but the legislation does *not* specifically authorize the DON's Pilot Program in its current form, nor does it explicitly say that the DON is even one of the agencies to have a pilot program. Therefore, there is some debate about whether Congress specifically blessed this particular program.[316] Legislative history is important here, and indicates that the bill was intended to specifically allow the DON's program.[317] Ultimately, the decision will fall on the Secretary of Defense.

Adding to the confusion, President Clinton, upon signing the legislation, sent the Secretary of Defense a memorandum[318] expressing concerns for the minimum procedures he expects such programs to contain, specifically stating that the employees must retain the right to opt-out of the pro-

316. Interview with Mr. Bernal, *supra* note 101.

317. *See, e.g.*, 146 CONG. REC. H9663-9665 (daily ed. October 11, 2000). In debating the conference report on the Appropriations Act of 2001 in the House of Representatives, Congressman Goodling, the chairman of the Education and Workforce Committee, which has jurisdiction over EEO matters, rose and said:

> The legislation also contains a provision establishing a pilot program to reengineer the equal employment opportunity complaint process for Department of Defense civilian employees. This will allow the continuation of a successful alternative dispute resolution (ADR) program already begun by the Navy—which has reduced the average wait for a determination on the merits from 781 to just 111 days. The bill permits the expansion of this model to other defense agencies. This complements our committee's successful effort to have the Equal Employment Opportunity Commission expand use of ADR to expedite the processing of charges of discrimination in the private sector.

Id. See also Press Release, Representative Floyd Spence (Oct. 6, 2000) (indicating that the Act was intended to allow the continuation of the Navy's Pilot Program).

318. White House Memorandum on the Signing of the National Defense Authorization Act, (Oct. 31, 2000), *available at* LEXIS, News Library, News Group File.

gram at any point.[319] Interestingly, this appears directly contrary to the legislative history of the bill,[320] and brings up two interesting issues: First, since this memorandum is not law, and has no binding authority, the Secretary of Defense could choose to ignore it, though at his own peril. Second, and perhaps more significantly, with the passing of power to President Bush, the effect of this memorandum is now unclear. Will it be formally rescinded? Or can the Secretary of Defense disregard it as contrary to the legislative history without fear of losing his job? To date, both the Bush Administration and the Secretary of Defense have remained silent on the issue.

Should the Secretary of Defense select the DON's original Pilot Program with the opt-out provision intact, the DON would then have a legislatively sanctioned process that would in effect be an alternative to the Part 1614 process. As the EEOC created the Part 1614 process and its implementing directions (MD-110) based on various legislation, newer legislation can create exceptions to it. Whether Title VII or some other employment law has a right which is interfered with via section 1111 of the Act is not readily apparent, but nonetheless it is something that will undoubtedly be explored in federal courts should the DON's Pilot Program be selected. This issue is speculative, however, and beyond the scope of this article.

Weighing the pros and cons discussed above leads to the conclusion that the Pilot Program works better than any other established ADR pro-

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319. *Id.* The president explained his misgivings about the pilot program:

> My Administration recently completed a major regulatory initiative to make the Federal equal employment opportunity process fairer and more effective. To operate any pilot program that eliminates the procedural safeguards incorporated in that initiative would leave civilian employees without important means to ensure the protection of their civil rights. For this reason, I am directing that the following steps be taken in the implementation of this provision: First, you must personally approve the creation and implementation of any pilot program created under section 111 of H.R. 4205. Second, you must approve the implementation of this pilot program in no more than one military department and two Defense agencies. Third, in order to ensure that the participation in these pilot programs by civilian employees is truly voluntary, I direct you to ensure that the pilot programs provide that complaining parties may opt out of participation in the pilot programs at any time . . . .

Id.

320. *See supra* notes 203-11 and accompanying text.

gram in a federal agency. And while there are important policy considerations against the program stemming from the negative publicity it has generated, these considerations are outweighed by the legislative push by Congress to allow such a radical change. In passing section 1111 of the Act, Congress intended to allow further testing of the DON's dramatic program. With congressional backing and a new Administration, the DON may have an opportunity to expand its testing further and see how far the Pilot Program can go toward fixing the problem. Restarting the Pilot Program on a larger scale, offered alongside the current Part 1614 process, could provide this testing. Alternatively, the Pilot Program could be offered alongside a more traditional ADR procedure inserted into the Part 1614 process—and offered as an additional way to provide mandated ADR to employees—to directly test the benefits of both systems when offered as alternative choices.[321]

A third option, going forward with the Revised Pilot Program, is not as attractive, but is nonetheless still a step in the right direction. While the Revised Pilot Program will certainly be an improvement over the traditional Part 1614 process as employed in the DON,[322] it is nonetheless too minor of an adjustment to truly correct the deficiencies in the system. The Revised Pilot Program, by allowing the employee to opt-out of the Program and return to the Part 1614 process at any time, adds nothing substantial[323] over the multiple layers of ADR processes already practiced in the Part 1614 process. Without this agreement to waive the right to opt-out (and thus remain in the Pilot Program until the end), the Revised Pilot Program looses its effectiveness by taking away the employee's incentive to resolve their complaint in ADR. It is this knowing and voluntary commitment by the employee to stay with the Pilot Program through its completion that makes it different from other forms of ADR, and which bears further testing.

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321. For example, a system similar to that tested in the Navy Region Southwest, *see supra* note 309, could be offered alongside the Pilot Program to compare head to head which process is more popular and effective.

322. As the Revised Pilot Program has not yet been tested, no data is available on its effectiveness.

323. The only significant change offered by the Revised Pilot Program is the shortened and more strictly enforced processing timelines.

IV. Conclusion

The DON finds itself engaged in battle with the EEOC despite its best efforts to work with it in developing this program. Currently the Pilot Program is in limbo, awaiting a final decision by the Secretary of Defense on the section 1111 selection before moving on with its program. Many in the DON want to continue to use the original Pilot Program, including the no opt-out provision, but realize it can only be done with the blessing of the section 1111 legislation and the Secretary of Defense's selection of the DON as one of the pilots. Add to this the current uncertainty under the new Bush Administration of the effect of former President Clinton's memorandum to the Secretary of Defense requiring that any pilot program not allow such a "no opt-out" provision, and it becomes clear that the future of the Pilot Program is anything but certain.

Based on the legislative intent of the bill, the Secretary of Defense should select the DON's original Pilot Program as one of the section 1111 test programs. This decision to select the Pilot Program, however, will require initiative, courage, and leadership in the face of significant opposition to the Pilot Program. The Bush Administration has been presented with an opportunity to make a bold move to fix the still broken EEO complaint procedure. While the EEOC's recent changes to the Part 1614 process are good steps, they are nonetheless small steps at best. They are merely minor tweaks to a system in need of an overhaul. It is time to try something bold. A courageous leap of faith, so to speak. And given the fact that more important rights are waived every day in other areas of the law, there is no compelling reason against allowing the further testing of such a program.

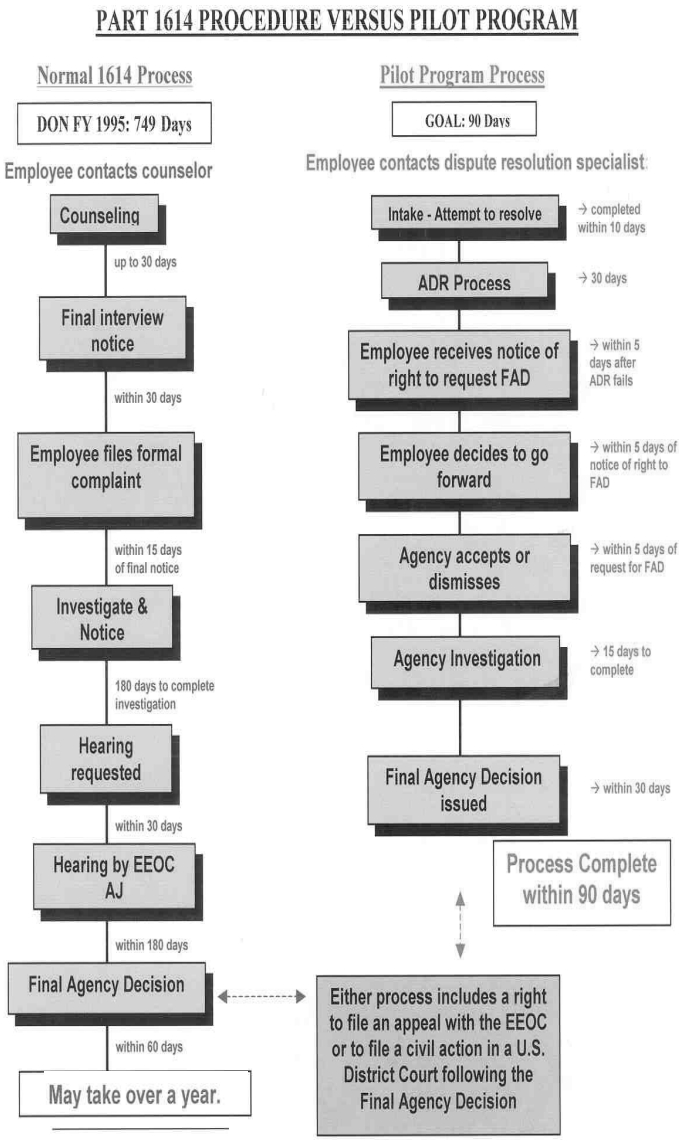
As an alternative, the DON has its Revised Pilot Program that has been specifically evaluated and blessed by the EEOC as being fully in compliance with the Part 1614 process. Under the Revised Pilot Program, the "no opt-out" provision is eliminated, a number of other EEOC concerns such as confidentiality, neutrality, and a more thorough investigation are addressed, and a 115 day timeline is employed as the goal. This Revised Pilot Program gives sufficient guarantees of trustworthiness and due process protection to employees to satisfy the EEOC, and is more in line with the pace of innovation at which the EEOC would like to move. While it is not as bold a step, it is nonetheless a step in the right direction.

By adopting either program, DON employees and managers will be better off for the DON's innovative thinking and leadership in the EEO

complaint-processing arena. After all, the goal of the EEO complaint procedure is to address workplace discrimination in an appropriate manner—timely, accurately, fairly, and efficiently. The current Part 1614 procedures fail to achieve this goal. The DON Pilot Program achieves significantly better results, while ensuring adequate employee rights are preserved. It is time to take the leap of faith and allow this innovative program to be tested further to see how far it can go in fixing the problem.

Appendix A

Part 1614 Procedure versus Pilot Program[324]



324. Chart originally prepared by Mr. Adalberto Bernal, Director, Department of Navy EEO Reengineering Project. It is available at the DON Civilian Human Resources Web page, http://www.donhr.navy.mil.

Appendix B

Time Schedule for Processing under Pilot Program [325]

OCCURRENCE OF INCIDENT/DISPUTE

- Disputant has **45** Calendar days to contact an Intake Dispute Resolution Specialist (DRS) for Resolution.

INTAKE (10 DAYS)

- Disputant meets to discuss dispute and define dispute based on interview and intake form.
- Attempts to resolve dispute are made.
- Resolution attempts fail → disputant must notify DRS in writing within 10 days (of intake process) of his/her wish to pursue dispute to dispute resolution options stage.

DISPUTE RESOLTUION OPTIONS (45 DAYS)

- Menu of options for resolving dispute is provided.
- Option is selected and disputant, management and DRS attempt to resolve dispute.
- Resolution is reduced to written agreement and signed by disputant and management official.
- If attempts to resolve fail→disputant notified in writing within 45 days.

FILE FORMAL (5 DAYS)

- Disputant must make a written request for a final decision after being notified that attempts to resolve have been unsuccessful.
- DRS acknowledge request for final decision and inform disputant of process.

FINAL DECISION (30 DAYS)

- The final decision is issued by the EEOO within 30 calendar days of the disputant's request.
- Final decision includes rights to appeal or to file civil action.

APPEAL TO EEOC (30 DAYS)

- If disputant is dissatisfied with the final decision he/she may file a notice of appeal to the EEOC within 30 calendar days of receipt of the final decision.

RIGHT TO FILE A CIVIL ACTION

- Disputant may file a civil action in an appropriate district court within 90 calendar days of receipt of the final decision or, if no final decision has been issued, after 180 days from the date the formal dispute was filed.

Or

- If an appeal is filed with the EEOC, a civil action may be filed within 90 calendar days of receipt of the EEOC's final appeal decision, or 180 calendar days after the date of the initial appeal to the EEOC if the EEOC has not issued a final decision on the appeal.

325. Draft Pilot Dispute Resolution Guidelines, *supra* note 144, app. A.

Appendix C

Agreement to Use DON Pilot Dispute Resolution Procedures[326]

Encl: (1) Dispute Resolution Process

I, (Name of Disputant), voluntarily agree to have my discrimination dispute processed under the Department of the Navy's Pilot Dispute Resolution Procedures.

I, acknowledge that (Dispute Resolution Specialist's Name), Dispute Resolution Specialist (DRS), has provided me a copy of the procedures which will be used in the processing of the following dispute:

NOTE: The dispute as defined will be inserted here.

I further agree and acknowledge the following:

a. The procedures for processing disputes under 29 CFR Part 1614 and the Pilot Dispute Resolution (DR) process have been explained to me and a copy of the DR process has been provided to me as enclosure (1). I understand that I have one (1) Workday to notify the DRS of my election to pursue the traditional (CFR 1614) process or the DON Pilot Dispute Resolution Process. Failure to notify the DRS of my election will result in no further action. _____(Sign & Date)

b. I understand that by entering into this agreement I agree that the dispute identified above will **NOT** be processed under the provisions of 29 CFR Part 1614;

c. I **WAIVE MY RIGHT TO ANONYMITY** in the processing of the dispute identified above;

d. I **WAIVE MY RIGHT TO A FINAL AGENCY DECISION WITH A HEARING** in the processing of the dispute identified above; and

326. *Id.* app. H (Attachment H).

e. I acknowledge that I **CANNOT** opt out of the Department of the Navy's Pilot Dispute Resolution Procedures upon my signing this agreement.

_____	_____
Disputant's Signature	DRS's Signature
_____	_____
Date	Date

THE LAWFULNESS OF ATTACKING COMPUTER NETWORKS IN ARMED CONFLICT AND IN SELF-DEFENSE IN PERIODS SHORT OF ARMED CONFLICT: WHAT ARE THE TARGETING CONSTRAINTS?

JAMES P. TERRY[1]

I. Introduction

When President Clinton signed the Fiscal Year 2000 version of the Unified Command Plan (UCP) on 29 September 1999, it marked a new era in operational planning for information warfare, to include the possible targeting of an adversary's computer networks where necessary to protect vital U.S. or allied interests.[2] The UCP provides planning guidance and requirements for the operational commands within the Department of Defense (DOD).[3] In the latest version, responsibility for maintaining and managing the Joint Information Operations Center (JIOC), located in San Antonio, Texas, was transferred to the U.S. Space Command (USSPACECOM) at Petersen Air Force Base, Colorado.[4]

The JIOC, formerly known as the Joint Command and Control Warfare Center, provides "full-spectrum" information warfare (IW) and information operations (IO) support to U.S. operational commanders worldwide. That is, the JIOC provides support in planning, coordination, and execution of all DOD IW and IO missions, as well as assistance in the development of IO doctrine, tactics and procedures.

What makes the transfer of the JIOC significant is the recent enhancement of its missions. In August 1999, the mission of the JIOC was broad-

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2. U.S. DEP'T OF DEFENSE, UNIFIED COMMAND PLAN (1999).

3. *Id.*

4. Press Release, U.S. Space Command News Release No. 20-99, at 1 (Oct. 1, 1999) [hereinafter News Release No. 20-99].

ened from command and control to include operations support. The enhanced operations support now required includes psychological operations, security, electronic warfare, targeting of command and control facilities, military deception, computer network defense, civil and public affairs, and, significantly, computer network attack.[5]

For the first time in the UCP, computer network attack was specifically identified in the planning requirements for unified commanders.[6] This is significant because, by implication, the planning requirements now recognize the legality of targeting critical foreign computer infrastructure when vital U.S. or allied national interests are threatened.

II. Defining the Debate

The renewed emphasis on considering critical computer infrastructure as a legitimate target arises from recent incidents where critical U.S. infrastructure has been threatened by government-sponsored intrusions or by individual hackers using sophisticated software. From these incidents, the United States has recognized that electronic or physical elimination of this threat may be necessary to protect our defense capability or to ensure the continued effective operation of other critical computer infrastructure.

Several incidents are significant. In February 1998, two California teenagers were able to breach computer systems at eleven Air Force and Navy bases, causing a series of "denials of service" and forcing defense officials to reassess the security of their networks.[7] The investigation of this incident, code named Solar Sunrise, however, pales in comparison with "Moonlight Maze," the code name for the investigation of an early 1999 electronic assault involving hackers based in Russia. In this attack, intruders accessed sensitive DOD science and technology information.[8]

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5. *Id.*

6. UNIFIED COMMAND PLAN, *supra* note 2, para. 22(a)(12) (unclassified portion). Under the Fiscal Year 2000 UCP, USSPACECOM's responsibilities now include:

> In coordination with the Joint Staff and appropriate CINCs, serving as the military lead for computer network defense (CND) and, effective 1 October 2000, computer network attack (CNA), to include advocating the CND and CNA requirements of all CINCs, conducting CND and CNA operations, planning and developing national requirements for CND and CNA, and supporting other CINCs for CND and CNA.

7. INSIDE DEFENSE, DEFENSE INFORMATION AND ELECTRONICS REPORT 1 (22 Oct. 1999).

Computer tracing determined that the Moonlight Maze attack originated from the Russian Academy of Science, a government organization that interacts closely with the Russian military.[9] This raises the possibility of an asymmetrical attack sponsored by a nation-state.

Nor has this been the first state-sponsored intrusion into our critical computer infrastructure. In 1996, U.S. authorities detected the introduction of a program, called a "sniffer," into computers at NASA's Goddard Space Flight Center, permitting the perpetrator to download a large volume of complex telemetry information transmitted from satellites. The Deputy Attorney General reported that the "sniffer" had remained in place for a significant period of time.[10] Of equal concern, a Federal Bureau of Investigation (FBI) report completed in 1999 detailed efforts of the People's Republic of China to attack U.S. Government information systems, including the White House network.[11]

These incidents raise important issues for defense planning. How can these threats be discovered and eliminated? What is the interplay between the role of an investigating agency and that of an operational planner? It is clear that while the targeting of these threats may require a military component, the gathering of indicators of an imminent threat requires a far broader participation. It is for this reason that the Clinton Administration established the National Infrastructure Protection Center (NIPC) in February 1998.[12]

The NIPC's mission is to serve as the government's focal point for threat assessment, warning, investigation, and response to threats or attacks against our critical infrastructures. These critical infrastructures include our defense communication networks, telecommunications sys-

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8. *Id.*

9. *Id.*

10. Honorable Jamie Gorelick, Speech Before the Corps of Cadets, U.S. Air Force Academy (29 Feb. 1996).

11. *See* William Gertz, *Chinese Hackers Raid U.S. Computers*, WASH. TIMES, May 16, 1999, at C1, C8 (providing a review of Chinese efforts to attack White House, State Department and other government computer systems).

12. Presidential Decision Directive 63, Critical Infrastructure Protection (May 1998) [hereinafter PDD 63]. The NIPC, located in the FBI's Hoover Building in Washington, D.C, brings together representatives from the FBI, DOD, other government agencies, state and local governments, and the private sector.

tems, energy grids, banking and finance organizations, water systems, government operations apparatus and emergency services organizations.[13]

The NIPC is organized with both an indication and warning arm and an operational arm. The Analysis and Warning Section (AWS) provides analytical support during computer intrusion investigations and long-term analysis of vulnerability and threat trends. The Computer Investigations and Operations Section (CIOS) is the operational arm of the NIPC. This section manages computer intrusion investigations conducted by FBI field offices throughout the country; provides subject matter experts, equipment, and technical support to investigators in federal, state, and local government agencies involved in critical infrastructure protection; and provides an emergency response capability to help resolve a cyber incident.[14]

Neither the JIOC at USSPACECOM nor the NIPC possess the capability to eliminate a hostile cyber threat. Only the operational assets assigned to the various unified commands within the Department of Defense (DOD) possess that unique capability, and they may only be employed when the strict parameters of the law of armed conflict are satisfied.

III. Legal Constraints on Attacks on Critical Infrastructure

A. United Nations Charter System

The legal regime available to authorize actions in lawful self-defense, and specifically for attacks on critical enemy infrastructure, includes the U.N. Charter system and customary international law. The basic provision restricting the threat or use of force in international relations is Article 2, paragraph 4, of the United Nations Charter. That provision states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any

13. *Id.* Presidential Decision Directive 63 establishes these categories as "critical infrastructure," the protection of which constitutes the defense of vital national interests. *Id.*

14. The NIPC works closely with USSPACECOM's JIOC and with the Critical Infrastructure Coordination Group, which is directed by the National Coordinator for Infrastructure Protection. *See* News Release No. 20-99, *supra* note 4.

state, or in any manner inconsistent with the Purposes of the United Nations."[15]

The underlying purpose of Article 2, paragraph 4, to regulate aggressive behavior between states, is identical to that of its precursor in the Covenant of the League of Nations. Article 12 of the Covenant stated that League members were obliged not to "resort to war."[16] This terminology, however, left unmentioned actions that, although clearly hostile, could not be considered to constitute acts of war. The drafters of the U.N. Charter wished to ensure the legal niceties of a conflict's status did not preclude cognizance by the international body. Thus, in drafting Article 2, paragraph 4, the term "war" was replaced by the phrase "threat or use of force." The wording was interpreted as prohibiting a broad range of hostile activities including not only "war" and other equally destructive conflicts, but also applications of force of a lesser intensity or magnitude.[17] This distinction may be all-important, for example, when a nation's commercial infrastructure is attacked, and actions in lawful self-defense are contemplated which include targeting critical infrastructure of the adversary, an element of which may have been used in the initial attack.

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15. U.N. CHARTER art. 2, para. 4.

16. *See* LEAGUE OF NATIONS COVENANT art. 12. Article 12 states:

> 1. The members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to *resort to war* until three months after the award by the arbitrators or the judicial decision or the report of the Council.
>
> 2. In any case under this Article the award of the arbitrators or judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

Id.

17. MYRES MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 142-43 (Yale ed., 1961).

B. U.N. General Assembly Resolution 2625

The United Nations General Assembly has clarified the scope of Article 2 in two important resolutions, both adopted unanimously.[18] Resolution 2625, the Declaration on Friendly Relations, describes behavior that constitutes the "unlawful threat or use of force" and enumerates standards of conduct by which states must abide.[19] Contravention of any of these standards of conduct is declared to be in violation of Article 2, paragraph 4, and would likely authorize a response in self-defense.[20]

C. U.N. General Assembly Resolution 3314

Resolution 3314, The Definition of Aggression, provides a detailed statement on the meaning of "aggression" and defines it as "the use of armed force by a State against the sovereignty, territorial integrity or political integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."[21] This resolution

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18. *See* Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc A/9631 (1974) [hereinafter U.N. Definition of Aggression]; 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, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter U.N. Declaration on Friendly Relations].

19. The Declaration on Friendly Relations includes the following provisions:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.
>
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.
>
> No State shall organize, assist, foment, finance, incite, or tolerate subversive,
> terrorist, or armed activities directed towards . . . the regime of another State.

U.N. Declaration on Friendly Relations, *supra* note 18, at 122-23.

20. U.N. CHARTER art. 2, para. 4 "By accepting the respective texts [of the Declaration on Friendly Relations], States have acknowledged that the principles represent their interpretations of the obligations of the Charter." James Resinstock, *The Declaration of Principles of International Law Concerning Friendly Nations: A Survey*, 65 AM. J. INT'L L. 713, 715 (1971).

21. U.N. Definition of Aggression, *supra* note 18, at 142.

contains a list of acts that qualify as acts of aggression. Included in the list is "the use of any weapon by a State against the territory of another State."[22] The resolution provides that the state that commits an act of aggression violates international law as embodied in the U.N. Charter.[23] The actions of states or their surrogates—in supporting or taking part in acts of aggression, which threaten vital national interests of a state or states—clearly fall within the scope of Article 2, paragraph 4 and authorize a response sufficient to end the violence and deter future aggression.[24] This responding coercion might include, for example, disruption of military information downlinks in satellites, sabotage of vital computer networks, or infiltration of electronic commercial transmission systems, where proportional to the original attack and where necessary to preclude future aggression.

D. The Right of Self-Defense

When the U.N. Charter was drafted in 1945, the right of self-defense was the only included exception to the prohibition of the use of force.[25] Customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses as well. Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction on the delinquent state of the same injury that it has caused the victim. Retribution is a criminal law concept, implying vengeance, which is sometimes used loosely in the international law context as a synonym for retaliation. While debate continues as to the present status of these responses, the U.S. position has always been that actions protective of U.S. interests, rather than punitive in nature, offer the

22. *Id.* at 143.

23. A fundamental purpose of the U.N. Charter is to "maintain international peace and security." U.N. CHARTER art. 1, para. 1. Article 5, paragraph 2, of the Definition of Aggression provides: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." Definition of Aggression, *supra* note 18, at 144.

24. *See* U.N. CHARTER art. 2, para. 4. One potential act of destructive information warfare that would certainly trigger the definition of aggression would be the use of information technology to disrupt some vital element of the U.S. economic apparatus, such as the banking system or stock exchange, such that a Juggernaut would impede U.S. commercial activity.

25. U.N. CHARTER art. 51.

greatest hope of securing a lasting, peaceful resolution of international conflict.[26]

The right of self-defense was codified in Article 51 of the U.N. Charter. That article provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[27] The use of the word "inherent" in the text of Article 51 suggests that self-defense is broader than the immediate Charter parameters. During the drafting of the Kellogg-Briand Treaty, for example, the United States expressed its views as follows:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.[28]

Because self-defense is an inherent right, its contours have been shaped by custom and are subject to customary interpretation. Although the drafters of Article 51 may not have anticipated its use in protecting states through defensive actions using technological means, international law has long recognized the need for flexible application. Former Secretary of State George Shultz emphasized this point when he said: "The U.N. Charter is not a suicide pact. The law is a weapon on our side and it is up to us to use it to its maximum extent."[29] The final clause of Article 2, paragraph 4, of the Charter supports this interpretation and forbids the threat or

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26. *See* Steve Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 720, 736 (1974).

27. U.N. CHARTER art. 51.

28. 5 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW § 25, at 971-72 (1965).

29. George Shultz, *Low Intensity Warfare: The Challenge of Ambiguity*, *in* U.S. Department of State Current Policy No. 783, at 3 (Jan. 1986).

use of force "in any manner inconsistent with the Purposes of the United Nations."[30]

The late Professor Myres McDougal of Yale University placed the relationship between Article 2, paragraph 4, and Article 51 in clearer perspective.

> Article 2(4) refers to both *the threat* and use of force and commits the Members to refrain from the "threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations;" the customary right of self-defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion . . . .[31]

Significant from Professor McDougal's interpretation is our correlative recognition of the right to counter the imminent threat of violent attack with all lawful available means, to include destruction of critical infrastructure that may preclude an imminent attack. This comprehensive conception of permissible or defensive actions, honoring appropriate responses to threats of an imminent nature, is merely reflective of the customary international law. It is precisely this anticipatory element, such as the elimination of a necessary command and control system in the moments before an unlawful attack, which is critical to an effective policy to counter aggression. This does not suggest a lack of international law constraints upon the determination of necessity for preemptive action. Rather, it suggests that legitimate consideration must be given to critical computer infrastructure on target lists, where the preemptive targeting of those systems could eliminate the possibility of one or more enemy attacks.

One aspect of this contextual appraisal of necessity, especially as it relates to the converse situation of responding after the fact to destructive

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30. U.N. CHARTER art. 2, para. 4.

31. Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600 (1963).

acts against our sovereignty, concerns the issue of whether force, even limited force where only systems are targeted, can be considered necessary if peaceful measures are available to lessen the threat. To require a state to tolerate attacks to its security or economic well-being without resistance, on the grounds that peaceful means have not been exhausted, is absurd. Once an attack has occurred, the failure to consider a military response, whether on critical infrastructure or otherwise, would play into the hands of those governments or groups who deny the relevance of law in their actions.

The legal criteria for the proportionate use of force are established once a state or identifiable group-supported attack on the security of the nation has taken place. No state is obliged to ignore an attack as irrelevant, and the imminent threat to the national security requires consideration of a response. One such lawful response is the elimination of the very computer infrastructure that allows the enemy's weapons systems to function.

A related, but more difficult issue concerns the elapsed time between the initial attack and the identification of the state or group responsible, thus authorizing responding coercion, possibly against critical infrastructure. Admittedly, there must be some temporal relationship between a destructive act and the lawful defensive response. Nevertheless, it would be unreasonable to preclude the United States from taking appropriate action after a delay in identifying an attacker—for example, where the actions of the perpetrator of the attack on the *USS Cole* precluded their immediate identification—based upon a doctrinaire determination that the threat of further destructive attack is no longer imminent.

The requirement of proportionality is linked to necessity. Professor McDougal and Dr. Feliciano have defined the rule as follows:

> Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion.[32]

32. MCDOUGAL & FELICIANO, *supra* note 17, at 242.

This definition simply requires a rational relationship between the nature of the attack and the nature of the response. Although the relationship need not approach precision, a nation subjected to an isolated attack may not be entitled to launch a strike on the offender nation's most critical infrastructure. Other canons of military practice, such as conservation of resources, support the principle of restraint in defense. The United Nations has condemned as reprisals those defensive actions that greatly exceed the provocation.[33] Where there is evidence that a continuation of destructive attacks will occur beyond the triggering event, however, such attacks could threaten the very fiber of a nation's ability to defend itself. Therefore, a response beyond that related to the initial intrusion would be legally appropriate to counter the continuing threat, and one could envision that such responding coercion could properly include an attack on critical computer systems.

Because the real-time relationship between threat and threat recognition is often compressed in the case of a violent military attack, such as the attack on the *USS Cole* in the Yemeni Aden harbor, strategy development is severely limited with respect to the non-military initiatives that may be considered in response. These lesser initiatives should always be the choice where available. However, traditional means of conflict resolution, authorized by law and customary practice, are often precluded because attacks by terrorists are, by nature, covert in execution, unacknowledged by the state or group sponsor, and practiced with silent effectiveness. As part of any response considered, therefore, the use of technical means to place electronic blocks on a nation's or organization's computer systems and telecommunications network may be an important adjunct of any proportionate response in the future.

IV. Operational-Legal Considerations in the Use of National Command Authority

A. Operational Law Context Provided in Rules of Engagement (ROE)

The rules of necessity and proportionality in determining the appropriateness of attacking critical computer infrastructure are given operational significance through ROE. The ROE are directives that a government may establish to define the circumstances and limitations, including targeting limitations, under which its forces will initiate and con-

33. *See* U.N. SCOR, 36th Sess., 2285-88 mtgs., U.N. Docs. S/PV 2285-88 (1981).

tinue responsive actions to eliminate the threat posed by an attack. That response might include the complete or partial destruction, through technical or other means, of the critical communications or information infrastructure of an adversary, where proportional to the threat. For the United States, adherence to the ROE provided by the National Command Authority ensures that crisis-response guidance is provided through the Joint Chiefs of Staff (JCS) to subordinate headquarters and deployed U.S. forces both during armed conflict and in periods of crisis short of war.[34]

Rules of engagement reflect domestic law requirements and U.S. commitments to international law. They are affected by political, as well as operational considerations. For the commander concerned with responding to a threat to his force, ROE represent limitations or upper bounds on how to use defensive or responsive systems and forces, without diminishing his authority to consider the available range of critical infrastructure targets where those systems pose immediate risks to his command.[35]

B. Evolution of JCS Rules of Engagement

Violence directed against a critical U.S. interest—whether military forces, a weapons platform, or critical infrastructure—represents hostile activity that may trigger the applicable ROE. Until June 1986, the only U.S. peacetime ROE applicable worldwide were the JCS Peacetime ROE for U.S. Seaborne Forces. These ROE, which until 1986 served as the basis for all commands' peacetime ROE, were designed exclusively for the maritime environment. In June 1986, Secretary of Defense Caspar Weinberger promulgated more comprehensive ROE for sea, air, and land operations worldwide.[36] These 1986 Peacetime ROE provided the on-scene commander with the flexibility to respond to hostile intent, as well as hostile acts and unconventional threats, with the minimum necessary force to limit the scope and intensity of the threat. The strategy underlying the

34. *See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter CJCS INSTR. 3121.01A].

35. *See generally* Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126 (1998).

36. CHAIRMAN, JOINT CHIEFS OF STAFF, PEACETIME RULES OF ENGAGEMENT FOR U.S. FORCES (June 1986).

1986 Peacetime ROE sought to terminate violence quickly and decisively, and on terms favorable to the United States.

In October 1994, Secretary of Defense Les Aspen approved the Standing Rules of Engagement for U.S. Forces (SROE), which significantly broadened the scope of the national ROE.[37] In January 2000, Secretary of Defense William Cohen approved SROE modifications, which delineated the scope of SROE application.[38] Significantly, the SROE "apply [to U.S. forces] during 'operations, contingencies, and terrorist attacks' *outside* the United States, and during attacks against the United States."[39] The SROE establish U.S. policy that, should deterrence fail, provides commanders flexibility to respond to crises with means that are proportional to the provocation and designed to limit the scope and intensity of the conflict, to discourage escalation, and to achieve political and military objectives. The inherent right of self-defense underlies the SROE, which are intended to provide general guidance on self-defense and the use of force consistent with mission accomplishment. The SROE apply to all echelons of command.[40]

The expanded national guidance represented in the SROE has greatly assisted in providing both clarity and flexibility of action for U.S. theater commanders. The approval by the Secretary of Defense ensures consistency in the way military commanders address the unconventional threats posed by the advanced command and control infrastructure systems of our adversaries. The SROE permits U.S. forces to respond to the hostile use of such infrastructure systems, within the application limits of the SROE. Targeting these systems specifically, where possible through the electronic means of U.S forces, may now be authorized where enemy platforms carrying these systems pose a specific threat to our forces.

When and if the DOD assets are used to eliminate or destroy critical enemy infrastructure in lawful self-defense, the specific—as opposed to standing—ROE developed for the operation will be guided by Presidential Decision Directive (PDD) 62, *Combating Terrorism*, signed into law by

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37. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) (superceded by CJCS INSTR. 3121.01A, *supra* note 34).

38. CJCS INSTR. 3121.01A, *supra* note 34.

39. Major W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 3 (quoting CJCS INSTR. 3121.01A, *supra* note 34, para. 3). *See generally* Stafford, *supra*, at 3-6 (discussing the current SROE in some detail).

