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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEW

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ARTICLES

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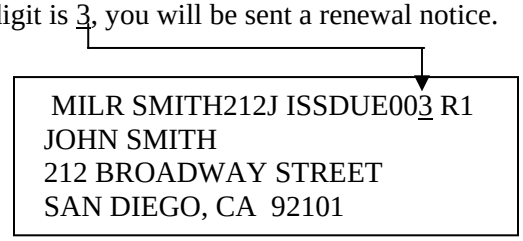

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MILITARY LAW REVIEW

Volume 185 **Fall 2005**

PROTECTING U.S. PORTS WITH LAYERED SECURITY MEASURES FOR CONTAINER SHIPS

LIEUTENANT COMMANDER (SEL) RACHAEL B. BRALLIAR*

When it comes to dealing with the new security agenda, Americans need to grow up. We cannot afford to act as though 9/11 was just a freak event. Nor can we expect our government to secure a permanent victory in a war on terrorism . . . Terrorism is simply too cheap, too available, and too tempting ever to be totally eradicated. We must have the maturity both to live with the risk of future attacks and to invest in reasonable measures to rein in that risk. In other words, the best we can do is to keep terrorism within manageable proportions.[1]

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[1] STEPHEN FLYNN, AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM 59 (2004).

I. Introduction

The maritime transportation system presents tremendous opportunities for terrorists to attack the United States of America. One of the greatest threats to U.S. security is the maritime transportation system—the approximately 25,000[2] shipping containers (containers) that enter U.S. ports each day, and then infiltrate the mainland via railways, highways, interstates, and residential roads.[3] The consequences of a breach in the security of a single container have the potential to dwarf the devastation felt after the 11 September 2001 terrorist attacks (9/11) in a number of ways. For instance, the detonation of a single nuclear or radiological device smuggled on a container would have a far greater impact upon both global trade and the global economy than did the 9/11 attacks.[4] Not only could a port security breach cause mass casualties, but it would necessitate closing U.S. maritime import and export systems, causing maritime trade gridlock, economic collapse of many businesses, and possibly leading to economic losses of $1 trillion.[5] By contrast, the

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[2] *See* Robert C. Bonner, Commissioner of the U.S. Customs and Border Protection, Speech at the Fourth Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005) (stating that 25,000 containers arrive in U.S. ports each day and that nine million containers arrive in U.S. ports annually); *cf.* GARY HART ET AL., AMERICA STILL UNPREPARED—AMERICA STILL IN DANGER: REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS 8 (2002) (estimating in 2001 that 21,000 containers arrived in U.S. ports every day).

[3] *See* JOHN F. FRITTELLI, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS 3 (updated May 27, 2005). This article references only unclassified information. The Maritime Administration, U.S. Coast Guard, Customs and Border Protection, and Transportation Security Administration are part of the Container Working Group which generated classified recommendations on how best to ensure the security of marine container transportation. *Id*. at 12.

[4] *See* Robert C. Bonner, Commissioner of the U.S. Customs and Border Protection, Speech before the Center for Strategic and International Studies (Jan. 17, 2002), *at* http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002 [hereinafter Bonner Speech].

[5] *See* MICHAEL E. O'HANLON, PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 7 (Brookings Institution Press) (2002) (explaining that a maritime security breach would impact the American economy by drastically increasing the prices of imported goods, devastating cities and seaports that depend upon container trade, and destroying businesses which would trigger mass layoffs; "[i]ndeed, the layoffs of airport workers at Reagan National Airport after Sept. 11 would seem tiny compared to the layoffs associated with even a temporary shutdown of global trade"); *see also* Bonner Speech, *supra* note 4.

attacks on 9/11 claimed more than 3,000 lives, and led to the loss of approximately $100 billion.[6]

Part II of this article provides readers with a greater understanding of the multi-tiered domestic and international threat that container ships present to the United States. Additionally, Part II discusses the feasibility of a terrorist exploiting such weaknesses. Drawing upon the vulnerabilities assessed in Part II, Part III presents an overview of the potential consequences resulting from a terrorist act involving a single container.

Based on the multi-tiered threat posed by container ships, experts agree that the best defense is a layered defense with coordinated security measures overseas and nationally.[7] Congress and international organizations continue to work to improve the security of maritime transportation post-9/11, with mixed success. As Congress recognizes "[p]ort security legislation can have significant implications for public safety, the war on terrorism, the U.S. and global economy, and federal, state, and local homeland security responsibilities and expenditures."[8]

While Part III discusses the need for a layered defense in securing container ships, Part IV introduces the international players involved in securing the maritime transportation system. Specifically, Part IV focuses on the International Ship and Port Facility Security Code (ISPS

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[6] O'HANLON, *supra* note 5, at 1.

[7] *See, e.g.*, CENTER FOR INT'L SECURITY & COOPERATION, THE STANFORD STUDY GROUP, CONTAINER SECURITY REPORT 5 (Jan. 2003) [hereinafter CISAC THE STANFORD STUDY GROUP]; FRITTELLI, *supra* note 3, at 18; FLYNN, *supra* note 1, at 69, 105; Customs-Trade Partnership Against Terrorism (C-TPAT), *C-TPAT Fact Sheet and Frequently Asked Questions*, *at* http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ [hereinafter *C-TPAT FAQ*] (last visited Mar. 19, 2005) (recognizing that "Customs can provide the highest level of security only through close cooperation with the ultimate owners of the supply chain, importers, carriers, brokers, warehouse operators and manufacturers"); U.S. GEN. ACCT. OFF., GAO-02-993T, PORT SECURITY: NATION FACES FORMIDABLE CHALLENGES IN MAKING NEW INITIATIVES SUCCESSFUL 4 (2002) [hereinafter PORT SECURITY] (testimony before the Subcommittee on National Security, Veterans Affairs, and International Relations House Committee on Government Reform) (testimony of JayEtta Z. Hecker, Director, Physical Infrastructure Issues); Admiral James M. Loy & Captain Robert G. Ross, *Global Trade, America's Achilles Heel*, DEF. HORIZONS, Feb. 2002, at 3, *available at* http://www.homelandsecurity.org/journal/articles/displayArticle.asp?article=33.

[8] FRITTELLI, *supra* note 3, at 1.

Code),[9] which was created post-9/11 to preserve the integrity of international maritime trade. In addition, Part IV analyzes the ISPS Code to determine if its security measures protect against the threats presented by container ships.

Part V approaches container security from the domestic realm, focusing on the distinct, yet inter-related, roles of the U.S. Coast Guard, the U.S. Customs and Border Protection, and the Transportation Security Administration. Many of the domestic initiatives of the United States are modeled after or initiated to implement international law. In particular, the Maritime Transportation Security Act of 2002 (MTSA)[10] implements the ISPS Code. Part V discusses the MTSA in detail and analyzes its effectiveness in creating layered security measures for container ships in conjunction with the Customs-Trade Partnership Against Terrorism (C-TPAT),[11] and its companion program, the Container Security Initiative (CSI).[12] While each of these domestic measures is separate, they function together to provide defensive layers in container ship security: the MTSA deals with security requirements for vessels and port facilities; the C-TPAT deals with the supply chain for goods loaded onto container ships; and the CSI deals with the containers.

Parts IV and V are designed to explain the layered defense in place to protect the United States from the threat of container ships and to show where the vulnerabilities discussed in Part III persist. Regulation of the international maritime transportation system requires a delicate balance between simultaneously protecting the United States and avoiding too many impediments to the flow of maritime commerce. Unfortunately, the international and domestic laws and initiatives do not

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[9] International Ship and Port Facility Security Code, SOLAS/CONF.5/34, annex 1 (Dec. 12, 2002) [hereinafter ISPS Code] (providing Resolution 2 of the Dec. 2002 conference containing the ISPS Code). The ISPS Code is implemented through chapter XI-2 of the International Convention for the Safety of Life at Sea (SOLAS). *See* International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 276 [hereinafter SOLAS].

[10] Senator Hollings introduced The Maritime Transportation Security Act of 2002 in S. 1214 on 20 July 2001. Maritime Transportation Security Act of 2002, 46 U.S.C.S. §§ 70101-117 (LEXIS 2005). *See* FRITTELLI, *supra* note 3, at 1-2 (stating that the MTSA is attempting to strengthen U.S. port security).

[11] *C-TPAT FAQ*, *supra* note 7. A copy of a Voluntary Agreement to Participate in C-TPAT is *available at* http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/sea_carriers/sea_carrier_voluntary.xml (last visited Mar. 20, 2005).

[12] Bonner Speech, *supra* note 4 (proposing the Container Security Initiative, which was then referred to as the "Container Security Strategy").

adequately address the threats posed by the voluminous contents of the 25,000 containers that enter U.S. ports each day. Individually, and collectively, the security layers are unable to confirm whether goods loaded on containers are legitimate and remain uncompromised during transit.[13]

While international and domestic laws attempt to focus on enhancing maritime security, they do not provide adequate protections against foreseeable security breaches. As a partial remedy, Part VI recommends the further development of detection devices imbedded within containers to address the remaining gaps in container ship security. According to the report of an independent task force sponsored by the Council on Foreign Relations, "we can transform the calculations of would-be terrorists by elevating the risk that (1) an attack on the United States will fail, and (2) the disruptive consequences of a successful attack will be minimal."[14] The development and implementation of smart, tamper-resistant containers with internal detection devices may be a viable and cost-effective final layer in container ship security.

II. Vulnerability of the Maritime Transportation System in the United States and Abroad

Investigations following the attacks on 9/11 highlight continuing concern over the security of the maritime transportation system and, in particular, container ships. Several reports indicate that al Qaeda either owns or controls approximately fifteen cargo ships.[15] Reports also state

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[13] *See* FLYNN, *supra* note 1, at 107.

[14] HART, *supra* note 2, at 8.

[15] *See, e.g.*, RONALD O'ROURKE, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, HOMELAND SECURITY: NAVY OPERATIONS—BACKGROUND AND ISSUES FOR CONGRESS 4 (updated May 17, 2004); John Mintz, *15 Freighters Believed to Be Linked to Al Qaeda*, WASH. POST, Dec. 31, 2002, *available at* http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A56442-2002Dec30&notFound=true (stating that "approximately 15 cargo freighters around the world that they believe are controlled by al Qaeda or could be used by the terrorist network to ferry operatives, bombs, money or commodities over the high seas, government officials said."); William K. Rashbaum & Benjamin Weiser, *A Tramp Freighter's Money Trail to bin Laden*, N.Y. TIMES, Dec. 27, 2001, *available at* http://query.nytimes.com/gst/abstract.html?res=F30810FD3B550C748EDDAB0994D9404482/. While this link may require the reader to subscribe to view the article, the same article is available without registration at http://news.pseka.net/index.php?module=article&id=135&PHPSESSID=46eca01da7d32

that al Qaeda terrorists may have smuggled themselves into foreign ports over long distances on ships.[16]

According to U.S. officials cited in a Washington Post article, al Qaeda's leader, Osama bin Laden, and his aides have owned ships for years.[17] More specifically, a New York Times article published three months after the 9/11 attacks reported that "[a]l Qaeda is now said to control at least 20 ships."[18] The same article pointed out a possible link between the tramp freighter Seastar, allegedly operated by al Qaeda, and a car bomb in Riyadh that killed several people, including five U.S. government employees in November 1995, which bin Laden extolled as "praiseworthy terrorism."[19] Likewise, officials purportedly found a startling link between one of bin Laden's ships and the explosives delivered to al Qaeda operatives and used in the 1998 bombing of two American embassies in Africa.[20] In addition, an article in the Washington Post reported an incident in February 2002 when eight Pakistani men jumped off of a freighter at an Italian port after a trip from Cairo.[21] According to the report, U.S. officials determined that the men were sent by al Qaeda and gained access to the freighter by fabricating their status as crewmen and using false documents.[22] Reports cite other incidents involving alleged crew members onboard vessels bound for foreign ports who knew nothing about seafaring. Upon further investigation, authorities discovered that these individuals had large volumes of cash, false documents, intricate maps of port cities, and evidence tying them to al Qaeda in Europe.[23] The threat of al Qaeda or other terrorist operatives is a reality, and the U.S. maritime transportation system's susceptibility makes it a ripe target.

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a265f98dacd99f2f2c00; J. Ashley Roach, United States Initiatives to Enhance Maritime Security at Sea, Address at The Regime of the Exclusive Economic Zone: Issues and Reponses to the Tokyo Round in Tokyo, Japan 1 (Feb. 20, 2003).

[16] O'ROURKE, *supra* note 15, at 4 (discussing that al Qaeda may have used ships to invade foreign countries but failing to identify where the terrorists allegedly alighted).

[17] *See* Mintz, *supra* note 15.

[18] Rashbaum & Weiser, *supra* note 15.

[19] *Id.*

[20] *See* Mintz, *supra* note 15.

[21] *See id.*

[22] *See id.*

[23] *See id.*

Although international boundaries of the United States include its 361 public ports,[24] ports do not provide actual borders in the traditional sense. Instead, ports and borders function as a check-point in the infiltration of people and foreign goods onto the mainland. As Robert C. Bonner,[25] the Commissioner of the U.S. Customs and Border Protection, explained to the Senate Committee on Commerce, Science, and Transportation several months after the attacks on 9/11:

> We can no longer afford to think of "the border" merely as a physical line separating one nation from another. We must also now think of it in terms of the actions we can undertake with private industry and with our foreign partners to pre-screen people and goods before they reach the U.S. The ultimate aims of "pushing the border outward" are to allow U.S. Customs more time to react to potential threats—to stop threats before they reach us—and to expedite the flow of low-risk commerce across our borders.[26]

The attacks on 9/11 "highlighted the fact that our borders offer no effective barrier to terrorists [who are] intent on bringing their war to our soil."[27] The vulnerability of domestic ports and vessels is inextricably linked to the function of the ports and the tremendously fast-paced economy of the United States, as detailed below.

A. The Breadth of Maritime Transportation in the United States

United States ports, which include domestic ports located within the interior of the United States, deal with more than ninety-five percent of overseas trade domestically.[28] While ninety percent of the cargo tonnage

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[24] *See* Maritime Transportation Security Act of 2002, H.R. 777, 107th Cong. § 101 (2002) (codified at 46 U.S.C.S. §§ 70101-70117 (LEXIS 2005)) (finding that "there are 361 public ports in the United States that are an integral part of our Nation's commerce").

[25] A biography of Commissioner Bonner is *available at* http://www.dhs.gov/dhspublic/interapp/biography/biography_0070.xml (last visited Sept. 8, 2005).