40. CJCS INSTR. 3121.01A, *supra* note 34, paras. 1, 3, 6.

President Clinton in 1998.[41] Presidential Decision Directive 62 is the successor to National Security Decision Directive (NSDD) 138, signed by President Reagan in 1984, which determined that the threat of terrorism constituted a form of aggression that justified acts in self-defense.[42] Presidential Decision Directive 62 is more expansive in its coverage than NSDD 138 and addresses a broad range of unconventional threats, to include attacks on critical infrastructure, terrorist acts, and the threat of the use of weapons of mass destruction. The aim of the PDD is to establish a more pragmatic and systems-based approach to counter-terrorism. It recognizes the legality of computer network attack (CNA) and that preparedness is the key to effective consequence management. Presidential Decision Directive 62 creates the new position of National Coordinator for Security, Infrastructure Protection and Counter-Terrorism, which will coordinate program management through the Office of the National Security Advisor.[43]

V. Evaluation of Lawful Targeting Criteria

When a vital U.S. national interest—such as one of the critical infrastructure systems defined in PDD 63, *Critical Infrastructure Protection*[44]—is threatened or attacked by electronic or other computer-driven means, the system responsible for the threat may become a legal target that can be destroyed or disabled by military assets. Such destruction may be both necessary and proportionate under the law of armed conflict to eliminate the threat perceived.[45] The law of targeting is premised upon three

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41. Presidential Decision Directive 62, Combating Terrorism (May 22, 1998) [hereinafter PDD 62].

42. National Security Decision Directive 138 (Apr. 3, 1984). *See* James P. Terry, *An Appraisal of Lawful Military Response to State-Sponsored Terrorism*, NAVAL WAR C. REV., May-June 1986, at 58 (discussing NSDD 138).

43. PDD 62, *supra* note 41. Richard C. Clarke, longtime senior National Security Council staff-member, was appointed as the first National Coordinator.

44. PDD 63, *supra* note 12. The eight categories of critical infrastructure listed are banking and finance, telecommunications, power generation/distribution, transportation, water services, emergency law enforcement, continuity of government, and public services. *Id.*; *see also* W. GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 201-04 (1999) (providing a comprehensive review of the major elements of PDD 63 and the requirements it imposed upon the government departments and the private sector).

45. The law of targeting is a subset of the law of armed conflict, and the dual requirements of necessity and proportionality, the twin pillars of that body of law, are equally applicable to target selection and approval. *See, e.g.,* Jonathan P. Tomes, *Legal Implications of Targeting for the Deep Attack,* MIL. REV., Sept. 1988, at 70-76.

fundamental principles: the means of injuring an enemy are not unlimited; it is unlawful to launch attacks against civilian populations; and distinctions must be made between combatants and non-combatants, with non-combatants spared to the extent possible.[46] These rules are complimented by other, more specific, customary notions and by international conventions.

Commonly accepted is the premise that only military objectives may be attacked.[47] Military objectives, however, embrace more than troops, weapons systems, and military equipment. Rather, they include all objects which, by their nature, purpose, use, or location, effectively contribute to the military initiative being pursued and whose destruction would constitute a "military advantage" to the force attacking the objective.[48] Instead of using language incorporating the term "military advantage," Article 52(2) of the 1977 Geneva Protocol I uses the broader phrase, "make an effective contribution to enemy action."[49] This expansive definition includes all dual-use facilities used to support military operations, such as communications networks, command and control facilities, and other critical infrastructure such as petroleum storage areas, power generation plants, and economic targets that indirectly but effectively support and sustain the aggressor's capability to continue its military operations.[50] This definition would clearly encompass computer networks, to include civilian

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46. *See* 20th International Conference of the Red Cross, Fundamental Principles of the Red Cross: Res. XXVIII (1965); G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, at 1(c), U.N. Doc. A/7218 (1968) (adopting Red Cross. Res. XXVIII); G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970) (affirming the principles of G.A. Res. 2444). The United States considers these fundamental principles as customary international law. *See* Letter from General Counsel, Department of Defense, to Senator Edward Kennedy (Sept. 22, 1972), *in* 67 AM. J. INT'L L. 122 (1973).

47. This customary rule of international law was codified for the first time in 1977. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 57(4), 1125 U.N.T.S. 3 [hereinafter Protocol I].

48. This definition is accepted by the United States as declarative of the customary rule. *See* DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, at 8.1.1 (1995) [hereinafter ANNOTATED SUPPLEMENT].

49. Protocol I, *supra* note 47, art. 52(2).

50. *See id.*

networks, supporting military operations, communications, and command and control. All such military objectives may be attacked.

While military objectives, including computer networks supporting military requirements, are properly included within target sets, civilians and civilian objects are not.[51] Civilian objects consist of all civilian property and activities other than those used to support or sustain the capability for armed aggression on the part of the attacker.[52] Thus, activities normally considered civilian in character—when conducted in support of a nation's aggression, where implemented to shield an aggressor's identification, or where employed to preclude effective and lawful response to unlawful attack—would, under these circumstances, become the lawful objects of attack. The DOD General Counsel made this point succinctly in May 1999, when she wrote:

> If the international community were persuaded that a particular computer attack or a pattern of such attacks should be considered to be an "armed attack," or equivalent to an armed attack, it would seem to follow that the victim nation would be entitled to respond in self-defense either by computer network attack or by traditional military means in order to disable the equipment and personnel that were used to mount the offending attack.[53]

Stated another way, a civilian computer system, used either to conduct an attack or to shield an aggressor's attack from discovery, becomes a valid and lawful target when: (1) aggression against critical infrastructure equating to an armed attack has occurred; and (2) the total or partial destruction, capture or neutralization of the computer system offers the United States or its allies a definite military advantage.

Computer networks are not *per se* illegal targets under traditional international law criteria. The standard law of armed conflict analysis must be applied in every instance, however. This analysis determines whether the critical computer infrastructure of an attacking state or other non-state aggressor constitutes a valid target under the circumstances. The target review must conclude that the specific computer network or other critical infrastructure system—by its nature, location, capability, purpose

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51. *See id.* art. 51(1) (codifying this principle of customary international law).

52. *Id.* art. 52 (1) (defining civilian objects as "all objects which are not military objectives as defined in paragraph 2").

53. GENERAL COUNSEL, DEP'T OF DEFENSE, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 22 (1999) [hereinafter DOD GC ASSESSMENT].

or use—makes an effective contribution to the military capability of the offending state *and* that its destruction, capture or neutralization offers the United States or its allies a definite military advantage.

The fact that a computer system or other critical infrastructure is a valid target does not necessarily mean it should be attacked. In weighing the political and strategic implications, refraining from an in-kind, albeit legal, response may provide greater benefit. For example, such restraint may be appropriate to facilitate a shift in world sentiment, a movement of nations in terms of their allegiances, an opportunity for international bodies like the U.N. to become engaged, or an opportunity to open or expand previously closed political channels.

A final concern relates to collateral damage. While collateral damage does not have a different definition in a CNA context, additional steps may be required to show that reasonable precautions were taken to avoid unnecessary destruction. Obviously, the effects of a CNA are less predictable than the effects of conventional weapon systems. Lawrence G. Downs, Jr., explains a related and even more important consideration for the state using digital data warfare in lawful self-defense.

> When the U.S. Army contracted a study to determine the feasibility of developing DDW [digital data warfare] -type viruses for military use, many people had misgivings that were summed up by Gary Chapman, program director of Computer Professionals for Social Responsibility. "Unleashing this kind of thing is dangerous," he said. "Should the virus escape, the United states heads the list of vulnerable countries. Our computers are by far the most networked."[54]

These concerns make it clear that any weapon developed to provide CNA capability must be both predictable and capable of being armed and disarmed; otherwise they will unduly threaten innocent civilians in the target state *and* the user state. Downs is correct when he suggests that weaponeers should, in general, co-develop a detection and immunization program for all viruses they intend to use. [55] In this way, a DDW attack gone wrong cannot inadvertently do harm to the attacker. In short, users and

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54. Lawrence G. Downs, Jr., *Digital Data Warfare: Using Malicious Computer Code as a Weapon*, NAT'L DEF. U. INST. FOR STRATEGIC STUD. 58 (1995).

55. *Id.*

developers of DDW need to be aware of the risks and the absolute requirement for predictability when developing DDW code.

VI. The Impact of International Agreements and Domestic Communications Law on CNA

Military planners developing a cyber-defense capability must also consider the international agreements regulating the use of space. The United States is a party to four such multilateral conventions: (1) the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty);[56] (2) the 1968 Agreement on the Rescue of Astronauts, Return of Astronauts, and the Return of Objects Launched in Space (Rescue and Return Agreement);[57] (3) the 1972 Convention on International Liability for Damages Caused by Space Objects (Liability Convention);[58] and (4) the 1975 Convention on Registration of Objects Launched into Outer Space (Space Objects Registration Treaty).[59]

These four conventions reiterate principles which are so widely accepted that they are viewed as reflective of customary international law, even as between non-parties. These accepted principles include the premises that: (1) access to outer space is free and open to all nations;[60] (2) each user of outer space must show due regard for the rights of others;[61] (3) states that launch space objects are liable for damage for any damage they may do in space, in the air, and on land;[62] and (4) space activities are subject to the general principles of international law.[63] Military planners).

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56. Jan 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

57. Apr. 26, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119.

58. Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].

59. Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15.

60. Outer Space Treaty, *supra* note 56, art. I.

61. *Id.* art. IX.

62. The Liability Convention elaborates the general principles of international liability for damages set forth in Article VII of the Outer Space Treaty. Liability Convention, *supra* note 58, arts. Ia, II, III, VI. The Liability Convention also address joint and several liability. *Id.* arts. IV, V.

63. *See* ANNOTATED SUPPLEMENT, *supra* note 48, at 2-38 ("International law, including the United Nations Charter, applies to the outer space activities of nations.").

should heed not only the international agreements, but also these underlying principles.

Restrictions imposed by some of the preceding conventions and principles may not apply in wartime. The DOD General Counsel concluded, in her 1999 assessment of international legal issues related to information operations, that the non-interference principle—which preserves the right to use outer space—does not apply during armed conflict. She stated:

> There appears to be a strong argument that the principle of non-interference established by these agreements is inconsistent with a state of hostilities, at least where the systems concerned are of such high military value that there is a strong military imperative for the adversary to be free to interfere with them, even to the extent of destroying the satellites in the system. As indicated in the discussion of treaty law in the introduction to this paper, the outcome of this debate may depend on the circumstances in which it first arises in practice. Nevertheless, it seems most likely that these agreements will be considered to be suspended between the belligerents for the duration of any armed conflict, at least to the extent necessary for the conduct of the conflict.[64]

Underlying this statement by the DOD General Counsel is the obvious principle that the right of self-defense is in no way abrogated by other international commitments entered into by a nation.

One significant convention with apparent applicability to U.S. interdiction of foreign communications infrastructure is the International Telecommunications Convention (ITC) of 1982. In Article 35, the ITC prohibits interference by member states with the communications of other member states. The ITC has an exception for military transmissions in Article 38, however, which arguably would authorize information operations conducted by military forces.[65] The Office of Legal Counsel in the U.S. Department of Justice took this position in July 1994 when it ruled,

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64. DOD GC ASSESSMENT, *supra* note 53, at 32.

65. The same requirements were stated previously in the International Telecommunications Convention, Malaga-Torremolinos, Oct. 25, 1973, 28 U.S.T. 2495, T.I.A.S. 8572. The Malaga-Torremolinos Convention was replaced by the International Telecommunications Convention, Nairobi, 6 Nov. 1982, 32 U.S.T. 3821; T.I.A.S. 9920 (entered into force for the United States 10 January 1986).

with respect to planned broadcasts into Haiti concerning boat operations, that the ITC did not prohibit such broadcasts.[66]

An unlikely convention to consider when discussing cyber operations is the 1907 Hague Convention on Neutrality on Land,[67] which could affect satellite relay operations. That convention does not apply to systems that generate information, but does apply to relay facilities and requires that facilities of other states not be disrupted. While Articles 8 and 9 contemplate only telegraph and telephone cable links, they would arguably apply to satellite links as well.[68] However, since most computer-based systems and certainly all that control critical infrastructure generate information as well as relay that information, the prohibition against disruption would likely not apply.

International consortia that lease satellite nodes for commercial communications raise another potential concern. These organizations include International Telecommunications Satellite, International Marine/Maritime Satellite, Arab Satellite Communications Organization, European Telecommunications Satellite, and European Organization for the Exploration of Meteorological Satellites. The contracts signed by each user, which are nearly identical in the case of each provider, state that the system must be used exclusively for peaceful purposes.[69] While the United States has leased one or more nodes from at least one of these providers in the past, it retains separate satellite capabilities should it need to defend itself through digital data warfare.[70]

Domestic communications law provides a final consideration for cyber operations. Congress passed 47 U.S.C. § 502 in 1994 to implement the ITC requirement that member states enact legislation to prohibit interference with the communications of other members.[71] During Haiti operations in October 1993, just as it would again in July 1994, the Office of Legal Counsel to the Department of Justice issued a written opinion to the effect that the § 502 does not apply to military actions by the United States.[72] Thus, domestic law would not preclude the United States from

66. *See* DOD GC ASSESSMENT, *supra* note 53, at 36-37.

67. Hague Convention No. V Respecting The Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310-2331; 1 BEVANS 654-668.

68. *Id.* arts. 8-9.

69. *See generally* SHARP, *supra* note 44. Where this provision is violated, however, and a satellite node is used for aggression, the inviolability of the system from attack would arguably cease.

70. *See id.*

using CNA when it is engaged in an armed conflict or in operations short of war, provided necessity and proportionality dictate the use of CNA.

VII. Conclusion

From the preceding analysis, it is clear that computer networks critical to the functioning of enemy infrastructure systems can be valid military targets under customary international law principles. Further, the use of CNA does not violate applicable international conventions. During armed conflict, military and dual-use computer infrastructure are always legitimate targets provided they make an effective contribution to the adversary's military effort and if their destruction would offer a definite military advantage. The criteria for determining military advantage include the nature, location, purpose or use of the offending computer network and whether it is used to threaten U.S. or allied interests. Similarly, under self-defense principles, these same computer networks may be attacked as lawful targets in circumstances prior to armed conflict if their partial or total destruction is a necessary and proportional response to an attack. As a corollary to this rule, simply because a particular target is valid in a military sense does not mean that it must be attacked; a nation must always analyze potential targets in light of the applicable political, tactical, and strategic implications.

In the target analysis required for CNA, as with more traditional targets, reasonable precautions must be taken to discriminate between military and civilian networks. This will be most difficult with dual-use systems such as commercial telephone exchanges that can serve both a military and civilian purpose. In this area, the political implications are

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71. 47 U.S.C. § 502 (1994**)** provided:

> Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

Id.

72. *See* DOD GC ASSESSMENT, *supra* note 53, at 38.

magnified and must be carefully weighed. However, it is clear that computer networks—such as those serving commercial infrastructure, government agencies, and banking and financial institutions—can constitute legitimate targets if those networks contribute to the enemy's war-sustaining capability such that their destruction would constitute a definite military advantage. Conversely, attacks on computer networks—such as those serving civilian infrastructure, food distribution systems, and water supply systems—would be prohibited if designed solely to support the civilian population.

International communications law likewise contains no direct or specific prohibition against the conduct of CNA or other information operations by military forces during armed conflict or in response to aggression. Again, the law of self-defense enjoys a superior position in the hierarchy of a nation's sovereign rights. Moreover, the practice of nations provides persuasive evidence that telecommunications treaties are regarded as suspended among belligerents during international armed conflict. Similarly, domestic communications laws, and specifically 47 U.S.C. § 502, do not prohibit military information operations. It is apparent that computer network attacks—authorized by the Fiscal Year 2000 Unified Command Plan and implemented through the JIOC and NIPC—can be employed in a manner consistent with domestic law, as well as customary and conventional international law principles.

THE MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000: IMPLICATIONS FOR CONTRACTOR PERSONNEL

MAJOR JOSEPH R. PERLAK[1]

> *For a man will never be judged good who, in his work—if he wants to make a steady profit from it—must be rapacious, fraudulent, violent, and exhibit many qualities which, of necessity, do not make him good. Nor can men who practice war as a profession—great men as well as insignificant men—act in any other way, since their profession does not prosper in peacetime. Therefore, such men must either hope for no peace or must profit from times of war in such a manner that they can live off the profit in times of peace. Neither of these thoughts is found in a good man.*[2]

I. Introduction

In the early sixteenth century, Italian military theorist Niccolo Machiavelli used a notional dialogue between two Florentine citizens as a vehicle to discuss the complexities of war and military science and their overall

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1. Judge Advocate, United States Marine Corps. Presently assigned as Assistant Counsel, Marine Corps Systems Command, Quantico, Virginia. LL.M., 2001, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D. 1991, Western New England College School of Law; B.A., 1988, College of the Holy Cross. Formerly assigned as Assistant Command Counsel and Special Project Officer (G-3), Marine Corps Combat Development Command and Marine Corps Base, Quantico, Virginia, 1999-2000; United Nations Military Observer and Senior Supply Officer, United Nations Iraq-Kuwait Observation Mission, Umm Qasr, Iraq, 1999; Special Assistant to Counsel for the Commandant of the Marine Corps, Headquarters, Marine Corps, The Pentagon, 1996-1999; Trial Counsel, Special Assistant U.S. Attorney, Senior Defense Counsel, Marine Corps Air Station Beaufort, South Carolina, 1994-1996; Deputy Staff Judge Advocate, 3d Force Service Support Group; Marine Expeditionary Unit SJA, III Marine Expeditionary Force; Judge Advocate, Legal Services Support Section, Okinawa, Japan, 1993-1994. This article was submitted in partial completion of the Master of Laws requirements of the 49th Judge Advocate Officer Graduate Course.

2. NICCOLO MACHIAVELLI, THE ART OF WAR 13-14 (Peter Bondanella & Mark Musa eds., 1995) (1521).

influence on a society. The passage quoted above seems to paint an absolutist and bleak picture about the inherent character of people who make their living through military pursuits. Machiavelli likely intended this, however, as a commentary on the evils of warfare itself as much as an indictment of individuals. Both prongs are worthy of exploration.

Now nearly five centuries later, warfare has been institutionalized so that a professional military is a significant part of any important nation on the world stage. Indeed, military prowess largely defines a nation's international status and credibility. Another large component of international military significance is the scope and capabilities of a nation's defense industry. Today we are no longer burdened as Machiavelli was with concepts of good versus evil in formulating military policy. We have accepted it as a necessary and integral part of modern nationhood. We have learned to live with the social structures of warfare, including a standing military and a sophisticated defense industry.

But what about individuals? The other side of Machiavelli's entreaty, the concern with individual acts of evil in the context of the martial professions, remains a concern today. As is true in all walks of life, some who derive their living from warfare will engage in criminal activity. We may have reached a social accommodation with warfare itself, but not with individual wrongdoing. The Uniform Code of Military Justice (UCMJ)[3] provides a comprehensive scheme of procedural rules and proscriptive laws to cover transgressions by members of the military, but until now the judicial system has not affected the significant number of civilians accompanying the force overseas.

For over forty-three years, civilians accompanying the force overseas have been beyond court-martial jurisdiction and a significant portion of the overall criminal jurisdiction of the United States.[4] In an unacceptable number of cases, these civilians have escaped prosecution altogether.[5]

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3. 10 U.S.C. §§ 801-946 (2000).

4. *See* Reid v. Covert, 354 U.S. 1 (1957) (overturning two cases involving civilian spouses convicted at courts-martial for the murders of their Active Duty spouses at overseas bases).

5. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' INVESTIGATIVE EFFECTIVENESS REGARDING U.S. FORCES CIVILIANS STATIONED OVERSEAS, REPORT NO. 99500009I, 7-10 (Sept. 7, 1999). [hereinafter DOD IG REPORT]. *See also* GENERAL ACCOUNTING OFFICE, SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED, REPORT NO. FPCD 79-45 (1979).

With years of legislative history and careful draftsmanship[6] to support it, Congress enacted the much-anticipated[7] Military Extraterritorial Jurisdiction Act of 2000.[8] The purpose of the Act is to fill this jurisdictional gap by extending many of the criminal laws of the United States to overseas areas.[9] Historically, many of these crimes were beyond U.S. jurisdiction and involved crimes that host nations had little interest in prosecuting. This article takes a fresh look at the Military Extraterritorial Jurisdiction Act's new scheme of criminal law applicable to civilian contractor employees accompanying the force, from both international and domestic law perspectives.

Operational commanders, their legal advisors, and members of the contracting community must be aware of the implications of the Act for contractors accompanying the force in both a deployed and pre-positioned overseas environment. Commanders, contracting officers, and contractors alike will have to know how to respond when the new jurisdiction is applicable. Commanders, especially, will be challenged to fulfill the often-competing goals of maintaining positive relations with foreign states, which are governed by international agreements, exploitation of contractor support as a force multiplier, and overall mission accomplishment.

To this end, this article analyzes the Act from three necessarily interrelated perspectives. First, the article provides a brief overview of the state

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6. *See generally* Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW., Dec. 2000, at 1.

7. *See generally Military Extraterritorial Jurisdiction Act of 1999, Hearing on H.R. 3380 Before the House Subcomm. on Crime, Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *H.R. 3380 Hearing*] (containing the testimony of Department of Defense attorneys and the concerns of various employee organizations); Michael J. Davidson and Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW, ABA, No. 4, Summer 2000, at 1 (describing the problem of the jurisdictional gap and the history of efforts to close it); Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL L. REV. 114 (1995) (providing a comprehensive analysis of the problem and advocating for the limited extension of court-martial jurisdiction over civilians accompanying the deployed force); Rick Maze, *Bill to Protect Overseas Families Awaits Clinton Nod*, MARINE CORPS TIMES, Nov. 13, 2000, at 20, (reporting brief description of the issue and anecdotal information about the Act published a week before the President signed it).

8. The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2000).

9. *See generally* Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 12 (briefly detailing the coverage of the Act).

of the criminal law for those forty-three years leading up the to the enactment of the Military Extraterritorial Jurisdiction Act of 2000. Next, the article provides a comprehensive overview of jurisdiction from an international law perspective. Last, the article addresses the import of this overall scheme of criminal and international law imposed by the Act from a perspective that has received scant attention to date—the contract law perspective.

With a forty-three year jurisdictional gap, there is a dearth of doctrine, procedure, and policy on just how this new criminal statute will affect the way the military does business with contractors. Equally unclear is how the Act will affect the actions of contractor employees and the commanders they support overseas. To that end, this article offers proposals to help fill the current doctrinal gap and to incorporate the practical effects of this new law into Joint Chiefs of Staff (JCS) doctrine, Department of Defense instructions, and the Federal Acquisition Regulation. The article ultimately intends to effect the Act's synthesis into relevant government policies and regulations to ensure a predictable continuity of contractor support to overseas commanders.

II. Criminal Law Background

While this article focuses on international and contract law implications, at its foundation, the Military Extraterritorial Jurisdiction Act is a federal *criminal* statute. The Act applies to civilians[10] and is found, like most other federal criminal statutes, in title 18 of the U.S. Code.[11] Important for the purposes of this article, "civilians" includes both contractors and subcontractors.[12] Another significant aspect of the statute is its additional applicability to members of the armed forces and the corresponding intersection with the Uniform Code of Military Justice (UCMJ), which, like most military and defense-related matters, is found in title 10 of the U.S. Code.[13] A brief discussion of judicial history is required to explain the development of this federal criminal statute with extraterritorial effect

10. 18 U.S.C. § 3261 (2000).

11. *Id.* §§ 3261-3267.

12. *Id.* § 3267. *See also* Major Louis A. Chiarella et al., *2000 Contract and Fiscal Law Developments—The Year in Review*, ARMY LAW., Jan. 2001, at 70, 125 (providing a brief overview of the new Act and its applicability).

13. UCMJ arts. 1-146 (2000).

that applies to both the armed forces and those civilians accompanying the forces overseas.

Before the enactment of the UCMJ in 1950,[14] military jurisdiction over both the uniformed military and civilians[15] serving with the armed forces was well established in law under the Articles of War.[16] With the codification of military law in 1950 came a series of provisions establishing court-martial jurisdiction over certain personnel, including active duty and Reserve military personnel, military retirees, prisoners of war, certain civilians, and others.[17] The personal jurisdiction provisions of the first UCMJ came under almost immediate challenge in court.[18] These provisions became the basis for judicial challenges that ultimately led to the Military Extraterritorial Jurisdiction Act of 2000. These judicial challenges were directed at Articles 2(a)(10)[19] and 2(a)(11) of the UCMJ,[20] previously Articles 2(10) and 2(11) of the Articles of War. Article 2(a)(10) generally applies to those serving with the force in the field in time of war. Article 2(a)(11) applies to those serving with or accompanying the force overseas under an international agreement, not necessarily in time of war.

Beginning with *Reid v. Covert*[21] and *Kinsella v. Krueger*,[22] the Supreme Court decided a series of cases challenging the UCMJ's jurisdiction over civilians charged and tried at courts-martial for various crimes committed in overseas areas. These cases involved military spouses stationed overseas who were tried by courts-martial for capital offenses occurring in peacetime. The Court held that subjecting civilian dependents

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14. *Id.*

15. *See, e.g.*, Hines v. Mikell, 259 F. 28 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

16. *See, e.g.*, 1920 Articles of War, 41 Stat. 787, art. 2(d) (1920).

17. *See generally* UCMJ art. 2 (providing a complete list of court-martial jurisdiction over various persons: members of the armed forces, reservists, certain civilians, military retirees, prisoners of war, and others).

18. *See generally* Toth v. Quarles, 350 U.S. 11 (1955) (releasing jailed former service member arrested by military authority five months post-discharge and convicted at court-martial). This case stands for the proposition that a civilian is generally entitled to a civilian trial.

19. UCMJ art. 2(a)(10) reads, "[I]n time of war, persons serving with or accompanying an armed force in the field."

20. UCMJ art. 2(a)(11) reads, in pertinent part, "[S]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . ."

21. 354 U.S. 1 (1957).

22. 351 U.S. 470 (1956).

to trial by courts-martial for capital offenses under Article 2(11) was unconstitutional.[23] Shortly thereafter, unable to find any basis in law to distinguish capital from non-capital offenses, the Court extended its holding to non-capital offenses committed by military dependents, invalidating the exercise of court-martial jurisdiction.[24]

During the same session, the Court also considered the applicability of UCMJ Article 2(11) to other civilians who were not military dependents, but rather employees of the various military branches. In both capital[25] and non-capital[26] cases, the Court held that courts-martial had no jurisdiction to try civilian employees during peacetime.

In 1967, the Vietnam War served as the backdrop for the next challenge to UCMJ jurisdiction over civilians. A challenge came to Article 2(10), which extends jurisdiction over civilians[27] serving in the field "in time of war." The Court of Appeals for the D.C. Circuit held that, even assuming a proper assertion of court-martial jurisdiction over a civilian was possible under Article 2(10) in an undeclared war, the circumstances of the offense were too remote to permit jurisdiction in that case, resulting in the release of a merchant seaman convicted by court-martial for murder.[28]

The final blow to court-martial jurisdiction over civilians overseas came, interestingly enough, at the hands of an appellate military court in 1970 in a case involving a contractor employee, *United States v. Averette*.[29] As the analysis in this paper focuses on civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000, this case is particularly sig-

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23. *Reid*, 354 U.S. at 31.

24. Kinsella v. Singleton, 361 U.S. 234 (1960).

25. Grisham v. Hagan, 361 U.S. 278 (1960). This case involved an Army civilian employee tried by court-martial for premeditated murder in France. He was convicted of a lesser form of murder and originally sentenced to life imprisonment. *Id.*

26. McElroy v. Guagliardo, 361 U.S. 281 (1960) (involving non-capital offenses committed by civilian employees overseas).

27. *See generally* GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 99-100 (1989).

28. Latney v. Ignatious, 416 F.2d 821 (D.C. Cir. 1969). In this case, a merchant seaman aboard a tanker belonging to the Navy's Military Sea Transportation Service (now the Military Sealift Command) was court-martialed for a murder that occurred during a port call to Da Nang harbor. *Id.*

29. 19 C.M.A. 363 (1970).

nificant because it effectively removed the last vestiges of jurisdiction based on UCMJ Article 2(10).

Averette was a civilian employee of an Army contractor serving in Vietnam. He was convicted of conspiracy to commit larceny and attempted larceny in a scam involving the attempted theft of several thousand government-owned batteries.[30] The Court of Military Appeals ordered the charges dismissed, holding that Article 2(10) jurisdiction applies only to offenses committed "in time of war"—defined by the court as a congressionally declared war[31]—and not during a *de facto* state of war as with the Vietnam conflict.

With this comprehensive narrowing of court-martial jurisdiction under Articles 2(10) and 2(11), predictably there have not been any cases of this kind in over thirty years. Except in times of declared war, court-martial jurisdiction over civilians is effectively dead. The crimes that were previously addressed by these courts-martial, however, did not die along with the loss of jurisdiction.[32]

With court-martial jurisdiction effectively removed by the courts, it devolved to Congress to come up with a legal scheme that would fill the gap. From the very outset in 1957,[33] up to the present day,[34] no court has ever questioned the ability of Congress to do exactly that. Federal criminal laws with extraterritorial effect have existed for years.[35] Likewise, jurisdiction over land under military control or put to military use within the United States has existed under the special maritime and territorial juris-

30. *Id.* at 363.

31. *Id.* at 365. There have been no declared wars since the UCMJ was enacted in 1950, the last one being World War II.

32. *See* DOD IG Report, *supra* note 5.

33. *See* Reid v. Covert, 354 U.S. 1, 35 (1957) (Justice Frankfurter, concurring in the result, clearly states that Congress has the power to extend criminal jurisdiction over, in this case, civilian dependents).

34. *See* United States v. Gatlin, 216 F.3d 207, 209 (2d Cir. 2000).

35. For an exhaustive list of federal criminal statutes that already have express or implied extraterritorial effect, see CHAIR, OVERSEAS JURISDICTION ADVISORY COMMITTEE, OFFICE OF THE GENERAL COUNSEL, DEP'T OF DEFENSE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT 40-41 (1997) [hereinafter ADVISORY COMMITTEE REPORT].

diction of the United States.[36] However, because this jurisdiction has no extraterritorial effect, there have been conspicuous gaps.[37] Courts have employed a rule of statutory construction providing a presumption that a law does not have extraterritorial effect unless there is clear congressional intent to make it so.[38]

A significant case in 2000 explains why passage of the Military Extraterritorial Jurisdiction Act of 2000 was imperative. Decided last summer by the Court of Appeals for the Second Circuit, *United States v. Gatlin*[39] emphasized the fact that, in the forty-plus years since *Reid*, the civilian criminal code had still not filled the overseas jurisdictional void.[40] *Gatlin* stands for the proposition that even meritorious prosecutions under valid federal statutes fail unless these statutes have clear extraterritorial effect.

The solution seemed clear and overdue—for Congress to extend the existing criteria for special maritime and territorial jurisdiction to encompass expressly those additional crimes that it had not historically covered. That is just what the Act does, extending jurisdiction by analogy over the

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36. 18 U.S.C. § 7(3) (2000) defines the special maritime and territorial jurisdiction of the United States as:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building . . . .

Id.

37. Lacking an express extraterritorial applicability, such felonious acts as rape, child sexual abuse, and robbery could not be prosecuted for want of jurisdiction. *See* ADVISORY COMMITTEE REPORT, *supra* note 35.

38. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

39. United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000). Gatlin, a military spouse stationed in Germany, pled guilty to repeatedly sexually abusing a minor. When the thirteen-year-old became pregnant, genetic tests proved Gatlin was the father. *Id.* at 210. His plea and conviction were reversed for want of jurisdiction. The court found that the criminal statute he pled guilty to, 18 U.S.C. § 2243(a), did not apply to Gatlin's acts, nor was Gatlin within the jurisdictional ambit of the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 7(3). *Id.* at 220. In an extraordinary step, the court ordered its clerk to deliver a copy of the opinion and outcome in the case to the chairmen of both the Senate and House Armed Services and Judiciary Committees. *Id.* at 223. The opinion reads like a plea to the legislature to fix the jurisdictional gap that allows cases like Gatlin to occur.

40. *Id. Gatlin* was decided in the summer of 2000 while the Act was still under consideration in its various congressional committees.

listed individuals for crimes punishable by imprisonment for more than one year, just as though the conduct had occurred within the special maritime and territorial jurisdiction of the United States.[41]

The scope of civilians covered by the Act is comprehensive, specifically including government contractors[42] and their dependents.[43] The jurisdictional loopholes allowing contractor personnel to escape prosecution are now largely closed. The new Act intersects with the UCMJ by pro-

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41. Section 3261(a) of the Act states this application of this new jurisdiction by analogizing to the special maritime and territorial jurisdiction. "[W]hoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . ." 18 U.S.C. § 3261(a).

42. Section 3267(1) of the Act defines "employed by the Armed Forces outside the United States" as:

> (A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);
> (B) present or residing outside the United States in connection with such employment; and
> (C) not a national of or ordinarily resident in the host nation.

Id. § 3267(1).

43. Section 3267(2) of the Act defines "accompanying the Armed Forces outside the United States" as:

> (A) a dependent of—
> (i) a member of the Armed Forces;
> (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
> (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
> (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
> (C) not a national of or ordinarily resident in the host nation.

Id. § 3267(2).

viding for concurrent jurisdiction[44] over persons subject to the UCMJ when their co-accuseds are civilians.[45]

III. International Law Issues

In addition to bridging the jurisdictional gap that evolved between federal criminal law and the UCMJ, the Military Extraterritorial Jurisdiction Act of 2000 also interfaces significantly with the existing scheme of international law. This article addresses this interface in three ways: by scrutinizing the wording and import of the Act from a statutory construction perspective; by analyzing the Act under the applicable Geneva Conventions and Protocols; and finally, by juxtaposing the Act on an existing international agreement, the North Atlantic Treaty Organization's Status of Forces Agreement (NATO SOFA).

A. Statutory Analysis of the Act

Before the passage of the Act, only host nations had criminal jurisdiction over many offenses committed in overseas areas by civilians accompanying the armed forces.[46] If the host nation neglected or deliberately

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44. Section 3261(c) provides:

> Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

Id. § 3261(c).

45. Section 3261(d) of the Act reads:

> No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—
>
> (1) such member ceases to be subject to such chapter, or
>
> (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

Id. § 3261(d).

46. *See* DOD IG REPORT, *supra* note 5.

declined to exercise its jurisdiction and to prosecute, then the offense would go unpunished.[47]

The Act addresses the issue of possible concurrent jurisdiction with a foreign government with the following provision:

> No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity, which function of approval may not be delegated).[48]

The purpose of this provision is clear, and the intent of Congress appears to be twofold. First, Congress intends to limit the use of the Act only to situations that are not already addressed by an existing scheme of criminal law. Where international agreements recognized by the United States already provide for foreign criminal jurisdiction, and that jurisdiction is exercised, then Congress is content to allow that existing scheme of law, namely foreign law, to be applied. In a recently publicized case involving a deadly stone throwing on a motorway by dependent teenagers of American service members in Germany, German law was applied, yielding sentences between seven years and eight-and-a-half years for the three defendants.[49] While these same criminal acts would now ostensibly fall under the Military Extraterritorial Jurisdiction Act, Congress intends to allow the foreign government to prosecute these cases, if it chooses. It follows that if the foreign government were to decline prosecution for some reason, then the United States could do so under the Act.

Second, Congress has expressed a desire to minimize situations where dual prosecutions by the United States and a foreign government might occur. Although the American legal doctrine of "double jeopardy"[50] does not apply where there are two separate sovereigns (for example, the

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47. *Id.*

48. 18 U.S.C. § 3261(b).

49. *See generally Stone-Throwers Sent to Prison*, ASSOCIATED PRESS, Dec. 23, 2000 (reporting on the facts, offenses, and sentences in these cases prosecuted under German law as attempted murder and endangering traffic), *available at* http://www.abcnews.go.com/sections/world/DailyNews/germany001222.html.