[26] Robert C. Bonner, Commissioner of the U.S. Customs and Border Protection, Statement at the Hearing on Security at U.S. Seaports, Senate Committee on Commerce, Science, and Transportation (Feb. 19, 2002) *available at* http://commerce.senate.gov/hearings/021902bonner.pdf. (last visited Mar. 20, 2005).

[27] FLYNN, *supra* note 1, at x.

[28] *See* Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, tit. I, § 101, 116 Stat. 2064, 2066 (codified at 46 U.S.C.S. §§ 70101-117 (LEXIS 2005)) (listing

passing through domestic ports occurs in the top fifty U.S. ports, twenty-five U.S. ports process nearly ninety-eight percent of all container shipments.[29] Furthermore, "[t]he total volume of goods imported and exported through ports is expected to more than double over the next 20 years."[30] Additionally, ships carry more than ninety-five percent of the nation's "non-North American trade by weight and 75% by value. Trade now accounts for 25% of the U.S. Gross Domestic Product (GDP)."[31] Given the potential impact of a terrorist attack targeted against domestic ports, the United States has a fundamental interest in maintaining "a free flow of interstate and foreign commerce and . . . ensur[ing] the efficient movement of cargo."[32]

Within the 361 U.S. ports, there are more than 3,700 terminals for cargo and passengers, as well as over 1,000 harbor channels that extend throughout the coastline.[33] As such, U.S. ports are particularly vulnerable to breaches in security, and "may present weaknesses in the ability of the United States to realize its national security objectives; and may serve as a vector or target for terrorist attacks aimed at the United States."[34] Although the United States is the leading maritime trading nation, accounting for approximately twenty percent of the annual world ocean-borne overseas trade, the international community also has a substantial interest in protecting the maritime transportation system because ships transport "approximately 80% of world trade by volume."[35] By analyzing the tremendous economic link between the

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Congressional findings); *see also* E-mail from Dr. Stephen E. Flynn, Jeane J. Kirkpatrick Senior Fellow for National Security Studies, Council on Foreign Relations, to author (May 31, 2005) (on file with author) [hereinafter Flynn E-mail].

[29] *See* Maritime Transportation Security Act of 2002 § 101 (listing congressional findings).

[30] *Id.* (listing congressional findings); *see* H.R. REP. No. 107-777, at 4.

[31] FRITTELLI, *supra* note 3, at 3.

[32] *Id.*; Maritime Transportation Security Act of 2002 § 101 (listing congressional findings).

[33] *See* U.S. DEP'T OF TRANSP., MAR. ADMIN., AN ASSESSMENT OF THE U.S. MARINE TRANSPORTATION SYSTEM 1 (Sept. 1999), *available at* http://www.marad.dot.gov/publications/MTSreport/ [hereinafter ASSESSMENT OF MARINE TRANSPORTATION].

[34] Maritime Transportation Security Act of 2002 § 101 (listing congressional findings); *see* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: International Oceans, Environment, Health, and Aviation Law: Establishment of U.S. Antiterrorism Maritime Transportation System*, 98 AM. J. INT'L L. 588, 588 (2004**)**.

[35] FRITTELLI, *supra* note 3, at 3 (citing United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2002*).

maritime system and global economy, it is easy to envision the potential impact of terrorist activities, both domestically and internationally.[36]

B. The Foreign Element

The prevalence of foreign vessels in domestic ports contributes to the tremendous vulnerability of the United States, thereby making U.S. ports particularly susceptible to attack. Of the nearly 5,400 commercial ships that entered U.S. ports during approximately 60,000 port calls in 2001, most of the ships were owned and crewed by foreigners.[37] In fact, "less than 3% of U.S. overseas trade is carried on U.S.-flag vessels."[38] The prevalence of foreign vessels and crews creates a plethora of security concerns for U.S. ports due, in large part, to the lack of control that the United States has over the people and contents aboard the vessels. The opened and exposed nature of domestic ports, coupled with the vast foreign component to the shipping industry, makes ports "susceptible to large scale acts of terrorism that could cause a large loss of life or economic disruption."[39]

1. Difficulty of Tracking Suspect Vessels and Crewmembers

While container ships have their own set of unique vulnerabilities, they also face many of the same security issues as other international seaborne systems. For example, vessels are difficult to track because they "are continually given new fictitious names, repainted or re-registered using invented corporate owners, all while plying the oceans."[40] The crew loading the vessels are often unknown, which brings into question "what cargo is loaded onto ships entering U.S. waters?"[41] Moreover, the individuals on board foreign container ships are often unaccounted for, or may possess false documentation.[42]

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[36] *See infra* Part III.A.

[37] *See* JOHN F. FRITTELLI, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, MARITIME SECURITY: OVERVIEW OF ISSUES 2 (updated Feb. 24, 2003); *see also* Bruce Stubbs, *The Maritime Component*, SEA POWER 44:32-36 (Aug. 2001).

[38] FRITTELLI, *supra* note 37, at 2; *see* FRITTELLI, *supra* note 3, at 2 (citing Stubbs, *supra* note 37).

[39] Maritime Transportation Security Act of 2002 § 101 (listing congressional findings); *see* Murphy, *supra* note 34, at 588.

[40] Mintz, *supra* note 15.

[41] *Id.*

[42] *See id.*

2. Threats of Piracy in Foreign Ports and During Transit

Although containers are subject to security breaches during the loading phase, they may experience additional potential security breaches while transiting overseas. Maritime container ships run the risk of piracy during transit. The number of reported piracy attacks on cargo ships tripled during the 1990s.[43] Most of the attacks took place when the ships were in port and "in Southeast Asian waters on foreign-flag freighters."[44] Significantly, there may be a link between piracy and terrorism. Experts propose that piracy may be intended to fund or promote terrorist operations.[45] For example, the *Financial Times* reported an incident where pirates boarded a chemical tanker in the south Pacific and steered the vessel at varying speeds for several hours.[46] The purpose behind these maneuvers is unclear, yet they bear an eerie resemblance to the attacks on 9/11, where hijackers had flying experience, but little experience landing aircraft.[47] As we learned from those attacks, terrorists can be creative in choosing their weapons. It is conceivable that terrorists could use a chemical tanker or a container ship carrying flammable components or weapons of mass destruction in a similar fashion—by colliding into a bridge or busy port and causing mass casualties and collateral damage.[48]

C. Unique Threats Posed by Container Ships

The volume and multiple sources providing cargo in maritime containers transported overseas, as well as the potential anonymity of such contents, make containers and container ships easy targets for terrorists. These vulnerabilities make containers and container ships unique security threats. Commissioner Bonner recently described containers as "potential Trojan horses of the 21st century."[49]

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[43] FRITTELLI, *supra* note 3, at 7 (citing U.S. DOT, Surface Transportation Security: Vulnerabilities and Developing Solutions, n.d., n.p.).
[44] *Id.*
[45] *See id.*
[46] Mansoor Ijaz, *The Maritime Threat from Al Qaeda*, FIN. TIMES, Oct. 20, 2003, *available at* http://www.benadorassociates.com/pf.php?id=636.
[47] HART, *supra* note 2, at 10.
[48] *See* Mintz, *supra* note 15 (presenting a frightening scenario in which terrorists pose as crewmen and "commandeer a freighter carrying dangerous chemicals and slam it into a harbor").
[49] Bonner, *supra* note 2.

1. The Many Sources Providing Goods in Containers

A container ship differs from a common cargo vessel because it transports marine containers laden with a variety of goods.[50] A single container ship may carry more than 3,000, and sometimes upwards of 6000, containers "of which several hundred might be offloaded at a given port."[51] The average container traverses seventeen intermediate points before arriving at its final U.S. destination, and its contents often include goods obtained from several locations even before the container was loaded.[52] As Dr. Stephen E. Flynn, a retired Coast Guard Commander and the preeminent expert on homeland security and border control,[53] explained:

> Nearly 40 percent of all containers shipped to the United States are the maritime transportation equivalent of the back of a UPS van. Intermediaries known as consolidators gather together goods or packages from a variety of customers or even other intermediaries, and load them all into the container. Just like express carriers in the U.S., they only know what their customers tell them about what they are shipping.[54]

The above analogy extends further because any potential container threat arriving in a U.S. port easily can infiltrate into the mainland.

> [Containers are] similar to a truck trailer without wheels; standard sizes are 8x8x20 feet or 8x8x40 feet. Once offloaded from ships, they are transferred to rail cars or tractor-trailers or barges for inland transportation. Over-the-road weight

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[50] FRITTELLI, *supra* note 3, at 3, 8.

[51] *Id. But see* Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 350-51 (2002) (explaining that the current trend seems to be towards enormous container ships with the capacity to accommodate more than 6,000 containers, but acknowledging that such vessels are limited to large "megaports" equipped to handle their size. These megaports become hubs upon which many other ports rely as a centralized distribution point).

[52] *See* FLYNN, *supra* note 1, at 89.

[53] Dr. Stephen E. Flynn is the Jeane J. Kirkpatrick Senior Fellow for National Security Studies at the Council on Foreign Relations and a retired Commander in the U.S. Coast Guard. A copy of Dr. Flynn's biography is *available at* http://www.cfr.org/bios/3301/stephen_e_flynn.html (last visited Sept. 7, 2005).

[54] FLYNN, *supra* note 1, at 89.

> regulations generally limit the cargo load of a 40 foot container to approximately 45,000 pounds.[55]

Although maritime containers only comprise eleven percent of the annual tonnage of cargo carried into U.S. ports each year "containers account for 66% of the total value of U.S. maritime overseas trade."[56] Furthermore, the Bureau of Transportation Statistics estimated that in the year 2001 over six million cargo containers entered U.S. seaports.[57] Currently, this figure is closer to nine million.[58] To illustrate, if the 25,000 containers that enter U.S. ports daily were loaded on a continuous train end-to-end, that train would extend over 189 miles long each day.[59]

Container ships carry cargo from "hundreds of companies" and, often, the containers are loaded at individual company warehouses located away from the port.[60] Typical individual container shipments involve numerous parties and may "generate 30 to 40 documents."[61] The individuals involved in a straight-forward container shipment "usually include the exporter, the importer, a freight forwarder, a customs broker, a customs inspector, inland transportation provider(s) (which may include more than one trucker or railroad), the port operators, possibly a

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[55] FRITTELLI, *supra* note 3, at 3.

[56] *Id. But see* HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 188 (James F. Hoge, Jr. & Gideon Rose eds., New York: Public Affairs 2001) ("It is also important to keep in mind that not all U.S.-bound containers arrive at U.S. ports. Half of the containers discharged at the Port of Montreal, for instance, move by truck or rail for cities in the northeastern or mid-western United States.").

[57] BUREAU OF TRANSP. STAT., U.S. INT'L TRADE AND FREIGHT TRANSP. TRENDS, Executive Summary (2003), *available at* http://www.bts.gov/publications/us_international_trade_and_freight_transportation_trends/2003/html/executive_summary.html [hereinafter TRADE AND FREIGHT TRENDS] (citing statistics from 2001).

[58] *See* U.S. Customs and Border Protection, *Container Security Initiative Expands Beyond the Megaports, Strengthening Anti-Terror* (2003), *at* http://cbp.gov/xp/cgov/newsroom/press_releases/archives/cbp_press_releases/022003/02212003.xml (providing maritime statistics from 2001); *see also* Bonner, *supra* note 2 (stating that 25,000 containers arrive in U.S. ports each day and that nine million containers arrive in U.S. ports annually); TRADE AND FREIGHT TRENDS, *supra* note 57 (noting that approximately 13 million containers arrive by truck or train from Canada and Mexico)

[59] Interview with Commander William Drelling, U.S. Coast Guard, in San Francisco, Cal. (Mar. 15, 2005) (providing the illustration of the annual containers that enter U.S. ports wrapping around the globe approximately three times). Commander Drelling worked as a Coast Guard Regional Examiner in Long Beach, California prior to the attacks on 9/11. *Id.*

[60] FRITTELLI, *supra* note 3, at 8.

[61] *Id.*

feeder ship, and the ocean carrier."[62] As Congress recognizes, "[e]ach transfer of the container from one party to the next is a point of vulnerability in the supply chain. The security of each transfer facility and the trustworthiness of each company [are] therefore critical in the overall security of the shipment."[63]

2. Unreliability of Container Ship Documents

Each container must have a "cargo manifest" specifying the contents of the container. The U.S. Customs and Border Protection is the federal agency with the principal responsibility for reviewing the information contained on the cargo manifest and determining which containers should be more closely scrutinized.[64] After containers arrive in U.S. ports, they may be unloaded or inspected by x-ray or gamma ray machines.[65] Unfortunately, representations contained in cargo manifests may be inherently unreliable for several reasons. First, the manifests are only as reliable as those who provide them. Second, the contents listed on a cargo manifest may not protect the United States from dangerous materials that may be loaded while the carrier is in foreign ports. Third, the manifests may not protect against tampering with the container contents during transit, or at any other time prior to arriving in U.S. ports.

III. The Potential Consequences of a Security Breach in a Container and the Need for a Layered Defense for Container Ship Security

JayEtta Z. Hecker, the Director of Physical Infrastructure for the General Accounting Office, testified before the Subcommittee on National Security, Veterans Affairs, and International Relations in 2002 that terrorist acts

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[62] *Id.*

[63] *Id.*

[64] *Id.* at 10 (explaining the role of the CBP). United States Customs and Border Protection is the agency within the Department of Homeland Security that manages, controls, and secures U.S. borders; *see* United States Customs and Border Protection, *Mission: Protecting Our Borders Against Terrorism* [hereinafter CBP Mission], http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml (last visited May 18, 2005); *see also infra* Part V.

[65] *See* Informed Trade International, *The 5 Percent Myth vs. U.S. Customs and Border Protection Reality*, http://www.itintl.com/articles/US_Customs_5_percent_myth.php (last visited Mar. 20, 2005).

> involving chemical, biological, radiological, or nuclear weapons at one of these seaports could result in extensive loss of lives, property, and business; affect the operations of harbors and the transportation infrastructure (bridges, railroads, and highways) within the port limits; cause extensive environmental damage; and disrupt the free flow of trade.[66]

For example, Congress considered the effects of a simple "dirty bomb"[67] arriving via container ship.[68] Congress concluded that an attack with a dirty bomb would be feasible for terrorist groups, but likely would kill or injure only a few people and would not cause great property damage. Congress, however, acknowledged that the use of a dirty bomb in a seaport could cause "panic and might require closing some areas for an undetermined time."[69] Furthermore, the Council on Foreign Relations elaborates that the effects of a dirty bomb in a U.S. port would "snarl a city" and require closure of the area for cleanup which would last at least several months and, possibly, years.[70] The effect of even a simple dirty bomb "could paralyze a local economy and reinforce public fears about being near a radioactive area."[71]

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[66] PORT SECURITY, *supra* note 7, at 4 (testimony of JayEtta Z. Hecker).