50. The Fifth Amendment states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

United States and Germany), Congress wants to avoid redundancy. By vesting in the Attorney General and Deputy Attorney General the decisional authority over any contemplated prosecutions,[51] Congress intends that the United States will not pursue concurrent or parallel prosecutions except in the most extraordinary of circumstances, and with the very highest level of authorization.

Taken together, from an international law perspective, the import of § 3261(b) is to have the Act fill the apparent jurisdictional gaps, but nothing more, and certainly not to undo or supplant any part of the existing international law scheme. This is important from a constitutional law perspective, because the effect of a U.S. statute, even if merely intended as a stopgap measure, would be of equal legal effect on the United States as any treaty currently in force.[52]

The Military Extraterritorial Jurisdiction Act is carefully drawn not to upset existing jurisdictional schemes, including those provided by international agreements. It is equally cautious in two other key areas: exercising U.S. powers of arrest in an extraterritorial context,[53] and prescribing the process for either removal of suspects to the United States or delivering them to the foreign country.[54] The thrust of the Act in these two areas seems designed to assuage any potential concerns by foreign governments that the United States plans to undermine host-nation jurisdiction. Rather than offering a sweeping mandate for U.S. law enforcement to spirit suspects out of the host country to face American justice, the Act is again cautious, deliberate, and intentionally deferential to the existing international law and jurisdictional scheme.

Few issues are more sensitive than the exercise of criminal arrest powers by one state within the territory of another.[55] Indeed, the exclusive exercise of police powers within one's own borders seems to be at the very essence of statehood. Without careful wording, the Act may well have had

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51. 18 U.S.C. § 3261(b).

52. The "Supremacy Clause" provides, "[T]his Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land . . . ." U.S. CONST. art. VI.

53. 18 U.S.C. § 3262(a).

54. *Id.* § 3263.

55. *See generally* United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990) (recounting the body of American case law regarding the extraterritorial exercise of arrest and jurisdiction).

the unintended consequence of undermining that basic sovereign power of the nations that are hosting U.S. armed forces overseas. Instead, the Act thoughtfully deals with the potentially volatile issues of arrest and confinement as follows:

> The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person . . . (who is subject to jurisdiction of the Act) . . . if there is probable cause to believe such person violated (the Act).[56]

On one hand, the statute broadly gives the Secretary of Defense the power to designate and authorize its various law enforcement agencies to arrest those United States civilians, including dependents, Department of Defense employees, and contractor personnel, in an overseas environment.[57] On the other hand, the Act constrains itself (and by implication, the Secretary of Defense) in the exercise of that power by the words "in accordance with applicable international agreements."[58] With this one critical qualification, the Act intentionally defers to treaties and international agreements, which will require careful scrutiny before these powers of arrest are attempted, much less exercised. This area is explored in greater depth in Section III.C, where this article looks at the potential application of the Act under an existing international agreement.

The next issue the Act deals with is the concept of delivery of U.S. citizens to the authorities of foreign countries for potential prosecution. If and when the powers of arrest as described above are exercised, the Act sets the conditions that are prescribed for transferring someone under arrest to a foreign country. Section 3263 of the Act provides:

> (a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—
>
> > (1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

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56. 18 U.S.C. § 3262(a).
57. *Id.* § 3263(b).
58. *Id.* § 3262(a).

> (2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.
>
> (b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.[59]

Thus, the Act is purposefully deferential to existing international agreements. Consistent with the overall statutory scheme discussed so far, the wording of the Act is tailored not to break new ground, but merely to fill unacceptable gaps.

Upon closer scrutiny, one can discern the subtle extension of greater extraterritorial jurisdiction by the United States, logically at the expense of a foreign power. For example, the Act provides that those law enforcement personnel designated by the Secretary of Defense to arrest U.S. civilians covered by the Act *may*[60] deliver those persons to foreign authority in the specific circumstances that follow. The use of the word "may" instead of "shall" is critical because this choice of words introduces the element of discretion on the part of commanders exercising their disciplinary powers. More importantly, it eliminates the notion of a statutory prescription—a requirement to do a certain thing. Defense law enforcement personnel may turn U.S. civilians over to foreign countries; then again, they may not. This discretion takes on even greater significance as the Act next describes the conditional circumstances under which U.S. citizens "may" be delivered—"if" two conditions are met.

The first condition under § 3263(a)(1) is that "appropriate authorities" of the foreign country must request delivery of a U.S. citizen (who is presumably then in the custody of a U.S. law enforcement agency under to the arrest powers in the Act) for trial under the laws of that country.[61] Under § 3263(b), the United States, through the offices of the Secretaries of Defense and State, will determine just who is an appropriate authority. Based on the discretion of the Secretaries, it follows that the United States

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59. *Id.* § 3263.
60. *Id.*
61. *Id.*

will also determine who is *not* an appropriate authority. This implies a significant amount of latitude on the part of U.S. officials.

This first condition in § 3263(a)(1) is followed by the important conjunctive, "and,"[62] which combines it with the second condition found in § 3263(a)(2). This requires an existing international agreement, to which the United States is a party, which authorizes the delivery of U.S. personnel. Unless Congress contemplates the re-negotiation or clarification of scores of international agreements, it stands to reason that this power must exist and be exercised in the context of existing agreements. Arguably, there cannot be very many existing international agreements to which the United States is a party that contemplate, much less specifically authorize, this type of delivery. It follows that any such pre-existing authorization contained in a treaty or status of forces agreement is applicable more by coincidence or by analogy, rather than by the express intent of the parties at the time the international agreement was entered. But as this article will demonstrate, the terms of existing agreements are sufficiently broad to subsume this new arrest and delivery procedure without modification. Therefore, the Act effectively serves its purpose to fill the gaps and fit into the existing scheme of law.

To summarize, then, this is the state of the law under § 3263: *if* a U.S. citizen covered by the Act violates the Act; and *if* he or she is arrested by an authorized Department of Defense law enforcement official for violating the Act; and *if* the foreign country where the offense occurred requests his or her delivery; and *if* the requester is found to be an appropriate authority; *and* an existing international agreement authorizes this delivery; then the Department of Defense law enforcement official *may* deliver these citizens to foreign control.[63]

This repeated use of the subjunctive in distilling this portion of the Act is offered for two analytical reasons. The first is to give some comfort to those U.S. citizens serving with the armed forces overseas who have expressed concerns about the Act providing them with fewer protections than they would receive under the domestic law if the offense had occurred

62. *Id.*
63. *See id.*

in the United States.[64] If they were already subject to host nation law, that circumstance is largely unchanged, with the Act deferring to existing foreign jurisdiction where applicable. When U.S. law enforcement personnel arrest U.S. citizens for violation of U.S. laws, however, it seems unlikely the U.S. citizen will be summarily turned over to a foreign country. Moreover, this situation could work to the U.S. citizen's advantage, depending on the crime alleged and the law of the host nation.

Second, this analysis of § 3263 demonstrates that this one section, more so than any other, has the greatest potential for expansion of jurisdiction by the United States. Conversely, it also has the greatest potential for generating a situation of international tension based on encroachment, real or perceived, into the jurisdiction and even the sovereignty of the host nation, especially in situations where the host nation is inclined to exercise its previously exclusive jurisdiction. The rationale is simple, as the following example illustrates.

Using a hypothetical that is somewhat derivative of *Averette*,[65] suppose a contractor employee is arrested by Department of Defense law enforcement personnel for larceny of large quantities of government batteries. Suppose further that this same contractor is selling these batteries on the black market[66] of the local economy, or worse, clandestinely selling them to insurgents fighting against the host nation, thereby violating host nation law. Given a state of domestic affairs that requires a U.S. presence to assist the host nation in the first place, it stands to reason that U.S. law enforcement personnel would be able to move more quickly to investigate and make the arrest. This is even more probable since the host nation law enforcement personnel would be occupied working against the insurgency, and the contractor would likely spend most of his time in the U.S. base camp. Once in U.S. physical custody, it is difficult to imagine a circumstance where the United States would then turn over the citizen for foreign trial, particularly if that citizen had already been repatriated back to the

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64. *See, e.g.*, *H.R. 3380 Hearing*, *supra* note 7. In a prepared statement, the Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO, opposed the Act on the bases that "host nation law has worked very well" and that the Act cannot be supported because it does not afford overseas teachers "the same balance of rights and protections as their domestic counterparts." *Id.*

65. 19 C.M.A. 363 (1970).

66. *See generally* GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973, at 108-10 (1975) (discussing jurisdiction over civilians, identifying black marketeering and currency manipulation as major concerns in Vietnam, and documenting Averette as one of four civilians tried by courts-martial during the war).

United States. Suppose further that the American concern was the larceny itself, whereas the host nation concern was an act of treason, punishable by death under host nation law. Whether an international agreement exists that specifically provides for this circumstance is an important consideration, but there still are domestic political realities that may well make this "delivery" of the U.S. citizen to the host nation politically untenable for the United States.[67]

B. Analysis Under the Geneva Conventions and Protocols

Besides the wording and potential impact of the Act itself, additional analysis is required to place the Act into the actual context in which it will operate—international agreements. The most common agreements include treaties of the United States, status of forces agreements negotiated with countries hosting U.S. armed forces overseas, and any customary international law that is binding on the United States.

Since the focus is on civilian contractors serving with the armed forces overseas, in either a garrison or operational environment, it is important to remember the essential reason for their hiring. As is now fully incorporated and reinforced in joint doctrine,[68] civilian contractors function as an "effective force multiplier."[69] This means they are hired to provide services that will free a "trigger-puller" to fight, or they provide technical expertise to the force, thereby assisting the force in waging war or enforcing peace.

From an international law perspective, there is an intellectual inconsistency here between status as a "civilian" and service as a "force multiplier." This is uniquely the case for contractors, whose predecessors in Machiavelli's day were the supposed evil profiteers of war,[70] and who

67. *See generally* SOLIS, *supra* note 27, at 99.

68. *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 1-06, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FINANCIAL MANAGEMENT DURING JOINT OPERATIONS G-1 (22 Dec. 1999) (identifying contingency contracting as an effective force multiplier); JOINT CHIEFS OF STAFF, JOINT PUB. 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES VIII-11 (13 Jan. 1999) [hereinafter JOINT PUB 5-00.2] (discussing the importance of an effective contracting support plan as an essential tool to a Joint Task Force Commander); JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS ch. V (6 Apr. 2000) [hereinafter JOINT PUB 4-0] (identifying the capabilities and discussing the employment of various types of contractor support).

69. JOINT PUB 5-00.2, *supra* note 68, at VIII-11.

70. MACHIAVELLI, *supra* note 2, at 15.

today obviously make their living supporting the operations of the military. Furthermore, for contractors, this incongruity is even more conspicuous when compared to any other civilians accompanying the force abroad. The status of a dependent spouse, a Department of Defense schoolteacher, or an Army-Air Force Exchange Service store manager accompanying the force[71] is fairly innocuous. But can the same be said for the contractor providing technical support to maximize operational capabilities or freeing a soldier to fight on a one-for-one basis?

For this analysis, it makes sense to start with a broad historical overview, followed by a focused examination of the current international law status of a contractor employee in an operational or contingency environment. The article begins this analysis with two critical issues in international law applicable to contractors that are not affected by the Act—their civilian status and their treatment if captured. The article then deals with the significant provisions of status of forces agreements in light of the new Act.

Following the massive destruction and suffering caused to civilian populations during World War II, the 1949 Geneva Conventions addressed the protection of non-combatants generally. Potentially affecting the issue of contractors are two key groups covered by the Conventions—civilians[72] and prisoners of war.[73] Unfortunately, while providing protections to civilians, the 1949 Conventions never actually defined a "civilian." The lack of a definition was obviously problematic, so the 1977 Protocols[74] to the 1949 Geneva Conventions sought to provide one. Unfortunately, the Protocols defined "civilian" by describing whom they were *not*—such as members of armed forces or organized militias[75]—as opposed to making an affirmative statement or definition of whom they are.[76]

Having supplied this definition-by-negation, the Protocols then provide a civilian with scores of protections; however, these protections are

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71. Like the contractor employee, all three of these described personnel, while accompanying the force overseas, are also now subject to the jurisdiction of the United States under the Act. 18 U.S.C. § 3261 (2000).

72. 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.

73. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

74. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I].

75. *See id.* art. 43.

76. *See id.* art. 50.

conditional, based on the actions of the person and applying "unless and for such time as they take a direct part in hostilities."[77] Should the civilian briefly take a direct part in the hostilities, then cease to do so, the protections they receive are in turn applicable or not, based on their conduct. Importantly, the Protocols do not further define what is meant by the word "direct," nor do they provide examples, although the official commentary to the Protocols does offer what amounts to a "causing actual harm" standard.[78]

By contrast, Common Article 3 to the Geneva Conventions does not use the term "direct" and instead introduces the concept of taking an "active" part in the hostilities.[79] Particularly with contractors supporting the force, this may be an area of concern and possibly contention, because it ties directly into important law of war issues regarding targeting and the requirement of distinction in targeting.[80] One can readily imagine a military rear area activity such as a mess hall being targeted during a state of hostilities. While it is of questionable tactical value as a mess hall, it does present a large concentration of enemy troops at certain times of day, and it functions to sustain the fighting power of the force. The fact that it is run exclusively by contractor employees certainly blurs the line between combatants and noncombatants and makes targeting increasingly complex. It is instructive that, for the limited purpose of assessing the risk of direct attack on U.S. civilians accompanying the force (such as contractor employees), the Department of Defense Law of War Working Group has used the term "active" as found in Common Article 3.[81]

The next significant international law issue is the status of contractors in the event an opposing force captures them during international armed conflict. Prisoner of war status is significant, because those who rate it typically enjoy special protections, such as combatant immunity from prosecution for warlike acts.[82] Just as importantly, they are not treated as

77. *See id.* art. 51.

78. YVES SANDOZ, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 619 (1987).

79. Common Article 3 provides that "persons taking no active part in the hostilities . . . shall . . . be treated humanely." GPW, *supra* note 73, art. 3.

80. Protocol I, *supra* note 74, art. 51.

81. E-mail from Mr. W. Hays Parks, Office of the Judge Advocate General, U.S. Army, to Captain Jeanne Meyer, United States Air Force, Professor of International and Operational Law, The Judge Advocate General's School, U.S. Army (23 Aug. 2000) (on file with author).

82. GPW, *supra* note 73, art. 85.

ordinary criminals under capturing nation law.[83] Prisoner of war status is accorded to "[p]ersons who accompany the armed forces without actually being members thereof, such as . . . supply contractors [and] members of labour units . . . provided they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card."[84] Thus, contractor personnel clearly are covered. Again we see the paradox inherent in the status of contractor employees supporting the force—they are ostensibly non-combatants, yet they are to be afforded the protections of a prisoner of war. While this status is a matter of international law, numerous practical questions persist, as the lines have predictably begun to blur further between contractor support and traditional soldierly functions in the prosecution of U.S. foreign policy overseas.[85]

To ensure proper treatment should they be captured, the issuance of identification cards is a significant matter affecting contractors. Identification cards also are addressed in the Geneva Convention regarding prisoners of war, which provides in part: "Each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth."[86] Contractor personnel in a deployed environment clearly are persons under U.S. jurisdiction who may indeed become prisoners of war.

To preserve their proper treatment, the importance of issuing a Geneva Convention identification card to all authorized contractor personnel in the theater cannot be overemphasized. The Department of Defense has specific guidelines requiring the issuance of identification cards to civilian personnel accompanying the armed forces in combat or contingency areas who are at risk of capture or detention.[87] These guidelines specifically provide for equivalency grading of contractor representatives, assigning them Geneva Convention categories based on their standing in

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83. *Id.* art. 82.

84. *Id.* art. 4.A.(4).

85. *See generally* Lieutenant Colonel Lourdes A. Castillo, *Waging War With Civilians: Asking the Unanswered Questions*, AIR CHRON, 2000 (discussing numerous short- and long-term issues regarding increased contractor support to military operations), *available at* htttp://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/castillo.htm.

86. GPW, *supra* note 73, art. 17.

87. U.S. DEP'T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS (30 Jan. 1974) (C2, 5 June 1991).

their profession, aligned to the categories of company grade through flag grade officers.[88] Predictably, the importance of identification card issuance is reinforced in joint doctrine as well.[89] Ultimately, the Military Extraterritorial Jurisdiction Act of 2000 does not immediately affect or conflict with these fundamental portions of international law dealing with civilian contractors and prisoner of war status.

C. Analysis Under The NATO SOFA

The context where the Act will most often be applied under international law will be within the fabric of an existing status of forces agreement (SOFA) with a host nation overseas. In situations where the United States does not have a SOFA or other diplomatic agreement, the Act will be applied as the United States decides to apply it, because the Act's requirement to operate in the context of existing international agreements[90] would be rendered a nullity. For specific analysis, this article uses the NATO SOFA as an example.[91]

Beginning with *Reid*[92] in 1957, U.S. courts, in interpreting the overall criminal law scheme, have consistently recognized the interplay between the exercise of criminal jurisdiction by the United States and the terms and conditions of treaties such as SOFAs.[93] These courts have also been careful to reaffirm the notion that treaties are only valid to the extent that they pass constitutional muster.[94]

Despite the fact that *Reid* and its progeny effectively eliminated the exercise of court-martial jurisdiction over civilians, the importance of considering the impact of a SOFA in the context of an extraterritorial prosecution continues today. Just last year, in deciding the *Gatlin* case on the eve of the Act's passage, the Second Circuit Court of Appeals carefully analyzed the thrust and jurisdictional coverage of the NATO SOFA in determining that Gatlin was neither subject to the military law of the United States nor was he covered by any U.S. jurisdiction pursuant to the SOFA.[95]

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88. *Id.*

89. *See* JOINT PUB. 4-0, *supra* note 68.

90. *See* 18 U.S.C. § 3262(a) (2000).

91. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

92. 354 U.S. 1 (1957).

93. *Id.* at 15.

94. *See id.*

The NATO SOFA contains a critical definition of contractor personnel:

> (b) "civilian component" means the civilian personnel accompanying a force of a Contracting Party[96] who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.[97]

From this definition, a U.S. citizen working as a defense contractor providing services to the U.S. component of a NATO force overseas is a member of the "civilian component" and entitled to SOFA status under the treaty. Other alternatives are counterintuitive and untenable, such as defining these persons as tourists, resident aliens, or businessmen unconnected to the military operation.[98] It follows that the sending state, in this case the United States, must take whatever administrative measures are necessary to ensure that the proper SOFA-status credentials are afforded to contractor personnel brought into foreign countries with which the United States has a SOFA.

Article VII of the NATO SOFA addresses jurisdiction in specific detail, with the following provisions directly applicable to contractor employees belonging to the "civilian component" as defined above:

> 1(b). [T]he authorities of the receiving State shall have jurisdiction over the . . . civilian component . . . with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.
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> 2(b). [T]he members of the receiving State shall have the right to exercise exclusive jurisdiction over . . . civilian components . . . with respect to offenses, including offenses relating to the

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95. 216 F.3d 207 (2d. Cir. 2000).

96. *See* NATO SOFA, *supra* note 91. The term "Contracting Party" itself is not defined in the NATO SOFA, but is used to refer to the members and signatories to the treaty organization. The use of the word "contracting" is an unintentional coincidence in an article focusing on personnel providing services based on contracts with the Department of Defense.

97. *Id.* art. I.1.(b).

98. *See Reid*, 354 U.S. at 15.

> security of that State, punishable by its law but not by the law of the sending State.
> 3. In cases where the right to exercise jurisdiction is concurrent . . . military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of . . . a civilian component in relation to . . . offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State . . . ; in the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.[99]

In this multi-layered jurisdictional scheme, the nature and type of the offense, where it is committed, and who or what entity it is committed against are critical in determining which nation is entitled to exercise primary jurisdiction or any jurisdiction at all. Congress clearly did not intend to upset this current scheme under the Extraterritorial Jurisdiction Act, but rather filled in the gap left by the elimination of court-martial jurisdiction over civilians.[100] The Act seamlessly fits this scheme. The receiving NATO state enjoys exclusive jurisdiction for offenses against that state and for any offense covered by its law but not by United States law, along with any violation of the security of that state, such as spying. Additionally, the receiving state enjoys concurrent jurisdiction over all offenses committed in its territory and covered by its laws in all cases except where the offense is solely an American-on-American crime or matter of United States security.

The terms in the NATO SOFA covering arrest again fit seamlessly with the scheme governing arrest and commitment in § 3262 of the Act. The complete terms of arrest and delivery are laid out in paragraph 5 of the NATO SOFA:

> (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

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99. NATO SOFA, *supra* note 91, art. VII.
100. 18 U.S.C. § 3263 (2000).

> (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
> (c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.[101]

As discussed earlier, the Act specifically states that arrest and confinement will be handled "in accordance with applicable international agreements."[102] Section 3263(a)(1) of the Act provides for delivery of arrested U.S. citizens when they are charged with offenses under the laws of the host nation where an international agreement to which the United States is a party specifically authorizes delivery.[103] When applied to the NATO SOFA, for example, the Act's provisions on arrest and delivery, §§ 3262 and 3263, dovetail perfectly with paragraph 5 of the NATO SOFA.

Double jeopardy concerns also arise under the Act and the NATO SOFA.[104] As discussed earlier, the protection against double jeopardy does not apply when separate sovereigns, each with lawful jurisdiction over an offense or a person, seek to prosecute. In crafting the Act, Congress ostensibly intended simply to fill existing gaps in criminal jurisdiction over Americans overseas. In doing so, however, it specifically left open the possibility of a trial of a U.S. citizen by the United States, notwithstanding a parallel prosecution of the same citizen by a foreign government.[105] Congress vested the authority to authorize such a prosecution in the very highest law enforcement authorities in the United States.

In examining the overall statutory scheme of the Act, it is essential to compare this possibility of parallel prosecution to an existing international agreement such as the NATO SOFA. While not specifically addressing the American legal theory of double jeopardy, the NATO SOFA does address the exercise of disciplinary prerogatives by more than one state.

> 8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or

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101. NATO SOFA, *supra* note 91, para. 5.
102. 18 U.S.C. § 3263.
103. *Id.* § 3263(a)(1).
104. *See supra* note 50 and accompanying text.
105. *See supra* note 48 and accompanying text.

> has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.[106]

This provision presents several points for analysis. The first sentence of the paragraph seems to provide a conditional double jeopardy type of protection, stating that the accused cannot be twice tried for the same offense.[107] The prohibition applies, however, only "within the same territory by the authorities of another Contracting Party."[108] This leaves open numerous other possibilities. Read as a whole, this paragraph stands for the notion that each state will get one opportunity—at most—to try an accused. In addition, the second sentence in the paragraph, which specifically allows for military discipline over the force, is inapplicable to civilians accompanying the force. This is evident because the NATO SOFA essentially limits the definition of "members of the force" to include only military personnel.[109]

From the preceding, the Act clearly provides for the exceptional possibility of a distinct U.S. prosecution, and the NATO SOFA does not prevent such an exercise of jurisdiction by a sending state. The NATO SOFA merely provides that such a second trial, except for trials of military personnel, may not occur in the territory of the state first exercising its jurisdiction under the multi-layered scheme in the NATO SOFA. Because the Act provides for the removal of American citizens back to the United States for prosecution, it does not hinder a parallel or subsequent prosecution in the United States for the same offense. The previous hypothetical, loosely based on *Averette*, illustrates this point.

The interplay of the Act and the NATO SOFA would make it entirely possible for a contractor employee, charged with larceny and black marketeering of government batteries overseas, to be tried by the host nation under the NATO SOFA or some other international agreement. After com-

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106. NATO SOFA, *supra* note 91, art. VII.8.
107. *Id.*
108. *Id*.
109. *Id.*

pleting his sentence, the employee could be returned to the United States to be tried in federal court under the Act, assuming any applicable statute of limitations did not toll while he was serving his sentence overseas.

Taken together, the new Act and the existing scheme of international law based on treaties and international agreements provide a comprehensive process for the trial of civilians accompanying the force overseas. This imparts a multi-layered jurisdictional approach. Under the new scheme, the gaps created by the non-exercise of jurisdiction by a foreign state are filled by an expansion of the applicability of U.S. laws, giving them extraterritorial effect. Important safeguards under the Geneva Conventions and Protocols dealing with the status of civilians—as both civilians, generally, and as potential prisoners of war, specifically—remain unaffected by the Act. Finally, international agreements such as the NATO SOFA square neatly with the Act without further modification. Together, they provide both the sending and receiving states with the ability to protect their national interests through the exercise of criminal jurisdiction over these persons in accordance with prescribed procedures.

IV. Contract Law Analysis and Proposals

Throughout this discussion of the Military Extraterritorial Jurisdiction Act of 2000, the focus has been on analyzing the Act with special emphasis on one particular group of civilians accompanying the force overseas—contractor employees. Up to this point, this article demonstrated how a progression of judicial decisions removed civilians in general from the criminal jurisdiction of courts-martial, and then applied that same legal conclusion to civilians who happen to be contractors.[110] Subsequent cases further narrowed the court-martial jurisdiction over civilians to declared wars only.[111] Finally, this article studied the effects of the Act under various aspects of international law and agreements. Remaining, however, is a discussion of the interplay between contract law and criminal statutes having international law implications.

This interplay has more dimensions to it than just the newfound ability to pursue an occasional criminal prosecution of a contractor who commits a crime overseas. The increasing use of contractor support is not just

110. *See* Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo 361 U.S. 281 (1960).

111. *See* United States v. Averette, 41 C.M.R. 393 (1970).

to provide expertise for particular weapons systems, but rather to perform a variety of garrison support services that in turn frees soldiers to fight. This amounts to an apparent one-for-one swap of soldiers and contractors. Current joint doctrine further acknowledges the importance of an effective contracting support plan covering the spectrum of commercially available services, including construction and the broad range of base camp or garrison services under the general category of "logistics," as part of a commander's overall force logistics plan.[112]

From a command and control perspective, however, contractors are not commanded or led as are soldiers. When contractor personnel perform soldierly functions, there is not a real one-for-one swap. A significant discrepancy remains between the concepts of "command" and "contract" that may be unnecessary or unacceptable, but at a minimum, must be addressed. The new Act provides an opportunity and impetus to do just that.

A. Contractor Discipline

The Act first must be considered in the overall context of an issue that often confounds commanders in both a deployed and garrison overseas environment—contractor discipline and its impact on mission accomplishment. In many respects, the very notion of "contractor discipline" presents a paradox. On the one hand is the idea of a contract, which is strictly a commercial transaction where the government enters a financial relationship with another party in order to obtain products or services on certain terms.[113] Discipline, conversely, is commonly thought of as "correction; chastisement; punishment inflicted by way of correction and training."[114]

The contract relationship lends itself to various remedies, normally financial or performance-based in nature, if a party does not honor or perform its part of the bargain. Discipline, however, creates a relationship between a senior and a subordinate where the senior ensures that his or her will prevails by the threat of punishing the subordinate. Because the UCMJ does not apply to contractor employees (except potentially in a declared war), and because the Act addresses only civilian criminal stat-

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112. *See* JOINT PUB. 5-00.2, *supra* note 68, at VIII-11 ("When properly used, contracting is another essential tool of the CJTF in support of the mission.").

113. *See generally* GENERAL SERVS. ADMIN ET AL., FEDERAL ACQUISITION REG. pt. 2 (June 1997) [hereinafter FAR].

114. THE COMPACT OXFORD ENGLISH DICTIONARY 442 (2d ed. 1998).

utes, it appears there is no relationship that could result in "discipline" over a contractor. Clearly, the options that the government has to ensure proper performance by contractors do not include any actual ability to punish individual contractor employees.

There is an existing scheme of control, however, based on contract terms and parameters of performance. Contractors enter an overseas theater expected to perform certain necessary or technical duties under the terms of their contracts. They may well have specialized skills or expertise that are not resident in the U.S. military, and which may prove essential to the operational commanders. Despite the command's aspirations to the contrary, however, contractors are not subject to the overall military disciplinary scheme that commanders may envision for their forces.[115] The contract relationship is based on performance, which leaves supervision to superior civilian employees within the contractors' organizations.[116] The fact that they may be under contract to provide services or perform skills does not translate into a command relationship over contractors. Even with the advent of the Act, commanders must still rely on the contracting officer to directly enforce contractor discipline.[117]

The overseas operational or garrison environment calls for force discipline and predictable, unambiguous, unified command relationships. Ostensibly, in an overseas contingency mission, the commander is "in command" of all assets within his force. Nevertheless, the reality with contractor employees is quite different. In fact, current doctrine defers completely to the terms of the contract, perhaps at the expense of the operational prerogatives of the commander.[118]

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115. *But see* U.S. DEP'T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE 1 (27 Feb. 1998) ("Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander or his/her representative.").

116. *See id.* "Supervision of contractor personnel is generally performed by the respective contractor. A contracting officer's representative (COR) acting within the limits of the authority delegated by the contracting officer, may provide guidance to the contractor regarding contractor employee performance." *Id.*

117. *See* JOINT PUB. 4-0, *supra* note 68, at V-8 (stating that contractor employees are disciplined by their employers by the terms of their employment, and that commanders have no penal authority over either contractor performance or misconduct).

118. *See id.* ("Commanders have no penal authority to compel contractor personnel

The linchpin to this whole process—indeed the link between the commander and the contractor employee—is the contracting officer, the only person with the ability to bind the government.[119] The contracting officer's authority includes not only entering into contracts, but also authorizing modifications to existing contracts. As such, he (and any duly appointed representative) is the only member of the command with the contractual ability to require or prohibit conduct by contractor employees, subject to the terms of the contract.

The importance of the contracting officer in a deployed overseas environment cannot be overemphasized. A consistent theme arises from the debriefs after recent U.S. overseas operations, as typified by this lesson learned in Somalia: "[A]s had been the case with Desert Storm, there was an urgent need to have contracting officers on site early—and with authority sufficient to the monumental tasks of arranging for supplies and services . . . ."[120]

Contracting officers must be present in the theater to ensure that vital services are performed and, where necessary, to enforce contractor discipline. Otherwise, the commander is missing a vital link in the supervisory chain over a potentially significant portion of his own assets. The operational importance of contracting officers takes on even greater significance

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118. (continued) to perform their duties or to punish any acts of misconduct."); U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 14 (29 Oct. 1999) ("Similar to the military chain of command, command and control of commercial support service personnel will be defined by the terms and conditions of the contract . . . . [T]he cognizant contracting officer is the only government official with the authority to increase, decrease, or materially alter a contract's scope of work."); U.S. DEP'T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE 1 (27 Feb. 1998) ("While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract."); INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, ch. 8, para. 4 (2001) ("For contractor employees command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command.").

119. *See generally* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (holding that the government may only be bound by government agents acting within their actual authority to contract). For recent developments concerning *Merrill* and its progeny, see Chiarella et al., *supra* note 12, at 1-4.

120. KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 52 (National Defense University Press, n.d.).

when one considers the supervisory-type role they play in enforcing contractor discipline.

The commander's inability to enter contracts personally or to discipline contractors is firmly established in all current doctrine.[121] One would conclude from this doctrine that the contracting officer alone has the ability to discipline contractors and that the commander is virtually powerless; however, this doctrinal surrender of commanders' authority over contractors supporting their forces in the field goes too far and must be reconsidered. The inconsistency is clear. On the one hand, doctrine urges operational commanders to rely on contractor support and to work contractors into the force mix to the maximum extent possible.[122] On the other hand, doctrine tells commanders they have no supervisory or disciplinary control whatsoever over these contractors.[123]

The dynamics of the modern battlefield are too complex to have separate and inconsistent relationships between some members of the force vis-à-vis others. Current doctrine regarding the relationship between commanders and contractor members of the force also presents a challenge to the principle of unity of command, as the contractors are not in the chain of command. Taken to its logical extreme, this may well prove detrimental to the success of the mission. To date, the United States has been able to employ successfully contractors for garrison, commercial-type services in places like Bosnia. This success, however, has been in secure environments where base camps have not been attacked or targeted by credible threats. Where such threats are present, the corresponding need to discipline contractors will likely increase.

While contracting officers, by design, exercise independence and discretion in the performance of their duties, they also belong in a chain of command or supervisory chain. In a deployed environment, the contracting officer is responsible to the theater commander in a direct supervisory relationship.[124] The theater commander's operational control over civilian employees of the Department of Defense—such as a civilian contracting

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121. *See supra* notes 116-18.

122. U.S. DEP'T. OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES 2 (26 Jan.1996) [hereinafter DODI 3020.37]. "It is DoD policy that . . . the DoD components shall rely on the most effective mix of the Total Force, cost and other factors considered, including Active, Reserve, civilian, host-nation, and contract resources necessary to fulfill assigned peacetime and wartime missions." *Id.*

123. *See supra* notes 117-18.

officer—is an important component of the overall contingency planning of the United States.[125]

With the advent of the Act, the time has come to reassess this situation and the overall issue of command relationships with contractors. If contractors are going to supplant troops, it stands to reason that a command or supervisory relationship should exist that allows contractors to be controlled in a manner more akin to troops. This must involve a more direct relationship between the commander and the contracting officer in supervising or potentially disciplining contractor personnel. This article does not advocate replacing contracting officers' judgment or discretion with their commanders'; however, the current state of that relationship disenfranchises the commander's role unnecessarily.

The closest the United States has come to creating a traditional military relationship with contractors comes from a single, key Department of Defense Instruction.[126] This instruction seeks to institutionalize policies and procedures to ensure uninterrupted contractor support to the force in a crisis situation at home or abroad. The instruction is largely focused on including appropriate language in contracting documents to ensure continued performance.[127] In so doing, this instruction also takes a realistic but fatalistic approach to ensuring contractor support. It tasks Department of Defense activities to "[p]repare a contingency plan for obtaining the essential services from other sources if the contractor does not perform in a crisis."[128]

In the final analysis, it must be conceded that even the most flexible and carefully drafted contract ultimately may not be fully or adequately performed, leaving a financial penalty of some kind as the only available remedy. Accordingly, it is time to take down the "white flag" that exists in current doctrine and procedures, which gives an exaggerated sense of surrender of a commander's prerogatives to the nuances of a commercial

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124. *See generally* U.S. DEP'T. OF DEFENSE, INSTR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY PLANNING AND EXECUTION, at 3 (28 Apr. 1995). "As an integral part of the total force…the deployed civilian work force shall be under Unified Combatant Commander operational control when employed in or deployed to theaters of operations. . . ." *Id.* Of course, where the contracting officer is a service member, the command relationship is clear.

125. *Id.*

126. DODI 3020.37, *supra* note 122.

127. *Id*.

128. *Id*.

transaction. The commander's operational control of the contracting officer in a deployed environment should be clear and immediate, and the commander should not be as far removed as current doctrine makes him.

B. Commander's Discretion and the Act

Earlier, in the discussion of the Act from an international law perspective, the issues of arrest and delivery were considered at some length. That discussion focused on the potential for much greater discretion by the United States when it comes to delivery of American citizens to foreign nations. This section will discuss the contract law implications of arrest of U.S. contractor employees by Department of Defense law enforcement personnel.

While filling several gaps, the Act does not expand court-martial jurisdiction over civilians.[129] Military commanders, however, are reintroduced into the criminal justice process regarding civilians in overseas areas, perhaps in a very significant way. With the powers of arrest now vested in designated Department of Defense law enforcement agencies, the Act insinuates additional authority in military commanders. The rationale is simple—military commanders "own" those law enforcement assets because commanders exercise command and control over the law enforcement assets of their commands. This includes the newfound powers of arrest of civilians accompanying the force, under the Act.[130] The implications of this authority are complex and as yet unknown.

Where there is command, however, there is always a considerable amount of discretion. This precept may be explored using the *Averette* hypothetical. Suppose the hypothetical contractor is once again stealing quantities of government batteries and selling them on the black market. Suppose further that the host country either cannot or will not exercise any jurisdiction over the offense. Assume further that the offense is covered by U.S. law[131] and is within the jurisdictional ambit of the Act, leaving the contractor's offense strictly a matter of U.S. concern.

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129. *See* 18 U.S.C. § 3263 (2000).
130. *Id*.
131. *See id.* § 641.

In the United States, police make decisions to arrest, and prosecutors decide whether to pursue cases in court. But in a wartime or contingency scenario, the police belong to the commander, who may or may not find the offense worthy of prosecution. In assessing the alleged transgressions of either a civilian contractor or a military member, the commander weighs the relative importance of keeping that person engaged in his mission. Clearly, a commander's concerns and priorities are different from those of local police or local district attorneys.

Suppose that the hypothetical contractor, when he isn't stealing batteries, is the only member of the task force with a specialized skill—a skill the commander absolutely requires to execute his mission. For example, perhaps the contractor programs and repairs guidance systems on "smart" munitions. Presume that he is one of five people in the world with this expertise, that no one else in the mission can do this, and that the skill is operationally necessary. What does the commander do? Does he authorize his military police to arrest the contractor pursuant to the Act, possibly repatriating him to the United States and jeopardizing the mission? Or does he affirmatively act to prohibit or delay the military police from making that same arrest?

The contract implications are numerous indeed. At some point, the premium placed on the specialized skill may compel a delay in criminal justice or may cause forbearance by the government in redressing any actions that are non-compliant with the contract. If the contractor is arrested and repatriated to stand trial, who bears the costs associated with this action? Is the contractor employer held liable for the additional expenses caused by the criminal actions of its employee? Can the government hold a contractor responsible for the unforeseen and illegal actions of an employee? Can an effective contract vehicle even be crafted to deal with crime? What if the hypothetical contractor employee commits a crime of violence, one for which he clearly must be arrested and repatriated, but the contractor does not have anyone else with the required skills? In responding to such situations, the commander finds himself in a dilemma between exercising his criminal justice prerogatives and meeting the requirements for mission accomplishment.

Taking civilians out of courts-martial, while at the same time giving military law enforcement the power to arrest civilians, introduces the commander's discretion into the initial investigation, arrest, and prosecution of civilians accompanying the force. In many respects, the initial investiga-

tion and arrest of a civilian suspect takes on a strange parallel to the process applied to a member of the armed forces subject to the UCMJ.[132]

The preceding analysis leads to several important conclusions relating to contractor employees accompanying the force overseas. Although contract documents may be unaffected by the Act, the government contracting community must react to the new realities of contractor employees' relationships with operational military commanders in the field. Although the contracting officer necessarily remains the main conduit for contractor performance and therefore contractor discipline, under the Act the entire disciplinary calculus has changed. It now involves much greater potential for a commander's influence in criminal investigation and arrest overseas. It has changed to the point that the commander cannot simply be written out of U.S. doctrine. External to and apart from any contract document, the military commander has a significant new role in handling contractor employees, if only in the context of criminal misconduct covered by the Act. Now is the time to write the commander, through his authority over the contracting officer, back into U.S. doctrine dealing with contractors supporting the force.

C. Proposed Amendments to Implement the Act

From the multiple questions raised in the preceding section, the Act compels a reassessment of existing policy, doctrine, and regulatory language regarding potential criminal actions by contractor employees. The full breadth of this reassessment has only begun. Predictably, the first indicator was interim guidance with brief references to the Act.[133] Discussions among military contract attorneys are already underway,[134] but in the long-

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132. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 301-305 (2000) [hereinafter MCM] (detailing a commander's intimate involvement in the initial reporting, investigating, arrest, and disposition of charges alleged against a service member under the UCMJ).

133. *See* Interim Policy Memorandum, Acting Secretary, United States Air Force, subject: Contractors in the Theater (8 Feb. 2001). "Under newly enacted United States law, contractor employees and other civilians accompanying the Armed Forces can also be prosecuted by the United States for Criminal Acts." *Id.*

134. E-mail from Mr. David DeFrieze, Attorney/Advisor, U.S. Army Operations Support Command, to Major Kevin M. Walker, Professor, The Judge Advocate General's School, U.S. Army (Mar. 12, 2001) (on file with author). Mr. DeFrieze is the legal advisor on the current re-solicitation of the Army's Logistics Civilian Augmentation Program or LOGCAP contract, a comprehensive contract for logistics support services to deployed forces.

term, practitioners will need a more comprehensive look at all relevant sources of guidance where the Act may have a potential impact on contractors accompanying the force. To that end, this article proposes modifications to an existing Department of Defense instruction and to a joint publication. While numerous publications need to be reassessed in light of the Act, two specific examples offered as illustrations of the need for change. Lastly, this article offers draft language for the Federal Acquisition Regulation (FAR)[135] or Defense Federal Acquisition Regulation Supplement (DFARS),[136] as appropriate, thereby writing the Act into the contract regulatory framework.

A good place to begin this reassessment is to account for and accommodate the Act in pertinent, existing Department of Defense-wide guidance, such as *Department of Defense Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises* (*DODI 3020.37*).[137] Germane to the discussion of contractor support during overseas contingency or combat operations, *DODI 3020.37* already provides a useful and comprehensive definition of what constitutes a crisis.[138] The instruction also provides a framework[139] that requires contingency planning for the continuation of essential services during a crisis.[140] *Department of the Defense Directive 3020.37* should also account, however, for the additional scenarios that the Act may bring by incorporating two amendments to the instruction. First, the Act should be added to the list of references.

> *(k) Public Law 106-523, "The Military Extraterritorial Jurisdiction Act of 2000," November 22, 2000, codified at 18 U.S. Code §§ 3261-3267 (2000).*

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135. FAR, *supra* note 113.

136. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 201.103 (Apr. 1, 1984) [hereinafter DFARS].

137. DODI 3020.37, *supra* note 122.

138. DODI 3020.37 defines a "Crisis Situation" as:

> Any emergency so declared by the National Command Authority (NCA) or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international armed conflict presenting a serious threat to DoD interests.

Id. at 8.

139. *Id.* at 2-5.

Second, a new paragraph should be added, which states:

> *4.5. The DoD Components, cognizant DoD Component Commanders, and contractors, in planning for the continuation of essential services during crises, shall consider the possibility of disruption of essential contractor services due to criminal prosecutions under the Military Extraterritorial Jurisdiction Act of 2000 (reference (k)) and shall include in contingency plans, to the maximum extent possible, alternatives and procedures to ensure continuity of contractor services in this eventuality.*

These two brief amendments do not go into exhaustive detail, because that is unnecessary for the desired impact on this instruction. In their brevity and general guidance, these additions fit into the overall tenor and broad-brush guidance of the rest of the instruction, alerting readers to issues and directing them to consider certain issues. More importantly, however, the amendments alert government personnel to the existence of the Act and the need to consider its potential implications in planning for the continuity of contractor support. Lastly, by using the imperative "shall," it carries greater force and effect, requiring Department of Defense planners to consider the Act's consequences in advance in order to avoid unexpected disruptions or crises later.

Much as it will be necessary to reconsider various Department of Defense and service-specific guidance in light of the Act, it is also neces-

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140. DODI 3020.37 defines "Essential Contractor Services" as:

> E2.1.3. A service provided by a firm or an individual under contract to the Department of Defense to support vital systems including ship's (sic) owned, leased, or operated in support of military missions or roles at sea and associated support activities including installation, garrison, and base support serviced (sic) considered of utmost importance to the U.S. mobilization and wartime mission. That includes services provided to FMS customers under the Security Assistance Program. Those services are essential because of the following:
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> > E2.1.3.1. DoD Components may not have military or DoD civilian employees to perform these services immediately.
> >
> > E2.1.3.2. The effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately.

Id. at 8.

sary to look at joint doctrine and its treatment of contractor support.[141] The following changes are offered as a sample of the various revisions needed to accommodate the Act in joint publications. The paragraph below, proposing an amendment to *Joint Publication 4-0, Doctrine for Logistic Support to Joint Operations*, removes the current "white flag" language by inserting a new paragraph (b).[142]

> *b. Commanders have no penal authority to compel contractor personnel to perform their duties; however, commanders do have the authority within their commands, as exercised by their Contracting Officers, to ensure contractor compliance with the terms of their contracts. Should contractor personnel commit criminal offenses while accompanying the force in overseas areas, jurisdiction over these offenses must be clarified in close consultation with the command judge advocate. Host-nation law may apply, and its applicability to contractor employees will be dictated by the status afforded them under a SOFA or other agreement with the host nation, if one exists. Additionally, the criminal jurisdiction of the United States covers contractor employees overseas under the Military Extraterritorial Jurisdiction Act of 2000 (Title 18, Sections 3261-3267). The commander plays an important role in the implementation of this Act, as military law enforcement personnel belonging to the commander will be the agents responsible for any investigation, arrest, and international removal to the United States of contractor employees suspected of felony-level criminal offenses under U.S. law. Contractor employees remain subject to trial in U.S. district courts for war crimes under U.S. law (Title 18, Section 2441).*

With changes such as this worked into existing joint publications, the Act can be incorporated into doctrine throughout the Department of Defense to define properly the role of the commander with respect to contractor employees. By alerting commanders to their role, to the interplay of international agreements, and to the need for consulting with their legal

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141. *See supra* note 118 and accompanying text.

142. JOINT PUB 4-0, *supra* note 68, at V-8, currently reads, "Commanders have no penal authority . . . to punish any acts of misconduct."

advisors, the Act will become a component part of overall doctrinal considerations for contractor support in overseas theaters.

To consider and incorporate fully the provisions of the Act into contract formation, administration, and law, it makes sense to examine the most pervasive and authoritative doctrinal or regulatory sources. To that end, this article next proposes amendments to the FAR or DFARS, as appropriate, where new or altered language is indicated in italics.

The following changes are proposed to the language of the FAR text. Part 23 should be renamed:

> Part 23—Environment, Conservation, Occupational Safety, Drug-Free Workplace, *and Military Extraterritorial Jurisdiction.*

Section 23.000, Scope of Part, should be amended to read:

> This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace and for protecting and improving the quality of the environment through pollution control, energy conservation, identification of hazardous material, and use of covered materials. *This part also prescribes policies and procedures for ensuring continued contractor performance in situations arising under the Military Extraterritorial Jurisdiction Act."*

A new subpart 23.11 should be added, which reads:

> ***Subpart 23.11-- Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523.***
>
> ***23.1101 Purpose.***
>
> *This subpart implements Public Law 106-523, the Military Extraterritorial Jurisdiction Act of 2000, ("the Act"); codified at 18 U.S.C. §§ 3261-3267.*
>
> ***23.1102 Applicability.***

The requirements of this subpart apply to contracts or those parts of contracts that are to be performed outside of the United States by contractor personnel accompanying the Armed Forces.

23.1103 Definitions.

As used in this subpart, the terms "essential," "necessary," and "supporting," as applied to contractor and subcontractor positions in support of the United States Armed Forces outside of the United States, have the following meanings:

(1) "Essential," which will be applied to contractor and subcontractor employee positions providing mission-essential services. Essential services are so categorized because the Government may not have either military or civilian employees to perform these services immediately, and the effectiveness of systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately. Mission-essential services include services relating to: (i) equipment owned, leased, or operated in support of military missions and associated installation, garrison, and base support; (ii) command, control, communications and intelligence systems, including tactical and strategic information, intelligence collection and computer subsystems; (iii) selected operational weapons systems, including fielded systems, those being brought into the defense inventory or international customer inventory; (iv) operational logistics support of the systems described in (i-iii) above, medical services, non-combatant evacuation activities, and other services if determined vital for mission continuance by the component commander.[143]

(2) "Necessary," which will be applied to contractor and subcontractor employee positions providing mission-sustaining services involving technical skill or specialized training. Necessary services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Brief, temporary interruptions in service may be acceptable without causing a serious impairment to mission readiness.

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143. *See generally* DODI 3020.37, *supra* note 122, at 8-9.

(3) "Supporting," which will be applied to contractor and subcontractor employee positions providing mission-sustaining services not involving technical skills or specialty training. Supporting services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Interruptions in the delivery of these unskilled services may be acceptable for longer temporary periods without causing a serious impairment to mission readiness.

23.1104 Requirements.

(a) The Act establishes U.S. criminal jurisdiction over contractor personnel accompanying the Armed Forces outside of the United States.

(b) Every new contract that provides for performance or partial performance by contractor or contractor personnel accompanying the Armed Forces outside of the United States shall identify positions designated as essential, necessary, or supporting in the contract statement of work.

(c) Contracting officers shall ensure that the statement of work provides reasonable assurances of continuation of essential, necessary, and supporting services in the event that any contractor employee or subcontractor employee is arrested and removed to the United States under the provisions of the Act. Such assurances may be in the form of a contingency plan, contingency personnel roster, or other assurances as the contracting officer may require.

(d) Contracting officers shall ensure that existing contracts being performed outside of the United States be modified to include the position designations described in subparagraph (b) above, contingency plans or other assurances described in subparagraph (c) above, and the clause at 52.223-15. The contracting officer shall negotiate a reasonable consideration for the modifications.

23.1105 Contract clause.

The contracting officer shall insert the clause at 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, in all solicitations and contracts that provide for performance, in whole or in part, by contractor or subcontractor personnel accompanying the Armed Forces outside of the United States.

23.1106 Disallowance of costs, suspension of payments, and termination of the contract.[144]

(a) After determining in writing that the contractor has failed to comply with the requirements of the clause at FAR 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, the contracting officer may disallow any associated costs in accordance with FAR 42.8 or suspend contract payments in accordance with FAR 32.503-6.[145]

(b) After determining in writing that the contractor has failed to comply with the requirements of the clause at FAR 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, the contracting officer may terminate the contract for default in accordance with the termination clause of the contract.[146]

(c) A determination under this section to disallow costs, suspend payments, or to terminate a contract for default may be waived by the agency head for a particular contract in accordance with agency procedures if such waiver is necessary to prevent a severe disruption of the agency operation to the detriment of the federal government or the general public.[147]

The following FAR clause is also proposed to complement the new subpart 23.11 previously outlined:

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144. *See generally* FAR, *supra* note 113, at 23.506 (discussing disallowance of costs, suspension of payments, and termination of a contract in the context of the Drug-Free Workplace statute).

145. *Id.* at 23.506(a).

146. *Id.* at 23.506(b).

147. *Id.* at 23.506(e).

52.223-15 Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523; codified at 18 U.S.C. §§ 3261-3267.

(a) Definitions: As used in this clause—

"The Act" refers to the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523.

"Essential" shall be applied to contractor and subcontractor employee positions providing mission-essential services. Essential services are so categorized because the Government may not have either military or civilian employees to perform these services immediately, and the effectiveness of systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately. Mission-essential services include services relating to: (i) equipment owned, leased, or operated in support of military missions and associated installation, garrison, and base support; (ii) command, control, communications and intelligence systems, including tactical and strategic information, intelligence collection and computer subsystems; (iii) selected operational weapons systems, including fielded systems, those being brought into the defense inventory or international customer inventory; (iv) operational logistics support of the systems described in (i-iii) above, medical services, non-combatant evacuation activities and other services if determined vital for mission continuance by the component commander.[148]

"Necessary" shall be applied to contractor and subcontractor employee positions providing mission-sustaining services involving technical skill or specialized training. Necessary services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Brief, temporary interruptions in service may be acceptable without causing a serious impairment to mission readiness.

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148. DODI 3020.37, *supra* note 122, at 8-9.

"Supporting" shall be applied to contractor and subcontractor employee positions providing mission-sustaining services not involving technical skills or specialty training. Supporting services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Interruptions in the receipt of these unskilled services may be acceptable for longer temporary periods without causing a serious impairment to mission readiness.

(b) If any contractor or subcontractor personnel become subject to the provisions of the Act during the performance of the contract, the contractor shall remain liable to perform the contract in accordance with its terms and conditions. The Government shall retain all of its rights and remedies under the existing terms of the contract, including, but not limited to, its rights under the termination clause and the disputes clause.

(c) Contracts which may be performed wholly or partially outside of the United States by contractor or subcontractor personnel accompanying the Armed Forces shall identify and designate each contractor and subcontractor employee position, as "essential," "necessary," or "supporting" per the definitions in subpart (a) above.

(d) Upon the arrest and pending removal to the United States of a contractor or subcontractor employee under the criminal jurisdiction of the Act, the contracting officer shall notify the contractor. The contractor shall identify immediately the designation of the employee position: essential, necessary, or supporting.

(1) If the contractor or subcontractor employee position has been designated under the contract as "essential," then the contractor shall act immediately to ensure continued and uninterrupted provision of the essential service.

(2) If the contractor or subcontractor employee position has been designated as "necessary" under the contract, then the contractor shall act immediately to minimize the interruption of service and take action to mitigate the impact of any disruption on

the provision of the necessary service. In no case shall the service be disrupted for a period greater than seven days.

(3) If the contractor or subcontractor employee position has been designated as "supporting" under the contract, then the contractor shall act immediately to minimize the interruption of service and take action to mitigate the impact of any disruption on the provision of the necessary service. In no case shall the service be disrupted for a period greater than fourteen days.

(e) Any costs associated with replacing employees under this Subpart shall be borne by the contractor and shall not be allowable under the contract.

(f) In addition to other remedies available to the government, the contractor's failure to comply with the requirements of paragraph (c), (d), or (e) of this clause may, pursuant to FAR 23.1106, render the contractor subject to disallowance of costs, suspension of contract payments, and/or termination of the contract, in whole or in part, for default.

In reviewing the FAR, there does not seem to be any particular place to insert language readily dealing with the contract implications of a new criminal law, such as the Act. Ultimately, it makes sense to choose Part 23, in part because it has a certain "cats and dogs" quality to it, but more importantly because it contains various other statutory compliance and implementation issues.[149] Because the Act does not fit into any existing scheme covered in the FAR, it follows that it belongs in its own subpart.

In deciding who should bear the costs of replacing contractor employees, the options are finite: the government pays; the contractor pays; or the government and the contractor agree on a means of splitting the costs. The decision to make the contractor pay is based on a review of other portions of the FAR, analogous situations, and practical considerations.

Relocation costs are normally allowable under a contract, provided the relocation is for at least twelve months;[150] however, the government's willingness to pay relocation costs is premised on its receipt of a benefit—

149. FAR, *supra* note 113, at 23.2 (dealing with Energy Conservation), 23.5 (dealing with a Drug-Free Workplace), and 23.7 (dealing with environmental and energy issues).

150. *Id*. at 31.205-35.

the services of the person it is paying to relocate at the new location. The government's willingness to pay, based on one year's minimum service at the new locale, reflects the government's need to recoup the benefit of a year's services in order to justify the expense of the relocation. Therefore, if an employee "resigns within 12 months for reasons within the employee's control, the contractor shall refund or credit the relocation costs to the Government."[151] By analogy, if a contractor resignation within a year of a government-funded relocation results in a refund to the government, then a contractor employee decision to commit a crime while accompanying the force abroad should also result in no costs to the government. While "relocation" is not the same as a criminal removal action or forced repatriation, if the government will not allow the expense in the event of a resignation within a year after a government-funded relocation in non-criminal circumstances, then it seems counterintuitive for the government to pay the costs associated with a criminal removal action. Where the FAR specifically addresses costs relating to legal proceedings, there is language suggesting that costs relating to criminal proceedings are typically not allowable, at least not in situations resulting in a conviction.[152]

Considering these provisions together, the logical conclusion for the government is to disallow the expenses incurred by a contractor if a contractor employee is removed or repatriated under the Act.[153] This rationale is reflected in the proposed FAR language above.

In distinguishing the three categories of contractor employee positions, careful consideration should be given to the operational needs of the commander who is relying on contractor support to accomplish his mission. The terms governing the replacement of contractor personnel reflect the operational necessity of their various functions and skill levels. In the event a crime is committed, however infrequent or unlikely, a predictable and responsive replacement scheme must exist and the mission must come first.

If a commander has only a single contractor avionics technician, whose services are absolutely necessary to keep the air component in the

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151. *Id.* at 31.205-35(d).

152. The FAR provides, "Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or failure to comply with, law or regulation by a contractor (including its agents or employees) . . . are unallowable if the result is—(1) In a criminal proceeding, a conviction. . . ." *Id.* at 31.205-47(b).

153. *But see id.* at 52.249-14(a) (which does include in its definition of excusable delays "acts of the Government in either its sovereign or contractual capacity").

fight, that contractor position must be classified as "essential." Accordingly, the contracting officer must be satisfied with the depth of the contractor's capability before he awards the contract to avoid having the absence of a single employee unnecessarily jeopardize a military mission. For "essential" positions, the commander simply cannot do without that capability for any length of time, and he should not have to do so. In recognition of that imperative, the proposed language requires advance planning by the contractor to ensure those essential services are delivered without interruption. Such high assurances will naturally have a price tag attached.

If an essential contractor employee does commit a crime covered by the Act, and there is no likelihood of replacement when that capability is needed, then it is increasingly likely that the commander will feel pressure to delay pursuing any criminal action against that contractor employee. For a "supporting" contractor employee, however, such as a cook or truck driver, the commander is unlikely to delay any investigation or arrest. Although differing timelines for replacing different types of contractor personnel are offered to meet the commander's needs, the proposed guidance also allows for waiver of the timelines in the government's discretion.

It is vitally important to include in the contract terms the point in time when the contracting officer must give the contractor notice that the government is pursuing criminal action against a contractor employee under the Act. In deciding on the circumstances of "arrest and pending removal" as the point of notification, several issues must be considered. First and foremost is the impracticality of giving notice to the contractor any earlier than when the arrest is made. In the event of a violent crime calling for immediate removal to the United States, this entire process is likely to be extremely abbreviated. But a known point for contractor notification is essential, and it makes sense to choose a point linked to arrest so as not to jeopardize the investigative process. Until that point, the criminal investigative process often relies on secrecy to collect and analyze evidence. Then a decision must be made whether to arrest at all, as the government works to perfect whatever case it has. Until this time, depending on the secrecy of the investigation, the contracting officer is unlikely to be privy to the details.

The prerogatives of the criminal investigative process and the commander's exercise of discretion combine to make contractor notification in advance of arrest impractical. In addition, the privacy rights of the individual under investigation demand prudence by the government in notify-

ing the contractor. Arrest is deliberately coupled with the concept of "pending removal," because the Act calls for trial in the United States. It is unlikely that a contractor employee will be arrested and then released to continue performance under the contract. The draft language above reflects these considerations.

This article proposes a methodology for incorporating language addressing the potentially significant impact of the Act into future contracts for contractor support of military operations. It also recognizes the need to make these same provisions part of existing contracts, which will require re-negotiation and, probably, consideration.[154] This will be time and money well spent should a scenario arise involving a contractor employee prosecuted under the Act, because commanders require and deserve predictable delivery of contractor services to accomplish their missions.

If the United States relies on contractor services with greater regularity in the battlefield of the future, it must eliminate variables and make the contract vehicle as comprehensive and circumspect as possible. By writing the Act into Department of Defense instructions, joint doctrine, and contract law regulations, future contracts will contain the provisions necessary to ensure the uninterrupted delivery of contractor services in support of forces deployed abroad.

V. Conclusion

With the enactment of the Military Extraterritorial Jurisdiction Act of 2000, Congress has given a far-reaching, new criminal law affecting civilians accompanying the armed forces overseas. Filling a decades-old void, the new Act stands ready to extend the criminal jurisdiction of the United States to persons and places that have been deemed beyond the reach of American justice since the *Reid* line of cases.

From an international law perspective, the Act fits neatly within the existing scheme of criminal jurisdiction found in status of forces agreements. The status of a civilian accompanying the force remains unchanged in the critical Geneva Convention areas of prisoner of war status and status as a civilian generally. Under the Act, there are potential areas, particularly regarding arrest and delivery, where the United States has the ability to use

154. *Id*. at 52.243-2.

greater discretion in the exercise of its jurisdictional authority and law enforcement powers outside of the United States. Military law enforcement agencies will now have a greater power of arrest over American civilians overseas; by extension, so will overseas commanders. It remains to be seen whether this authority will create situations that prove discordant with existing international agreements, and whether it will come to be perceived as a threat to host-nation sovereignty. Ultimately, the contractor employee accompanying the force, like all other civilians affected by the Act, can expect a comprehensive criminal justice scheme to cover virtually any criminal actions under host nation or United States law.

The notion of contractor discipline, however, remains an oxymoron. While the essence of a contract relationship does not necessarily lend itself to matters of punishment *per se*, it does lend itself to corrections in performance. As the Act enters into force, this is a good time to reassess the overall issue of contractor discipline, particularly in a deployed setting overseas. The Act provides the criminal jurisdiction that has for so long left gaps in the overall disciplinary scheme. Military law enforcement assets will be the means to the exercise of that jurisdiction, and the overseas commander owns those law enforcement assets. Whether intended or not, the contracting officer is no longer the sole arbiter of contractor conduct in the overseas environment.

To the extent that contractors are becoming an even greater presence on the battlefield, and to the extent that they are taking over more and more traditional soldier functions, the issues of overall command and control, force discipline, and contract performance raised by a new extension of U.S. criminal jurisdiction abroad require a fresh look. While contracting officers or their representatives will necessarily remain the most important conduit for corrections in performance-related matters, the greater potential role of the commander and command discretion cannot be ignored, particularly if criminal conduct is alleged. It is time to institute—as a matter of doctrine, regulation, and practice—those steps necessary to tighten and clarify the lines of command and control of contractors accompanying the force. It is also time to incorporate this significant Act into standard contract practices. The aspirations of various Department of Defense policies, aimed at ensuring the continuity of essential services, should be elevated to a contract-based reality to the extent possible. The Act gives the impetus and opportunity to do so now.

If contractor employees are destined to support the modern battlefield or contingency environment, then the prerogatives of command and the

imperatives of mission accomplishment must find their way into the contracting process. The role of the contracting officer in this environment must include the clear realization of commanders' intent, including crafting contracts with sufficient foresight and flexibility to meet that intent. Failing this, the substitution and use of contract support for traditional soldier functions will become a false economy that ultimately may degrade U.S. ability to prosecute wars and enforce peace.

After Machiavelli wrote the foreboding words about the evils of war and the men who make their living from warfare, we now casually live in a world where warfare in some guise is our national business, with a civilian industry whose purpose is to assist us in that business. As for addressing the individual's propensity to commit bad acts, we now have the Act to prevent potential wrongdoers from escaping American justice.

If contractor employees are going to be part of the engine of war, then our contracts and practices must reflect the need for unity of command and properly account for the commander's role in the discipline of troops and contractor employees alike. With the commander's considerable newfound discretion under the Act in investigating and prosecuting overseas offenses by contractor employees, now is the time to readdress the commander's role in doctrine. The Military Extraterritorial Jurisdiction Act of 2000 is an essential part of that discussion. Changes must be made so the Act becomes an integral part of United States contract practice. To that end, we can take counsel in Machiavelli's words again: "Whosoever desires constant success must change his conduct with the times."[155]

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155. NICCOLO MACHIAVELLI, DISCORSI IX 3 (1531), *in* ROBERT DEBS HEINL, DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 314 (1966).

THE SEVENTH ANNUAL HUGH J. CLAUSEN LECTURE ON LEADERSHIP[1]

COLONEL GEORGE E. "BUD" DAY[2]

Thank you. Good morning. General and Mrs. Clausen, Colonel Lederer, distinguished guests, fellow lawyers. It's a pleasure to be here and I

1. This is an edited transcript of a lecture delivered by Colonel George E. "Bud" Day to members of the staff and faculty, their distinguished guests, and officers attending the 49th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, on 26 March 2001. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, United States Army, from 1981 to 1985 and served over thirty years in the United States Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

2. United States Air Force (Retired). Colonel Day's military career spanned more than thirty years, during which he excelled in combat in three wars. He joined the Marine Corps in 1942 and served thirty months in the South Pacific as a noncommissioned officer. He received an appointment as a second lieutenant in the National Guard in 1950, and he entered jet pilot training when called to active duty in the Air Force in 1951. He served two tours in the Far East as a fighter-bomber pilot during the Korean War. In 1955 he survived the first "no chute" bailout from a burning jet fighter in England. In April 1967, Colonel Day was assigned to the 31st Tactical Fighter Wing at Tuy Hoa Air Base, Republic of Vietnam. He later moved to Phu Cat Air Base where he organized and became the first commander of the "Misty Super FAC's," an F-100 squadron. Shot down over North Vietnam on 26 August 1967, Colonel Day spent sixty-seven months as a prisoner of war (POW). He was the only POW to escape from prison in North Vietnam and then be recaptured by the Viet Cong in the South. When shot down in 1967, Colonel Day was one of the nation's most experienced jet fighter pilots, with 4500 hours of single-engine jet time and more than 5000 hours of flying time.

Colonel Day holds nearly seventy military decorations and awards, of which more than fifty are for combat, including the Medal of Honor, Distinguished Service Medal, Silver Star, Legion of Merit, Distinguished Flying Cross, Air Medal with nine Oak Leaf Clusters, Bronze Star for Valor with two Oak Leaf Clusters, Bronze Star, and Purple Heart with three Clusters. Colonel Day was also presented Vietnam's highest medal by President Thieu, two Vietnamese Gallantry Crosses, and Vietnamese Wings. He wears twelve Campaign Battle Stars.

Colonel Day is a trial attorney at his law firm in Fort Walton Beach, Florida. In his practice, Colonel Day frequently represents the interests of service members.

want to start out by telling you, I appreciate, as all Americans do, your service. I know, and our country knows, you all have other choices. And I'd just like to see a hand out there. How many lifers are in this group? Way to go! It's been a chilling experience here. I went out to walk this morning, and it was freezing. I hadn't felt temperatures like this since Korea. And leaving Fort Walton Beach was maybe not the greatest idea in the world, because it was about fifty-five degrees when I left down there and getting better.

I wanted to talk in kind of general terms about some of my experiences, and before I get into that, I wanted to talk about the importance of role models. Most of you are older than many of the groups that I have talked to, but I think one of the most significant things that we can do as citizens, is to sort out what kind of a person we're going to be and what kind of a track we're going to follow. And many times, we get to where we get to because of our imitation, hopefully, of a good role model. Certainly, these gentlemen down here in the front are that kind of a model for you. And in my case, I had a lot of problems sorting out who my role model was going to be as a young guy.

I had a great affection, as a young boy, for Charlie Lindbergh, because I can remember, very early in my years, Charlie had just flown the Atlantic. And he was a hero of a dimension we have not seen, probably since that time. The country was absolutely gaga over Lindbergh, a fact that drove him absolutely into seclusion. They worshiped him so much until he got to the point he couldn't stand all that company, which was a pity, because he was an incredible man. As I got a little older, one of my heroes was Franklin Roosevelt, who back during the Depression, came up with some socialistic schemes that kept the country afloat, and got us prepared for World War II. And following him, of course, was Harry Truman. A man who, in his time, was highly maligned. I remember how they desecrated Harry as a shoe clerk and clothing salesman from Kansas City and as a spokesman for the Pendergass gang. Truly, Harry was one of the better men of our times. Winston Churchill is another man for whom I had a fervent admiration. Back during the Battle of Britain and when times were very, very tough, Winnie was famous for saying, "Never, never, never give up." And that was so important in those days, because had anyone fallen during the course of the war, it would have been absolutely different.

As time went by, I learned to admire another great American named Jimmy Doolittle. Perhaps the strangest-named man in all of history, Jimmy was a little guy, smaller than me, probably about five foot, four

inches, an absolutely fantastic aviator. Learned by a Ph.D. in Aeronautics, a brilliant man and a great hero. It was Jimmy that turned the tide in World War II with the launch off the carriers of the B-25s that bombed Tokyo, which turned the morale of the country totally around. He was a marvelous man, and very modest. One of the things that I always admired about him was that he was absolutely candid. He never told any mistruths and he was very careful about how he said things; he was always truthful. And that, as a matter of fact, cost him a fourth star. Jimmy never got to be a four-star until either just before he died or right after he died—I don't recall which—when someone finally said, "It's time to promote this wonderful guy to four-stars."

All of those people have kind of a message, a thread in their life, that's useful for us to adopt. And with that kind of a background, I went to Vietnam in 1967, a very senior aviator. At that time I had about 4500 hours of jet time—fighter time—which was more than any commander in World War II. Talk with any of those famous air leaders and so forth; none of them had that kind of a background. I was, hands down, far more experienced as a major than any of those people had been, going off to war. And that was because of the wonderful training and turnaround in our combat proficiency that had occurred after Korea. And the beautiful part of that was, that when I got to Vietnam, I was ready to go. All I had to do was crank the engine up and check the bomb load and go. And interestingly enough, I dropped a few bombs for the Big Red One while I was in Vietnam. And in fact, I had a poster of a soldier. They gave you a huge poster with a soldier-grunt personified on it. Somehow or another, it was lost in my travels, so I still don't have my "Big Red One," but I remember him well.

When I got there, it was kind of an astonishing experience. The war was going absolutely nowhere. It was as if we transported all our forces over there and said, "go get 'em," but you never got to go get them. And if you would imagine Vietnam as being a peninsula like Florida and put some mountains on the west side, your area of activity was really quite narrow as maybe fifteen or twenty miles wide as you got up in the central part of North Vietnam, and then it widened out as you got up near Hanoi. But down in those southern areas going over into Laos, you had this really narrow operating area. And amazingly, we were fighting their war. They were indigenous, so they were out there milling around in the villages and in the jungle at night. And instead of fighting the war as we had fought World War II in the name of "terminate, do it quick," as you saw in the Gulf

War, there never was the political commitment to get busy and win the war. And as a result, unfortunately, we lost it.

The bottom line was that the soldiers and the marines, and the sailors and the Air Force won their part of the war, but the political part of the war was lost. And, of course, today they are occupied by this Communist apparatus. Well, on August 26, 1967, I had moved up to another job. I had been asked to set up a fast-FAC [Forward Air Controller] operation into North Vietnam. And what that meant was we were supposed to go up and look for lucrative targets and then have some fighter bombers meet us from the fleet or from the bases in Thailand or South Vietnam to go hammer these targets. And basically, what I had available were any of the airplanes off the ships or the F-105's, F-4's, and occasionally some F-100's from South Vietnam and Thailand. I was really skeptical about this business of FAC-ing with a jet because I'd been in the fighter business over in Europe and back in the mid-fifties through about the mid-sixties, and we had literally hundreds of fighters available that had a nuke bomb hung on them. And these were pretty good-sized nukes. Up to about ten mega-ton nukes, which would have dwarfed what happened at Hiroshima or Nagasaki. And in those days, because of the limitation of radar, we low-leveled all the time. So I had literally hundreds of hours down on the deck at fifty feet or sometimes less. A lot of dodging telephone poles and power lines and that sort of stuff. And so the idea was that they'd send me up there and we'd crank up a FAC operation and go up and locate lucrative targets and, theoretically, I'd have all these forces to come up and hammer the targets.