[67] Both dirty bombs and nuclear weapons are weapons of mass destruction. A dirty bomb, however, is a radiological weapon rather than a nuclear weapon and contains both conventional explosives and radioactive materials. A nuclear weapon is much more sophisticated, involves a complex nuclear-fission reaction, and can be thousands of times more destructive than a dirty bomb. For a detailed explanation of the difference between a dirty bomb and a nuclear weapon, visit the website for the Council on Foreign Relations, http://cfrterrorism.org/weapons/dirtybomb.html (last visited Sept. 7, 2005).

[68] *See* FRITTELLI, *supra* note 3, at 6. In addition to the terrorist activities identified as relevant to container ships, Congress recognized other means by which terrorists could attack the United States through the maritime transportation system: terrorists could seize control of a large commercial cargo ship and crash it into a bridge or refinery located on the waterfront; terrorists could block sea traffic by sinking a large commercial cargo ship in a major shipping channel; terrorists could detonate the fuel of a large ship, causing an in-port explosion; terrorists could attack an oil tanker and disrupt the world oil trade and cause large-scale damage to the environment; terrorists could seize control of a ferry or cruise ship and hold the passengers hostage until demands are met; or terrorists could attack U.S. Navy ships and kill U.S. military personnel, destroy military assets, and attempt to cause radiological releases. *Id.* at 5-6.

[69] JONATHAN MEDALIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, TERRORIST NUCLEAR ATTACKS ON SEAPORTS: THREAT AND RESPONSE (updated Jan. 24, 2005).

[70] *See* Council on Foreign Rel., *Terrorism: Questions & Answers*, *at* http://www.cnn.com/SPECIALS/2002/cfr/stories/dirty.bomb/ (last visited Sept. 7, 2005).

[71] *Id.*

A. Economic Impact: Domestically and Worldwide

If commerce is the heart of America, ports are the sustaining arteries. Given the vast shipping component of U.S. economy, it follows that disruption of the maritime transportation system could devastate the country's economy. A terrorist attack on U.S. ports or ships entering domestic ports would necessitate closing ports, at least for a period of time, much like the closed aircraft traffic immediately following the attacks on 9/11. Regardless of the breadth or direct consequence of a maritime terrorist attack or infiltration, widespread port closures would be necessary to assess how the attack or infiltration occurred, decipher whether other ports and foreign vessels have been sabotaged, and create a mode for intervening to protect American people and property.

In January 2002, Commissioner Bonner stated in a speech before the Center for Strategic and International Studies that the detonation of a bomb in a container would gridlock container shipments.[72] He explained that such gridlock would have "devastating" consequences for the global economy, and would bring some countries "whose economies are particularly dependent upon robust sea container transit to the edge of economic collapse."[73] While a mere two-week shutdown of international container traffic by sea would cost billions, container transportation would likely stop for a much longer period of time while governments worldwide "figure[d] out how to build a security system that could find the other deadly needles in the massive haystack of global trade."[74]

Considering the tremendous volume and breadth of cargo coming into U.S. ports, it is easy to see the potentially staggering effect that even a short-term shut down would have upon the country's economy. For example, consider the recent closure of ports on the West Coast during a labor dispute. According to one report, the cost of port closures was roughly "$1 billion per day for the first five days, rising exponentially thereafter."[75] The Brookings Institution[76] estimated in 2002 that the

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[72] Bonner Speech, *supra* note 4.
[73] *Id.*
[74] *Id.*
[75] HART, *supra* note 2, at 17.
[76] The Brookings Institution is an independent and nonpartisan organization devoted to researching, analyzing, and providing the public education while emphasizing economics, foreign policy, governance, and metropolitan policy. More information on the Brookings Institution and its history as "one of Washington's oldest think tanks" is *available at* http://www.brookings.edu/index/about.htm (last visited Sept. 7, 2005).

shipping of a weapon of mass destruction (WMD) via container ship or postal service could result in damages and disruption of the economy costing up to $1 trillion.[77]

Even absent actual port closures due to terrorist attacks, the effect of delaying transportation due to security concerns and screening processes could have a tremendous impact on the U.S. economy. Admiral James M. Loy,[78] the former Deputy Secretary of Homeland Security, asserts that slowing the efficiency of U.S. maritime transportation would be "economically intolerable."[79] Yet, such consequences would be unavoidable. As Congress recognizes, any enhanced security measure would bring with it costs as well.[80]

While terrorists could smuggle a variety of components for a chemical or biological attack—from sarin gas to smallpox—into the United States via container ships, the primary focus has been upon the possibility of terrorists smuggling nuclear weapons into domestic ports on container ships: "[e]xperts are concerned that if a nuclear weapon in a container aboard a ship in port is detonated, it could not only kill tens of thousands of people and cause massive destruction, but could also paralyze the movement of cargo containers globally, thereby shutting down world trade."[81] Currently, the maritime transportation system lacks adequate security measures to protect container shipments.[82] Therefore, it would be relatively easy for a terrorist to smuggle a WMD, or necessary components, into U.S. ports. For instance, if increased protections are placed on small or infrequently sailed vessels, terrorists could "purchase a known exporter with a long and trustworthy shipping record."[83] Apparently, this is a tactic often employed by drug smugglers to bury their contraband among legitimate cargo.[84] Although the Coast Guard and CBP may be familiar with tactics employed in marine transport of illegal drugs, terrorist container threats are unique in method and impact.[85] Drug smugglers often establish patterns that the Coast

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[77] O'HANLON, *supra* note 5, at 7.
[78] Biography of Admiral James E. Loy, http://www.whitehouse.gov/government/loy-bio.html (last visited Sept. 7, 2005).
[79] *See* Loy & Ross, *supra* note 7.
[80] FRITTELLI, *supra* note 3, at 4.
[81] *Id.* at 8; *see* Bonner Speech, *supra* note 4.
[82] FLYNN, *supra* note 1, at x.
[83] FRITTELLI, *supra* note 3, at 8.
[84] *See id.*
[85] *See id.*

Guard and CBP can track over time. In contrast, terrorists only need to transport a WMD on a single occasion to achieve their goal.[86] In addition, a single WMD may present a substantially greater risk to the American people and economy than mass infiltration of drugs.[87] As Admiral Loy stated during a recent speech before the Maritime and Port Security Summit in Washington D.C., "[t]errorism is a scourge that is not going away; it is the new reality under which we live . . . And in this struggle, we have to be right hundreds of times a day—the terrorists only once."[88]

B. Military Impact

An attack at a major U.S. port could also hinder deployment of military troops. Thirteen of the seventeen U.S. ports identified by the Departments of Defense and Transportation as "strategic because they are necessary for use by DOD in the event of a major military deployment" are "commercial seaports."[89] The maritime transportation system is necessary for the nation's security because it "support[s] the swift mobilization and sustainment [sic] of America's military."[90] To illustrate, the Government Accountability Office noted that "90 percent of all equipment and supplies for Desert Storm were shipped from U.S. strategic ports using our inland and coastal waterways."[91] It follows that a terrorist attack on any of these strategic ports could restrict mobilization of armed forces to flight capabilities and hinder the delivery of supplies and equipment, thereby causing significant delays.[92]

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[86] *See id*.
[87] *See id*.
[88] James Loy, Former Deputy Secretary of Homeland Security, Remarks at the Maritime and Port Security Summit in Washington, D.C. (Nov. 16, 2004) (transcript), *available at* http://www.cargosecurityinternational.com/channeldetail.asp?cid=4&caid=3759.
[89] U.S. GEN. ACCT. OFF., GAO-03-15, COMBATING TERRORISM, ACTIONS NEEDED TO IMPROVE FORCE PROTECTION FOR DOD DEPLOYMENTS THROUGH SEAPORTS 5 (2002) [hereinafter GAO COMBATING TERRORISM]; *see* ASSESSMENT OF MARINE TRANSPORTATION, *supra* note 33, at 15.
[90] GAO COMBATING TERRORISM, *supra* note 89, at 5; *see* ASSESSMENT OF MARINE TRANSPORTATION, *supra* note 33, at 14-15.
[91] GAO COMBATING TERRORISM, *supra* note 89, at 5; *see* ASSESSMENT OF MARINE TRANSPORTATION, *supra* note 33, at 14.
[92] *See* GAO COMBATING TERRORISM, *supra* note 89, at 1.

C. Current Measures to Address the Threat Posed by Container Ships

Concern over the vulnerability of U.S. ports and, in particular, the potential sabotage of containers by terrorists, is not new. Even before the attacks of 9/11, U.S. ports were identified as potential conduits for terrorist activities. President Clinton established the Interagency Commission on Crime and Security in U.S. Ports on 27 April 1999 to provide a comprehensive study of crime occurring in U.S. ports and the means by which state and local governments are responding.[93] The Commission found widespread criminal exploitation of the security at ports, particularly prevalent in cargo crimes.[94] The Commission also concluded that there are insufficient controls over access to ports and operations within the ports to protect against criminal activity.[95] In fact, many of the ports lacked basic technical necessities, such as security detection equipment, small boats, cameras, x-ray machines, and vessel tracking devices.[96] While the Commission did not identify ports as high threats for terrorist activities, the report noted that the Federal Bureau of investigation (FBI) recognized the "high vulnerability" of ports for such attacks.[97] Congress concluded that "it is in the best interests of the United States to implement new international instruments that establish such a system [of global maritime security]."[98]

Following the attacks on 9/11, concentration on security at U.S. ports was both expanded and focused.[99] In October 2002, an Independent Task Force sponsored by the Council on Foreign Relations reported that U.S. sea and land transportation are more vulnerable to a terrorist attack

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[93] Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, tit. I, § 101, 116 Stat. 2064, 2066 (codified at 46 U.S.C.S. §§ 70101-117 (LEXIS 2005)) (containing congressional findings rendered as a result of the Commission).

[94] *Id.*; *see* Murphy, *supra* note 34, at 588.

[95] *See* 46 U.S.C.S. § 70101.

[96] *Id.*

[97] *See id.; see also* PORT SECURITY, *supra* note 7, at 4 (testimony of JayEtta Z. Hecker) (finding that U.S. ports are extremely vulnerable to attacks by terrorists due to the vast size and network of ports, the water and land transfers inherent in port activities, and the large quantity of cargo transferred at U.S. ports); HART, *supra* note 2, at 23.

[98] 46 U.S.C.S. § 70101 (containing congressional findings rendered as a result of the Commission). *See* U.S. COMM'N ON NAT'L SEC., HART-RUDMAN COMM'N RELEASE PHASE III ADDENDUM (2001), *available at* http://govinfo.library.unt.edu/nssg/addendum page.htm (finding that terrorism on U.S. soil is the most likely threat Americans face, and the U.S. government is not organized to counter that threat); *see also* FLYNN, *supra* note 1, at 46.

[99] PORT SECURITY, *supra* note 7, at 4 (finding that U.S. ports are opened and extremely vulnerable to attacks).

than aviation.[100] In addition, the 9/11 Commission Report found that the security of transportation is not "allocated to the greatest risks in a cost effective way" and that "[o]pportunities to do harm are as great, or greater, in maritime or surface transportation [than they are in aviation]. Initiatives to secure shipping containers have just begun."[101] Moreover, the 9/11 Commission Report concludes that the need for screening containers is not commensurate with current technology.[102]

D. Layered Security Measures for Container Ships

In response to recommendations of the 9/11 Commission Report and the Commission on Crime and Security in U.S. Ports, recent domestic and international measures have been put into effect to create "a security-oriented approach to container inspection."[103] The domestic laws and initiatives both implement and go beyond the international requirements. Each of these measures creates a layer in security defense by coordinating a variety of detection opportunities throughout the supply chain. A layered defense requires not only an adequate "[s]ystem design," but also "continued system monitoring . . . given that all static systems and technologies are vulnerable to eventual evasion by a sophisticated enemy."[104] Congress recognizes the following:

> [A]n effective solution for securing maritime trade requires creating an international maritime security regime. This regime would rely not on a single solution, such as increasing the number of container inspections, but rather on a layered approach with multiple lines of defense from the beginning to the final destination of a shipment.[105]

In fact, several sources promote a "layered" approach to maritime security, particularly when dealing with container ships.[106] These layers

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[100] HART, *supra* note 2, at 23.
[101] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 391 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.
[102] *See id.* at 391-92 (concluding that it will take years to develop effective technology to screen containers).
[103] *Id.* at 391.
[104] FLYNN, *supra* note 1, at 105. *See also C-TPAT FAQ*, *supra* note 7.
[105] FRITTELLI, *supra* note 3, at 18.
[106] *See, e.g.*, FLYNN, *supra* note 1, at 69 (promoting "a security-oriented approach to container inspection . . . structured as a 'layered defense'").

involve international cooperation as well as cooperation among many federal agencies. As detailed above, containers are particularly susceptible to sabotage by terrorists during three key phases: while in foreign ports; during non-ocean portions of transit;[107] and after arriving in U.S. ports.

In order to create an effective layered defense to enhance container security, it is necessary to identify the numerous international, federal, state, and local law enforcement players involved, as well as the port authorities, private sector businesses, organized labor and other port employees who play a role in the collective effort.[108] As Congress acknowledges, "[a] major concern for U.S. policymakers is assigning roles and responsibilities for maritime security among federal agencies, among federal, state, and local agencies, and between government agencies and private industry."[109] Without establishing clearly defined roles and responsibilities of each player, there is a risk of overlapping or duplicating efforts. It is crucial for the maritime trade community to understand how federal agencies work in concert. Failure in this organized effort would undermine the Department of Homeland Security's (DHS) goal of forming a "close partnership with industry" to fight terrorism.[110]

> [T]he permissible failure rate for commercial inspection systems falls short of a tolerable threshold for security. . . . By contrast, the consequences of even a single breach of security involving a nuclear weapon could be catastrophic. Therefore, a more sophisticated strategy is required to fulfill the objective of preventing incidents of nuclear terrorism on U.S. territory.