On the morning of August 26, the briefer came in. Then we got geared up and went out to the airplane. I had a wonderful group of young kids, mostly Air Force Academy graduates and captains, low time guys but very gung ho and ready to go to war. And on this morning, I had a young fellow in the front seat, who was getting his first front seat ride. It was going to be a really exciting day. As we were sitting in the airplane getting it bombed up and armed up, an airplane landed which was a stranger, a Saigon airplane. I knew something was up because those planes didn't visit you but very, very rarely. Someone came out to the airplane and brought me a photo of a SAM [surface-to-air missile] site. And this site was the furthest south in North Vietnam that a site had ever been. It was probably roughly forty miles north of the demilitarized zone. I had, just the week before, killed a bunch of SAMs and some other weaponry about another fifty or sixty miles north of there. And my first thought, when I saw this photo, was that it was a flat trap. We'd had several of those built up at various times and they usually victimized one or two pilots before we

sorted out that that's what they were. So we cracked on out, and we flew a very unusual mission. The mission was long and very arduous, and we got shot at a tremendous amount. We flew out of South Vietnam up into North Vietnam and dropped down to about 3500 to 4000 feet, and ran the airplane at about 520 or 540, however fast it would go, and we would be working the roads or whatever.

On this day, we did this: we got down on the deck and started into North Vietnam heading for this target on our Northwest course. Then we just ran into a hail of fire coming up out of the green of the jungle. So there was no question it was a pretty good target and luckily we got through this mess and buzzed on off. Not that you all are interested in this, but you never circle a target like that because, it's well known, you always circle once. We went on up and beat up some targets and then went out over Thailand to tank, picked up a load of fuel, and came back into North Vietnam. There were some incredible strange formations of land there that are upside down icicles that look like something right out of a movie. And these great big things that look like an upside down radish are sticking up. We popped up over this ridge and dropped back down and we were about four miles from the target and the guns just opened up again. This time, we were in a different position; the sun had moved and I could see the side of the radar van and I could see the end of one of the missiles. So we bored in, junking the airplane pretty hard, bending it around trying to keep the gunner from tracking us, and just as we got over the target, we took a tremendous hit in the aft of the "hun" [the F-100]. So I said to this young gent, "I've got the airplane," and struck the burner in and got the nose up and we were doing about 540 or so, and headed out toward the water. Just as I got the airplane coming to about 4500 feet, the controls reversed and the airplane bunted over into what would be an outside loop. Now the F-100 was not famous for turning some tight corners. You could not do an inside loop inside 4500 feet so I knew damn well I wasn't going to make that outside loop. I thought momentarily about trying to roll the airplane over and see if that was going to solve our problem but the way we were descending, if that failed, I wasn't going to have time to eject. So, I punched the canopy and pulled the handle and reversed the American dream from riches to rags in the pull of one handle.

But it was quite difficult. I was strapped up as tight as I could be, but I'd never been in a three or four negative-G bunt like that, and it raised me way up off the seat. So I was up in this awkward position, my head up against the canopy, all these water bottles and all this trash we had up around my head. And cameras. When I pulled the handle, instead of get-

ting my arm in tight, I obviously was out of position. When I stroked the ejection seat, my arm hit the right canopy rail and broke my arm in three places. It was not my day. Also, the oxygen mask did not separate right and popped up and hit my visor and blinded me in the left eye. When I hit the ground, I hit it pretty hard, and I dislocated my left knee. So I wound up on the ground in the worst condition possible for any kind of escape or evasion.

That problem was solved real quick about escape or evasion, because I had just got my radio out and recognized that my arm was broken. I had a couple radios, and I got one of them out and called the Airborne controller and said, "I'm on the deck." I'd seen my kid get a good chute; he landed probably about a mile south of me and I saw a chute with my other guy. And boom! I've got this young Vietnamese poking a really old rifle in my face. So I was obviously captured. This kid could not have been more than thirteen, maybe twelve, and they stripped me instantly out of my boots and out of my clothes—some procedure they had been taught—and started trying to march me back up over this little hill. And just as I popped up over this ridge, I heard the whop-whop-whop of a Jolly Green chopper coming after me. We had a beeper in our chute for an identification thing, and this Jolly was heading in right on top of the trees, right straight where I had landed, and they were just shooting the bejesus out of him! I had no idea how those things ever get through that hail of fire. That always escapes me, but amazingly they do. So he drove right in, stopped and tilted the chopper up a little bit to the left and then to the right and didn't see me and did a hard left turn and moved out. Now I have to say, of some of the courageous deeds I've seen, that had to be one of the bravest things I have ever seen. That dude only runs at about eighty or one-hundred knots, I don't know, but its way, way, way too slow. So all the time, he's taking the fire from these places that shot me down.

Next I got dragged into camp and got tied up. I'd made up my mind that if I ever got captured, I had a plan that I would try to escape if I could. At first, they were really quite careful with me. They would take my good hand here and wrap a piece of telephone wire around it and wire my arm to this little tunnel that I was in. I convinced them that I absolutely couldn't move. I went through a lot of drill with them, and they put me through a mock execution. They told me I had to answer some questions or they were going to shoot me. So you have to make some kind of decision about what you're going to do about that. I knew there were other POWs up there, so I was quite certain I wasn't going to get shot. [My captor] said "either speak or I'm going to shoot you," and I just refused. Obviously, he

didn't shoot me. But we went through some of these kinds of things, and eventually I was able to set up the escape.

They started tying me up with this little garden rope, and I was able to untie that. I was unaware that your hand and all of that still works, even though your arms are broken. You just don't have much strength because you don't have bony structure. But I could untie. So I did that and escaped. I was out for somewhere around two weeks. I don't really know how long. I made my way back into South Vietnam, and I was recaptured by some North Vietnamese who had set an ambush on this Marine camp that I was trying to locate. My navigation was good. I'd made it to within a mile of this Marine base, but I began running out of brainpower. I wasn't aware of what happens to you when you don't eat. There was plenty to drink, and I wasn't really concerned about what I drank because I figured, if I made it back to friendly hands, certainly they'd be able to treat me for whatever problems I might have with water. But I had no idea what it was like to function without food. What happens is you lose your mental capacity. By about the tenth or eleventh day, somewhere in that vicinity, I was hallucinating. I was having some wacky illusions and started talking to my wife and my Sunday school teacher and some other things. And then I walked into an ambush.

I had evaded thirty-three patrols, basically, because I was keeping my eyes open and I was looking for them, and they were not looking for me. I went walking up [toward the Marine base] late in the morning. I had missed a helicopter that had landed, and I wrongfully assumed that I was at the base. I thought I was right at the base, because I'd heard gun fire coming out of there. 155s [Howitzers] were firing, and I thought I was just within a matter of yards from this Marine Corps base. In fact, it was just over the next little ridge. And so I woke up late in the morning, which was strange because I had been waking up before light or right at light. I was kind of groggy, and I was having some trouble getting my head going, and I decided that I was going to have to follow the trail. I stepped out into this area where I thought the base was, and I made a left turn, and some Vietnamese popped up out of little holes and yelled at me. I couldn't sort out whether they were our Vietnamese or the other Vietnamese. Finally it dawned on me that these Vietnamese had an AK-47 that wasn't the standard weapon that [our Vietnamese] were issued, which had a little handle on the top and was camouflaged. So, when I figured out who they were, I said to myself, "Well, I didn't come this far to surrender to these little guys." I took off running, and they shot me down, and I got into the woods

and evaded them for a while and eventually they came in and found me. And that was when my story of real abuse commenced.

I got moved from there. They picked me up, moved me in a litter, and it took them about thirty-four hours to get me back to the camp that I'd escaped from some two weeks or so before. These guys, six of them who were carrying a chogi pole and had me in a litter, had me back in that camp in about thirty-four hours. A steady trot, pretty impressive. I got a lot of abuse when I got back there, as you can imagine. The worst was from the cook, for some reason. Someone must have passed the word that I was griping about the chow, because she came in with a little stick and really pounded me. They had me wired to the ceiling again, and the only thing I could do was eventually get kind of rolled up in a ball and get my legs up there and I kicked her right in the chin and then kicked her out of the hole. After that, they instantly moved me to a holding camp right up along the eastern coast.

[When I got there, they] insisted that I was going to have to tell them some things and they were giving me some instructions about what I was going to have to do. And all of these were things that you simply couldn't do and live with yourself. So I refused to do them, and went through some very bad beating-type abuse. And that culminated in getting hung. They took me into this pagoda, got my arms behind my back, wrapped a rope behind me, got me up on a chair and wrapped a rope around the beams that were in the ceiling, and jerked the chair out from under me. It's a horrible torture. Your chest feels like it's coming apart, your arms try to separate from your shoulders and it's just incredibly painful. That didn't go all that well; I had a terrible time fighting off the pain and tried to think The senior guy said something to the guard, who came over and took my wrist and began twisting my wrist until he actually broke it. I could hear the bone splintering and that was, needless to say, ungodly painful. Somewhere from within me came this voice that said, "Well, I'm not gonna say zip until you put me down." So I finally told him, "Okay, I will answer some questions, but only if you put me down." Well, they put me down.

So the first question they asked me was, "What political party is your family?" And I wondered if I was just in a really bad movie in which I'm the star. One thing I knew was that the Vietnamese were such that, at that time, the Democratic Party was very anti-Vietnam War, so I responded that I was a Democrat. And I don't know if God's ever forgiven me for that. That outrageous, dreadful lie. At any rate, the aftermath of that was that both of my hands and arms were wiped out. My left hand was rolled up

into a ball like this, and my right hand fingers were curled up, and the only motion I had was just the tiniest bit of motion between thumb and forefinger. I could not get my arms up; I had zero mobility.

When I got to Hanoi, which was by truck, I was back in the same thing. I realized then the value of having very short and very brief stories. The [Hanoi] Hilton was a dreadful place, almost indescribable in it's brutality, it's lack of civilization. The Vietnamese were, as Oriental torturers are, skillful and persistent, and the main goal was to turn your head around.[3] They were determined that, if they put enough brutality to you, you were going to roll up and join them and help them. I can't speak for all prisoners because obviously these things are one-on-one. As you came into camp, if you've seen any photos, you came into this place down the left side, this place called New Guy Village, which was the initial torture room. They had a dossier of some sort on you, although it might be quite primitive. They immediately started asking you questions about basically the same things that you had been responding to before.

Before I depart that subject, let me just say one thing about torture and our Code of Conduct. Our Code of Conduct says that you've got to resist them to the best of your ability. And that does not mean that you're expected to be a Kamikaze; that means just what it says. Determined torture can make some noises come out of you that you had no idea existed within you. One of the favorite tortures up there was to get your hand behind your back, and they would then plant their foot in the middle of your back and raise your arms up. This has a tendency to either break your arms or pop your arms out of the socket. It's just excruciatingly painful. When I say it will make some noises come out of you that you didn't know you had, that's 100% true. So, I went through basically a replay of what had happened down there where they'd hung me. But this time, of course, I'm really defenseless, and I forgot to tell you I'd been shot in the leg and in the hand, and I'd been wounded in the right leg. So basically, I had no defenses whatsoever except what brainpower I had. I got through that session without anything disgraceful happening and got filtered out into the system. I went out into a little small cell area where they run you into some stocks right out of the Fourteenth Century. Metal stocks go across your

3. For a gripping account of an American's experience in Japanese POW camps during World War II, see Colonel John K. Wallace II, *Japanese Prison Camps: Diary of a Survivor*, 113 MIL. L. REV. 219 (1986).

legs and I spent three days in there. And that's an interesting experience also.

So when I got through with [the stocks], I got filtered out and paired up with a guy who was an Air Force major who was my nurse. They gave me this guy because they didn't want to expend any manpower in getting me fed, getting me washed up, or anything like that. He turned out to be a very nice, very kind guy. In December, 1967, we got moved to a camp that was called the Plantation and that was an easy treatment camp. It was kind of the equivalent of a rehabilitation camp I guess you would say, an easy camp. They had a plan to release some Americans from this camp. I got paired up with Senator John McCain there. John was a lieutenant commander; he got shot down October 16th, and I'd heard this stuff on the radio. They had a speaker in your cell, and you got a lot of great propaganda from the Voice of Vietnam. John was truly a pathetic sight. My first impression was that they'd brought John in and dumped him on us so that he would die with Americans. Then they would be able to say that the Americans killed him, that we'd taken care of him and let him die. But John had an incredible heart, great spirit, and he began to recuperate. Just for example, his right leg had been broken, he'd been bayoneted in the left leg, and his left shoulder, the arm was out of the socket, dislocated. His right arm was broken in a couple places, and he was in a cast that started about here and came clear up over his shoulder. His right arm stuck out of this cast kind of like a snowman, you know with the stick sticking out. You didn't have to be a doctor to know that this was a botched job. And if you watch John walk around today, you notice that he's still very gimpy from that experience. He was wonderful. We lived together from December through the next May, and I got moved from there to a very hard camp. I eventually got through that, and then got a trip back to the Hilton.

I wound up being the camp commander of several of the major camps in Hanoi, largely because they took a lot of the commanders and lieutenant colonels and isolated them. They had three full colonels who had been shot down, but they were also isolated, so none of those guys had any leadership chances because the Vietnamese just locked them up and kept them sequestered. Finally, in December, 1972, Richard Nixon sent the bombers up north, and on the night of December 19th, the sky just rained bombs and began to blow away everything that was of any value. That went on until early January. The Vietnamese rolled up and agreed to release the prisoners, and that was the idea behind the bombing. So that was the way we got

out, and that was precisely the way we should have been fighting the war from day one.

Vietnam, like Iraq, was about a twelve- to fifteen-day war, in terms of destroying all their infrastructure and ability to really operate. If there was any lesson to be learned [from Vietnam], it was, "Never do it that way again." So I wrote a book, and it got published in 1991, and the primary message was, "Don't ever do it that way again." And I will give Dick Cheney, our new Vice President, credit. He was Secretary of Defense during the Gulf War, and Cheney gave [Generals] Schwarzkopf and Powell clear reign to go fight the war the way it needed to be fought. Our air crews and Army and all of our naval vessels, Marine Corps, everybody took off and did exactly what they could do, and do well, and in ten days the war was over, because we basically did it right. That was my message [in my book].

We had been misled for a very long time. I would occasionally lecture up at Maxwell [Air Force Base] when I got called back from Korea. All of the pointy heads were telling us how easy it was to control these little regional conflicts, these limited wars. Limited wars do not work; it's a screw up to even think that a limited war is going to work. Never has worked. I have no knowledge of where limited war has been 100% successful. It wins some battles, but you don't win the war. And if you're going to put your troops at risk and go to war, you need to go to war 100%.

I think some of the things I brought out of [Vietnam] that were so valuable to me were how ingenious Americans are, how well they can function under some horrible conditions. Roughly 45% of our people had some kind of a major orthopedic injury. And a combination of injuries, like John McCain had, was not at all an isolated case. As I said, 45% of the people had a broken arm, back, legs, skull fracture, or some combination of these injuries.

Nevertheless, the communication net was cranked up, and the first thing that you found when you got into a compound of any kind where a bunch of Americans were was that there was some comm going. As soon as the guys were sweeping, shoveling, scraping, whatever it was, you would then hear sounds going [in the background], and you knew that it

meant something. If you didn't know the tap code at that time, you didn't know what was going on, so you just knew that something was going on.

In my case, the first one of those that I heard and was able to identify was this tap here. [Taps out C-C] I later learned the C-C tap was the church call. So on Sunday, when the guards would clear, the C-C would tap church call and we would pray for everyone who was getting brutalized over in the cells or getting tortured. And we prayed for our families and prayed for ourselves. In fact, I did that so seriously, there were times I'm sure that no one else got a word in because I had the line blocked. The second one I learned was this call [taps out H-H], which was an H-H that was tapped on Friday night, for Happy Hour! My God, when I got that one sorted out I said: "This guy is really around the bend. There ain't been nobody happy up in this place."

But there were a few light moments. The most memorable for me is the wonderful dedication of these many people who would get in that line of communication. We were isolated. My time up there I spent thirty-eight months in solitary. That was not a high number; there were quite a few people who spent fifty-two to fifty-four months. And when we all got moved together after the Son Tay Raid, you would see some strange people. All this isolation had gotten you into some time-killing patterns where you had to get through that day, so you develop these routines. And when they got us back into a single large cell, which held about forty people, it was just wild to watch all of these patterns work themselves out. A psychiatrist would have been in hog heaven. Because there were, without question, many of us who had turned the corner. And this move back into this room with forty-five people got you reoriented into the world.

Of course that night when all of those bombs started to hit the ground was really a marvelous thing, because we'd been waiting for that, in my case, for sixty-seven months. I was a short timer in a sense; Everett Alvarez, our first POW shoot down, got shot down August 5, 1964. So at the time I got released with five years and seven months, Everett got released the month before, obviously with seven some odd years. And the fact that he endured and came out with his head up the way he did was a manifest testimony to his convictions and his courage and his allegiance to his country.

One thing I remember most fervently: when I got into a big room, I was the building commander. I had a policy that every day as soon as the guards would clear the room, we would all stand up and face west and

pledge allegiance to the United States. That was a defiant moment for us. We had a flag; a guy had made a flag and had it sewn inside his shirt and we would all stand together and pledge allegiance to the United States.

And out of this 500 and some shoot downs that we had, we only had two really bad apples. One was a colonel; the other was a Navy captain. Unfortunately, they were opportunists who refused to stay in the loop, refused to hang in with us, and they opted to cross over to the other side. And they did so, of course, at the loss of their reputation and future. So I thought it was a wonderful monument to America to see all these people come out of there in 1973 with their head up and full of conviction that they'd done the best that they could do under these very difficult circumstances. Jerry Denton, a Navy commander from down in Mobile, became the spokesman for the first group that came out on February 14th. And I can't precisely recall his words, but it was much like this: he saluted the flag and said, "It's been a pleasure to serve under difficult conditions. God bless America." And that said it all.

CASE NOTE: *UNITED STATES V. BAUERBACH*: HAS THE ARMY COURT OF CRIMINAL APPEALS PUT "*COLLAZO* RELIEF" BEYOND REVIEW?

MAJOR TIMOTHY C. MACDONNELL[1]

I. Introduction

Ex cathedra, meaning "from the chair," is "a theological term which signifies authoritative teaching,"[2] and is used to describe the Pope's authority to create irreformable dogma for the Catholic Church.[3] Once the Pope exercises this rarely used power, his decision cannot be overturned. The Army Court of Criminal Appeals (Army Court) claims, with some support, a similar power to place their decisions beyond review.[4] According to the Army Court, its decisions are unreviewable when it exercises its sentence appropriateness authority under Article 66(c) of the Uniform Code of Military Justice (UCMJ).[5] In *United States v. Bauerbach*, the Army Court invoked this authority when it granted relief for non-prejudicial post-trial delay, known as "*Collazo* relief."[6] Thus, according to the Army Court, "*Collazo* relief" is beyond review by the Court of Appeals for the Armed Forces (CAAF).

This note examines the *Bauerbach* opinion and its ramifications, focusing on three questions raised by *Bauerbach* and "*Collazo* relief" in general. First, was the Army Court correct when it stated that "*Collazo*

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2. 5 THE CATHOLIC ENCYCLOPEDIA (1913).

3. *Id.* According to Catholicism, when the Pope speaks *ex cathedra* he is doing so through and with divine assistance.

4. *See* United States v. Bauerbach, 55 M.J. 501, 505 (Army Ct. Crim. App. 2001); United States v. Dukes, 5 M.J. 71, 73 (C.M.A. 1978); United States v. Turner, 35 C.M.R. 410, 411 (A.B.R. 1965).

5. Article 66(c) provides:

> In cases referred to it, the Courts of Criminal Appeals . . . . 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.

UCMJ art. 66(c) (2000).

6. *Bauerbach*, 55 M.J. at 505.

relief" has always been a matter of sentence appropriateness? Second, did the Army Court correctly conclude that *Bauerbach* and "*Collazo* relief" are beyond review? Third, was the Army Court's use of its sentence appropriateness authority to create "*Collazo* relief" consistent with Congress's intent for how the Courts of Criminal Appeal (or "service courts") should use this unique authority?

II. *United States v. Collazo*: The Birth of a New Method of Addressing Undue Post-Trial Delay

Last year, in *United States v. Collazo*,[7] the Army Court of Criminal Appeals took the bold and controversial step of granting sentence relief for a non-prejudicial post-trial delay. Since that 2000 decision, the Army Court has granted "*Collazo* relief" in several memorandum opinions and four published opinions.[8] The court has used these opinions to pressure staff judge advocates (SJA) and chiefs of criminal law to devote greater attention to post-trial processing. In *Collazo*, the court stated that the reason there are so many post-trial errors and records involving excessive delay is because "there are no meaningful sanctions for tardy or sloppy work."[9] The court's creation of "*Collazo* relief" was obviously an effort to provide a meaningful sanction.

One problem with *Collazo*, however, was the court's failure to state clearly its legal authority to reduce a sentence for post-trial delay absent prejudicial error. The caselaw regarding undue post-trial delay seemed to

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7. 53 M.J. 721 (Army Ct. Crim. App. 2000).

8. *See Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000) (unpublished); United States v. Bass, No. 9801511 (Army Ct. Crim. App. Aug. 3, 2001) (unpublished); United States v. Holland, No. 9901168 (Army Ct. Crim. App. Aug. 1, 2001) (unpublished); United States v. Stevens, No. 9900666 (Army Ct. Crim. App. Aug. 1, 2001) (unpublished); United States v. Delvalle, No. 9800126 (Army Ct. Crim. App. July 16, 2001); United States v. Brown, No. 9900216 (Army Ct. Crim. App. Jul. 13, 2001) (unpublished); United States v. Pershay, No. 9800729 (Army Ct. Crim. App. Jun. 12, 2001) (unpublished); United States v. Bradford, No. 9900366 (Army Ct. Crim. App. May 16, 2001) (unpublished); United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Acostas-Rondon, No. 9900458 (Army Ct. Crim. App. Apr. 30, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished); United States v. Hernandez, No. 9900776 (Army Ct. Crim. App. Feb. 21, 2001) (unpublished); United States v. Fussell, No. 9801022 (Army Ct. Crim. App. Oct. 20, 2000) (unpublished).

9. *Collazo*, 53 M.J. at 725 n.4.

require prejudice before a court could grant relief.[10] In *United States v. Bauerbach*, [11] the Army Court removed any confusion regarding its legal authority to grant "*Collazo* relief." The court devoted almost the entire opinion to explaining that its authority to grant "*Collazo* relief" came from the court's Article 66(c) sentence appropriateness power.

In *Bauerbach*, the appellant pled guilty to one specification of wrongful use of marijuana and was sentenced to three months confinement, forfeiture of all pay and allowances, and a bad-conduct discharge.[12] The only issue raised by appellate defense counsel was whether Private Bauerbach was entitled to "*Collazo* relief," as it took 288 days to process the 385-page record of trial and complete the post-trial process. Appellate defense counsel did not allege any prejudice from the post-trial delay, only that the post-trial process took too long.[13]

The government argued that the Army Court was not permitted to grant relief from non-prejudicial post-trial delay, because to do so would violate Article 59(a), UCMJ.[14] The court disagreed, stating the government's argument "suggests a misunderstanding of the court's responsibility and authority to determine sentence appropriateness under Article 66(c), UCMJ."[15] The court went on to discuss the origins of Article 66, the interplay between Articles 59 and 66, and its holding in *Collazo*. The gist of this discussion was that when the Army Court grants "*Collazo* relief," it does so under its sentence appropriateness authority.

The significance of this holding is considerable. For the first time, the Army Court expressly declared that its Article 66 sentence appropriateness authority may be used to grant "*Collazo* relief." If the court was properly exercising this authority, its decision, and "*Collazo* relief" in general, may be beyond review.[16] Finally, *Bauerbach* and all the "*Collazo* relief"

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10. *See, e.g.*, United States v. Bell, 46 M.J. 351 (1997); United States v. Hudson, 46 M.J. 226 (1997); United States v. Banks, 7 M.J. 92 (C.M.A. 1979).

11. 55 M.J. 501 (Army Ct. Crim. App. 2001).

12. *Id.* at 502. Although Private Bauerbach pled guilty to one specification of wrongful use of a controlled substance on multiple occasions, the government also went forward on a wrongful distribution charge. Private Bauerbach was found not guilty of the distribution charge. *Id.*

13. *Id.*

14. UCMJ art. 59(a) (2000). "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *Id.*

15. *Bauerbach*, 55 M.J. at 502.

16. *See supra* note 4 and accompanying text.

cases represent an aggressive use of sentence appropriateness authority to resolve undue post-trial delay, an issue traditionally addressed as legal error.

III. Has "*Collazo* Relief" Always Been a Matter of Sentence Appropriateness?

The first section of this note addresses whether the Army Court was correct when it stated in *Bauerbach* that "*Collazo* relief" has always been a matter of sentence appropriateness. This statement's potential significance has already been discussed, but not its accuracy. Despite the Army Court's conclusion to the contrary, it is unlikely the *Collazo* court had conclusively resolved that sentence appropriateness was its basis for granting relief. Three observations about the Court's opinion in *Collazo*, as well as subsequent Army Court opinions, support this proposition. First, the *Collazo* opinion lacks any discussion clearly identifying it as a case where the Army Court was exercising its sentence appropriateness authority. Second, based on an examination of the *Collazo* record, it is unlikely the court would have concluded that Collazo received an unjust sentence, despite the government's undue post-trial processing delay. Third, in two later memorandum opinions, the Army Court dealt with sentence appropriateness and "*Collazo* relief" separately.[17] In one case, the court even stated, "We disagree that the appellant's sentence was inappropriately severe, but find that the post-trial processing of this case warrants some relief."[18]

A. The *Collazo* Court's Failure to Discuss Sentence Appropriateness

The Army Court, like all service courts, derives its authority to act from UCMJ Article 66(c). In accordance with Article 66(c), the Army Court "may affirm only such findings of guilt 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." Based on this lan-

17. United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001).

18. *Hansen*, No. 20000532.

guage, the Army Court can affect sentences through one of three powers. The court described these powers in *Bauerbach* as follows:

> The three components of our Article 66(c), UCMJ, authority are commonly referred to as legal sufficiency ("correct in law"), factual sufficiency ("correct in . . . fact"), and sentence appropriateness ("may affirm only . . . such part or amount of the sentence, as it . . . determines, on the basis of the entire record, should be approved").[19]

In *Collazo*, the court granted relief for undue post-trial delay by exercising its "broad power to moot claims of prejudice by 'affirming only such findings of guilt 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.'"[20] Thus, the *Collazo* court refused to state which of three components of Article 66(c) it was exercising. Additionally, in the five memorandum opinions following *Collazo*, the court did not state which of the three components of Article 66(c) it was exercising when granting "*Collazo* relief".

In addition to the court's failure to state expressly that it was exercising sentence appropriateness authority, the court failed to discuss or apply the standard of review for granting sentence appropriateness relief. The case law regarding sentence appropriateness consistently describes the service courts' authority as the power to ensure that justice is done and that the accused receives a just punishment.[21] In *United States v. Healy*, the Court of Military Appeals (CMA) stated, "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves."[22] The court must make its sentence appropriateness determination on the basis of the entire record.[23] Although the *Collazo* court discussed the dictates of "fundamental fairness" regarding the government's diligence in the post-trial process,[24] the

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19. *Bauerbach*, 55 M.J. at 504.

20. 53 M.J. 721, 727 (Army Ct. Crim. App. 2000) (quoting United States v. Wheelus, 49 M.J. 283, 288 (1988) (quoting Article 66(c), UCMJ)).

21. *See, e.g.*, United States v. Parker, 36 M.J. 269, 271 (C.M.A. 1993); United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991); United States v. Lanford, 20 C.M.R. 87, 94 (C.M.A. 1955); United States v. Cavallaro, 14 C.M.R. 71, 74 (C.M.A. 1954).

22. 26 M.J. 394, 395 (C.M.A. 1988).

23. UCMJ art. 66(c) (2000).

24. *Collazo*, 53 M.J. at 727.

court never concluded—based on the entire record—that Private Collazo did not get the punishment he deserved.

A seminal case describing factors to consider when making sentence appropriateness determinations is *United States v. Cavallaro*.[25] In *Cavallaro*, the CMA found the Navy Board of Review was confused about the scope of its sentence appropriateness authority and responsibility.[26] The CMA returned the case to the Board of Review because the Board had affirmed the accused's sentence, and also recommended that The Judge Advocate General exercise clemency. The CMA concluded there was at least an appearance that "boards of review do not understand fully the factors they may consider in determining the appropriateness of [a] sentence."[27] The CMA went on to state,

> When reconsidering the sentence, the board of review should consider the appropriateness of the sentence in light of the entire record before it, giving due consideration to the factors set forth in paragraph 76a and other parts of the *Manual* and any other factors in the record which tend to establish a fair and just sentence.[28]

The CMA referred to paragraph 76a of the *1951 Manual for Courts-Martial*, which described the matters a panel or judge were required to consider when sentencing a convicted soldier. These factors included: aggravation evidence, character of the soldier's service, extenuation evidence, prior convictions, and the needs of good order and discipline.[29]

In *Collazo*, the Army Court did not discuss these factors, other than the needs of good order and discipline. This one discussion was extremely brief, and was limited to the effect of undue post-trial delay on "the confidence of both soldiers and the public in the fairness of military justice."[30] The court did not address other seemingly important factors in determining

25. 14 C.M.R. 71 (C.M.A. 1954).
26. *Id.* at 74.
27. *Id.*
28. *Id.* at 75.
29. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 76a (1951).
30. United States v. Collazo, 53 M.J. 721, 726 (Army Ct. Crim. App. 2000).

a just sentence, like the nature and seriousness of Private Collazo's crimes or extenuation and mitigation evidence presented during sentencing.

It could be argued that it was unnecessary for the *Collazo* court to state it was exercising sentence appropriateness authority because to do so would articulate the obvious. The *Collazo* court found that appellant suffered no actual prejudice, and still granted relief. Since Article 59(a) prevents military courts from granting relief for non-prejudicial legal errors, the court must have been exercising its sentence appropriateness authority. It could also be argued that the only reason the *Bauerbach* court stated that "*Collazo* relief" was a matter of sentence appropriateness was because the government's position in *Bauerbach* indicated the government did not understand what should have been obvious.

If the government's position in *Bauerbach* "suggests a misunderstanding"[31] of "*Collazo* relief" and the service courts' Article 66(c) authority, as the Army Court stated in *Bauerbach*, they were not alone. The Coast Guard Court of Criminal Appeals,[32] the Navy-Marine Corps Court of Criminal Appeals,[33] and even panels of the Army Court apparently "misunderstood" that "*Collazo* relief" was based on sentence appropriateness rather than legal error.[34] One viable explanation for these misunderstandings: the Army Court erred in *Bauerbach* by concluding that "*Collazo* relief" has always been based on sentence appropriateness.

On its face, *United States v. Collazo* does not appear to be a sentence appropriateness case. The Army Court neither stated it was exercising sentence appropriateness authority when granting relief, nor did it discuss or apply the standard of review for granting sentence appropriateness. In *United States v. Bauerbach*, the court referred to no less than twenty cases dealing directly with the court's sentence appropriateness authority.[35] The *Collazo* court, by contrast, only referred to one case that tangentially addressed the court's sentence appropriateness authority.[36] If the court

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31. United States v. Bauerbach, 55 M.J. 501, 502 (Army Ct. Crim. App. 2001).

32. *See* United States v. Tardiff, 54 M.J. 827, 830 (C.G. Ct. Crim. App. 2001).

33. *See* United States v. Green, No. 9900256, 2001 CCA Lexis 9 (N-M. Ct. Crim. App. Jan. 16, 2001).

34. *See* United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001).

35. *Bauerbach*, 55 M.J. at 503-06.

36. 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

intended to grant sentence appropriateness relief in *Collazo*, it could have done so in clear, unambiguous terms, as it did in *Bauerbach*.

B. Private Collazo's Sentence Was Not Rendered Unjust by the Undue Post-Trial Delay

The Army Court's failure in *Collazo* to state it was granting relief based on sentence appropriateness could have been because it did not believe Private Collazo received an unjust punishment. It is impossible to know exactly what the members of any court were thinking beyond that which is written in its opinion. This is also true of the Army Court in *Collazo*. It is possible, however, to examine those factors the court was required to consider when granting sentence appropriateness relief and discuss whether, under that standard, Private Collazo received an unjust punishment.

Service courts are required to base their sentence appropriateness determination on the entire record. The entire record "encompass[es] the transcript, the documentary exhibits, and all the allied papers as well as any appellate brief."[37] When examining the record, the court should consider a variety of factors. These factors include "the nature and seriousness of the offense,"[38] matters presented during sentencing under Rule for Courts-Martial (RCM) 1001,[39] the accused's "acceptance or lack of acceptance of responsibility for his offense[s],"[40] and any other factors the court deems relevant to whether the accused received a just punishment. Applying these considerations to Private Collazo's sentence, it seems unlikely that the court would have concluded Collazo received an unjust punishment.

Private Collazo was convicted, contrary to his pleas, of raping Ms. P. and having carnal knowledge of Ms. B, the fifteen year-old step-daughter of a soldier stationed at Fort Drum.[41] The government called no witnesses in sentencing, relying instead on the victims' testimony from the findings phase of trial. The defense called four sentencing witnesses and presented one stipulation of expected testimony. The defense witnesses and the stip-

37. *Id.*

38. United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *see also* United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished).

39. *See* United States v. Cavallaro, 14 C.M.R. 71, 75 (C.M.A. 1954).

40. United States v. Aurich, 31 M.J. 95, 97 (C.M.A. 1990).

41. United States v. Collazo, No. 9701562, 474 (Headquarters, Fort Drum Sept. 25, 1997) (Record of Trial).

ulation of expected testimony were from Private Collazo's chain of command, who all stated Collazo was an excellent duty performer with good rehabilitative potential.[42] The accused did not make a sworn or unsworn statement, but instead had both his defense counsel make statements on his behalf. Although the statements made by Collazo's attorneys communicated his regret for any pain he may have caused the two victims of his crimes, the statements fell short of either a full acceptance of guilt or a full apology.[43] Private Collazo's Enlisted Record Brief was unremarkable, containing one Army Achievement Medal.[44]

The post-trial process in Collazo's case took one year and five days, with twenty of those days owing to a defense delay.[45] The record of trial was 519 pages long, and it took the government about ten months to authenticate it. In addition to this delay, there were errors in the post-trial process. The government failed to let Collazo's defense counsel review the record of trial before authentication, provide Collazo or his defense counsel with an authenticated record of trial for the preparation of RCM 1105/1106 matters, and provide the accused and defense counsel with a copy of the convening authority's action in a timely manner.[46] Despite the delay in Private Collazo's case and the technical errors in the post-trial process, his appellate defense counsel alleged no harm from these errors, other than a delay in having his matters considered by the Army Court.[47]

The Army Court found that the government's lack of due diligence in the post-trial process was fundamentally unfair, but found no harm arising from the delay. The Army Court also found no merit to Private Collazo's other allegations of error.[48] Thus, if the court was correct in *Bauerbach*, which asserted that "*Collazo* relief" has always been an exercise of sentence appropriateness authority, then the *Collazo* court would have concluded that the unspecified harm to Private Collazo's post-trial processing rights rendered his sentence unjust or unfair. Given Private Collazo's crimes, sentence, and the lack of any actual harm due to the government's

42. *Id.* at 477-96.