Id. at 105. *See also* CISAC THE STANFORD STUDY GROUP, *supra* note 7, at 5; FRITTELLI, *supra* note 3, at 18; *C-TPAT FAQ*, *supra* note 7; PORT SECURITY, *supra* note 7, at 4 (testimony of JayEtta Z. Hecker).

[107] *See* Flynn E-mail, *supra* note 28 (explaining that the gap between containers on a ship is only 8-12 inches. Therefore, few containers "are accessible once they are stowed"); *see also* E-mail from Lieutenant Commander Michael T. Cunningham, Legal Counsel for the U.S. Coast Guard Port Security Directorate, to author (May 20, 2005) (on file with author) [hereinafter Cunningham E-mail] (explaining that sabotage during transit would be more feasible during the non-ocean portions of the voyage). It is extremely difficult to tamper with containers, or their contents, after they are loaded on a ship. "It's just so much easier to do something with a container when it's landside." *Id*.

[108] *See* PORT SECURITY, *supra* note 7, at 4 (testimony of JayEtta Z. Hecker).

[109] FRITTELLI, *supra* note 3, at 20.

[110] *See id.*

IV. International Players and Initiatives Involved in the Layered Defense of Container Ship Security

The greatest threat presented by containers is during the foreign port phase because containers loaded onto foreign vessels involve a number of unknown variables: they are loaded in ports generally beyond the control of the United States; they are loaded by foreign workers and crew who may not be subject to U.S. regulations;[111] and, their cargo often is a compilation of goods provided by hundreds of different sources. Effective container security must begin by addressing the overseas network of variables. Therefore, it follows that "[t]he first security perimeter in this 'defense in depth' strategy would be at the overseas point of origin."[112] It is necessary to prevent dangerous items from entering the maritime transportation network at the initial phase, because some of these items, in particular WMD, could be detonated before inspectors in a U.S. port find them.[113]

Nine months after the 9/11 attacks, the International Maritime Organization (IMO) and the World Customs Organization (WCO) were identified as the two main institutions to develop global initiatives for improving maritime security.[114] The United States is a contracting government to both the IMO and the WCO. Because neither the IMO nor the WCO is able to enforce the standards and conventions adopted, individual contracting governments have implementation responsibilities.[115] The United States is also a party to the International Labor Organization (ILO), which adopted a convention to document seafarers and assist in maritime security.[116] The United States, however,

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[111] *But cf.* Cunningham E-mail, *supra* note 107 (noting that the vast majority of foreign workers or foreign mariners "are trustworthy and law abiding" and that the security issue involves the difficulty in "identifying the ones that are untrustworthy, a problem we have just as much as with U.S. workers").

[112] FRITELLI, *supra* note 3, at 18.

[113] *See id.* at 12, 18.

[114] *See id.* at 12.

[115] *See* Int'l Mar. Org., Frequently Asked Questions, http://www.imo.org/home.asp (select the IMO FAQ link) (last visited Sept. 7, 2005) [hereinafter IMO FAQ] (explaining that the IMO adopts legislation but neither implements nor polices compliance); *see also* WORLD CUSTOMS ORG., ABOUT THE WORLD CUSTOMS ORGANIZATION, *available a*t http://www.wcoomd.org/ie/En/AboutUs/aboutus.html.

[116] INT'L LAB. ORG., SEAFARERS' IDENTITY DOCUMENTS CONVENTION (REVISED), 2003 (NO. 185) (2004), *available at* http://www.ilo.org/public/english/dialogue/sector/papers/maritime/sid0002.pdf [SEAFARERS' IDENTITY DOCUMENTS CONVENTION (REVISED)].

has not ratified the convention.[117] Therefore, the main focus of this section will be on the active roles taken by the IMO and WCO, and a minor mention will be given to the ILO's 2003 Convention revising the Seafarers' Identity Documents Convention of 1958.[118]

A. The International Maritime Organization

The IMO and WCO signed a Memorandum of Understanding in July 2002 to coordinate, among other things, examination of security measures for containers loaded onto ships.[119] The IMO[120] is an agency of the United Nations responsible for designing measures to improve the safety and security of international shipping, and to prevent ships from causing marine pollution.[121] Because the IMO was established to adopt legislation only, it has no implementing or policing authority. Therefore, the responsibility for implementing legislation remains with each government that ratifies the conventions to make them part of national law, and to enforce them at the same level as domestic laws.[122] Despite its 164 member governments, the "IMO has plenty of teeth but some of them don't bite."[123]

The IMO adopted a new version of the International Convention for the Safety of Life at Sea (SOLAS) in 1960.[124] The SOLAS Convention is generally regarded as the most important international treaty dealing with maritime safety and the safety of individual merchant ships.[125] It

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[117] *Id*.

[118] *See id*.; SEAFARERS' IDENTITY DOCUMENTS CONVENTION (REVISED), *supra* note 116; Hartmut Hesse & Nicolaos L. Charalambous, *New Security Measures for the International Shipping Community*, 3 WMU J. MAR. AFF. 123, 128. This article revisits the seafarer identity issue later. *See also infra* Part V.A.3.a-b.

[119] *See* Hesse & Charalambous, *supra* note 118, at 128.

[120] The IMO's original name, "Inter-Governmental Maritime Consultative Organization" (IMCO), was changed to International Maritime Organization (IMO) in 1982. *See* Int'l Mar. Org., *Introduction to IMO*, http://www.imo.org/home.asp (last visited Mar. 20, 2005).

[121] Committees on marine environmental protection, law, technical co-operation, and facilitation, as well as numerous sub-committees, are responsible for the main technical work of the IMO. *See id.*

[122] *See* Hesse & Charalambous, *supra* note 118, at 131.

[123] IMO FAQ, *supra* note 115 (last visited Sept. 7, 2005) (explaining the various components of the IMO).

[124] *See id.*; *see also* SOLAS, *supra* note 9.

[125] *See* Int'l Mar. Org., *Maritime Security on Agenda as USCG Commandant Visits IMO*, Feb. 17, 2005, http://www.imo.org/Newsroom/mainframe.asp?topic_id+1018&doc_id=

has 155 contracting Governments which account for over ninety-eight percent of the world shipping fleet by tonnage.[126] Afterwards, the IMO turned its focus towards facilitating international maritime traffic, and dealing with the carriage of dangerous goods.[127] Because SOLAS was designed to be reviewed and updated periodically, a new Convention was adopted on 1 November 1974 and entered into force on 25 May 1980. The Safety of Life at Sea was amended on numerous occasions and is commonly referred to as "SOLAS 1974 Convention, as amended."[128] Mandatory security measures adopted in December 2002 include a number of amendments to SOLAS. The most far-reaching of these amendments contains the International Ship and Port Facility Security Code (ISPS Code), which details security-related requirements for Governments, port authorities, and shipping companies.[129]

B. The International Ship and Port Facility Security Code

The ISPS Code is a set of measures adopted by the IMO to enhance the security of both port facilities and individual ships involved in international trade.[130] "The ISPS Code requires ships on international voyages and the port facilities that serve them to conduct a security assessment, develop a security plan, designate security officers, perform training and drills, and take appropriate preventive measures against security incidents."[131] The process leading up to the creation of the ISPS Code warrants brief explanation to provide context for the tremendous breadth of the Code.

In an attempt to address port security concerns post-9/11, the IMO and other international organizations began to develop a new maritime security system with the requisite elements for enhancing global

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4708 [hereinafter *Maritime Security on Agenda*].

126 *Id.*

127 A detailed discussion of the history of SOLAS is *available at* U.S. Coast Guard, *What is "SOLAS"?* (June 12, 2002), http://www.uscg.mil/hq/g-m/mse4/solas.htm.

128 *See* Int'l Mar. Org., *International Convention for the Safety of Life at Sea (SOLAS), 1974*, at http://www.imo.org/Conventions/contents.asp?topic_id=257 &doc_id=647 (last visited Mar. 20, 2005).

129 *See* The ISPS Code, *supra* note 9.

130 *Id.*

131 Subcomm. on Coast Guard and Mar. Transp., *Hearing on Implementation of the Maritime Transportation Security Act, Background*, *available at* http://www.house.gov/transportation/cgmt/06-09-04/06-09-04memo.html [hereinafter *Hearing on Implementation*] (last visited Mar. 20, 2005).

maritime security.[132] In particular, the IMO Assembly met in London in November 2001 to review and update methods for addressing terrorist threats.[133] Following a week-long diplomatic conference in December 2002, the IMO adopted a series of measures designed to strengthen maritime security and, thereby, prevent potential terrorists from targeting the international shipping industry.[134] Although adopted in December 2002, the ISPS Code did not become operative until 1 July 2004 for the 155 contracting parties to SOLAS.[135] Therefore, IMO member governments had until 1 July 2004 to implement the new regulations.[136]

The overarching goals of the ISPS Code are to establish an international framework between governments and the shipping and port industries to prevent security breaches affecting international trade, and to detect such breaches if they occur.[137] The impact of the ISPS Code is expected to affect the international maritime community as well as the world economy, due to the key role of shipping in trade.[138] Because of the tremendous role that container ships play in international trade, implementation of the ISPS Code is critical in addressing the container security issues identified earlier.[139]

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[132] *See* FRITTELLI, *supra* note 3, at 12-13; *see also* Murphy, *supra* note 34, at 588.

[133] *See* INT'L MAR. ORG., IMO 2004: FOCUS ON MARITIME SECURITY 2, *available at* http://www.imo.org/includes/blastData.asp?doc_id=3808 (containing a message from the Secretary-General of the International Maritime Organization, Mr. Efthimios Mitropoulos, and discussing past efforts to address terrorist threats).

[134] *See* SOLAS, *supra* note 9; *see also* Murphy, *supra* note 34, at 589; Hesse & Charalambous, *supra* note 118, at 125.

[135] *See* Int'l Mar. Org., Summary of Status of Conventions, http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Mar. 5, 2005) (providing a list of the SOLAS Contracting Governments as of 31 January 2005).

[136] Unlike other Conventions that may require affirmative ratification by participating governments, SOLAS provides for a "tacit acceptance procedure" so that "an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from one-third of the parties or from the parties whose combined merchant fleets represent not less than 50 percent of world gross tonnage." SOLAS, *supra* note 9, art. VIII. The International Convention for the Safety of Life at Sea, Chapter XI contains two parts: Chapter XI-1, "Special Measures to Enhance Maritime Safety;" and Chapter XI-2, "Special Measures to Enhance Maritime Security." Chapter XI-2 contains the ISPS Code. *Id.* at XI-2.

[137] *See* The ISPS Code, *supra* note 9; *see also* Hesse & Charalambous, *supra* note 118, at 125-26.

[138] *See* Int'l Mar. Org., FAQ on ISPS Code and Maritime Security, http://www.imo.org/Newsroom/mainframe.asp?topic_id=897 (last visited Mar. 20, 2005) [hereinafter *FAQ on ISPS Code*].

[139] *See supra* Part II.

1. How the ISPS Code Addresses the "Foreign Element" of Container Vulnerability

The rationale behind the ISPS Code is that port security is a risk management function. In order to manage risks, risks must first be identified.[140] Therefore, the ISPS Code imposes duties upon governments, owners, and operators of certain ships and ports involved in international trade.[141] These requirements provide partial protection against the threat of container ships by requiring foreign vessels and ports to identify vulnerabilities and to create and implement security plans to address the vulnerabilities. The more checks and balances in place overseas, the greater the likelihood of enhancing every realm of security. For instance, a container ship that visited ports with excellent security histories and established security plans may pose a low security risk to U.S ports. Container ships with less stellar security plans, or coming from suspect ports may trigger more concern and a need for inspection. The more information available to U.S. ports upfront, the more prepared port authorities will be to determine necessary action in a timely fashion. Thus, high threats, low threats, and necessary security measures will be more readily apparent. Through these measures, the ISPS Code attempts to remove some of the unknown elements involved in the international transportation of container ships.

The ISPS Code contains two sections for ships and port facilities: Part A is mandatory; and Part B is recommended and contains guidance on implementing the Code.[142] Under Part A, certain vessels and ports involved in international voyages must develop extensive security plans, which their government must also approve.[143] Part A also requires the

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[140] *See* Hesse & Charalambous, *supra* note 118, at 125-26.

[141] *See* The ISPS Code, *supra* note 9, pt. A, §§ 4.1-4.4; pt. B, § 4.1 (setting forth the requirements of contracting governments in performing security assessments). *See also id.* pt. A, §§ 6.1-6.2, 11.1-11.2.13; pt. B, §§ 6.1-6.8, 8, 9, 13 (discussing the obligations of companies as well as the designation and duties of company security officers); *id.* pt. A, §§ 7.1-9.1, 12.1-12.2.10; pt. B, §§ 8, 9, and 13 (detailing requirements and guidance for ensuring ship security as well as the designation and duties of ship security officers); *id.* pt. A, §§ 14.1-14.6; pt. B, §§ 15, 16, 18 (discussing the security of port facilities, in particular, port facility assessments, plans, and officers); *id.* pt. A, §§ 19.1.1-19.1.4, 19.2.1-19.2.4 (explaining the verification and certification issued to complying ships); *id.* pt. B, § 4.20 (detailing ships that are not required to comply with Part A of the ISPS Code).

[142] *See* The ISPS Code, *supra* note 9, pts. A, B.

[143] *See id.* pt. A, §§ 1.2.1, 3.1. Additional requirements that apply to both ship and port facilities under the ISPS Code include measures for monitoring and controlling access to

use of security personnel, including security officers, and appropriate security equipment.[144] The guidance that the ISPS Code provides to ships depends on "the type of ship, its cargoes and/or passengers, its trading pattern and the characteristics of the port facilities visited by the ship."[145] Likewise, the ISPS Code's guidance for port facilities depends upon the types of cargo, passengers, and the trading patterns of vessels that frequent the port.[146] Under the ISPS Code, contracting governments must first assess the risks faced by individual ports and vessels, then owners and operators must identify and undertake appropriate security measures.[147]

a. The ISPS Code Ship Requirements

Under the ISPS Code, certain ships must have a Ship Security Plan (SSP),[148] detailing both the minimum operational and physical security measures that the ship must meet at all times and also the increasingly demanding measures required in case the designated security level escalates.[149] Vessels subject to the ISPS Code include passenger ships and all vessels weighing more than 500 gross tons involved in international trade, including tankers.[150] Company and ship security officers must review the SSP periodically for sufficiency.[151] Each SSP must be approved by the contracting government, or authorized agency, prior to implementation, and any amendment in an SSP requires

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secure areas, monitoring the activities of people and cargo, and ensuring that readily available security communications are in place. *See* Hesse & Charalambous, *supra* note 118, at 127. This will be addressed later in the analysis of the ILO and the MTSA. *See infra* Part IV.D., Part V.A.

144 *See* The ISPS Code, *supra* note 9, pt. A. §§ 2.1.6-2.1.8, 4.3, 5.4, 6.2.

145 Hesse & Charalambous, *supra* note 118, at 125; *see* The ISPS Code, *supra* note 9, pt. B, § 4.20 (detailing which ships are not required to comply with Part A of the ISPS Code).

146 *See* The ISPS Code, *supra* note 9, pt. A, §§ 14.1-14.6; pt. B, §§ 15, 16, 18 (detailing port facility security requirements and guidance, including port facility security plans and assessments); *see also* Hesse & Charalambous, *supra* note 118, at 125.

147 *See, e.g.*, The ISPS Code, *supra* note 9, pt. A, §§ 14.1-14.6; pt. B, §§ 15, 16, 18 (discussing port facility security). *See also id.* pt. A, §§ 7.1-9.1; pt. B, §§ 8, 9, 13 (discussing ship security).

148 *See* The ISPS Code, *supra* note 9, pt. A, §§ 2.1.4, 9.1-9.8.1; pt. B, §§ 9.1-9.53; *see also* Hesse & Charalambous, *supra* note 118, at 125, 127.

149 *See* The ISPS Code, *supra* note 9, pt. A, §§ 9.1-9.8.1; pt. B, §§ 9.1-9.53; *see also* Hesse & Charalambous, *supra* note 118, at 125, 127.

150 *See* The ISPS Code, *supra* note 9, pt. A, §§ 3.1, 9.1-9.8.1; pt. B, §§ 9.1-9.53.

151 *Id.* pt. B, § 9.5.

resubmission and approval.[152] To support compliance with the ISPS Code, the ship must carry an International Ship Security Certificate (ISSC).[153] A valid ISSC, however, is only indicia of compliance, and may be subject to further verification by a port state.[154]

b. The ISPS Code Port Facility Requirements

Contracting governments are responsible for initially assessing the security of their port and facility plans. The ports and facilities subject to the ISPS Code include mobile offshore drilling units as well as port facilities serving ships involved with international voyages.[155] Individual governments may complete the Port Facility Security Assessments (PFSA), task intergovernmental agencies with the responsibility, or rely upon assessments conducted by a Recognized Security Organization (RSO).[156] The PFSA will factor into the determination of whether a Port Facility Security Officer (PFSO) is needed.[157] The PFSA, like the SSP, states the minimum security requirements that each facility and port needs in place at each security threat level.[158] Using the PFSA, port facility owners and operators must implement an approved Port Facility Security Plan (PFSP).[159]

c. The ISPS Code's "White Lists"

The IMO is responsible for publishing a list of ports that have approved PFSPs.[160] In addition, the IMO is responsible for publishing a

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[152] Hesse & Charalambous, *supra* note 118, at 125, 127.

[153] *See* ISPS Code, *supra* note 9, pt. A, §§ 19.1-19.2; *see also* Hesse & Charalambous, *supra* note 118, at 127.

[154] *See* Cunningham E-mail, *supra* note 107.

[155] The ISPS Code, *supra* note 9, pt. A, § 3.1.1.3, 3.1.2.

[156] *Id.* pt. A, §§ 15.1-15.7; pt. B, §§ 4.3, 15.1-15.16.12.

[157] *See id.* pt. A, §§ 17.1-17.3; pt. B, §§ 17.1-17.2; *see also* Hesse & Charalambous, *supra* note 118, at 128.

[158] Hesse & Charalambous, *supra* note 118, at 128.

[159] *Id.* at 26; The ISPS Code, *supra* note 9, pt. A, §§ 16.1-16.8; pt. B, §§ 16.1-16.63.

[160] *See FAQ on ISPS Code*, *supra* note 138 (providing a link to "Status of Compliance with the maritime security provisions of SOLAS chapter XI-2 and the ISPS Code"); *see also* The ISPS Code, *supra* note 9, pt. B, § 4.33 (providing examples of "possible clear grounds" that a ship may not be in compliance with the ISPS Code).

list of vessels that have ISSCs issued by authorized shipping societies.[161] Any ship subject to the ISPS Code that lacks a valid ISSC violates the ISPS Code.[162] Likewise, when a vessel scheduled to arrive from a port is not on the IMO "white list," "the government responsible for a 'white list' port may use this as 'clear grounds' that the ship may not be in compliance with the ISPS Code."[163]

To illustrate the ISPS Code's usefulness, CBP officials will know if a container ship and the ports visited by the ship comply with the ISPS Code even before the vessel departs for U.S. ports. If a foreign container ship fails to comply with the ISPS Code, the U.S. port authority has the discretion to impose compliance as a condition for entering domestic ports.[164] United States authorities may choose to inspect ships while in foreign ports to ensure that they meet IMO standards before they enter U.S. territorial waters.[165] The U.S. Coast Guard, however, always retains discretion to deny entry of a container ship, or any other vessel, arriving from a port that is not on the "white list."[166]

2. Limits of the ISPS Code in Addressing the Unique Threat of Containers

When the ISPS Code became operational on 1 July 2004, IMO reported that eighty-six percent of ships and sixty-nine percent of port

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[161] *See* Murphy, *supra* note 34, at 589; *see also* The ISPS Code, *supra* note 9, pt. B, §§ 4.3-4.4 (discussing the use of Recognized Security Organizations by contracting governments to fulfill their responsibilities under the ISPS Code). Details on domestic or foreign port or facility compliance are available to the public. *See* Int'l Mar. Org., IMO Global Integrated Shipping Information System (GISIS): Status of Compliance with the Maritime Security Provisions of SOLAS Chapter XI-2 and the ISPS Code, http://www2.imo.org/ISPSCode/ISPSInformation.aspx.

[162] *See* The ISPS Code, *supra* note 9, pt. B, §§ 1.13, 4.32; Murphy, *supra* note 34, at 589.

[163] Murphy, *supra* note 34, at 589.

[164] *See id.* at 589.

[165] *See* FRITTELLI, *supra* note 3, at 10; *but see* Cunningham E-mail *supra* note 107 (explaining that the U.S. Coast Guard does not have the unilateral ability to board foreign vessels, but may require the permission of the port state or the vessel's flag state).

[166] *See* Cunningham E-mail, *supra* note 107 (noting that the U.S. Coast Guard has the prerogative to deny a foreign vessel entry into a domestic port due to the vessel's failure to comply with the ISPS Code). *See also* The ISPS Code, *supra* note 9, pt. B, § 4.33 (listing examples of "clear grounds" for ISPS Code violations, warranting denial of port entry); *id*. pt. A, § 4 (setting forth the responsibilities of Contracting Governments and listing some of the conditions that each Contracting Government may impose upon foreign vessels seeking port entry).

facilities had approved security plans in place.[167] Those figures have substantially increased, and currently nearly ninety-seven percent of the more than 9600 declared port facilities have approved PFSPs in place.[168] Likewise, "well beyond" ninety percent of ships have approved security plans in effect.[169]

Despite these promising statistics, even 100% compliance with the ISPS Code provisions is insufficient to address the security threats containers pose to U.S. ports. As identified earlier, the primary vulnerability of container ships is the inherently unknown element of containers arriving from foreign ports.[170] The ISPS Code attempts to remove some of these unknown variables by both exposing weaknesses and addressing security measures in place to prevent security breaches. These measures are useful, but leave the following enormous gaps in container ship security: (1) the ISPS Code does not protect against goods loaded into containers during or before the containers were loaded onto ships; (2) ports and vessels may have difficulty complying with the ISPS Code, thereby excluding them from the benefits of maritime commerce; and (3) the ISPS Code may expand the threats posed by containers by introducing a largely unregulated privatization element that lacks oversight.

a. The ISPS Code Does Not Protect Against Goods Loaded into Container Ships

Despite the clear informational advantages of the ISPS Code, it was not designed to address a number of key foreign threats that container ships present to U.S. ports.[171] In particular, the ISPS Code does not protect against goods loaded into containers that are then loaded onto container ships. Notably, the ISPS Code does not provide any protection

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[167] Hesse & Charalambous, *supra* note 118, at 132.

[168] *Maritime Security on Agenda*, *supra* note 125.

[169] Hesse & Charalambous, *supra* note 118, at 132. The IMO and the United States have been very active in providing training in maritime security measures. *Id.* at 133.

[170] *See supra* Part II.B.

[171] While the ISPS Code was not designed to address container ship security, container security issues are an inherent element of the ISPS Code's objective to provide an "international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade." The ISPS Code, *supra* note 9, pt. A, § 1.2 (stating the objectives of the ISPS Code).

against a WMD being loaded onto a container scheduled to enter a U.S. port.

The contents of a typical single container shipment may include goods from various sources and involve thirty to forty documents.[172] The sources providing the container contents, however, are cloaked in anonymity. While cargo manifests should list the contents of each container, even by a conservative estimate, it is possible that the listed contents of a single container ship carrying 3,000 containers may require good faith reliance upon representations from more than 90,000 sources.[173] The 25,000 containers[174] that arrive in U.S. ports each day present continuing threats. The arrival of this enormous volume of containers translates to daily good faith reliance upon the representations of over 750,000 providers of goods entering U.S. ports.[175] The ISPS Code alone is insufficient to address these threats.

b. The ISPS Code Does Not Protect Against Container Ships Arriving from Countries that Lack the Financial Means or Political Incentive to Comply with ISPS Code Requirements

While the percentage of ports and vessels complying with the ISPS Code is extremely high, there remain regional areas where compliance has been difficult to achieve. The numbers suggest that the ISPS Code strikes a good balance between security and feasibility for most countries. As Scott J. Glover, a retired Captain with the U.S. Coast Guard, recently explained, although reports indicate a large percentage of ISPS Code compliance in foreign ports and with foreign vessels, trips to these ports suggest that the ISPS Code is not actually in compliance with U.S. standards; "a cursory examination of some ports may make you wonder."[176] In addition, "Africa is falling behind other continents in

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[172] *See* FRITTELLI, *supra* note 3, at 8.

[173] This figure is calculated by multiplying the number of containers on a large container ship (i.e. 3,000) by a conservative estimate of the number of documents connected to and listing the purported cargo of each container (i.e. thirty).

[174] *See* Bonner, *supra* note 2 (stating that 25,000 containers arrive in U.S. ports each day and that nine million containers arrive in U.S. ports annually).

[175] This figure is calculated by multiplying the average number of containers that arrive in U.S. ports each day (i.e. 25,000) by a conservative estimate of the number of documents connected to and listing the purported cargo of each container (i.e. thirty).

[176] Scott J. Glover, Director of Maritime Security, HPA, LLC, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 15,

complying with the new regulations" and "[c]ountries in the former Soviet Union and Eastern Europe have also been slow to implement the measures."[177]

There are two implementation problems identified by the IMO. First, member countries may lack the necessary expertise, experience, and resources to implement the ISPS Code.[178] Second, member countries may place a low priority on implementation.[179]

While wealthy countries that can afford to comply with the ISPS Code will likely enjoy priority as importers to the United States, poorer countries that lack the financial means to comply with the ISPS Code may find that they are internationally boycotted.[180] The IMO does not generate a "black list" of non-conforming countries, and specifically states that "[l]ack of inclusion in the database should not be construed automatically as failure to comply with the requirements in SOLAS."[181] As discussed above, however, if a vessel scheduled to arrive from a port is not on the IMO "white list," "the government responsible for a 'white list' port may use this as 'clear grounds' that the ship may not be in compliance with the ISPS Code."[182] It is easy to see that the "white list" implies a "black list" by negative inference.

Anticipating the plight of poorer countries, the IMO initiated a $2.5 million Global Program on Maritime and Port Security in January 2002.[183] The program includes worldwide activities, such as seminars and workshops at regional and national levels to help countries comply with SOLAS and the ISPS Code.[184] Thus far, the program has trained

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2005) (stating that progress is being made in ISPS Code compliance, but "we're still not there").

[177] Int'l Mar. Org., Security Compliance Shows Continued Improvement (Aug. 6, 2004), http://www.imo.org/Newsroom/mainframe.asp?topic_id=892&doc_id=3760 [hereinafter Security Compliance].

[178] *Id*.

[179] *See id*; *see also* Hesse & Charalambous, *supra* note 118, at 133.

[180] *See* Flynn E-mail, *supra* note 28 (noting that a ship may be delayed if it visited a non-compliant port during the past ten port calls).

[181] *FAQ on ISPS Code*, *supra* note 138.

[182] *See* Lloyd's Register, Maritime Security - Frequently Asked Questions and Answers, http://www.lr.org/market_sector/marine/maritime-security/faqs.htm; *see also* The ISPS Code, *supra* note 9, pt. B, § 4.33 (providing examples of "possible clear grounds" that a ship may not be in compliance with the ISPS Code).

[183] *See* Security Compliance, *supra* note 177.

[184] *See id.*

more than 3,200 people in developing regions.[185] As the current IMO figures suggest, however, parts of Africa, the former Soviet Union, and Eastern Europe still have not implemented the ISPS Code measures.[186] While compliance by ninety-seven percent of ports may sound high, because over 9,600 ports are involved in international trade, approximately 300 ports still are not in compliance. Therefore, the United States may face either an effective boycott of goods from these ports, or risk the potentially dangerous consequences of accepting goods from their ports.

c. Privatization Problems in Determining the Reliability of Information

By implementing international criteria for vessels and ports, the intent of the ISPS Code is that other participating countries will be able to rely on measures executed abroad to protect against the threat of people or goods harming their country.[187] Government approved security assessments and plans may provide a level of justified reliance. Unregulated private businesses, however, play a significant role in meeting the ISPS Code requirements and, due to lack of oversight, may be unreliable. While the ISPS Code removes some of the unknown variables faced by the United States in dealing with foreign containers, it also creates additional unknown variables.

The ISPS Code permits governments and owners to have security assessments of vessels and port facilities conducted by an RSO.[188] The ISPS Code defines an RSO as "an organization with appropriate expertise in security matters and with appropriate knowledge of ships

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[185] *Id.*
[186] *Id*.
[187] *See* The ISPS Code, *supra* note 9, pt. A, § 1.2 (stating objectives of the ISPS Code).
[188] *See* SOLAS, *supra* note 9, ch. 1, reg. 6.