43. *Id.* at 487.

44. *Id.* (Prosecution Exhibit 1).

45. *Id.* (Chronology Sheet).

46. United States v. Collazo, 53 M.J. 721, 726-27 (Army Ct. Crim. App. 2000).

47. *Id.*

48. *Id.* Due to the length of Private Collazo's term of confinement, he missed no parole opportunity because of the government's delay. *See* U.S. DEP'T OF ARMY, REG. 15-130, CLEMENCY AND PAROLE BOARDS para. 3-1(e) (23 Oct. 1998).

post-trial processing delay, it is unlikely the Army Court would have concluded Private Collazo's relief was for sentence appropriateness.

C. Army Court's Pre-*Bauerbach* Analysis of "*Collazo* relief" and Sentence Appropriateness Relief

Perhaps the strongest evidence that "*Collazo* relief" was not originally based on sentence appropriateness appears in the Army Court's memorandum opinions following *Collazo*. Although memorandum opinions are not binding precedent, they carry some weight of authority, especially with the court that wrote the opinion.[49] Memorandum opinions also reveal how a court analyzes a particular issue, because its analysis should not be affected by the decision to publish the opinion.[50] In two memorandum opinions written after *Collazo* but before *Bauerbach*, the Army Court addressed "*Collazo* relief" and sentence appropriateness relief separately. These opinions, *United States v. Sharp*[51] and *United States v. Hansen*,[52] shed considerable light on two Army Court panels' view of "*Collazo* relief" in relation to sentence appropriateness.

In *Sharp*, the accused was convicted, contrary to his pleas, of possession with the intent to distribute and distribution of cocaine. Sharp was sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, reduction to Private E1, and confinement for twenty years.[53] Appellate defense counsel raised several errors, including claims that "the dilatory post-trial processing of appellant's court-martial warrants relief, and . . . [the appellant's] sentence was inappropriately severe."[54] The Army Court addressed these two allegations of error separately.[55] Regarding the slow post-trial processing, the court concluded the government failed to proceed with due diligence when it took 399 days to authenticate

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49. *See, e.g.*, David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1996).

50. Although memorandum opinions are generally less extensive regarding the court's legal analysis, the analytic framework the court applies should generally be the same.

51. No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished).

52. No. 20000532 (Army Ct. Crim. App. May 10, 2001) (unpublished).

53. *Sharp*, No 9701883, at 2.

54. *Id.*

55. *Id.* at 5.

the appellant's record of trial. Based on this failure, the court reduced the accused's confinement by six months.[56]

The *Sharp* court then addressed sentence appropriateness. It discussed the following: the accused's age, marital status, number of children, educational level, general testing score, rank, number of prior convictions and Article 15s, awards and commendations, the offenses of which he was guilty, the effect of his offenses on unit readiness, the maximum sentence authorized, the evidence presented by defense during sentencing, and the accused's apology at the conclusion of his unsworn statement.[57] After considering these factors, the court reduced Sharp's punishment "by five years because his approved sentence was inappropriately severe."[58] The court added the relief it granted under *Collazo* to the relief it granted due to the inappropriately severe punishment.[59] In the end, the court approved fourteen and a half years of confinement.

In *United States v. Hansen*, the trial court convicted the accused of multiple specifications of willfully damaging property.[60] He was sentenced to a bad-conduct discharge, reduction to E1, a fine of $1,000, and confinement for six months. On appeal, the Army Court addressed allegations of undue post-trial delay and an inappropriately severe sentence. As in *Sharp*, the court dealt with the allegations separately. More significant, however, the *Hansen* court found the accused's sentence was not inappropriately severe, but granted "*Collazo* relief" anyway. The court wrote, "We disagree that the appellant's sentence was inappropriately severe, but find that the post-trial processing of this case warrants some relief."[61]

In light of *Hansen* and *Sharp*, it is difficult to conclude that "*Collazo* relief" has always been a matter of sentence appropriateness, as *Bauerbach* maintained. Both opinions dealt with "*Collazo* relief" and sentence appropriateness relief separately. In *Sharp*, the court gave a distinct quantum of relief for each issue and then added them together. In *Hansen*, the court did not find the sentence inappropriately severe, yet still granted "*Collazo* relief." If the *Hansen* court had truly determined that "*Collazo* relief" was a matter of sentence appropriateness, it would have likely discussed post-trial delays and errors within its sentence appropriateness analysis, and

56. *Id.*
57. *Id.* at 5-6.
58. *Id.*
59. *Id.* at 7.
60. No. 20000532, 1 (Army Ct. Crim. App. May 10, 2001) (unpublished).
61. *Id.*

granted relief only where the court found the sentence was inappropriately severe.

IV. Practical Effects of *Bauerbach*

Based on the *Collazo* record of trial, the language of the *Collazo* opinion, and the Army Court's subsequent memorandum opinions, it is unlikely that "*Collazo* relief" has always been a matter of sentence appropriateness. That being said, the *Bauerbach* court concluded otherwise. Until the Army Court changes its stand on "*Collazo* relief," or a higher court overrules it, practitioners must address "*Collazo* relief" issues.

Both defense counsel and government counsel must look for "*Collazo* relief" issues and respond appropriately. Government counsel opposing "*Collazo* relief" should emphasize the government's efforts to proceed with due diligence in post-trial processing. The government should highlight those portions of the record of trial that demonstrate the accused received a just punishment (such as severity of the accused's crime or a lack of remorse). Conversely, defense counsel should focus on post-trial delay issues and the accused's punishment in general. Thus, defense counsel should address not only the time it took the government to complete the record and any defense requests made to expedite the process, but also any other matters indicating the accused's sentence was inappropriately severe (such as a guilty plea or an excellent service record).

A defense claim for "*Collazo* relief" based on *Bauerbach* is not an allegation of legal error; however, there are two reasons why SJAs should address this claim in an addendum to their post-trial recommendation. First, the Army Court has repeatedly stated it expects these claims to be addressed in an addendum.[62] Second, most defense counsel do not simply ask for "*Collazo* relief," but also allege prejudice as a result of undue delay in post-trial processing.

Once prejudice is alleged, SJAs must address it in an addendum. The SJA's addendum is ideal for addressing claims for "*Collazo* relief," whether the SJA recommends granting or denying relief. If the SJA recommends granting some relief, that can be reflected in the addendum with

62. *See, e.g.*, United States v. Bass, No. 9801511, 2 (Army Ct. Crim. App. Aug. 3, 2001) (unpublished); United States v. Brown, No. 9900216, 3 (Army Ct. Crim. App. Jul. 13, 2001) (unpublished).

a concur/nonconcur line for the convening authority to initial. This approach leaves no doubt that any relief granted responds to a *Collazo* issue and is not a matter of clemency. If the SJA recommends disapproving a claim for "*Collazo* relief," the addendum can be used to account for the government's due diligence in post-trial processing. Staff judge advocates should be mindful that the Army Court applies a totality of the circumstance test for determining due diligence. Thus, SJAs must account for circumstances contributing to a lengthy post-trial process, and the steps taken to reduce processing time.[63]

V. Are *Bauerbach* and "*Collazo* Relief" Beyond Review?

This note next considers the Army Court's assertion that *Bauerbach*, and "*Collazo* relief" in general, are beyond review. The court claims that "any relief . . . we grant an appellant exercising our factual sufficiency or sentence appropriateness authority is final."[64] This statement has enormous implications. If the Army Court is correct, then theoretically a service court could grant any relief it chose for any error. So long as the service court stated it was exercising its sentence appropriateness authority, the CAAF could not review the grant of relief. Although readers may reflexively disagree with the Army Court, the issue is more complicated than it first appears.

The Army Court highlights a unique aspect of the military appellate system. Specifically, the military's initial appellate courts have broader statutory jurisdiction then the next level of appellate review. Because this

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63. The Army Court has specifically mentioned four potentially acceptable reasons for a lengthy post-trial process: "excessive delay in submission of R.C.M. 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments." *Bass*, No. 9801511, at 2. Although the court has rejected a lack of court reporters as an excuse for lengthy post-trial processing, this should still be mentioned in the SJA's addendum. United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). Also, the addendum should mention defense delays caused by the defense, like the time required for errata and the time required for the military judge to authenticate the record. Efforts that the criminal law office made to complete the record as quickly as possible should also be accounted for. Finally, efforts to send the record to another jurisdiction for typing or use of a civilian contract court reporter should also be mentioned.

64. *Bauerbach*, 55 M.J. at 505.

unique aspect of the military appellate system is critical to understanding the Army Court's position in *Bauerbach*, it bears some explaining.

The U.S. military justice system contains two levels of appellate review, the Courts of Criminal Appeal[65] and the CAAF.[66] There are four Courts of Criminal Appeal, one for each service, and one CAAF. Any service member found guilty at court-martial and sentenced to either a punitive discharge or to one or more years of confinement will have his record reviewed by a Court of Criminal Appeal.[67] Article 66, UCMJ, created this court and defined the scope of its authority, while Article 67 did the same for the CAAF. Article 66(c) requires the Courts of Criminal Appeal to review the entire record of trial in any case falling within their jurisdiction. After reviewing the record, the court "may only affirm such findings of guilty and sentence or such part or amount of sentence, as it finds correct in law and fact and determines . . . should be approved."[68] Thus, as mentioned earlier, the Courts of Criminal Appeal can overturn or alter a finding or sentence based on legal error, factual insufficiency, or an inappropriate sentence. The CAAF's jurisdiction, however, is not so broad.

According to UCMJ Article 67, the CAAF

> 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 Courts of Criminal Appeal . . . . The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.[69]

The plain language of Articles 66 and 67 seems to support the Army Court's assertion that its grant of "*Collazo* relief" is beyond review. Article 66 gives the Army Court the power to reduce a sentence based on sentence appropriateness, factual insufficiency, and legal error. Article 67 permits the CAAF to review only those cases affirmed or overturned by the service courts for legal error. Arguably, therefore, the CAAF has no jurisdiction over cases where the service courts have overturned a finding or sentence for factual sufficiency or sentence appropriateness. Although the plain

65. *See* UCMJ art. 66 (2000).
66. *See id.* art. 67.
67. *Id.* art. 66(b)(1).
68. *Id.* art. 66(c).
69. *Id.* art. 67(c).

language of Articles 66 and 67 seems to support the Army Court's position, the cases make it clear the analysis is not so cut and dry.

In *Bauerbach*, the Army Court cited five cases to support its conclusion that "any relief we grant an appellant exercising our factual sufficiency or sentence appropriateness authority is final."[70] Each case supports, in varying degrees, the broad authority of the service courts, and limits the CAAF's jurisdiction to legal errors. One of the cases, however, notes a significant exception to the general rule that the CAAF will not disturb a service court's exercise of one of its unique authorities.

In *United States v. Christopher*, the CMA stated that, although it did not have the authority to review a service court's factual determinations, "a board of review may not defeat review in this court by labeling as questions of fact those matters which are questions of law, or mixed holdings of law and fact."[71] Thus, the CAAF may exercise review despite a service court's assertion that it was exercising one of its unique authorities under Article 66(c). This is especially significant with regard to "*Collazo* relief" in general, and the *Bauerbach* case in particular.

This note previously argued that "*Collazo* relief" is not based on sentence appropriateness.[72] In addition to the matters discussed earlier, *Bauerbach* (and "*Collazo* relief" in general) are vulnerable to allegations that the Army Court has labeled "*Collazo* relief" as an exercise of sentence appropriateness authority rather than legal error to avoid CAAF review. The language of *Collazo* and its progeny has all the earmarks of a legal error analysis.

In *Collazo*, the Army Court established a standard that the government must meet: due diligence in post-trial processing.[73] The court stated it would measure whether the government met its burden given the totality of the circumstances.[74] In *Collazo* and the cases that followed, the court granted relief for violations of the post-trial due diligence standard without regard to other factors that might be relevant to sentence appropriateness.

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70. United States v. Bauerbach, 55 M.J. 501, 505 (Army Ct. Crim. App 2001).
71. 32 C.M.R. 231, 236 (C.M.A. 1962).
72. *See supra* notes 49-66 and accompanying text.
73. United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).
74. *Id.*

This manner of granting relief is based more on legal error than on sentence appropriateness.

To date, the Army Court has decided fifteen cases where it concluded the government did not proceed with due diligence in post-trial processing.[75] The court granted relief in each case. No case discussed any matters occurring before the post-trial process began. One of the cases, *United States v. Marlow*,[76] is particularly significant.

In *Marlow*, the convening authority approved a punishment less severe than the adjudged sentence and the Army Court still granted "*Collazo* relief."[77] Marlow pled guilty and was convicted of multiple larcenies, attempted larceny, forgery, and absence without leave. He was sentenced to thirty months of confinement, a bad-conduct discharge, and forfeiture of all pay and allowances.[78] In accordance with a pretrial agreement, the convening authority only approved eighteen months of Marlow's confinement. It took the government 335 days to complete the post-trial process for the 168-page record of trial. After examining Marlow's claim of prejudicial post-trial delay, the Army Court concluded he had not established prejudice.[79] Despite Marlow's failure to establish prejudice, the court held he was entitled to relief due to the government's failure to proceed with due diligence in the post-trial process. The court reduced Marlow's confinement from eighteen to fifteen months.[80]

As in many "*Collazo* relief" cases, the Army Court's application of sentence relief in *Marlow* appears disconnected from the central question of sentence appropriateness; that is, whether the accused got the punishment he deserved. In *Marlow*, the court first determined the government had failed to proceed with due diligence in the post-trial process, and although the accused was not prejudiced, he deserved some relief.[81] Next, the court established a quantum of relief to award the accused based on the

75. *See supra* note 8.
76. No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000) (unpublished).
77. *Id.* at 4.
78. *Id.* at 1.
79. *Id.* at 3.
80. *Id.*
81. *Id.* at 4.

government's error. Finally, the court subtracted that quantum from the approved sentence.[82]

This method would be appropriate if the Army Court was granting relief for a legal error, like illegal pretrial confinement; however, if the court is granting sentence appropriateness relief, the analysis starts from the wrong point. In determining sentence appropriateness, the court should begin with the sentence itself. It must determine whether the accused got the punishment he deserved based on the entire record. Thus, the court should begin with the accused's sentence, look at the entire record, and then determine whether the accused received a fair punishment. As part of that analysis, the court must consider the government's undue delay in post-trial processing, along with everything else in the record of trial.

The adjudged sentence in *Marlow* was particularly relevant, as the military judge sentenced Marlow to thirty months of confinement.[83] Presumably the judge's sentence should have been the baseline for the Army Court's sentence appropriateness analysis. Because Marlow had entered into an advantageous pretrial agreement, only eighteen of the thirty months of confinement could be approved. This pretrial agreement, however, should not alter the court's sentence appropriateness analysis. Thus, if the relief was based on sentence appropriateness, the Army Court would have to conclude that Marlow was sentenced to twice the confinement he deserved.

The *Bauerbach* assertion that the Army Court's exercise of sentence appropriateness authority is beyond review by the CAAF has support in the UCMJ and case law, but *Bauerbach* overstates that support. The CAAF can, and has, gone beyond the service court's characterization of its own actions. *Bauerbach* and "*Collazo* relief" are particularly vulnerable to such an examination. Specifically, the Army Court's application of "*Collazo* relief" in *Hansen*, *Sharp*, and *Marlow* may cause the CAAF to disagree with the Army Court's assertion that "*Collazo* relief" is an exercise of sentence appropriateness.

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82. *Id.*

83. *Id.* at 1.

VI. *Bauerbach*, "*Collazo* Relief," and Congressional Intent

Finally, this note examines whether the Army Court's creation of "*Collazo* relief" is consistent with Congress's intent for how service courts should exercise their unique Article 66(c) sentence appropriateness authority. Although the "*Collazo* relief" debate may begin with undue delay in the post-trial process, it clearly ends on a question of statutory interpretation.

The Army Court, through *Bauerbach*, has identified "*Collazo* relief" as a form of sentence appropriateness relief. Arguably, the Army Court has been granting relief for non-prejudicial legal error and calling it an exercise of sentence appropriateness authority. By doing so, the court avoids not only the requirement to find material prejudice, but also the potential consequence of finding prejudicial post-trial delay.[84] If this characterization is correct, does this mean the court has been acting outside its statutory authority?

The answer to this question is not an easy one, given the court's broad power to approve only those sentences it believes "should be approved."[85] Article 66(c) is worded broadly and has been interpreted broadly by the CAAF, which wrote, "A clearer *carte blanche* to do justice would be difficult to express."[86] Certainly an argument can be made, based on Article 66(c), that service courts can disapprove any sentence for whatever reason the court finds appropriate. Despite this argument, it is difficult to believe that Congress intentionally created a statutory trapdoor where service courts could sidestep Article 59(a) requirements[87] by using their sentence appropriateness authority. When faced with two reasonable and contradic-

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84. If a military appellate court finds that an accused was prejudiced by an undue delay in the post-trial process, the appellate court should be required to dismiss the findings and sentence. *See* United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982); United States v. Banks, 7 M.J. 92 (C.M.A. 1979); Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).

85. UCMJ art. 66(c) (2000).

86. United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).

87. *See supra* note 14.

tory interpretations of a statute, it is appropriate to refer to its legislative history.[88]

Although examining a statute's legislative history to divine congressional intent can be difficult, the UCMJ facilitates this with "one of the best and most informative . . . legislative histor[ies] anywhere."[89] Unfortunately, even with the UCMJ's extensive legislative history, there is no "smoking gun" regarding what, if any, restrictions Congress intended to place on the service courts' sentence appropriateness authority. The UCMJ's legislative history, however, does contain "circumstantial evidence" on the issue. Congress's discussion of why it was granting service courts sentence appropriateness authority provides this evidence. Presumably, determining the intended use of sentence appropriateness will also show how it was not intended to be used.

In 1948, work began on the creation of a uniform criminal code for the U.S. armed forces.[90] Secretary of Defense James Forrestal began the process by appointing a committee to draft the uniform code and asked Harvard Law Professor Edmund A. Morgan to chair the committee. Professor Morgan and his committee were tasked with creating a justice system that could provide the "proper accommodation between the meting out of justice and the performance of military operations—which involves not only fighting, but also the winning of wars."[91]

As Professor Morgan and his committee drafted the UCMJ, the committee constantly struck a balance between a commander's role in the discipline of his unit and "prevent[ing] courts martial from being an instrumentality and agency to express the will of the commander."[92] Pursuing that balance, Professor Morgan's committee retained aspects of the Articles of War that placed the commander at the center of the military justice system. Commanders still preferred charges, selected panel members, and retained clemency authority over an accused. While retaining the commander's role in military justice, the committee also created new safe-

88. Steven Breyer, *On the Use of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

89. Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (2000).

90. *Id.* at 8.

91. *Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 597 (1949) [hereinafter *Hearings on H.R. 2498*].

92. *Id.* at 606.

guards to prevent a commander's will from eclipsing the goal of fair and impartial justice. Some of these safeguards were requiring convening authorities to get advice from their SJA before preferring charges or taking action, giving Boards of Review (the 1949 equivalent to today's service courts) greater authority, and creating a civilian Court of Criminal Appeals.[93] For this note's purposes, expanding the boards' authority was the most significant new safeguard.

Boards of Review were not an innovation of the UCMJ; they had existed since the creation of Article of War 50.5 in 1920.[94] The Army and Air Force's Boards of Review underwent significant modification under the Elston Act in 1948, which authorized Boards of Review "to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact."[95] The UCMJ took the modifications created in the Elston Act and built upon them. In addition to deciding questions of law and factual sufficiency, the Boards of Review under the UCMJ were given the authority to approve only those sentences they determine should be approved. The creation of 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."[96]

Although the UCMJ's legislative history is extensive, surprisingly few sections specifically state why Boards of Review were granted sentence appropriateness authority. Beyond the language of Article 66(c) itself, only the Commentary sections of the House and Senate reports represent the collective intent of Congress. The Commentary on Article 66(c) is the same in both reports, and it states: "The Boards may set aside, on the basis of the entire 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."[97] Although sentence uniformity can be a goal in itself, in the context of the UCMJ, sentence uniformity was directed at curing two ills of

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93. *Id.*

94. Roger M. Currier & Irvin M. Kent, *The Boards of Review of the Armed Forces*, 6 VAND. L. REV. 241 (1952-1953).

95. *Id.* at 242.

96. *Id.*

97. SUBCOMM. OF THE HOUSE ARMED SERVICES COMM., REPORT ON H.R. 2498, 81st Cong., 1st Sess. 31-32 (1949); SUBCOMM. OF THE SENATE ARMED SERVICES COMM., REPORT ON S. 857 AND H.R. 2498, 81st Cong., 1st Sess. 28 (1949).

the military justice system: command influence in sentencing and excessive sentences.

As stated, striking a balance between discipline and justice occupied a majority of the House and Senate hearings on the UCMJ. Congress heard from several witnesses and read reports discussing the concern that "[t]oo often the [courts-martial] have been told by commanders they were expected to bring in verdicts of guilty, and impose specific sentences."[98] Witnesses like Mr. Arthur E. Farmer, Chairman of the Committee on Military Law, War Veterans Bar Association, testified that it was not unique for him to have heard commanding officers state, "Gentlemen, when you pass sentence on the accused, you will give him the maximum sentence. Clemency is my function."[99] Mr. Farmer went on to testify that the command influence did not have to be as overt as the above statement. It could be as subtle as a commander expressing his concern at a staff meeting that a particular crime should be treated as a serious offense.[100]

Professor Morgan testified that Boards of Review would be sufficiently separate from any general court-martial convening authority so as to remove any hint of command control.[101] Removed from command influence and armed with the power to reduce sentences, "the board of review would take care of any excessive sentence."[102]

A concern that military sentences were generally too severe provided another motivation for Congress to seek sentence uniformity through Article 66(c).[103] Several witnesses, most notably Professor Morgan, testified about their experiences or cited statistics regarding clemency boards that

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98. *Hearings on H.R. 2498*, *supra* note 92, at 640 (statement by Mr. Richard H. Wels, Chairman, Special Committee on Military Justice of the New York County Lawyers' Association); *see also id.* at 46 (statement of the Honorable Gerald R. Ford, Member of Congress From the Fifth District of the State of Michigan).

99. *Hearings on S. 857 and H.R. 2498 Before the Subcomm. of the Senate Armed Services Comm.*, 81st Cong., 1st Sess. 87 (1949) [hereinafter *Hearings on S. 857*] (statement of Mr. Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association).

100. *Id.*

101. *Hearings on H.R. 2498*, *supra* note 92, at 608 (statement of Professor Edmund A. Morgan).

102. *Hearings on S. 857*, *supra* note 100, at 46 (statement of Professor Edmund G. Morgan).

103. *Hearings on H.R. 2498*, *supra* note 92, at 840 (statement of Professor Arthur John Keeffe, Cornell Law School); *Hearings on S. 857*, *supra* note 100, at 46, 311 (statements of Professor Edmund G. Morgan).

were held after World War I.[104] Mr. George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association, stated, with the support of Senator Morse, "There is something . . . wrong with the system which results in a clemency board . . . reducing or remitting over 27,000 sentences."[105] Twice during the Senate hearings, Professor Morgan referred to his own experience sitting on a clemency board after World War I where the board "remitted 18,000 [years] in 6 weeks."[106]

Some of the witnesses that testified against making substantial changes to the military justice system actually may have encouraged Congress to pass measures like Article 66(c). Members of the House Subcommittee were concerned when witnesses like Colonel William A. Roberts of the U.S. Air Force Reserve testified:

> The real difference [between the military and civilian justice systems] is the object and amount of punishment. The object of civilian criminal court generally is to reform and rehabilitate the offenders. The object of military law . . . is to act as a deterrent so that when the first man steps out of line and gets a hard sentence it will deter others.[107]

Testimony like Colonel Roberts' supported the concern of many in Congress that sentencing in the military was too focused on discipline at the expense of justice.

Congress was fairly clear on why it granted Boards of Review sentence appropriateness authority. It intended that service courts exercise this authority to "establish sentence uniformity throughout the services."[108] As previously discussed, the purposes of sentence uniformity were to reduce command influence over the sentencing process and avoid unduly harsh sentences. If this was the motivation behind the Article 66(c)

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104. *Hearings on S. 857*, *supra* note 100, at 46, 311 (statements of Professor Edmund G. Morgan).

105. *Id.* at 80 (statement of Mr. George A. Spiegelberg, Chairman, American Bar Association Special Committee on Military Justice).

106. *Id.* at 46, 311 (statements of Professor Edmund G. Morgan).

107. *Hearings on H.R. 2498*, *supra* note 92, at 780 (statement of Colonel William A. Roberts, U.S. Air Force Reserve, representing the AMVETS).

108. *Id.* at 840 (1949) (statement of Professor Arthur John Keeffe, Cornell Law School).

sentence appropriateness authority, however, creation of "*Collazo* relief" would not fulfill these purposes.

Some have said that using legislative history to support a statutory interpretation is a bit like "looking over a crowd and picking out your friends."[109] In an effort to avoid such criticism, it should be noted that sections of the UCMJ's legislative history inure to the favor of those arguing that Congress intended no restriction on the Boards of Review in their exercise of sentence appropriateness authority. The testimony of the Judge Advocates General for the Army and Navy and Congress's lack of a response to their concerns offered the strongest evidence on this point. Both opposed granting Boards of Review sentence appropriateness authority because the boards' powers would be too sweeping.[110] Despite this opposition, premised on the Judge Advocates Generals' concern that Boards of Review would invade the province of commanders, Congress passed Article 66(c) with the sentence appropriateness provision intact. Thus, Congress arguably intended the Boards of Review to have sweeping unrestricted power since they were unmoved by the Judge Advocates Generals' concern.

Although this argument has some validity, it is not consistent with the legislative history. After the Judge Advocates General testified before the Senate, their concerns were discussed briefly.

> "Senator Kefauver. The next controversial subject is the board of review and Courts of Military Appeals.
> Professor Morgan. Yes.
> Senator Kefauver. The board of review.
> Professor Morgan. The first thing I understand on that, Senator, is that they [the Judge Advocates General] do not want the board of review to handle sentences, is that right?
> Mr. Galusha. That is right.
> Senator Kefauver. That is right.
> Professor Morgan. That is one of the places where there has been the tremendous criticism of the Army, Navy, and Air Force . . . . I was in the First World War, as a matter of fact, and I happened to sit for 6 weeks as chairman of the clemency committee,

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109. Breyer, *supra* note 89, at 846 (quoting Judge Leventhal).

110. *Hearings on S. 857*, *supra* note 100, at 258, 262 (statement of Major General Thomas A. Green, Judge Advocate General of the Army), 287 (statement of Rear Admiral George L. Russell, Judge Advocate General of the Navy).

> and I know we remitted 18,000 years in 6 weeks. The sentences are just fantastic at times.
> Senator Saltonstall. Mr Chairman, I do not want to make hasty decisions, but if you feel the same way, I would say very clearly that I believe they should have the right to reduce sentences.
> Senator Kefauver. I think undoubtedly it should be there.[111]

This discussion does not support a conclusion that Congress intended Boards of Review to exercise their sentence appropriateness authority without restriction. Rather, it highlights that Congress was primarily concerned with the harshness of court-martial sentences, and intended Boards of Review to take sentences that were unduly harsh and make them fair.

VII. Conclusion

In an effort to correct the growing problem of undue post-trial delay within the Army's military justice practice, the Army Court of Criminal Appeals took a bold step. The court broke from the traditional method of addressing post-trial delay and created a new method, "*Collazo* relief." This new method forces SJAs and chiefs of criminal law to scrutinize the post-trial process in their jurisdictions.[112]

The legal authority for this new method of addressing undue post-trial delay was unclear in *Collazo*. The Army Court sought to clarify its authority to grant "*Collazo* relief" in *Bauerbach*. The *Bauerbach* court claimed that "*Collazo* relief" was, and had always been, based on sentence appropriateness authority. The *Collazo* opinion and the Army Court's subsequent memorandum opinions before *Bauerbach*, however, do not support this conclusion.

In *Bauerbach*, the Army Court claimed that, when it exercises sentence appropriateness authority to the benefit of an accused, its decision is final. If true, the court's opinion in *Bauerbach*, and all "*Collazo* relief" cases, would be beyond review. It is unclear whether the CAAF would agree with the Army Court, even if the Army Court properly exercised its sentence appropriateness authority. Clearly, however, the Army Court cannot place its decisions beyond review simply by labeling them as an

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111. *Id.* at 311.

112. This new method also increased interest within the Army in fielding voice recognition software for court reporting.

exercise of the court's sentence appropriateness authority. The court's opinions in *Bauerbach* and all "*Collazo* relief" cases are vulnerable to claims that the court has mislabeled its action, trying to do through sentence appropriateness authority what it could not do through legal error analysis.

Finally, the Army Court's creation of "*Collazo* relief" raises the question of whether Congress intended service courts to use their sentence appropriateness authority to resolve non-prejudicial legal errors. Congress's intent, described in the House and Senate reports and committee hearings on the UCMJ, was to have sentence appropriateness authority used to create sentence uniformity and remove command influence and excessive sentencing from the military. "*Collazo* relief" achieves none of these objectives.

The Army Court's new method of addressing post-trial delay lies in the no-man's land of statutory authority. "*Collazo* relief" is based on neither legal error nor a true sentence appropriateness analysis. "*Collazo* relief", like the *Dunlap*[113] rule before it, is born of frustration with what the court perceives as "tardy or sloppy work."[114] In an effort to stem this tide, the court transformed its sentence appropriateness shield into a stick, which it now wields against errant jurisdictions. This approach grants relief because the government was inefficient, not because the accused received an unjust punishment.

It should be recognized that the Army Court's creation and use of "*Collazo* relief" is not limited to post-trial issues. The court has effectively stated that, although an accused has suffered no legal harm from the government's error, he may nonetheless be entitled to relief. He is entitled because he has a right to a speedy post-trial process, and fundamental fairness dictates that the government proceed with due diligence in the post-trial process.

This same analysis can apply to trial or pretrial errors. For example, the court could determine the government violated an accused's Fifth Amendment or Article 31 rights, but there was no prejudicial effect. If there was no prejudicial effect, then no relief under a legal error analysis is permitted.[115] It could be argued, however, that consistent with the Army

113. Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974) (imposing a strict, ninety day post-trial processing standard).

114. United States v. Collazo, 53 M.J. 721, 725 n.4 (Army Ct. Crim. App. 2000).

Court's analysis in *Bauerbach*, fundamental fairness dictates that the government protect soldiers' Fifth Amendment or Article 31 rights. Thus, when the government violates these rights, the court can provide relief in the form of a sentence reduction.

The legislative history of the UCMJ repeatedly makes reference to the struggle between the needs of discipline and the needs of justice. To ensure that discipline did not eclipse justice within the military, UCMJ Article 66(c) granted service courts sentence appropriateness authority. The intent of this authority was to ensure that convicted soldiers receive a just and fair punishment. Although much has changed in the military justice system since 1951,[116] the purpose and function of Article 66(c) has not. "*Collazo* relief," or interpretations like it, do not serve those purposes or functions.

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115. UCMJ art. 59(a) (2000).

116. Since 1951, the UCMJ has had two major revisions, in 1969 and 1984. *The Manual for Courts-Martial* has undergone four major revisions, in 1969, 1984, 1995, and 1998.

THE TUSKEGEE AIRMEN: THE MEN WHO CHANGED A NATION[1]

MAJOR KAREN S. WHITE, USAF[2]

"In combat a man is respected if he has 'guts' no matter where he is from, what his religious beliefs are, or the color of his skin."[3] That respect, however, doesn't always transcend the battlefield. Such was the experience of the African-American aircrews of World War II, known as the Tuskegee Airmen. Charles Francis chronicles the Tuskegee Airmen's struggle for acceptance, their performance during combat, and their eventual integration into the Air Force. The stories of the Tuskegee Airmen and their contributions are intriguing and important to understanding the struggle for integration of the armed forces.

The Tuskegee Airmen is a chronological accounting of the "experiment"[4] of African-American squadrons before, during, and after World War II. The book is designed to tell the stories of the African-American airmen who fought and died in World War II, as well as those who fought a battle on the home front to "achieve for black Americans the same rights, privileges, treatments, and opportunities enjoyed by white Americans."[5]

The Tuskegee Airmen is a tribute to the men of the 99th Fighter Squadron, the 332nd Fighter Group, and the 477th Bombardment and Composite Groups, and for that purpose the author and editor included the accomplishments and contributions of as many Tuskegans as possible

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1. CHARLES E. FRANCIS, THE TUSKEGEE AIRMEN: THE MEN WHO CHANGED A NATION (Adolph Caso ed., 4th ed. 1997).

2. Judge Advocate General's Corps, U.S. Air Force. Presently assigned as Professor, Contract and Fiscal Law, The Judge Advocate General School, U.S. Army, Charlottesville, Virginia. LL.M, 2000, The Judge Advocate General School, U.S. Army; J.D., 1995, University of Arizona Rogers College of Law; B.S.B.P.A., 1986, University of Arizona.

3. FRANCIS, *supra* note 1, at 185.

4. *Time* carried an article about the Tuskegee Airmen wherein the authors labeled the African-American squadrons as an "experiment" that was allegedly considered a failure by many of the senior leaders of the Army Air Corps. The War Department subsequently denied the assertions in the article. *Id*. at 88.

5. The author explains in the Preface that many previous attempts to tell the story have been based on biased reports from the period and his book attempts to tell the story as completely, accurately and objectively as possible. *Id*. at 19.

throughout the book.[6] The level of detail in the book results in sometimes-difficult reading, as the details of the pilots' names and hometowns often overshadow the results of the mission. This does not diminish the importance of the details, however, if the purpose in reading the book is to account for the contribution of the individuals, and not to track the results of the battles.

Mr. Francis uses another effective method of paying tribute to individual Tuskegans by including photographs of many of the airmen. The photos add a personal touch to the stories and put a face with some of the names and details recounted in the narrative. The pictures give the effect of looking through someone's photo album, fleshing out the stories told in the narrative, and sometimes adding pieces that aren't specifically covered in the factual accounting. For example, there are many pictures of proud family members admiring the smartly uniformed soldier. The pictures vividly display the families' pride in a way words can not portray.

Throughout the book, Mr. Francis presents the facts without commentary, letting the reader draw her own conclusions from the events and facts presented. Although this method is appropriate to an historical rendering of the topic, it is frustrating to a reader who wants to know *why* Mr. Francis believed the Tuskegee Airmen changed a nation. Given the time frame when the book was originally written,[7] Mr. Francis's choice was probably well made. His approach avoids criticism of bias, which would have diminished the credibility of the story he was trying to tell. For a reader today, however, the facts are fairly undisputed, and the real issue is whether the reader believes the Tuskegee Airmen forced or effected a change, or whether other forces were equally or more responsible for the change. This book does not support any particular theory; it is simply a presentation of the facts.

Even though the book may be short on commentary, Mr. Francis does present the facts of an interesting story. The book begins with a description of the struggle facing the early advocates for acceptance for African-Americans in the Air Service. Mr. Francis details the persistence of Walter White, Secretary of the National Association for the Advancement of Colored People; Robert Moton, President of Tuskegee Institute; and later Sen-

6. The editor, Adolph Caso, explains that in the 4th edition he has attempted to tell as complete a story as possible with the inclusion of as many Tuskegans as possible. *Id.* at 19.