> All ships must be surveyed in order to be issued certificates which establish their seaworthiness, type of ship, and so on and this is the responsibility of the flag State of the vessel . . . [h]owever, the flag State ("Administration") [may] entrust the inspections and surveys either to surveyors nominated for that purpose or to organizations recognized by it.

Id. See also ISPS Code, *supra* note 9, pt. A, §§ 15.1-15.7; pt. B, §§ 15.1-15.16.12.

authorized by the Administration to approve the SSP, carry out audits and issue on its behalf International Ship Security Certificates."[189] In addition, RSOs often are an international association of classification societies, or certain non-Governmental organizations that were granted consultative status with the IMO in 1969.[190]

Due to implementation and time constraints imposed by the ISPS Code, privatization is necessary for countries to comply with the multi-layered requirements in a timely fashion. Without oversight requirements, however, this privatization creates a new layer of unknowns and, consequently, another security threat. After all, regulations for RSOs may vary among countries, and there are no international certification requirements or formal training requirements for RSO inspectors.[191] The inherent problem with the existing scenario is that SSPs and ISSCs may only create the appearance that a foreign ship or port facility is in compliance. This appearance, however, may be more of an illusion than a reality, because the lack of RSO oversight or guidelines may render verification of the approval process virtually impossible. Furthermore, it is conceivable that unscrupulous RSOs could generate rubber-stamped SSP and ISSC approvals, which the United States may have difficulty controlling or discovering.[192]

According to the U.S. Coast Guard website, once an organization is certified as an RSO, its conduct is only policed by the Coast Guard if it is involved in "ISPS-related detention, expulsion, or denial of entry."[193]

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[189] *See* ISPS Code, *supra* note 9, pt. A, §§ 15.1-15.7; pt. B, §§ 15.1-15.16.12; *see also* U.S. Coast Guard, 2004 List of Targeted Recognized Security Organizations (July 19, 2005), http://www.uscg.mil/hq/g-m/pscweb/RSO.htm (explaining what targeted RSOs are, and providing the same definition of RSO contained in the ISPS Code) [hereinafter List of RSOs – 2004].

[190] *See* INT'L MAR. ORG., MSC/CIRC.1074, MEASURES TO ENHANCE MARITIME SECURITY: INTERIM GUIDELINES FOR THE AUTHORIZATION OF RECOGNIZED SECURITY ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION AND/OR DESIGNATED AUTHORITY OF A CONTRACTING GOVERNMENT (2003), *available at* http://www.imo.org/includes/blastData.asp/doc_id=3008/1074.pdf (explaining the role of RSOs in ISPS compliance).

[191] *See* Flynn E-mail, *supra* note 28 (noting that the lack of certified formal training for inspectors "raises obvious questions about the qualifications of those who are conducting these security checks").

[192] *But see* Cunningham E-mail, *supra* note 107 (arguing that "[w]hile an unscrupulous RSO may pencil whip an ISSC, we [the Coast Guard] most definitely will discover it via our very aggressive port state control activity"). *See infra* Part V.A.1.c. (discussing the U.S. Coast Guard's Port State Control Program).

[193] *See* List of RSOs – 2004, *supra* note 189 (containing the same definition for RSO as The ISPS Code and SOLAS). *But see* Cunningham E-mail, *supra* note 107 (noting that

The U.S. Coast Guard "determines whether the actions or inaction of the RSO contributed to the control action. If so, the Coast Guard attributes the control action to the RSO."[194] "[Recognized Security Organizations] will be targeted based on their total number of related major control actions accumulated during the previous 12-month period as determined by [Coast Guard Head Quarters]."[195]

In efforts to compensate for the inherent unknowns of RSOs, the Coast Guard scrutinizes activities of RSOs, uses Port State Control actions, [196] and constantly revamps assessments of RSOs based on new information.[197] The lack of RSO oversight or regulations, however, may lead to retroactive rather than preventive security measures.[198] Furthermore, while a foreign vessel's ISSC is available for the Coast Guard to review, the underlying plans reviewed by RSOs (or other foreign officials) in issuing the ISSC may not be available to the Coast Guard. Inspection officers designated by a Contracting Government have no authority to inspect SSPs except in very limited circumstances, as specified in section 9.8.1 of the ISPS Code.

RSOs can be targeted in various ways: e.g. "[i]f too many vessels issued an ISSC by an RSO have control actions, even control actions not directly attributable to the RSO, vessels using the RSO will be targeted and face increased scrutiny").

[194] *See* List of RSOs – 2004, *supra* note 189. *But see* Cunningham E-mail, *supra* note 107 (stating that port state control provides a very good method for verification and identifying unscrupulous RSOs).

[195] *See* List of RSOs – 2004, *supra* note 189 ("The list of targeted RSOs . . . will be updated and posted on a monthly basis. RSO's have the ability to appeal the determination made by USCG HQ concerning their association with a major control action.").

[196] *See infra* Part V.A.1.c. (discussing the U.S. Coast Guard's Port State Control Program).

[197] *See* Cunningham E-mail, *supra* note 107 (discussing various means by which an RSO may be targeted (e.g. "[i]f many vessels issued an ISSC by an RSO have control actions, even control actions not directly attributable to the RSO, vessels using the RSO will be targeted and face increased scrutiny")). While there may be a preventive aspect to this method of targeting, it is based upon past detection of other vessels that were subject to control actions rather than purely preventative methods.

[198] *Cf Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative Before the Permanent Sub-Committee on Investigations, Committee on Homeland Security and Governmental Affairs, United States Senate*, 109th Cong. (testimony of Stephen E. Flynn, Ph.d) (May 26, 2005) [hereinafter *Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiativ*] (stating that the C-TPAT approach to deterring terrorist activity is problematic "because private security is inherently reactive; i.e., companies cannot punish violators of their rules until there is some evidence that those rules have been broken.").

> If the officers duly authorized by a Contracting Government have clear grounds to believe that the ship is not in compliance . . . and the only means to verify or rectify the non-compliance is to review the relevant requirements of the ship security plan, limited access to the specific sections of the plan relating to the non-compliance is exceptionally allowed, but only with the consent of the Contracting Government, or the master of the ship concerned. [Certain] provisions in the plan . . . are considered as confidential information, and cannot be subject to inspection unless otherwise agreed by the Contracting Governments concerned. [199]

The lack of international regulations or certification of RSOs limits the ability of the United States to control or verify RSOs overseas.[200] These impediments pose security risks that may persist until RSOs are subject to oversight, international standards, and verifiable criteria.

C. The World Customs Organization

Although the ISPS Code does not deal with the possible threat posed by goods loaded on a container ship, the WCO compiled a set of elements to identify high-risk goods which can be applied to container ships.[201] The WCO is an international institution based in Brussels, Belgium that works "towards simplifying and harmonizing customs procedures to improve the efficiency of cross-border trade."[202] Current

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[199] *See* The ISPS Code, *supra* note 9, pt. A, § 9.8; *see also* Cunningham E-mail, *supra* note 107 (noting that while the United States inspects all vessels subject to SOLAS and the ISPS Code at least annually, there remain information stumbling blocks: "a port state does not have access to a vessel's security plan before an inspection," "[s]ome parts of the security plan may not be viewed by a port state unless the flag state gives permission," and "we must have clear grounds for seeing even parts of the plan").

[200] *See* U.S. COAST GUARD, NAVIGATION AND VESSEL INSPECTION CIR. NO. 04-03, CHANGE 1 TO GUIDANCE FOR VERIFICATION OF VESSEL SECURITY PLANS ON DOMESTIC VESSELS IN ACCORDANCE WITH THE MARITIME TRANSPORTATION SECURITY ACT (MTSA) REGULATIONS AND INTERNATIONAL SHIP & PORT FACILITY SECURITY (ISPS) CODE, COMDTPUB 16700.4, Enclosure 3, 3 (May 21, 2004), *available at* http://www.uscg.mil/hq/g-m/nvic/03/NVIC_04-03_CH-1.pdf (noting that although the ISPS Code permits RSOs, 33 C.F.R. pt. 104 does not and, therefore, the U.S. Coast Guard has not designated any RSOs).

[201] FRITTELLI, *supra* note 3, at 13.

[202] *Id.*

members of the WCO include 168 countries, including the United States, which account for ninety-eight percent of world trade.[203]

In June 2003, a WCO task force, consisting of representatives from fifty countries and twenty-five organizations, created a Resolution on Security and Facilitation of the International Supply Chain.[204] The task force generated a set of data elements for identifying high risk cargo. These elements were incorporated into the WCO's Framework of Standards to Secure and Facilitate Global Trade in June 2005.[205] In addition to identifying high risk cargo, the elements and subsequent framework provide a consistent method for exchanging information "on inbound, outbound and transit shipments," and a "consistent risk management approach to address security threats."[206] The objective of the task force was "to secure and protect the international trade supply chain from being used for acts of terrorism or other criminal activity while insuring continued improvements in trade facilitation without unnecessarily increasing costs."[207] As part of an effort to achieve this objective, the framework contains an Appendix entitled, "Seal Integrity Programme for Secure Container Shipments."[208]

Similarly, the Group of Eight, or G8,[209] began working with the WCO to develop joint standards and guidelines for electronic

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[203] *See* WORLD CUSTOMS ORG., WCO FACT SHEET: THE WORLD CUSTOMS ORGANIZATION, *available at* http://www.wcoomd.org/ie/en/AboutUs/aboutus.html (last visited Sept. 6, 2005); *see also* Kunio Mikuriya, Deputy Secretary General, WCO, The Challenges of Facilitating the Flow of Commerce in a Heightened Security Environment, Speech at the UNECE International Forum on Trade Facilitation (May 29-30, 2002), *available at* http://www.unece.org/trade/forums/forum02/presentations/session_i/kmikuriya.pdf (explaining that the members of the WCO account for 97% of world trade).

[204] PRAVIN GORDHAN, RESOLUTION OF THE CUSTOMS CO-OPERATION COUNCIL ON SECURITY AND FACILITATION OF THE INTERNATIONAL TRADE SUPPLY CHAIN (2002), http://www.wcoomd.org/ie/En/Press/Resolution%20Final%20Council%20June%202002%20-%20E.PDF [hereinafter Resolution of the Customs Co-operation].

[205] WORLD CUSTOMS ORG., FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE (2005), *available at* http://www.wcoomd.org/ie/En/Press/Cadre%20de%20normes%20GB_Version%20Juin%202005.pdf [hereinafter FRAMEWORK OF STANDARDS].

[206] *Id.* at 1.3, 1.2.2.

[207] Resolution of the Customs Co-operation, *supra* note 204.

[208] FRAMEWORK OF STANDARDS, *supra* note 205, at Appendix to Annex 1.

[209] *See* Fed'n of Am. Scientists, *G-8 to Take Further Steps to Enhance Transportation Security*, June 2, 2003, *available at* http://www.fas.org/asmp/campaigns/MANPADS/G8evianmtg_DoSsummary.htm. The Group of Eight—G8—is a grouping of eight of the world's leading industrialized, democratic nations (Canada, Germany, France, Italy, Japan, Russia, the United Kingdom, and the United States). *See id.*

transmission of customs data for cargo, and a standardized set of data elements to identify high-risk cargo.[210] The WCO and the G8 aspire to combine security needs with trade facilitation.

This article is limited in addressing the elements used to identify high-risk cargo because the lists and criteria are classified. Those familiar with the maritime trade industry, however, could likely manipulate the system. For example, cargo manifests and other representations of goods could be crafted to avoid suspicion. The classified criteria could be deciphered by following which patterns of cargo or shipments trigger enhanced scrutiny. Once the criteria are identified, the methods of reporting or otherwise providing ascertainable characteristics of a vessel and its goods could be altered to avoid further scrutiny. Furthermore, while the WCO "resolves" to do a variety of things, measures to achieve such goals are incomplete and not yet ratified.

D. The International Labor Organization and Documentation of Seafarers' Identity

Currently, there is no reliable seafarer document that verifies the identity of crewmembers on container ships and port facility workers. Containers are a source by which terrorists could smuggle themselves into U.S. ports.[211] Moreover, terrorist crewmembers or stowaways on container ships may sabotage the containers during transit or steer a container ship into a bridge or port. Therefore, the identity of those who have access to containers and container ships is an important security layer.

As a result of the 9/11 attacks, the international community recognized the need to update seafarer identification documents. The ISPS Code requires ships and port facilities to create measures for monitoring and controlling access to secure areas, for monitoring the activities of people and cargo, and for ensuring that readily available security communications are in place.[212] These requirements must be

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[210] *See id.*

[211] *See supra* Part II; *see also* Bonner, *supra* note 2 ("Shipments may contain terrorist operatives or terrorists themselves.").

[212] *See* The ISPS Code, *supra* note 9, pt. A, §§ 9.1-9.8.1, 14.1-14.6; pt. B, §§ 9.1-9.53, 15, 16, 18.

considered jointly with the efforts of the International Labor Organization (ILO).

The ILO revised the 1958 Convention Dealing with Documentation of Seafarers' Identity, effective 9 February 2005.[213] The new Convention provides rigorous procedures for seafarer identification to enhance security against infiltration of terrorists and to "ensur[e] that the world's 1.2 million seafarers will be given the freedom of movement necessary for their well-being and for their professional activities and, in general, to facilitate international commerce."[214]

Although the United States is a contracting government to the ILO, the United States has not ratified the revised Convention. In fact, only four countries—France, Hungary, Jordan and Nigeria—ratified the revised Convention.[215] Therefore, the ILO's attempt to provide another layer of security has achieved marginal success, at best. Nonetheless, the detailed discussion of the MTSA below addresses domestic attempts to resolve the identification issue.[216]

V. Domestic Players and Initiatives Involved in the Layered Defense of Container Ship Security

On 25 November 2002, Congress enacted the Homeland Security Act of 2002, which established the Department of Homeland Security as an executive department of the United States.[217] In addition to the creation of DHS, the U.S. Customs Service was reorganized and renamed as the Bureau of U.S. Customs and Border Protection on 1 March 2003 under the Customs Co-Operation and Mutual Assistance in

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[213] *See* SEAFARERS' IDENTITY DOCUMENTS (REVISED), *supra* note 116.

[214] Press Release, Int'l Lab. Org., 91st Annual Conference of the ILO Concludes Its Work: Delegates Debate Action To End Poverty Through Work, Adopt Convention On Seafarers Security Measures (June 19, 2004), *available at* http://www.ilo.org/public/english/bureau/inf/pr/2003/35.htm. *See* SEAFARERS' IDENTITY DOCUMENTS (REVISED), *supra* note 116.

[215] The International Labor Organization website contains a list of the countries that have ratified the SEAFARERS' IDENTITY DOCUMENTS (REVISED), *supra* note 116. *See* Int'l Lab. Org., Convention No. C185 Was Ratified by Four Countries, http://www/o;p/prg/ilolex/cgi-lex/ratifce.pl?C185 (last visited Sept. 21, 2005).

[216] *See infra* Part V.A.3.a-b (discussing §§ 70105, 70111 of the MTSA).

[217] *See* The Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).

Customs Matters. Furthermore, the U.S. Coast Guard was transferred from the Department of Transportation to DHS.[218]

The Coast Guard is the principal maritime law enforcement authority in the United States, as well as the lead DHS agency for maritime security, including port security.[219] The Coast Guard is the logical choice based on its equipment, training, connections to civilian federal law-enforcement agencies, and "because of its dual status as both an armed service and a law enforcement agency."[220] Coast Guard responsibilities include evaluating, boarding, and inspecting commercial ships as they approach U.S. waters.[221] In addition to numerous other duties, the Coast Guard assesses and counters terrorist threats in U.S. ports, as well as protects U.S. Navy ships while in U.S. ports.[222] Under both the Ports and Waterways Safety Act of 1972,[223] and the recently enacted Maritime Transportation Security Act of 2002, discussed in detail below,[224] the Coast Guard is responsible for protecting vessels and harbors from terrorists, or otherwise subversive acts.[225]

The U.S. Customs and Border Protection (CBP) has the principal and initial responsibility to inspect cargo.[226] This duty includes inspecting

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[218] *See id.* United States Customs and Border Protection is the agency within the Department of Homeland Security that manages, controls, and secures U.S. borders. *See* CBP Mission, *supra* note 64.

[219] *See Hearing on Implementation*, *supra* note 131; *see also* U.S. Coast Guard, Welcome to the Office of Law Enforcement Home Page (last updated Jan. 24, 2005), http://www.uscg.mil/hq/g-o/g-opl/Welcome.htm. *See also* 14 U.S.C.S. 2 (authorizing the Coast Guard Law Enforcement mission; "[t]he Coast Guard shall enforce or assist in the enforcement of all applicable laws on, under and over the high seas and waters subject to the jurisdiction of the United States"); 14 U.S.C.S. 89 (authorizing U.S. Coast Guard active duty commissioned, warrant, and petty officers to enforce applicable U.S. laws, and federal laws, on waters subject to U.S. jurisdiction, and in certain instances in international waters).

[220] O'ROURKE, *supra* note 15, at 1.

[221] *See id.*; *see also* FRITTELLI, *supra* note 3, at 9-11; Rear Admiral Kevin J. Eldridge, U.S. Coast Guard Commander of District 11, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 15, 2005) (explaining that surveillance technology allows the U.S. Coast Guard to know if a vessel encounters problems during transit, which warrant interdiction on the high seas).

[222] *See* FRITTELLI, *supra* note 3, at 9-10; *see also* RONALD O'ROURKE, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, HOMELAND SECURITY: COAST GUARD OPERATIONS BACKGROUND AND ISSUES FOR CONGRESS 1-2 (updated June 30, 2005).

[223] Ports and Waterways Safety Act of 1972, 33 U.S.C. S. §§ 1221-1236 (1994).

[224] *See infra* Part V.A.

[225] FRITTELLI, *supra* note 3, at 10.

[226] *Id.*

cargo containers that foreign ships bring into U.S. ports, as well as examining and inspecting the crew members and passengers on ships arriving in U.S. ports from foreign ports.[227]

The Transportation Security Administration (TSA) is yet another agency involved in domestic maritime security. The TSA was created by the Aviation and Transportation Security Act of 2001.[228] Initially, it focused on the security of air transportation, but then the TSA expanded to include all modes of transportation, including maritime transportation.[229]

In order to understand how the various players contribute layers to the domestic security of containers and container ships, it is necessary to look at the key national measures implemented post-9/11. While a number of federal agencies have implemented a variety of measures, the seminal sources that deal with container security threats in maritime transportation are the Maritime Transportation Security Act, the Container Security Initiative, and the Customs-Trade Partnership Against Terrorism.

A. The Maritime Transportation Security Act of 2002

On 25 November 2002, President George W. Bush signed into law the Maritime Transportation Security Act of 2002 (MTSA) in an attempt to improve port security standards.[230] The central function of the MTSA

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[227] *Id.* ("Prior to the establishment of the CBP, customs and immigration functions at U.S. borders were conducted separately by the Department of the Treasury's U.S. Customs Service and the Department of Justice's Immigration and Naturalization Service.").

[228] Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597. *See* FRITTELLI, *supra* note 3, at 10, 12 (explaining the role of TSA).

[229] Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597; FRITTELLI, *supra* note 3, at 11.

[230] *See* The Maritime Transportation Security Act of 2002, Pub. L. 107-295, tit. I, § 101, 116 Stat. 2064, 2066 (codified at 46 U.S.C.S. §§ 70101-117 (LEXIS 2005)); *see also* FRITTELLI, *supra* note 3, at 2. The Coast Guard and Maritime Transportation Act of 2004 was signed into law on 9 August 2004. Title VIII of the 2004 Act clarifies provisions of the MTSA and imposes specific deadlines for designated actions. For instance, the 2004 Act requires the Secretary to investigate and examine sensors that are able to track marine containers throughout their supply chain and detect hazardous and radioactive materials within the containers. *See* Coast Guard and Maritime Transportation Act of 2004, Pub. L. No. 108-293, 118 Stat. 1028; *see also* Maritime Transportation Security Act of 2002, 46 U.S.C.S. § 70115 (imposing AIS requirements).

is to "increase security at United States ports" by securing entry points and other areas of port facilities, and examining or inspecting containers.[231] The MTSA was implemented, in part, to comply with the requirements in the ISPS Code.[232] Therefore, much of the MTSA aligns with the ISPS Code. The MTSA, however, creates additional layers of protection against the container ship security threat facing U.S. ports by regulating domestic as well as foreign vessels and facilities.[233] Unfortunately, the MTSA leaves remaining gaps in container ship security, which necessitate additional measures.

The MTSA tasks agencies and individuals with a variety of responsibilities designed to deter a "transportation security incident" to the greatest extent practicable.[234] The MTSA addresses foreign maritime threats as well as domestic threats, recognizing that the central threat presented by container ships departing for the United States takes place during the foreign port phase. In attempts to resolve these outstanding threats, the MTSA strives to achieve the following: (1) to identify and track vessels;[235] (2) to assess the level of security preparation of particular vessels and port facilities;[236] (3) to limit access to secure areas;[237] (4) to develop an automatic identification system allowing port officials to identify and position vessels in U.S. waters;[238] and (5) to require foreign and domestic owners or operators of vessels operating in U.S. waters to prepare and submit a "vessel security plan" for approval to

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[231] *See* Maritime Transportation Security Act of 2002 § 101 (listing congressional findings).

[232] *See supra* Part IV.A. (explaining that the ISPS Code is an amendment to SOLAS). The ISPS Code enacted new regulations in Chapter V of SOLAS as well as a new Chapter, XI-2 which makes the ISPS Code mandatory. *See also* Cunningham E-mail, *supra* note 107 (noting that the MTSA and the ISPS Code "intentionally mirror each other. At the same time we (the Coast Guard) [were] providing drafting assistance to Congress on MTSA we were in London proposing the same text for ISPS").

[233] *See generally* The MTSA, 46 U.S.C.S. §§ 70101-117; Vessel Security, 33 C.F.R. Part 104 (LEXIS 2005) (implementing the MTSA, and requiring foreign SOLAS government members to submit vessel security plans in accordance with the ISPS Code to designated agencies).

[234] 46 U.S.C.S. § 70101.

[235] *Id.* § 70114.

[236] *Id.* §§ 70102-03; *see* Maritime Security, 33 C.F.R. pt. 101 (defining a facility as any structure located in, on, under, or adjacent to any waters and subject to the jurisdiction of the United States, regardless of whether it is operated, used, or maintained by public or private entities, and including any contiguous or adjoining property that is under common operation or ownership).

[237] 46 U.S.C.S. §§ 70105, 70111.

[238] *Id.* § 70114.

the Secretary of Homeland Security.[239] While the MTSA applies to a variety of ships, the following analysis focuses on the security layers it provides against the threat posed by container ships.

1. Role of the U.S. Coast Guard in Securing U.S. Vessels and Port Facilities Under the MTSA

The MTSA creates a system to enhance U.S. maritime security by requiring federal agencies, ports, and vessel owners to take numerous steps to upgrade security. In particular, the MTSA requires the Secretary[240] of the department in which the Coast Guard is operating to develop national and regional Area Maritime Transportation Security Plans.[241] The DHS further delegated the responsibility and authority for security plans to the Coast Guard.[242] These plans evaluate security risks and delegate the duties and responsibilities among federal, state, and local government agencies.[243] The MTSA also requires ports, waterfront terminals, and certain types of vessels to develop their own security and incident response plans.[244] These plans must receive Coast Guard approval.[245]

The Coast Guard published six final rules to implement the MTSA: Implementation of National Maritime Security Initiatives[246]; Area Maritime Security[247]; Vessel Security[248]; Facility Security[249]; Outer Continental Shelf (OCS) Facility Security[250]; and Automated Identification Systems.[251] While the requirements set forth in the MTSA

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[239] *Id.* §§ 70103(c)(1)-(3), 70108.
[240] *Id.* § 70101(5) (defining the term "Secretary").
[241] *Id.* § 70103(a).
[242] U.S. GEN. ACCT. OFF., GAO-04-838, MARITIME SECURITY: SUBSTANTIAL WORK REMAINS TO TRANSLATE NEW PLANNING REQUIREMENTS INTO EFFECTIVE PORT SECURITY 7 (2004).
[243] 46 U.S.C.S. § 70103(a).
[244] *Id.*
[245] *Id.* § 70104(a).
[246] Maritime Security, 33 C.F.R. pt. 101 (2005).
[247] Area Maritime Security, 33 C.F.R. pt. 103 (2005).
[248] Vessel Security, 33 C.F.R. pt. 104 (2005).
[249] Facility Security, 33 C.F.R. pt. 105 (2005).
[250] Outer Continental Shelf Facilities, 33 C.F.R. pt. 106 (2005).
[251] Automated Identification Systems Vessel Traffic Service, 33 C.F.R. pts. 26, 161, 164, and 165. In addition to these rules, on 21 October 2002, the Coast Guard issued a Navigation and Vessel Inspection Circular (NVIC) entitled "Security Guidelines for Vessels." This NVIC was revised on 6 August 2004, retains the same title, and instructs

apply broadly to U.S. ports and different categories of vessels, the requirements also increase the security of containers and container ships.

a. The Coast Guard's Duty to Identify Threats Faced by Ships and Ports

The MTSA requires the Coast Guard to conduct initial facility and vessel vulnerability assessments to identify the vessel types, ports, and port facilities "that pose a high risk of being involved in a transportation security incident."[252] The Coast Guard must then conduct a detailed vulnerability assessment of those vessels and facilities identified.[253] The detailed vulnerability assessment identifies all critical assets and infrastructures, threats to those assets and structures, and weaknesses in physical security, passenger and cargo security, structural integrity, and protection systems.[254] To protect against the foreign element, the MTSA also requires the Coast Guard to perform "antiterrorism assessments of certain foreign ports."[255]

b. The Coast Guard's Duty to Address Threats Faced by Ships and Ports

Using detailed vulnerability assessments, the Coast Guard must develop national and regional Maritime Transportation Security Plans for deterring and responding to a transportation security incident.[256] Like the assessments, the plans must identify critical assets, infrastructure, and potential threats and weaknesses in the security of the maritime

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vessel operators and owners on how to comply with IMO requirements. The revised NVIC also instructs on how to appoint company and ship security officers, conduct security assessments, designate protective measures, prepare vessel security plans, and coordinate security provisions with port facilities, in satisfaction of §§ 70102-70104 of the MTSA. *See* U.S. COAST GUARD, NAVIGATION AND VESSEL INSPECTION CIR. NO. 10-02, SECURITY GUIDELINES FOR VESSELS (Oct. 21, 2002), *available at* http://www/uscg/mil/hq/g-m/nvic/02/10-02.pdf; *see also* U.S. COAST GUARD, NAVIGATION AND VESSEL INSPECTION CIR. NO. 10-02, CHANGE 1, SECURITY GUIDELINES FOR VESSELS (Aug. 6, 2004), *available at* http://www.uscg.mil/hq/g-m/nvic/02/NVIC%2010-02%CHANGE%201.pdf.

[252] 46 U.S.C.S. § 70102.

[253] *See id.*

[254] *See id.*

[255] *See Hearing on Implementation*, *supra* note 131, at 3.

[256] 46 U.S.C.S. § 70103.

transportation system.[257] These plans are necessary both to help prevent breaches in security and, equally as important, to put into effect a plan for dealing with such breaches should they occur.

c. The Coast Guard's Port State Control Program

The Coast Guard developed a formal Port State Control Program in 1994 to "closely scrutinize foreign-flagged freight ships."[258] Following 9/11, the Coast Guard significantly enhanced security procedures as part of the Port State Control Program.[259] In particular, Subpart C of Title 33 of the Code of Federal Regulations, Part 160, which implements[260] the Ports and Waterways Safety Act,[261] requires certain foreign vessels to provide a Notice of Arrival (NOA) to the National Vessel Movement Center (NVMC) prior to entering the United States.[262] The Coast Guard then prescreens those vessels before they arrive in a U.S. port using three "Risk-Based Decision Making" (RBDM) tools.[263] The purpose of these RBDM tools is to determine the level of threat that each vessel poses to the United States.[264] The RBDM tools consist of three "Compliance Verification Examination Matrices," which the Coast Guard uses to prioritize vessel boardings.[265] The first of the three matrices is the "Foreign Vessel Port Security Targeting Matrix."[266] The classified components of this matrix are used to evaluate the security risk of certain foreign vessels entering a U.S. port.[267] The second matrix is the "ISPS/MTSA Compliance Targeting Matrix"[268] which evaluates compliance with security standards, rather than the actual security of the vessel. The third matrix is the "Port State Control (PSC) Safety and

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[257] *See id.*

[258] U.S. COAST GUARD, PORT STATE CONTROL IN THE UNITED STATES: ANNUAL REPORT 2004, *available at* https://www.piersystem.com/external/index.cfm?cid=786&fuseaction=EXTERNAL.docview&documentID=76068.