7. The book was originally published in 1955.

ator Schwartz and Congressman Dirksen, in opening the Air Corps to African-Americans. He also highlights the futility that many young African-Americans felt when they attempted to enlist in the Air Corps, only to be told that they were welcome to enlist, but there were no training or operational slots available for them. He recounts the circular arguments of the War Department, claiming non-interest of African-Americans, used to justify the non-existence of African-American programs.

After describing the struggle to open the door for African-Americans to begin aviation training, Mr. Francis describes the meager beginnings of the training at Tuskegee Army Air Field. He describes the lack of facilities and the lack of a completed airfield, leading to difficult conditions for the first group of cadets. In one passage he describes the particular challenges faced:

> When the first class completed primary training and arrived at the Advanced Flying Field, it found the field incomplete. Only one runway was sufficiently ready for flying. The ground school was located in a temporary wooden structure, which housed the offices and classrooms. One of the unusual things about the building interior was that there were no partitions separating the classes from the offices. The babble of voices was accompanied by the clicking of typewriters. Concentration was most difficult for the cadets. The six cadets were divided into three classes. One could almost take lecture notes from the different classes at the same time.[8]

Despite these conditions, training continued as did progress on the airfield. The description of this time period is somewhat disjointed, but probably accurately reflects the actual occurrence of the project.

Mr. Francis also introduces the men who formulated and implemented the transformation of Tuskegee Army Air Field. Most notable of these individuals was Colonel (COL) Noel F. Parrish, a southern-born and educated man who would become one of the only commanders to publicly commend the Tuskegee Airmen during the turmoil surrounding integration after World War II.

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8. *Id.* at 56.

The book next moves to the Tuskegee Airmen's preparations to go overseas. Mr. Francis describes the additional ground and flying training and the frustration felt by many of the airmen at what appeared to be stalling tactics to make things difficult for them. He quotes one of the airmen's comments about the experience:

> They made us fly all Christmas Day and New Years Day. You know, even in combat they wind down for Christmas. It is an unwritten agreement by the enemy and the Allies that they would respect the Lord's birthday. We knew it and we were angry. We said the sneaky bastards just wanted to give us a hard way to go.[9]

Mr. Francis does not specifically mention whether the additional training gave the Tuskegee Airmen an advantage as they headed into combat. There is no comparison to the white pilots' training programs to allow the reader to know whether the African-American pilots were actually given different training than the other pilots and what effect that had on their effectiveness in combat. The quoted complaint is valid if, in fact, other units had different training schedules, or if the training was unnecessary. It is also possible, however, that the additional training given to the Tuskegee Airmen resulted in better preparation for their eventual combat missions, thereby leading to increased success.

The description of the debarkation of the 99th Fighter Squadron gives the reader a vivid picture of the anticipation, then confusion, then sadness, as the men left their country on the way to their first overseas posting. The narrative moves easily through the journey to Fez, and effectively uses several recollections to describe the satisfaction that the Airmen felt upon their arrival. Colonel Benjamin O. Davis, Jr., commander of the 99th, recalled, "[t]he town of Fez was found to be one of the most delightful spots that any of us had ever visited."[10] Notable to COL Davis was the "unusual"[11] ability of the men to visit the town without any "unpleasant incident[s]."[12] Surely, this was one of the first times that many of the men

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9. *Id*. at 61 (quoting Spann Watson).
10. *Id.* at 65.
11. *Id*.
12. *Id.*

had been able to freely frequent a town's establishments without any restrictions.

Another significant incident, subtlely mentioned, is a visit from some white P-39 pilots who had traveled with the Tuskegee Airmen. Colonel Davis describes the event as an indication that "a considerable bond existed among those who fly regardless of color or race."[13] Mr. Francis does not expand on this quotation, but in fact it is very significant to his proposition that the Tuskegee Airmen changed a nation. The fact that the bond that existed between airmen didn't necessarily extend beyond the battlefield became an important part of the discussion regarding integration of the Air Force. In fact, there were some who denied the bond existed at all.[14]

The descriptions of the missions flown by the Tuskegee Airmen and the various changes in operating location and alignment cover several chapters. These chapters are full of details of the individual accomplishments of the members of the 99th Fighter Squadron. As part of the chronicle of the Tuskegee Airmen, these details are important, but for the general reader the descriptions are too detailed. The most interesting parts of these chapters are the personal reminiscences of the Airmen. The words of the men themselves give great insight into how they felt about their contributions and the overall situation. It is easy to visualize the speaker excitedly recounting the battle to his squadron mates or in the barbershop several years later.

Things were not always as nice as they were at Fez for the members of the 99th Fighter Squadron. The squadron was attached to the 33rd Fighter Group, commanded by COL William Momyer. Colonel Momyer did not want the 99th attached to his group and was openly critical of the skill of the 99th's pilots. The 99th pilots found themselves in a situation where they were assigned missions where they encountered no enemy pilots, and then were criticized by their commander for failing to gain victories. As a result of COL Momyer's criticism, others began to question the pilot's courage and willingness to fight. Adding to these suspicions

13. *Id.* at 66.
14. *See* General Ira Eaker's quote, *infra* note 23.

was an article that ran in *Time*, alleging the Army was considering disbanding the 99th. These events combined to put the pilots under great strain.

Major (MAJ) George Roberts, commander of the 99th after COL Davis, is quoted as commenting, "[i]t was remarkable that the men kept their morale, being under such a strain because of the civilian attitude."[15] Unfortunately, there is no discussion of what kept these men going. This omission leaves the picture of the dedication and the motivation of the 99th pilots unfinished. Likewise, the leadership styles of COL Davis and MAJ Roberts are not discussed. This is also a significant omission because COL Davis and MAJ Roberts were both important members of the Tuskegee Airmen, and arguably, had a major impact on the morale and motivation of the rest of the 99th pilots. Mr. Francis notes in the book's references that he conducted a personal interview with COL Davis[16] in preparation for the book. Insight into COL Davis's leadership style, theories, and practices would be a valuable tool for other leaders who find themselves in situations where they face declining morale and seemingly impossible odds.

Whatever kept the men of the 99th motivated, they were ultimately successful engaging enemy pilots and performing close air support for bombing missions. The 99th made successful contributions throughout the remainder of the European campaigns, resulting in medals for many of the pilots.[17]

Meanwhile, there were problems facing another African-American combat unit, the 477th Bombardment Group. The difficulties were related to racial problems existing at home. Although the 477th was never sent to combat duty in the Pacific, it played a significant role in a most significant battle, the battle against the segregation policies of the armed forces.

The men who sacrificed for their country returned to a country where they weren't allowed to frequent the officer's club. Mr. Francis quotes Lieutenant Colonel (LTC) Willie Ashley, who eloquently summarized the situation:

> When we returned to the States with our chests full of ribbons, we were very proud of what we had done for our country and we

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15. FRANCIS, *supra* note 1, at 89.

16. *Id.* at 393 n.2 (at the time of the interview he was General Davis).

17. *Id.* at 399-401 (listing the names of pilots awarded the Distinguished Flying Cross).

> hoped others would be equally proud of us. But when we went into an officers club, we were marched through the kitchen, out the back door and told not to return. We were deeply hurt. We learned that we had helped to free everybody but ourselves.[18]

In his discussion of the difficulties faced by the 477th Bombardment Group, Mr. Francis recalls the history of the African-American pilot training program. Much of the information is repetitive of the materials presented earlier in the book, leading to confusion for the reader; however, the author specifically discusses the 477th in relation to the initial qualifications of the African-American bombardier candidates and the belief that many of the candidates were not as qualified as white candidates. Although much of the book does not compare white and black units, this section makes such a comparison, but without supporting some of the foundational materials. The fact that stanine scores required for acceptance into the training program were lowered for African-American candidates became a significant argument against integration; however, Mr. Francis does not explore the educational backgrounds of the different candidates, the tests that resulted in these scores, or the overall performance of the African-American candidates. This kind of information is important to allow the reader to form an opinion as to the relevance of the lowering of the stanine scores and to evaluate whether the arguments against integration were based on legitimate complaints or rhetoric.

The discussion of the incident at Freemen Field supports the book title's assertion that the Tuskegee Airmen changed a nation. This section describes the bold actions taken by several officers assigned to the 477th Bombardment Group to challenge the official practices of refusing to allow the African-American officers to use the same recreation facilities as the white officers. The refusal of these officers to follow an order to leave the white officer's club led to their arrest and, ultimately, high-level inquiries into the propriety of "separate but equal" facilities.[19] The confrontation also led to public pressure on the War Department to settle the issue of whether to allow a policy of officially separating the races. Arguably, this incident brought to the forefront the inequity in the Army Air Corps' treat-

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18. *Id.* at 204.

19. After a report by the Inspector General, the McCloy Committee at the War Department decided that existing regulations did not permit the practice of having separate recreational facilities. *Id.* at 245.

ment of African-American service members and led to President Truman's decision to fully integrate the armed forces.

Mr. Francis does a good job of laying out the facts surrounding the situation. In this case, the lack of personal commentary is very effective because the facts speak for themselves. For example, Mr. Francis details General Frank O. Hunter's response to the confrontation at the Selfridge Field officers' club. General Hunter was the Commanding General, First Air Force, and he wholeheartedly supported the segregated facilities. General Hunter's stance was clear: "there will be no race problems here, for I will not tolerate any mixing of the races and anyone who protests will be classed as an agitator, sought out, and dealt with accordingly."[20] Mr. Francis did not need to add anything; General Hunter's comments succinctly summarized the atmosphere at that time.

In the chapter titled "Integrating the Air Forces,"[21] Mr. Francis details the turmoil that ensued following the end of the war in the Pacific. The Air Corps was faced with the issue of what to do with the African-American troops. Mr. Francis straightforwardly presents the various arguments that were championed by many of the senior members of the Air Corps regarding the future utilization of African-American air and ground crews. Once again, there is no need for commentary during the recounting of the arguments, for they themselves speak volumes about the attitudes prevalent at the time. For example, Army General Daniel Noce is quoted expressing a widely held belief:

> For the present and foreseeable future, social intermingling of Negros and whites is not feasible. It is forbidden by law in some parts of the country and not practiced by the great majority of the people in the remainder of the country . . . . It would be a mistake for the Army to attempt to lead the nation in such a reform as social intermingling of the races.[22]

This chapter also documents the courageous and farsighted beliefs of COL Parrish, commander of Tuskegee Army Air Field. Colonel Parrish was a significant and positive influence on the eventual decision to integrate the Air Force. Colonel Parrish was one of the only white men to publicly give credit to the bravery and dedication of the airmen.[23] His

20. *Id.* at 235.
21. *Id.* ch. 21.
22. *Id.* at 262-63.

contribution to the debate was significant and, arguably, as important to the decision to integrate as the individual airmen's flying achievements or willingness to take a stand against unfair policies. The reader is left to decide which weighed more heavily in the final decision.

The Tuskegee Airmen did not endeavor to forever change the nation; rather, they wanted to "learn to fly as Army Air Corps pilots, fight for our country and survive."[24] They did that, and more. Even with its shortcomings, *The Tuskegee Airmen* is an important story, which deserves to be told.

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23. Unlike most other commanders evaluating the performance of the black unit, COL Parrish wrote:

> Either the Constitution and the laws must be changed or we must make some adjustment rather than defensive bewildered evasions, at least where the officers are concerned. Negro officers should be assigned according to qualifications, or dismissed. They cannot forever be isolated so that they will always be non-existent at meal time or at night. . . . The more rapidly officers in the Air Corps learn to accept these practical matters, as many of us have learned already, the better the position of everyone concerned. The answer is wider distribution, rather than greater concentration of Negro units, officers and trainees.

Id. at 259. Among the commanders who openly criticized the African-American pilots and supported continued integration was General Ira Eaker. Even though COL Davis and the pilots of the 99th had flown to carry out General Eaker's close support missions, General Eaker "refused to accept black pilots on an equal basis, contending that blacks and whites 'do not do their best work when so integrated.'" *Id.* at 261.

24. *Id.* at 290 (quoting LTC Edward C. Gleed).

TIDES OF WAR[1]

REVIEWED BY MAJOR ALEX G. PETERSON[2]

> *When the shadows began to lengthen, the Spartan Corps of Peers moved out for home. . . . They were eight thousand, all in scarlet, spears at the slope . . . . A sound broke from Alcibiades. When I turned, his brow stood flushed; tears pooled in the well of his eyes. . . . He was moved, as we all, by this splendor of the enemy's discipline and will. "Magnificent-looking bastards, aren't they?"*[3]

A biographical fiction of Alcibiades, an Athenian general in the Peloponnesian War, Steven Pressfield's *Tides of War* expands on Thucydides' historical documentary of the cataclysmic conflict between the two Greek city-states of Athens and Sparta. To Pressfield's credit, the book describes the Peloponnesian War in a way that is easier and more entertaining to read than Thucydides' original masterpiece.

Tides of War is accurate enough to give the novice military reader a basic understanding of the Peloponnesian War. It relates the conflict from the perspective of both an Athenian general and an infantryman. While charting the historic war, the book explores the political and sociological machinations surrounding the event and the role of one of its central figures, Alcibiades. Using this format, it speculates about the nature of the characters central to the conflict. In addition, the book explores the grinding nature of ancient Greek warfare. It uses the foot soldier's view to describe the harrowing battles, victory lost, survival enjoyed, decadence of camp life, and impact of political decisions on soldiers' lives. Besides these descriptions, the book compares and contrasts two fundamentally different cultural paradigms, Athens and Sparta. Finally, it provides interesting illustrations of charismatic leadership in a variety of settings. With

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1. STEVEN PRESSFIELD, TIDES OF WAR, A NOVEL OF ALCIBIADES AND THE PELOPONNESIAN WAR (2000).

2. United States Marine Corps. Written while assigned as a student, 49th Judge Advocate Officer's Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. PRESSFIELD, *supra* note 1, at 100-01.

dramatic writing and a flair for details, Pressfield's biographical fiction is an entertaining novel for military readers.

To describe the conflict, Pressfield uses a unique manner of storytelling, a Russian nestling doll approach to the narrators. Although confusing, the flexibility of this approach helps drive the story. The ultimate narrator is an anonymous Athenian citizen whose grandfather, Jason, has recently passed away. Before his death, Jason recounts this story to his unidentified grandson. A friend of Socrates, Jason was visiting the scholar in prison. One day, Jason is called to the cell of another death row inmate, Polemides. Polemides alleges he has been falsely convicted of a crime and requests that Jason, as a prominent Athenian citizen, speak for him. Jason agrees to listen to Polemides' story.

Polemides alleges the real reason for his unjust conviction is political vengeance for his role as the assassin of the famous Athenian general Alcibiades. Polemides narrates most of the tale, except for those events where he was not present. In those cases, Jason objectively interjects, filling in the holes. Jason's interjections provide segues and background that help tie together the disparate tales of Polemides. While this is a confusing way to write a book, it mostly works. The publisher eases this jumping narrator technique by printing Polemides' story in plain text and Jason's in italicized text. Although jarring, the book successfully describes the entire conflict and its central figures in this way.

In describing the conflict, Jason initially provides the social context and general time frame for the story.[4] He outlines the conflicting power struggles, the long night debates of policy, the unending politicization of war, and the changing support of the democratic politic. With the social context of the conflict described, the reader better understands the importance of the roles of various characters, the alliances among city-states, and ultimately the outcome of the war.

The story begins with the start of the Peloponnesian War in 431 B.C. and follows its twenty-seven year history. The book draws heavily from early Greek scholars, in particular Thucydides.[5] Historically, Athens had built her empire on naval power. The Aegean Sea and nearby Mediterranean waters were under her control. Fearful of Athens' continued and unchecked growth, Sparta and her allies, the Peloponnesian League,

4. *Id.* at 39-40.
5. *Id.* at 427.

sought to restrain her growth. The Spartans relied on land armies. Throughout the war, alliances were easily made and broken. City-states changed sides depending on which armies stood outside their gates. Sparta controlled the land, but Athens controlled the seas. With the support of Persian gold and the Persian navy, the Spartans finally forced the surrender of Athens in 404 B.C.[6]

The book also describes Alcibiades and his role in the Athenian citizenship-driven democracy. The shifting policies and political rivalries constantly influenced the war effort. The book suggests how this led to the eventual demise of Athens and the central character, Alcibiades. Moving into fiction, the book theorizes on the direct impact of Alcibiades on Athenian history. Fictionally, Alcibiades becomes the central figure in all the momentous events of this version of the Peloponnesian War.

With Alcibiades occupying the central role, the book describes events and debates the propriety of the courses of action taken in the war. It provides a satisfactory description of both the larger historical event and the blow-by-blow realism of ancient Greek combat by relying on historical sources such as Thucydides, Aristophanes, and modern scholarship.[7] The book does not alter these facts, but rather illuminates them with enlightened speculation. Suggesting the speeches, dialogues, and relationships surrounding the conflict, the book fills in the details with its central character, Alcibiades. By extrapolating insights into his character, the book creates a fictionalized biography of this enigmatic Athenian general. Like Shakespeare's Caesar, the person is known, but the details and individual passions and dramas can only be reconstructed fictionally.

Using a diverse cast of characters, *Tides of War* revolves around Alcibiades' accomplishments and failures, and it explores what drove him to act as he did. For example, in writing letters to politically powerful Athenians in support of his cause, Alcibiades describes the importance of his vision of the political course of Athens.[8] Alcibiades' vision is a self-created goddess called Necessity.[9] His arguments and speeches in support of this vision may remind readers of the "Manifest Destiny" that once guided U.S. foreign policy. Whether debating the Sicilian expedition[10] or

6. *Id.*
7. *Id.*
8. *Id.* at 294-95.
9. *Id.* at 32.
10. *Id.* at 116-20.

the war in Persia,[11] this vision of Necessity leads Alcibiades to become the pivotal figure in every major event of the war.

Pressfield's portrayal, however, likely gives too much credit for the conflict to one man. A historically documented figure, Alcibiades was a kinsman of Pericles and student of Socrates. Described as a handsome and brilliant man, he envisioned a world dominated by Athenian democracy. As a commanding general, he was never beaten; as a politician, however, he could never consolidate his rule. Historically, Alcibiades was an important figure and most other documentaries of the conflict portray him as such. In Thucydides' work, Alcibiades is the most often mentioned commander.[12] It is debatable, however, whether he is the pivotal figure around which Athens' success or failure in the war rested. What drove Alcibiades is ultimately irresolvable and lost in time. This book's speculation, however, makes a convincing argument of what might have driven him.

In addition to describing the Peloponnesian War and exploring the character of Alcibiades, Pressfield describes ancient Greek warfare through Polemides. A fictional Athenian marine captain, Polemides is called to war at the beginning of the conflict. He accompanies Alcibiades in a variety of roles, including fellow campaigner, confidant, bodyguard, and finally as his assassin. Pressfield weaves the biography, describing the significant events, speeches, and scenes. Using colorful language, he also brings alive the closed masses and desperate nature of Greek phalanx fighting: the grinding and relentlessness of a heavy infantry assault with nine-foot spears, interlocking shields, and packed formations of men.

> The enemy was massed in uncountable numbers. Our ranks closed; the armies crashed together. A melee ensued that could be given the name of battle by its scale only. No one could swing a sword; such was the press of bodies. The nine-foot spear was useless. One dropped it where he stood, fighting instead with the shield as a weapon, struggling simply to take your man's feet out or stick him Spartan-style with the short thrust and draw. Any part of the body that bore armor became a weapon. One fought with his knees, driving them into his man's testicles, with elbows fired at the throat and temple, and heels against those fallen on the earth. In the melee, a man seized the rim of the enemy's

11. *Id.* at 269-70.

12. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Penguin Books ed. 1972) (431 B.C.), *available at* http://classics.mit.edu/Thucydides/pelopwar.html.

> shield and pulled it down with all his weight. You clawed at a man's eyes, spit in his face if you could summon spit, and bit at him with your teeth.[13]

Through Polemides, Pressfield provides a "soldier in the trenches" view of the ancient Greek way of war. Many readers will find this aspect of the story most gripping.

Offering a description of historical characters, as well as providing a case study of this momentous event and ancient Greek warfare, the book also contrasts the dichotomy of two different cultural paradigms and politics. Athens and Sparta not only were opposing city-states, but also subscribed to opposing views of human character. This dichotomy, mirrored as recently as our own Cold War, is played out in the storyline. Perhaps as a consequence of using an assassin as a narrator, the book refreshingly does not take a side in the debate. Rather, this is left to the readers to decide.

Representing Athens is, of course, Alcibiades. Athens, the progenitor of modern democracy, is exemplified by its form of government, and also by the nature of the people who chose that government. As an Athenian politician describes them, the Athenians: "dream of what will be and disdain what is. You define yourselves not as who you are, but as who you may become, and hasten over oceans to this shore you can never reach."[14] Readers may find a resonance to our modern vision of the American dream, where every man has a right to become all they can.

Similarly, the book describes the philosophical underpinnings of Sparta society. Its warrior ethos and utilitarian lifestyle is best described by the very adjective that its name has come to symbolize—spartan. The Spartan general Lysander conveys this view to his men:

> Our race does not presume to dictate to God, but seeks to discover His will and adhere to it. Our ideal man is pious, modest, self-effacing; our ideal polity harmonious, uniform, communal. Those qualities most pleasing to heaven, we believe, are courage to endure and contempt for death. This renders our race peerless in land battle, for in infantry warfare to hold one's ground is all.

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13. PRESSFIELD, *supra* note 1, at 177.
14. *Id.* at 127.

> We are not individualist because to us such self-attention constitutes pride.[15]

The historical accuracy of these two cultural portraits is ample. Providing settings and scenes which favor one form over the other, the book counterpoises these two views in debates and battles. Although Sparta eventually wins the war, the reader is left to decide which course is better, individual freedom or community harmony.

Finally, *Tides of War* provides glimpses of charismatic leadership in the unique setting of Ancient Greece. Throughout, the book portrays leadership affecting the outcome of battles, debates, and political decisions. Examples include endurance and calmness in battle, such as Polemides at the battle of Syracuse,[16] or Lysander during the battle of Ephesus.[17] Other examples of leadership include the description of Alcibiades' preparation of the Greek fleet for upcoming sea battles[18] and his role in pursuing the war in Persia.[19] These examples effectively portray the leadership traits of the book's characters, and Alcibiades in particular.

For example, Pressfield uses the Spartan general Endius to suggest that Alcibiades leads not out of a sense of leadership, but rather for the political power that comes from assuming the leadership role. This contrasts sharply with Alcibiades' own view of leadership as "[o]ne who acts not for himself, but for his city."[20] These leadership examples and discussions help propel the story and, generally, they will be familiar to most military readers. Alhough the unique settings provide a fresh perspective to an illusive topic, still the novel should not be confused with a leadership guidebook. Exploring leadership techniques is merely a collateral effect of the primary purpose of telling the story of one of Athens' generals. The charismatic leadership of Alcibiades and others, like the vivid descriptions of the battles, are simply refreshing by-products of the story.

To its credit, *Tides of War* covers an expansive historical period, the Peloponnesian War, which lasted almost thirty years. As readers of Thucydides' saga know, it was not always a dramatic and stirring event. In addition, many of the historic details are missing, and the personalities of the

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15. *Id.* at 333.
16. *Id.* at 175-76.
17. *Id.* at 339.
18. *Id.* at 258.
19. *Id.* at 253-55.
20. *Id.* at 31-32.

principal players in the conflict are sketchy. Pressfield's historical fiction helps to fill this void. The book follows Alcibiades through the entire course of the war from the early battles at Potidaea in Macedonia, to the fall and surrender of Athens, to his death in Persia. Rather than providing a Thucydidian historical chronology, however, Pressfield attempts to provide additional depth through insight gained from the characters that played key roles in the conflict.

The book lives up to both obligations of historical fiction: first, the story should be as accurate as possible; second, it should fill the gaps of history with reasonable speculation. *Tides of War* takes a real character as complex and as contradictory as Alcibiades, and by extrapolation provides satisfying insight into the man that historians have sparsely described. In doing so, the book provides an accurate picture of a pivotal historical event. It uses facts, people, battles and history to set the stage. It then explores the event from a broad-sweeping view, where battles are parts of a larger socio-political struggle for control. Finally, it moves to an up-close, trenches view of the savagery of ancient Greek combat. The book relies on sources such as Thucydides, Aristophanes, and other ancient Greek writers. It also relies on modern scholarship, to include local Greek sources, to shed light on the conflict and its characters.

Starting with facts, Pressfield then postulates to fiction. Switching between real and imaginary characters, events, circumstances, and dialogue, he seeks to present a more complete picture of an enigmatic man and a pivotal war whose details and nuances are lost to time. *Tides of War* creates a dramatic fictional biography of a central character in this historic conflict. Additionally, the story provides a contrasting view of two stark philosophies, with Athenian democracy counterpoised against Spartan utilitarianism, in a battle over who would drive the destiny of Greece and the Aegean Sea basin. Finally, the book offers glimpses of military leadership, both in battle and in the corridors of politics.

The starting point for any serious study of the Peloponnesian War is Thucydides' historical documentary. Even Pressfield acknowledges this. *Tides of War*, however, provides some color and life to Thucydides' work. Entertaining and refreshing, this book is for the military reader that needs a break from the serious study of military history, or possibly for the military reader that is on temporary duty and needs something to pass the time in the airport lounge instead of reading yet another airline magazine.

GIDEON'S SPIES[1]

REVIEWED BY MAJOR EVAN M. STONE[2]

And I will give unto thee, and to thy seed after thee . . . all the land of Canaan for an everlasting possession.[3]

The world community and the media singularly harangue the state of Israel over her right to exist and her land claim, despite Israel's biblical title to both. They uniquely apply a "double standard" to everything Israel does or fails to do as compared to other nation states. Gordan Thomas joins the double-standard bandwagon in his book, *Gideon's Spies: The Secret History of the Mossad*. Thomas endeavors to reveal the "secret" history of the Mossad—the Israeli foreign intelligence service—but fails. Instead, he reveals his distaste for Israel and for Jews.

Thomas bashes Israel and Jews from start to finish under the pretext of criticizing the Mossad. His revisionist history misleads the reader into unwarranted sympathy for Arabs and unjustified contempt for Jews. For example, Thomas regurgitates sensational events such as the death of Princess Diana and the Rabin assassination, fixing blame on the Mossad for both. In his thinly disguised criticism of the Mossad, Thomas demonstrates his bias against Israel and revives centuries-old anti-Semitic canards.[4] Thomas begrudgingly acknowledges unquestionable Mossad accomplishments, such as the capture of Adolf Eichmann and intelligence support to the Entebbe hostage rescue, but in his re-telling of events, Thomas smears the Mossad, Israel, and the Jewish people.

The author's version of the Arab-Israeli conflict in the Middle-East contains startling omissions. Thomas cites a 1929 stone and glass throwing attack by Arabs on a group of Jews praying at the "Wailing Wall" as the beginning of the conflict.[5] He also claims that the Jewish leaders organized the embryo of what would become the Mossad some twenty-two years later in response to this incident.[6] Moreover, in minimizing the

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1. GORDAN THOMAS, GIDEON'S SPIES: THE SECRET HISTORY OF THE MOSSAD (1999).

2. Judge Advocate General's Corps, U.S. Army. Written while assigned as a student in the 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

3. *Bereshit* 17:8 (commonly translated as *Genesis* 17:8).

attack, the author emphasizes the lack of Jewish deaths and further suggests the attack was justified:

> To Arabs who lived there and could trace their ancestry back to the Prophet, this was an outrage. Land that they had farmed for many centuries would be threatened, perhaps even taken from them by the Zionists and their British protectors, who had arrived at the end of the Great War to place Palestine under a Mandate.[7]

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4. *See generally* JOSEPH TELUSHKIN & DENNIS PRAGER, WHY THE JEWS? THE REASON FOR ANTISEMETISM (1983). Note that these and other authors prefer the term "antisemitism," owing to the origins of the hyphenated "anti-Semitism."

> The term anti-Semitism was coined in 1879 by Wilheim Marr, an anti-Jewish spokesman in Germany, as a euphemistic substitute for *judenhass*, Jew-hatred. The term is a misnomer, of course, since it has nothing to do with Semites. Therefore, in order to avoid any confusion we have adopted the approach of the distinguished historian James Parkes, who has suggested that antisemitism be written as one word.

*Id.*at 199 n.1. [*Editor's Note:* The *Military Law Review* uses the term "anti-Semitic" in following the modern convention of an overwhelming majority of law reviews. *See, e.g.*, Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular KulturKampf*, 15 EMORY INT'L L. REV. 1 (2001).]

5. THOMAS, *supra* note 1, at 33. *See generally* RABBI JOSEPH TELUSHKIN, JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY 312-13 (1991) (noting that the term "Wailing Wall" is considered by some to be an undignified mockery of the sounds of Jews praying at the destroyed remains of their most holy site).

6. Thomas, *supra* note 1, at 34-35.

7. THOMAS, *supra* note 1, at 34. *See generally* A HISTORICAL ATLAS OF THE JEWISH PEOPLE FROM THE TIME OF THE PATRIARCHS TO THE PRESENT 74 (Eli Barnavi ed., 1992) (explaining that "Prophet" refers to Mohammed, founder of Islam, who lived circa 614 Common Era (C.E.)).

This implies that the Jews were invaders in 1929, but omits any reference to *their* 3,500-year history in the land.[8]

Thomas also omits acts of violence by Arabs during the same period, including one of the most brutal slaughters of Jews in the Twentieth Century. Also in 1929, the Mufti Haj Amin El-Husseini, then leader of the Arabs living in the British-controlled Mandate for Palestine, ordered riots against Jews to protest the British support for a Jewish homeland in the Mandate.[9] These riots included the Hebron Massacre, where sixty-seven Jews were murdered, and sixty were wounded.[10] During this incident, rioters:

> cut the heads off infants and hand[ed] them to their mothers before killing them too. They chopped off limbs and gouge[d] eyes. . . . A young woman [was] raped by fifteen rioters in the presence of her parents, who [were] then killed; a teenage girl [was] stripped naked and disemboweled. Arabs slash[ed a boy's] flesh, cut after cut, for a quarter of an hour, shouting: "Does it hurt, Jew?!"[11]

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8. The 3,500 year history of Jews in *Eretz Israel* (Land of Israel) includes: Biblical Period (17th-6th Centuries Before Common Era (B.C.E.)); Persian and Hellenistic Rule (536-142 B.C.E.); Roman Rule (63 B.C.E.-313 C.E.); Byzantine Rule (331-636 C.E.); Arab Rule (636-1099 C.E.); Crusader Rule (1099-1291 C.E.); Mamluk Rule (1291-1516 C.E.); Ottoman Rule (1517-1917 C.E.); and British Rule (1918-1948 C.E.). This history culminated with the third sovereign period known as the modern State of Israel. *See* Israel Ministry of Foreign Affairs, *Facts About Israel*, *at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00080 (last visited Sept. 7, 2001).

9. TELUSHKIN & PRAGER, *supra* note 4, at 123. This "British support" for the Jewish homeland was never intended to come at the expense of indigenous Arabs. Letter from Lord Arthur James Balfour, British Foreign Minister, to Lord Rothschild (Nov. 2, 1917), *reprinted in* WALTER LAQUEUR & BARRY RUBIN, THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT 17 (4th ed. 1984). "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people . . . it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine." *Id.* The League of Nations voted to give Britain the Mandate for Palestine on July 24, 1922, and the preamble of the British Mandate included similar language calling for preservation of Arab communities. *Id.* at 37. Further, Jewish-British relations were not always friendly on the ground. *See* TELUSHKIN, *supra* note 5, at 277-79 (explaining that British-Jewish relations in the British Mandate included the mutual hangings and floggings of personnel, the assassination of Lord Moyne in Egypt, and the bombing of the King David hotel killing ninety-six Britons).

10. TELUSHKIN, *supra* note 5, at 286.

11. Gerson Nadivy, *Hebron Baby*, NEFESH MAGAZINE, 5761-2000, at 23.

In failing even to mention such gruesome acts, the author misleadingly portrays the Arabs as sympathetic victims of Jewish aggression.[12]

Thomas's selective presentation of history paints a stilted picture of the Middle-East conflict. By omitting the historical Jewish presence in the land, he implies that the Jews are illegitimate invaders. By omitting the Hebron Massacre, and instead citing a relatively harmless stone-throwing incident of the very same year, he misleads readers unfamiliar with Middle-East history. In misrepresenting the historical antecedents, Thomas conveys to an unsuspecting reader that the Jewish quest for a homeland is without precedent, and the Israeli need for an aggressive intelligence service is an overreaction.

Thomas's assertions regarding the Mossad's responsibility for Princess Diana's death reads more like a story belonging in a British tabloid than a historical work found on a bookshelf. Thomas argues the Mossad caused the deaths of Diana, Princess of Wales, and her lover, Dodi Al Fayed. The Mossad allegedly recruited Henri Paul, the security chief for the Hotel Ritz in Paris. According to Thomas, the Mossad used blackmail to coerce Paul into passing on information about Arab elites frequenting the hotel; Mohamed Al Fayed, Dodi's father, owned the hotel. Thomas ultimately asserts that the Mossad's blackmail pressure caused Henri Paul's excessive alcohol and drug use the night he wrecked the hotel's Mercedes-Benz limousine, resulting in the deaths of Paul, the Princess, and Dodi Fayed.[13]

Thomas's sources for the Princess Diana connection are suspect, as he relies on two former intelligence officers with checkered pasts. The first is Ari Ben-Menashe, a former Mossad agent. *Newsweek*, the *Jerusalem Post*, and *ABC News* have all challenged Ben-Menashe's credibility.[14] The second officer is Richard Tomlinson, formerly of British Intelligence,

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12. Some authors suggest the 1929 Hebron Massacre reflects historical Arab animosity toward Jews and Christians in their midst. *See* TELUSHKIN & PRAGER, *supra* note 4, at 116 (explaining that under Muslim law, the Pact of Umar permits tolerance of Jews and Christians only if they publicly show their subservience to Muslims at all times). The authors analogize the law to "the behavior once expected of Blacks in the American South." *Id.*

13. *See* THOMAS, *supra* note 1, ch. 1.

14. Yated Ne'man & D.D. Levitin, *Seymour Hersh Has Record of False Claims, Bad Journalism* (Jan. 22, 1999) (discussing how the *Jerusalem Post*, *Newsweek*, and *ABC News* all referred to Ben-Menashe as a notorious and chronic liar), *at* http://www.jonathanpollard.org (Justice for Jonathan Pollard Web site).

whose book about British spy craft led to his conviction for revealing state secrets.[15] In addition to these questionable sources, Thomas relies most heavily on Mohamed Al Fayed himself. Al Fayed contends the British Crown wanted to kill his son and the Princess before they were married.[16] Al Fayed further claims the United States, Britain, and the Mossad all conspired to that end.[17]

Author credibility is a crucial factor in evaluating the value of any book about a secret intelligence organization. Thomas's historical revisionism and sensationalism cast doubt upon his authenticity from the beginning. *Gideon's Spies: The Secret History of the Mossad* lacks even a single footnote to support the book's premise, and Thomas refuses to name some of his sources for the book. Even Thomas apparently recognized this weakness, because he spends an inordinate amount of time in the middle of the book attempting to bolster his credibility by detailing his credentials. He claims twenty-five years of writing in the intelligence field, family connections to the intelligence community, and access to former directors of the CIA and Mossad as proof of his credibility. Thomas even notes at the end of his book that "I came to the subject of the Mossad with no baggage."[18] Since the book lacks corroborating authority, his assertions ultimately turn on his own believability. His credibility, however, wanes with every turn of the page.

Thomas surpasses all credulity after suggesting the Mossad murdered former Israeli Prime Minister Yitzkak Rabin. Thomas adopts a thesis proposed by Barry Chamish, whom Thomas calls "a dedicated Israeli investigative reporter."[19] Chamish claims that Rabin had planned a fake assassination as a publicity stunt, but was double-crossed by the Mossad. According to Chamish, Rabin's own bodyguard shot the Prime Minister twice during the ride to the hospital.[20] Thomas refers tangentially to a Chamish Web site, which allegedly contains the proof. There are indeed

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15. Steve Gold, *Ex-Spy Triggers Internet Battle of Wits With British Govt*., NEWSBYTES (May 14, 1999), *at* http://www.inet-one.com/cypherpunks/dir.1999.05.10-1999.05.16/msg00247.html (describing how Tomlinson was fired by British Intelligence, prosecuted for revealing state secrets in his book, and served one year in prison).

16. THOMAS, *supra* note 1, at 13.

17. *Id.*; *see also* David Ho, *U.S. to Be Sued in Diana Case*, ASSOCIATED PRESS (Aug. 31, 2000) (reporting that Mohamed Al Fayed filed suit in federal court seeking to gain access to U.S. intelligence information about the deaths of Princess Diana and his son).

18. THOMAS, *supra* note 1, at 361.

19. *Id.* at 138.

20. *Id.*

several conspiracy and UFO websites featuring Chamish and his articles, but none offer proof for the Rabin assassination theory.[21]

In addition to such unsupported theories, Thomas weaves disturbing anti-Jewish rhetoric into his anecdotal storytelling. In one blatant example, he compares Israel to Nazi Germany with regard to the Palestinian *intifada* in the Israeli-administered territories. Thomas describes the Israeli-Palestinian relationship as "reminiscent of the resistance in the last days of the German occupation of France in World War II."[22] In other words, Israel—like Nazi Germany—occupies and oppresses another people in their own country.[23] Thomas argues: "Zionist Israel ha[s] little wish to accommodate itself with Arabs: Everything about [Arab] religion and culture was seen by Zionists as inferior to their own beliefs and history . . . . [T]hey could not accept that . . . both races would live together."[24] Thomas further accuses Israel, like Nazi Germany, of preparing for genocide, and goes so far as to claim that Israel plans to attack Arabs using special

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21. *See, e.g.*, Great Dreams, *UFO Wave in Israel*, *at* http://www.greatdreams.com/chamish.htm (last visited Sept. 7, 2001) (describing Barry Chamish as the "leading UFO researcher in Israel"); Barry Chamish Archives, *Why Rabin Was Murdered*, *at* http://members.tripod.com/~VaAm/Jun2498.html (last visited Sept. 7, 2001) (allegedly written by Chamish and refusing to divulge who killed Rabin).

22. THOMAS, *supra* note 1, at 207.

23. Some commentators have argued that this notion is also regularly reinforced in American media. *See* WILLIAM NICHOLLS, CHRISTIAN ANTISEMETISM: A HISTORY OF HATE, 397-98 (1993). Nicholls explains that even the words commonly used by the media to characterize the territories are loaded with anti-Israeli propaganda.

> The perception of the viewer is automatically biased by terms such as "the West Bank"—Jordan's name for the territories in Western Palestine it seized in 1948, previously known as Judea and Samaria; "the occupied territories seized by Israel in 1967"—for the disputed territories that came under Israeli administration as a result of victory in a defensive war, when Jordan attacked Israel in 1967; "Arab East Jerusalem" for an indeterminate area, including the Old City, which has had a Jewish majority for over a century, together with almost wholly Jewish suburbs developed since 1967 . . . .

Id. *See also* Committee for Accuracy in Middle-East Reporting in America, *CAMERA Media Report*, *at* http://world.std.com/~camera (last visited Sept. 7, 2001) (cataloging anti-Israel reporting from such news agencies as CNN, NPR, ABC, NBC, CBS, PBS, and others).

24. THOMAS, *supra* note 1, at 324.

biological weapons that will discriminate and target only the Arab genetic makeup.[25]

Thomas's comparison to Nazi Germany is not only obscene; it is misplaced. He again fails to address history on several levels. He fails to mention that Mufti Haj Amin El-Hussein, de facto Arab leader in the British-controlled Mandate of Palestine, collaborated with the Nazis during World War II.[26] Moreover, after the war, a majority of Arabs living in the British-controlled Mandate rejected the 1947 United Nations Partition Plan, which would have created two sovereign states—one Jewish and one Arab—in the Mandate.[27] Within twenty-four hours of the end of the British Mandate, the mechanized armies of five Arab nations attacked the newly created Israeli state.[28] Thus, Thomas's historical revisionism—equating Israel with the tactics and aggression of Nazi Germany—cannot withstand scrutiny.

Thomas also betrays his misunderstanding of the Hebrew Bible, which further detracts from a book supposedly about the intelligence service of the Jewish State. He titles the book *Gideon's Spies* and explains, "Gideon was the Old Testament hero who saved Israel against superior enemy forces because he had better intelligence."[29] Thomas apparently analogizes ancient Israel to modern Israel, vastly outnumbered, but victorious; however, the book's title is misplaced, because a plain reading of the

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25. *Id.*

26. "[Mufti Haj Amin El-Hussein] met Hitler, Ribbentrop and other Nazi leaders on various occasions [as late as November 28, 1941] and attempted to coordinate Nazi and Arab policies in the Middle East." XIII DOCUMENTS ON GERMAN FOREIGN POLICY, 1918-1945, SERIES D 881 (1964) (referring to Record of the Conversation Between the Fuhrer and the Grand Mufti of Jerusalem on November 28, 1941, in the Presence of Reich Foreign Minister and Minister Grobba in Berlin), *reprinted in* LAQUEUR & RUBIN, *supra* note 9, at 79-84. *See also* PALESTINE RESEARCH CENTRE, BASIC POLITICAL DOCUMENTS OF THE ARMED PALESTINE RESISTANCE MOVEMENT 137-41 (1969) (noting that Articles 8-11 and 19-23 of the Palestinian Liberation Organization Charter call for an armed commando struggle against Zionism with a goal of "total elimination of Israel," a concept with overtones from Nazi Germany, as the only solution).

27. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11 (1947).

28. LAWRENCE KELEMEN, PERMISSION TO BELIEVE: FOUR RATIONAL APPROACHES TO GOD'S EXISTENCE 78 (3d ed. 1991) (citing PAUL JOHNSON, A HISTORY OF THE JEWS 526-27 (1987) (explaining how, the day after Israel's declaration of independence, the ragged band of Holocaust survivors who populated the new country—numbering fewer than 45,000—defended and beat the combined military forces of Egypt, Syria, Iraq, Lebanon and Transjordan)).

29. Thomas, *supra* note 1, at 75. *See generally* TELUSHKIN, *supra* note 5, at 23 ("[T]he Old Testament . . . is a Christian usage refer[ring] to the Hebrew Bible.").

Gideon account in the Hebrew Bible reveals that his victory came not from superior intelligence, but from his trust in God.[30]

Thomas further reveals his misunderstanding in his "vengeance" exegesis of the Jewish legal concept "eye for an eye." Jews interpret "eye for an eye" as a prohibition on revenge, not a call for revenge.[31] Thomas implies this concept supports the proposition that Jews have been and remain a vengeful people. For example, Thomas argues that such biblical, "eye for an eye" retribution was evident when the Mossad killed practically every Black September terrorist responsible for the 1972 Munich Olympics massacre of eleven Israeli athletes.[32] These killings may have indeed been acts of revenge subject to legitimate legal criticism, but Thomas's biblical linkage unfairly mischaracterizes an entire people and their holy book.

Thomas devotes two entire chapters to Vatican-Israel relations in which he slights Israel, Jews, and the Mossad. Despite legitimate grievances between Jews and the Vatican,[33] Thomas, using his revisionist history approach, attributes the bad relations to a failure of Israel to "restage the trial of Christ . . . revers[ing] the original verdict."[34] Further, he contrasts Israel's so-called "biblical revenge policy," with Pope John Paul II, "whose entire Pontificate [is] rooted in the power of forgiveness."[35] Iron-

30. *See Shoftim* 7:1-8 (commonly translated as *Judges* 7:1-8). The story at issue involves Gideon's initial confrontation with the Midianites. Gideon actually arrived at the pre-battle with very large numbers but was twice told to reduce his numbers lest the people think their victory would come from their own hands and not from divine intervention. *Id.*

31. *See* TELUSHKIN, *supra* note 5, at 500-01. Rabbi Telushkin explains that an "eye for an eye" was in response to various other legal codes of the biblical period that permitted revenge against the innocent, and uncontrolled vengeance. Rather, an "eye for an eye" is a call for proportion—not two eyes for an eye, or a life for an eye. Telushkin relies on *Bava Kamma 84a*, a Talmudic passage wherein the rabbinic authorities interpreted the biblical passage as requiring monetary compensation equivalent to the value of the injury. *Id.*

32. THOMAS, *supra* note 1, at 123. "[The terrorist's] execution would be an act of pure vengeance, the biblical "eye for an eye" principle Israelis liked to believe justified such killings." *Id.*

33. *See, e.g.*, TELUSHKIN & PRAGER, *supra* note 4, at 105 (summarizing about 1,000 years of Church Law, which the authors argue disenfranchised Jews and had parallels in Nazi-era laws against Jews such as book burning, badge wearing, and prohibiting civil service); NICHOLLS, *supra* note 22, at 229, 261, 351 (discussing Church involvement in the Crusades and Spanish Inquisition, its forced conversions of Jews, and its alleged silence during the Holocaust); *Pius IX and John XXIII: The Ultimate Odd Couple*, RESPONSE: SIMON WIESENTHAL CENTER, SNIDER SOCIAL ACTION INSTITUTE, WORLD REPORT 10 (2000) (arguing that the Catholic Church still demonstrates callous disregard for Jews).

34. THOMAS, *supra* note 1, at 232.

ically, Thomas ultimately credits the Mossad with strengthening Vatican-Israel ties by providing Pope John Paul II with information about who ordered his attempted assassination, but not without first resurrecting the "Christ-killer" canard.

Thomas continues his anti-Jewish assault by subtly asserting that every Jew is a potential traitor to his country. He tells the reader how the Mossad has a special recruitment tactic where it makes ethnic and religious appeals to Jews in every country to spy for Israel.[36] These helpers, or *sayanim*, appear throughout the book in various Mossad operations and always seem to be disloyal to their own countries in the process. As if to prove his dual-loyalty charge, Thomas writes a very slanted version of the Jonathan Pollard spy case in which he ultimately implies that every Jew, in every country, is a potential betrayer—a modern "Judas Iscariat."[37]

Thomas resurrects the world "Jewish conspiracy" myth by continually referring to the "powerful Jewish lobby" and to the "Jewish media." He claims that the Mossad manipulates world media through its *sayanim*, who spin stories favorable to Israel.[38] In one example, Thomas blames the Mossad for the lengthy and misguided investigations surrounding the crash of TWA Flight 800 and the Atlanta Olympic Park bombing. He contends the Mossad, through the Jewish media, misdirected investigators by planting stories of Arab involvement.[39] He quotes FBI Chief Investigator, James K. Kallstrom, as commenting: "If there were any way to nail those bastards in Tel Aviv for time wasting, I sure would like to see it happen. We had to check every item they slipped into the media."[40] According to

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35. *Id.*

36. *Id.* at 68.

37. *Id.* at 233. At the same time, Thomas describes an instance where CIA director William Casey genuflected to the Pope, although Thomas fails to raise similar dual loyalty concerns in regards to Mr. Casey. *Id.*

38. *But see* A.P. photo, NEW YORK TIMES, Sept. 29, 2000, at A5 (depicting an Israeli soldier standing over a bloody man, captioned: "An Israeli policeman and a Palestinian on the Temple Mount."). In reality, the bloody man was Tuvia Grossman, a Jewish student from Chicago, who had just been pulled from a taxicab in Jerusalem by a mob of Palestinian Arabs and was then beaten and stabbed. The soldier, contrary to the image conveyed by the photo's caption, was attempting to render first aid. E-mail from Aaron Grossman, M.D. (Tuvia Grossman's father) to the *New York Times* (Sept. 30, 2000) (on file with author).

39. THOMAS, *supra* note 1, at 70-72.

40. *Id.* at 70.

one reviewer, however, Kallstrom vehemently denies making that comment.[41]

According to Thomas, the world Jewish conspiracy includes the United States, and he implies that the Mossad controls the U.S. presidency. He asserts that the Mossad orchestrated the Monica Lewinsky affair and had telephone sex tapes as blackmail against President Clinton.[42] Thomas claims the FBI was powerless to stop the blackmail or to find an alleged Israeli mole high in the Clinton White House because of "the power of the Jewish lobby in Washington and the reluctance of successive administrations to confront it."[43] Unfortunately, Thomas is a century too late. In the late 19th Century, the Russian secret police manufactured their own world Jewish conspiracy theory in a fraudulent document entitled, *Protocols of the Elders of Zion.*[44]

Thomas acknowledges some of the more famous Mossad operations, but usually offers a negative fact or inference as if to prove his "secret history" thesis. For example, when the Mossad successfully obtained a Soviet MiG-21 from a defecting Iraqi pilot in 1966, Thomas is quick to point out that the Iraqi middleman "had Jewish roots."[45] When the Mossad successfully captured Adolf Eichman in 1960 for his crimes of genocide, Thomas highlights the operational bumbling of the agents. "Operation Thunderbolt," the Entebbe hostage rescue, was arguably the most daring strike against international terrorism the world has ever seen.[46] Yet Tho-

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41. Daniel Pipes, *Beyond the Pale*, COMMENTARY MAGAZINE (June 1999) (book review of *Gideon's Spies*) ("The only problem [with the Kallstrom quotation] is that Kallstrom, with whom I have spoken, characterizes this story as 'total nonsense' and categorically denies ever having said any such thing. In fact, he told me, the Israeli's were 'extremely helpful' in the investigation.").

42. THOMAS, *supra* note 1, 108-12.

43. *Id.* at 106.

44. TELUSHKIN, *supra* note 5, at 469-70 ("The most famous antisemitic document in history, *The Protocols of the Elders of Zion,* is a forgery. First circulated by Russian secret police during the late 1800s, it purports to reveal the minutes of a secret meeting of world Jewish leaders conspiring to take over the world."). *See generally* JOSEPH W. BENDERSKY, THE "JEWISH THREAT": ANTI-SEMITIC POLITICS OF THE U.S. ARMY ch. 2 (2000) (asserting that U.S. Army Military Intelligence maintained the legitimacy of the *Protocols* document during the early part of the Twentieth Century).

45. THOMAS, *supra* note 1, at 52. *But see* DAN RAVIV & YOSSI MELMAN, EVERY SPY A PRINCE: A COMPLETE HISTORY OF ISRAEL'S INTELLIGENCE COMMUNITY (1990) 141-42 (describing how an Israeli Mossad agent posing as an American tourist in Baghdad enticed Munir Redfa to Paris and then to Israel where the he agreed to fly the MiG-21 out of Iraq in exchange for money and protection of his family).

46. *See* WILLIAM STEVENSON, 90 MINUTES AT ENTEBBE (1976).

mas mistakenly refers to the rescue as "Operation Thunderball" and presents it as mere military adventurism staged for headlines.[47]

Naturally, one expects to find a dearth of books written on a secret intelligence organization like the Mossad. Therefore, an unsuspecting reader might jump to purchase *Gideon's Spies*, especially after reading Thomas's credentials on the cover. Unfortunately, Thomas used his connections and access to present a slanted anti-Israel thesis in tabloid style that lacks authority to back up his arguments. He misstates history, his sources, and the facts in a failed attempt to tell the secret history of the Mossad. According to Thomas's unproven conclusion, the underlying "secret" is that the Mossad actually controls the world.

Under the guise of simply criticizing Israel, *Gideon's Spies* tells its story by sowing the seeds of anti-Semitism into the soil of the Holy Land. Dr. Martin Luther King's comments over thirty years ago are relevant in summarizing Thomas's disingenuous approach: "When people criticize Zionists, they mean Jews. You're talking anti-Semitism."[48]

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47. THOMAS, *supra* note 1, at 149-50. *But see Operation Johathan: The Rescue at Entebbe*, MIL. REV., July 1982, at 2 (describing the detailed planning, preparations and training within the decision-making process in an interview with the deputy commander of the operation).

48. SEYMOUR M. LIPSET, *The Socialism of Fools—The Left, the Jews and Israel*, ENCOUNTER, Dec. 1969, at 24 (quoting Dr. Martin Luther King).

ARMY RELATIONS WITH CONGRESS: THICK ARMOR, DULL SWORD, SLOW HORSE[1]

REVIEWED BY MAJOR J. BURK VOIGT[2]

> *Thus began the inevitable politicization of the military. With so much responsibility for virtually everything government was expected to do, the military increasingly demanded a larger role in policymaking. But in a democracy policymaking is a task best left to those accountable to the electorate. Nonetheless, well-intentioned military officers, accustomed to the ordered, hierarchical structure of military society, became impatient with the delays and inefficiencies inherent in the democratic process. Consequently, they increasingly sought to avoid it.*[3]

I. The Coup

When Lieutenant Colonel Charles Dunlap penned these words of a fictional prisoner in the year 2012, he was concerned about the seeds that could potentially grow into America's first military coup: increased use of military forces for inherently civil purposes; consolidation of the different services into a single armed force; and isolation of the military from the rest of American society.[4] Dunlap might well have added the direct participation of military leaders in the political process to his list. Stephen Scroggs, in his book, *Army Relations With Congress: Thick Armor, Dull Sword, Slow Horse*, urges such participation by the Army, an Army where the military leadership should circumvent its executive branch, civilian chain of command to privately lobby members of Congress.

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1. STEPHEN K. SCROGGS, ARMY RELATIONS WITH CONGRESS: THICK ARMOR, DULL SWORD, SLOW HORSE (2000).

2. Judge Advocate General's Corps, U.S. Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

3. Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992-93, at 8.

4. *Id.* at 1.

II. The Scenario

In 1994, the U.S. Marine Corps initiated a successful campaign in the halls of Congress for legislation to force the U.S. Army to transfer eighty-four M1A1 tanks to the Marine Corps without reimbursement. The Marine Corps had previously sought the transfer of these tanks within the executive branch and had been turned down by the Administration, the Secretary of Defense and the Joint Chiefs of Staff.[5] Stephen Scroggs,[6] who worked hard as a congressional staff officer to defeat this raid by a sister service, feels that the Army lost this battle, and loses other resource battles daily, because of a cultural trait peculiar to the Army.[7] This cultural trait discourages organizational self-promotion and the concomitant lobbying of Congress for needed resources.[8] He attempts to support this conclusion with a myriad of interviews,[9] all seeming to suggest that the solution to the Army's resource problems is to emulate the other services by having senior Army officers privately lobby members of Congress and their staffs.[10]

III. The Culture

Scroggs establishes his definition of "culture" as "patterned values, beliefs, or attitudes shared and passed to new members of [an] organization or group."[11] This culture becomes an organizational trait that limits the choices a group will consider in dealing with future problems or events.

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5. SCROGGS, *supra* note 1, at 176.

6. Stephen Scroggs retired from the U.S. Army in 1996. His last duty assignment was as a congressional staff officer, an "LL", for the Secretary of the Army Legislative Liaison. He served in this position from 1992 to 1996 in the rank of lieutenant colonel. *Id.* at 267.

7. *Id.* at 112.

8. *Id.* at 111.

9. Scroggs provides numerous quotes from these interviews; however, he rarely identifies the actual interviewee making key comments. This denies the reader the ability to evaluate the weight Scroggs has given to a comment in support of Scroggs' advocated position. In addition to numerous congressional staff members and military legislative assistants, Scroggs catalogs his interviewees as including: among the military—twenty-four Army general officers (thirteen four-star, eight three-star, two two-star, and one one-star generals); five chiefs of staff of the Army going back to 1976; several regional commander in chiefs; former chiefs of Legislative Liaison; Corps commanders; one Marine three-star general officer; and among the civilian leadership—one Secretary of the Army; one Under Secretary of the Army; and one Deputy Assistant Secretary of the Army. *Id.* at 162.

10. *Id.* at 216-19.

11. *Id.* at 112.

Scroggs believes that the Army operates under one particular attitude or trait—the rejection of organizational self-promotion. He stresses that this cultural trait becomes a major liability for the Army when it competes for resources with the other services that thrive on self-promotion.

Organizationally, the Army teaches and breathes coordination—teamwork. The Army's very size, complexity, and broad scope of missions dictates this. Teamwork is the antithesis of self-promotion. A new second lieutenant platoon leader begins his military career learning that he cannot move forward or backward, to his right or to his left, without coordination for necessary support, transportation, and food. He also quickly discovers that failure to coordinate can subject him to friendly as well as hostile fire.[12] This lesson is reinforced at a larger scale by the Army's dependence on the Air Force and the Navy for transportation to the battlefield.[13]

Conversely, the other services' cultures encourage self-promotion.[14] A naval officer focuses on his ship, a self-contained weapons system. As the captain of his ship, he is expected to be independent in his decisions and actions. This is equally true for an Air Force pilot. Moreover, the very existence of the Navy and the Air Force depends on major, self-contained, and expensive weapons systems. This requires these services to justify and sell their programs on Capitol Hill continually .[15]

While similar to the Army in its dependence on others for support and its independence from major weapon systems, the Marine Corps suffers from its own unique cultural trait. Scroggs quotes a description of this trait given by an unidentified senior flag officer, obviously not a Marine.

> Now while Marine leaders have many parallels with Army leaders in combat, they are driven by their fear of institutional relevancy and going out of existence. You must remember they were initially formed to conduct the mission and serve the role of bodyguards to keep Navy Captains alive from their own crew. Their moral capacity to lead in a George Marshall sense of duty runs counter to their self-seeking and promoting frenzy that puts

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12. *Id.* at 133.

13. *Id.* at 136.

14. Scroggs quotes an unidentified general officer's observation: "A Navy Captain or Air Force pilot will eat before their men eat. Self-promotion is expected. An Army officer in a leadership position eats last after all his men have eaten. Self-promotion is not expected or rewarded." *Id.* at 168 n.80.

15. *Id.* at 123-24.

> Marine Corps interests before the nation's interests. Their loyalty to the Corps pervades their every action.[16]

So the Army alone recognizes no need for self-promotion, with its citizen-soldiers rather than the major weapon systems of the Air Force and Navy, and with its lack of the Marine's fear for losing institutional relevancy. Nevertheless, what is a virtue on the battlefield, Scroggs maintains, needs to change in the campaign for resources on Capitol Hill.[17]

IV. Liaising

To overcome the Army's inherent aversion to lobbying, Scroggs follows a subtle stratagem in his presentation. First, he creates a new term to make lobbying more palatable to the Army reader.[18] He calls it "liaising."[19] The focus of this "liaising" activity is the Army's Legislative Liaison Office (LLO) on Capitol Hill. Next, Scroggs attempts to differentiate between public lobbying as virtuous and private lobbying as disdainful.[20] He lumps laudable public relations activities of the Army, such as showcasing its training centers, with the problematic practice of senior Army officers paying informal visits to individual members of Congress to discuss Army needs off-line.[21] Finally, he tries to rationalize "liaising" by asserting that Congress's role in the command and leadership of the military is comparable to that of the executive branch.[22]

Each of the armed services has an LLO on Capitol Hill to serve as that service's primary interface with Congress. Benefits of this collocation are numerous. It gives Congress readily available, subject matter experts on military matters.[23] It also provides an additional conduit of communication between the executive branch and Congress for military-related concerns and interests.[24] And, most important, each service represents and supports executive branch defense programs and policies.[25]

The staff of the LLO represents the particular service secretary, who, in turn, represents the Secretary of Defense. All the different service sec-

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16. *Id.* at 135.

17. *Id.* at 113.

18. "For the benefit of the military, and especially the Army audience, this representational lobbying activity will be referred to as 'liaising' and will be differentiated from similar activities of private lobbyists in the nation's capital." *Id.* at 1.

19. "Communicating directly to establish and maintain mutual understanding between an agency and Congress is liaising activity." *Id.* at 2.

retaries and the Secretary of Defense are civilian political appointees. This organizational structure represents our traditional civilian control of the military by officials who are politically accountable.[26]

A dedicated legislative liaison staff for each service obviates the need for the various individual military commands or components to establish their own connection with Capitol Hill. More important, it allows each

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20. Webster's describes a "lobbyist" as "a person, acting for a special interest group, who tries to influence the introduction of or voting on legislation or the decisions of government administrators." WEBSTER'S NEW WORLD DICTIONARY (2d ed. 1972). This definition makes no distinction between a public and a private lobbyist, or between a public and a private special interest group. Scroggs feels there is a difference. Unlike private lobbying, he stresses that the public "liaising" he is advocating is not for personal gain.

> [Senior Army officers would be] engaged as public servants whose goals are institutional enhancement, bettering the condition of the Armed Forces personnel in the field, and contributing to defense and the general welfare of the nation by enhancing the ability of Congress to make informed decisions pertinent to the conduct of their oversight and legislative responsibilities in defense matters. Open communication and mutual understanding of concerns require credible and trusted relationships that LL officers and senior service leaders "liaise" to establish and maintain.

SCROGGS, *supra* note 1, at 2-3.

The only public lobbying activities that Scroggs recognizes as prohibited involve grassroots campaigns directed at Congress that are supported by appropriated funds. *Id.* at 5-6. All other proactive interaction with Congress is mere "liaising." *Id.* at 2.

21. Scroggs suggests ways the Army could improve its general public relations with members of Congress and their staffs on Capitol Hill. For example, the Army might follow the lead of the other services by allowing congressional staff members the opportunities to visit military bases, drive tanks, and jump from airborne training towers. It could lower the average age of the military personnel working at the Army LLO so that they would better relate to the generally younger congressional staffers. The Army could host informal social events directed at these younger staffers. And, LLO duty should be made a mid-career assignment rather than a terminal assignment, as it evidently is today. All of these suggestions are valid public relations points to consider, and he weaves them throughout his book. However, they are not at the heart of his argument. The clear agenda that he advocates is for the Army LLO and senior military leadership to begin aggressively "liaising" Congress.

22. *Id.* at 42.

23. *Id.* at 35. Services also make points by assisting congressional members with constituents' requests for information and help on matters involving the service. *Id.* at 38.

24. *Id.* at 33.

25. *Id.* at 13.

26. *Id.*

service to speak with "one voice" and "one message" to members of Congress. At the same time, it gives Congress a single point of contact for service-related matters.[27] Unfortunately, this "one voice-one message" stops at the service level as each LLO competes with the other services' LLOs in promoting its service's needs ahead of, and often to the exclusion of, its sister services. In this frenzy for resources on Capitol Hill, Scroggs believes that the Army's inability to promote itself with external audiences becomes a liability.[28]

V. The Army Message

Scroggs argues that the Army fails to sell its message on Capitol Hill. The message he proposes, however, is not a message the Army can or should sell: "why an Army and why this size?"[29] One former chief of staff of the Army pointed out to Scroggs that "why an Army" is self-evident.

> There has always been an Army. The Army is a product of the people of this country. The Army wins the wars of our nation. We don't have to justify the need or relevancy of an Army. America requires an Army. . . . There will always be an Army. Therefore Army officers don't have to justify and are therefore less inclined to do so. The sense of the Army and American people being inextricably linked goes beyond statute, but is in the militia cause and its citizen-soldier (not sailor, airman or Marine) implications. The roots of America and the Army go back to [Army] General George Washington.[30]

The size of the Army is not as patently obvious. The Army's size and structure are totally dependent on the policies and goals laid out by its civilian leadership. This is how it must be in a democracy.[31] The raison d'être of the military is "to fight or be ready to fight wars should the occasion arise."[32] In the aftermath of the Cold War, however, the mission of the Army has expanded into areas never before known, for example, law enforcement, drug interdiction, peacekeeping, and disaster relief.[33] If unfettered by the hand of civilian leadership, what independent missions would the Army legitimately undertake? What missions would it refuse?

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27. *Id.* at 35.

28. While Scroggs uses the term "external audiences," his focus is on members of Congress and their staffs. *Id.* at xiv.

29. *Id.* at 96.

30. *Id.* at 123-24.

How large would it be? What American values would it commit young soldiers to die for? And, most important, against whom would it unsheathe its sword? The armed forces, and especially the Army, exist to defend the civilian government, not to supplant it.[34] The role of the military in policymaking is necessarily limited to providing the best military advice possible to the civilian leadership in furtherance of the civilian leadership's goals.[35]

VI. The Chain of Command

Military services are members of the executive branch and, as such, are answerable to the President. They work directly for the politically appointed service secretaries and indirectly for the politically appointed Secretary of Defense.[36] It is the responsibility of the politically accountable civilian officials to provide direction to the military services and to

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> Clearly seen in the Articles of Confederation is a great fear of standing Armies. Standing Armies were to be maintained only during times of war. The creation of an active and militia Army in the Constitution, defense appropriations no longer than two years, and posse comitatus are all based on this early fear of active duty armies. The legacy and sensitivity of Army commanders to these fears and concerns started with Washington and were manifest in General Washington's refusal to assume leadership as King in the Newburg conspiracy. The Army's more overt subservience to civilian leadership, with the "can do" attitude being just one manifestation, impacts on the other services by setting a positive example.

Id. at 145 (quoting Interview with Honorable Jack Marsh, Secretary of the Army, 1980-88, in Washington, D.C. (Aug. 17, 1995)).

32. Parker v. Levy, 417 U.S. 733, 743 (1974).

33. It might be argued that the Army is, in fact, selling itself as it fights to maintain its post-Cold War size and budget.

34. "When the military is politically active, when it believes it is uniquely aware of certain dangers, when it discusses responding to domestic threats to cherished values, then it edges toward becoming an independent actor in domestic politics." Thomas E. Ricks, *The Widening Gap Between The Military And Society*, ATLANTIC, July 1997, at 19.

35. SCROGGS, *supra* note 1, at 120.

36. *Id.* at 13.

promote any missions involving the military to Congress. Congress maintains a fiscal constraint on this immediate civilian leadership.[37]

The framers of our Constitution observed the abuses in England where the King had the power both to direct and to raise and maintain an army.[38] They purposely separated these functions to balance the control of the military between the two branches of government. The President is to direct the military as the Commander-in-Chief.[39] Congress is to constrain the use of the military by its power to declare war (as opposed to make war) and its authority to raise and maintain the Army through two-year appropriations.[40] Scroggs acknowledges this built-in tension between the two branches but argues that the military has some independent voice in the process.

> The Constitution expects and promotes this nuanced conflict and tension between the legislative and executive branches. What the Constitution does not safeguard against is service culture that makes certain services less willing to participate *in this conflict* and less prepared to participate effectively. This is the danger that emanates from an imbalance in advocacy efforts being made by different services on the Hill.[41]

Scroggs further makes clear that when the service secretary, the Secretary of Defense, or the Administration denies the Army a request, the Army should be prepared, like the other services, to take that request to Congress.

> The Army's view of itself as the nation's obedient servant works against Army leaders taking institutional interests to Congress that have been ignored in the Pentagon. This dimension is related to the previous one of teamwork and dependency, that in this case stresses obediently doing one's part as a prerequisite for

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37. Robert R. Ivany, *Soldiers and Legislators: A Common Mission*, PARAMETERS, Spring 1991, at 8.

38. THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 340 (Johnny H. Killiam ed., 1982).

39. "The President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2, cl. 1.

40. "Congress shall have the power to . . . declare war . . . raise and support Armies . . . [and] make rules for the Government and regulation of the Land and Naval forces . . . ." U.S. CONST. art. I, § 8, cls. 11-14.

41. SCROGGS, *supra* note 1, at 49 [emphasis added].

> the success of the larger whole. This makes it more difficult for an Army leader to speak out to the congressional audience against executive branch positions that are viewed by the Army leader as antithetical to Army interests.[42]

This proposal, that battles lost in the executive branch be pursued independently in the legislative branch, challenges the real essence of Army culture—adherence to the chain of command. The Army is a hierarchical organization. It could not function if political debate and compromise preceded each campaign, each action. It must respond to one leader. The framers recognized this; nowhere in Congress's Article 1, section 8, enumeration of powers over the military is command conferred.

VII. Conclusion

Scroggs seems naïve of the political process and the inherently divergent pressures brought to bear on members of Congress. Which political party should the Army lobby? How should it lobby them?[43] Strategic military programs for a member of Congress might be those that funnel fed-

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42. *Id.* at 113-14.

43. In 1990, 60% of the Department of Defense line items were changed by Congress. Congressional staffers attributed many of these changes to end-run service initiatives to circumvent the Secretary of Defense's decisions. Robert R. Ivany, *Soldiers and Legislators: A Common Mission*, PARAMETERS, Spring 1991, at 2.

eral dollars and jobs into his home district or state. What does the Army bring to the bargaining table?[44]

According to Scroggs, the articulated missions for the Army as determined by its *civilian* leadership cannot determine the Army's share of the defense budget.[45] In the checks and balance system set up by the framers, the Army may very likely not get sufficient resources from the legislative branch to meet the missions directed by the executive branch; however, this does not justify the Army military leadership circumventing its civilian chain of command and directly and privately lobbying Congress as Scroggs advocates.

The military leadership must support and respect the checks and balances built into our government. They must manage the Army honestly within the fiscal constraints Congress imposes; however, they must also make known the true state of the military to the Administration and to Congress: "With this much funding, we can do this much mission."[46]

While the line must be clear marking the extent of missions directed by the executive branch that can be performed given the funding allocated by the legislative branch, equally clear must be the line that prohibits the trespass by military leadership into the area of political policy. Scroggs concludes that the national security of our country is in jeopardy unless there is a change in status quo that would permit and encourage Army military leadership to privately lobby Congress for the "true needs" of the

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44. One member of the House National Security Committee expressed his attitude towards the Army as:

> I see the Army and the other services as just another government agency asking for a handout that I don't have to give. At times, with our deficit situation, I feel as if I am an executor of a bankrupt organization. My predecessor saw the Army, the other services, and the DOD leadership as special. In my eyes, they are no longer special. I see them as I see those advocating housing, highways, or education. These are different times and I'm a different Member from those who served in World War II.

SCROGGS, *supra* note 1, at 56 (quoting Interview Unidentified Member, House National Security Committee, in Washington, D.C. (Jun. 29, 1995)).

45. *Id.* at 150-54, 225.

46. *Id.* at 147-49.

Army.[47] In reality, it is the undisguised politicization of the military he advocates that jeopardizes national security.

Army Relations With Congress: Thick Armor, Dull Sword, Slow Horse, proposes many commonsensical changes that would make the Army's relations with Congress more effective. The backdoor lobbying of individual members of Congress that Scroggs promotes, however, would result in a weakening of executive branch control. The military leadership of the Army, as well as the other services, must reject this proposal as contrary to the very concept of civilian leadership of the military.

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47. *Id.* at 238-39.

By Order of the Secretary of the Army:

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