[259] *See id*.

[260] 33 C.F.R. § 160.1(a) (2005).

[261] 33 U.S.C.S. 1221.

[262] 33 C.F.R. § 160.206 (setting forth the information that an NOA must contain).

[263] U.S. Coast Guard, ISPS/MTSA Compliance Targeting Matrix, *available at* http://www.uscg.mil/hq/g-m/pscweb/ISPS-MTSA.htm [hereinafter Targeting Matrix].

[264] *Id*.

[265] *Id.*

[266] *Id*.

[267] *Id*.

[268] *See* U.S. Coast Guard, ISPS/MTSA Compliance Targeting Matrix (PDF), *available at* http://www.uscg.mil/hq/g-m/pscweb/SecurityMatrix.pdf

Environmental Protection Compliance Targeting Matrix"[269] (formerly known as the "Foreign Vessel Targeting Matrix"), which evaluates the foreign vessel's compliance with both safety and environmental standards.

The objective of both the ISPS/MTSA Compliance Targeting Matrix and the PSC Safety and Environmental Protection Compliance Targeting Matrix is to help Captains of the Port or Officers-in-Charge, Marine Inspection identify which foreign vessels pose the greatest risk to U.S. ports.[270] "When applied consistently, the targeting regime will identify the appropriate risk level and corresponding boarding frequency for each vessel, ensuring that vessels posing a higher risk for noncompliance are boarded more frequently than vessels posing a lower risk."[271]

2. Role of Owners and Operators of Vessels and Port Facilities in Securing Container Ships Under the MTSA

Owners and operators of vessels, ports, and facilities must create comprehensive, Coast Guard-approved Security Plans and Incident Response Plans that incorporate the detailed vulnerability assessments and security recommendations issued by the Coast Guard.[272] The Security Plans must designate a qualified individual to implement security actions, and must be updated every five years.[273] The Response Plans must provide "a comprehensive response to an emergency, including [procedures for] notifying and coordinating with local, state, and federal authorities."[274] Following Coast Guard approval, the ports, waterfront facilities and vessels must operate in accordance with the Security and Response Plans.

In addition to domestic vessels, these requirements apply to certain foreign vessels. Although the MTSA is vague about the requirements of foreign vessels, the Area Maritime Security Regulations put forth by the

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[269] *See* U.S. Coast Guard, Port State Control Safety and Environmental Protection Compliance Targeting Matrix, *available at* http://www.uscg.mil/hq/g-m/pscweb/SafetyTargetingMatrix.htm.
[270] Targeting Matrix, *supra* note 263.
[271] *Id*.
[272] *See* 46 U.S.C.S. § 70103(c)(3); *see also* Facility Security, 33 C.F.R. pt. 105; Vessel Security, 33 C.F.R. pt. 104.
[273] 46 U.S.C.S. § 70103(c)(3).
[274] *Id.* § 70104(b).

Coast Guard provide clarification.[275] Pursuant to the regulations, foreign vessels from SOLAS member states need not submit Security Plans to the U.S. government for approval.[276] Non-SOLAS foreign vessels,[277] however, must either have and comply with a Coast Guard-approved Security Plan, or comply with an alternative security plan or specific measures contained in a bilateral or multilateral agreement.[278]

3. Limited Ability to Secure Access and Identify Legitimate Seafarers Under the MTSA

In an attempt to remove some of the unknown elements involved in the international maritime transportation system and, thereby, protect the integrity of U.S. ports, the MTSA imposes restrictions on access to secure areas on vessels and in port facilities.[279] The MTSA also requires foreign crew to carry and present valid documentation while in U.S. jurisdiction, which includes U.S. territorial seas.[280]

a. Limited Access to Secure Areas

The MTSA regulates access to secure areas on vessels, in ports, and in waterfront facilities.[281] By limiting access to secure areas used to load, unload, and store containers and container ships, the MTSA ostensibly reduces the risk of sabotage in these areas.

Specifically, the MTSA requires DHS to develop a transportation security card for port workers to limit access to secure areas.[282] The Security Plan shall identify the areas covered by the cards. Although the MTSA designates who should receive transportation security cards, guidance is more inclusive than exclusive, and proscribes issuance of

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[275] *See, e.g.*, Facility Security, 33 C.F.R. pt. 105; Vessel Security, 33 C.F.R. pt. 104.
[276] *See* Vessel Security, 33 C.F.R. pt. 104.
[277] A list of the SOLAS Contracting Governments as of 31 July 2005 is available online. *See* Int'l Mar. Org., Summary of Status of Conventions (31 July 2005), http://www.imo.org/Conventions/mainframe.asp?topic_id=247.
[278] *See* Area Maritime Security, 33 C.F.R. pt. 103.
[279] *See* 46 U.S.C.S. § 70105.
[280] *See id.*
[281] *See id.*
[282] *See id.*

cards unless an individual "poses a security risk . . . warranting denial of the card."[283]

The Transportation Security Administration is in the process of developing a Transportation Worker Identification Credential (TWIC) Program to meet the requirements of a transportation security card.[284] Under TWIC, background checks will be conducted but not released to the public.[285]

b. Seafarer Identification Requirements

Both the ISPS Code and the ILO discussed above[286] require methods for identifying legitimate seafarers and for preventing security breaches. The MTSA imposes similar requirements:

> The Secretary of the department in which the Coast Guard is operating is encouraged to negotiate an international agreement, or an amendment to an international agreement, that provides for a uniform, comprehensive, international system of identification for seafarers that will enable the United States and another country to establish authoritatively the identity of any seafarer aboard a vessel within the jurisdiction, including the territorial waters, of the United States or such other country.[287]

These requirements provide a necessary layer of protection against the unknown element of foreign crew arriving in U.S. ports. As discussed earlier, there is a threat that terrorists posing or legitimately working as crewmembers may tamper with containers or redirect container ships during transit, or may gain access to the United States via containers.[288] The MTSA enhances crewmember identification

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[283] *Id.* § 70105(b)(1).
[284] *See* Trans. Security Admin., Industry Partners: TSA Pilots & Programs: Transportation Worker Identification Credential (TWIC) Program, http://www.tsa.gov/public/interapp/editorial/editorial_multi_image_with_table_0218.xml.
[285] *See supra* Part IV.D.
[286] *Id*.
[287] 46 U.S.C.S. § 70111.
[288] *See supra* Part II.B.

requirements for "vessels calling at United States ports."[289] All foreign crew must carry and present on demand "any identification that the Secretary [of DHS] decides is necessary."[290]

4. Protections Against the Many Unknown Sources Providing Goods in Containers Under the MTSA

Possible security breaches in container ships may take place when a container ship stops at multiple foreign ports before arriving at U.S. ports.[291] Although it is relatively difficult to tamper with containers that already have been loaded on ships due to limited space and access,[292] terrorists may seek an opportunity to sabotage a shipment while loading additional containers during stops. To address this concern, the MTSA permits the United States to limit what comes into its ports and, in effect, to boycott goods coming from high risk foreign ports. In addition, the MTSA attempts to provide U.S. port authorities with greater insight into the possible contents lurking within containers.

a. Antiterrorism Measures at Foreign Ports

Under the MTSA, the Coast Guard must determine if antiterrorism measures maintained at foreign ports are effective.[293] The Coast Guard also must notify government officials of a foreign country if it determines that the port fails to maintain effective antiterrorism measures.[294] Although CBP Officials are present at foreign ports under CSI,[295] the level of coordination between CBP and the Coast Guard to combine efforts in foreign ports is questionable.[296]

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[289] 46 U.S.C.S. § 70111.
[290] *Id.* § 70111(a).
[291] *See supra* Part II.B-C.
[292] Flynn E-mail, *supra* note 28 (explaining that the gap between containers on a ship is only 8-12 inches. Therefore, few containers "are accessible once they are stowed").
[293] *See* 46 U.S.C.S. § 70108(a)(1); *see also* The Maritime Transportation Antiterrorism Act, H.R. 3983 (June 4, 2002) (tasking the Coast Guard with assessing security systems in certain foreign ports and denying entry to vessels from ports that fail to maintain effective security measures).
[294] 46 U.S.C.S. § 70108.
[295] *See infra* Part V.B.
[296] *See* Glover, *supra* note 176 (explaining that there are discussions between CBP and the U.S. Coast Guard to coordinate efforts but noting that "CBP and the Coast Guard are not bumping into each other"). *But see* Cunningham E-mail, *supra* note 107 (challenging

b. Uncertain Contents in Containers

The MTSA authorizes the CBP to require incoming foreign vessels to provide cargo manifests twenty-four hours before the cargo is laden on a vessel bound for a U.S. port.[297] These manifests contain explicit information on the claimed contents of the vessel.[298] Information on inbound or outbound shipments must be provided to the CBP electronically prior to the arrival or departure of the cargo.[299] This information may then "be shared with other appropriate federal agencies."[300]

As discussed earlier, the information contained on cargo manifests is only as reliable as those who provide it. [301] It is important, however, for federal agencies to have these manifests upfront, well before a container ship arrives in U.S. ports. Cargo manifests provided in advance of arrival allow federal agencies to consider the represented contents along with the history of ports visited in determining the risk level of the container ship.

To address the unreliability of cargo manifests, the MTSA attempts to "evaluate and certify secure systems of international intermodal transportation"[302] by setting standards and procedures to screen and assess cargo before it is loaded on a vessel in a foreign port bound for the United States. The MTSA also sets standards and procedures for securing cargo and monitoring security measures while the vessel is in transit.[303] Likewise, the MTSA calls for standards to increase the

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this assertion and noting that "[a] number of country visits have been done jointly with not only CBP, but TSA and DOD," and "the Coast Guard is on every CSI country visit, and CBP has been on a number of USCG foreign assessments").

[297] *See* FRITTELLI, *supra* note 3, at 13. *See also* Area Maritime Security, 33 C.F.R. pt. 103 (LEXIS 2004); 19 U.S.C.S. § 1431; Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Ports for Transport to the United States, 67 Fed. Reg. 66,318 (Oct. 31, 2002) (to be codified at 19 C.F.R. pts. 4, 113, and 178).

[298] In addition, section 343 of the Trade Act of 2002, which was signed into law on 6 August 2002, provides CBP with the authority to issue regulations that require the electronic transmission of cargo information to CBP prior to the shipments' exportation or importation into the United States. The Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

[299] FRITTELLI, *supra* note 3, at 13.

[300] *Id*.

[301] *See supra* Part II.C.2.

[302] 46 U.S.C.S. § 70116 (LEXIS 2005).

[303] *See id.*

physical security of containers, including the types of seals and locks used to prevent tampering.[304] The MTSA mandates creation of regulations that provide the United States with means to confirm and validate compliance with such procedures and standards.[305]

5. Addressing Container Ship Security Threats During Transit Under the MTSA

The MTSA protects against sabotage of container ships during transit by requiring seafarer identification and limiting access to secure areas on vessels and in port facilities.[306] By legitimizing those on container ships through affirmative methods of identification, containers loaded on foreign ships at foreign ports are less likely to be tampered with before or during transit, or upon arrival at U.S. ports. The MTSA provides for additional protection against security risks during transit by mandating domestic and foreign deployment of Automatic Identification Systems (AIS) for certain types of vessels.[307] Automatic Identification Systems consist of a VHF maritime radio for vessels and specific shore stations that broadcasts unique identifiers and safety information about a vessel.[308] Vessels required to have AIS include self-propelled commercial vessels sixty-five feet or longer, vessels that carry a particular number of passengers for hire (as specified by DHS), towing vessels longer than twenty-six feet and with 600 horsepower, and any other vessel DHS deems necessary for safe navigation.[309]

The Coast Guard implemented this specification of the MTSA by adopting certain AIS carriage and operational requirements for certain classes of U.S. flag vessels and foreign commercial vessels, including container ships.[310] In addition to providing mariners with accurate information on a vessel, AIS provides information on the type of cargo, as well as the vessel's destination and estimated time of arrival.[311] With

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304 *See id.*
305 *See id.*
306 46 U.S.C.S. § 70111.
307 *See id.* § 70114.
308 *See id.* §§ 70114, 70116.
309 *See id.*
310 *See, e.g.*, 33 C.F.R. pt. 164.46 (LEXIS 2005). *See also* Automated Identification Systems, 33 C.F.R. pts. 26, 161, 164 (LEXIS 2005).
311 *See* Automated Identification Systems, 33 C.F.R. pts. 26, 161, 164, 165 (LEXIS 2005).

AIS devices in place on foreign container ships, the Coast Guard is able to identify the vessel, its position, and a variety of other factors that may not be available through traditional radio or radar methods. If the AIS information is inconsistent with the cargo manifests, the history of foreign ports visited, or the GPS position of the vessel, U.S. authorities may be put on alert before a suspect vessel arrives in a domestic port. Therefore, if fully implemented and monitored, AIS has the potential to be one of the more creative and effective layers in container ship security.

6. Coordination and Exchange of Information Under the MTSA

The exchange of information, particularly intelligence information about sources scheduled to arrive in U.S. ports, must be broadly disseminated to federal and local agencies in order to avoid security breaches. Naturally, a system of gathering information is only useful if that information is disseminated to the proper authority equipped to respond to potential threats.

The MTSA provides for such exchange of information by setting up local port security committees to coordinate efforts of federal, state, local, and private law enforcement agencies and to advise on Security Plans.[312] The agencies include the FBI, the CBP, and the Coast Guard. Maritime intelligence systems collect and analyze information concerning vessels operating in U.S. waters, as well as their crew, passengers, and cargo. Thus, under the MTSA, agencies will collaborate and exchange their intelligence under a maritime intelligence regime.[313]

7. Security Layers Provided by the MTSA Fail to Protect U.S. Ports

As noted above, many of the MTSA requirements directly implement the international security requirements adopted by the IMO in the ISPS Code.[314] Therefore, the MTSA contains many of the same

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[312] *See* 46 U.S.C.S. § 70112. The Coast Guard implemented the MTSA requirement for Maritime Security Advisory Committees. *See* 33 C.F.R. pts. 103.300, 103.305, 103.310 (LEXIS 2005).

[313] 46 U.S.C.S. § 70112; *see also* 33 C.F.R. pts. 103.300, 103.305, 103.310 (LEXIS 2005).

[314] *See supra* Part V.A.

weaknesses as the ISPS Code. Specifically, the MTSA does not adequately address the nature of goods loaded in foreign ports.[315] While the MTSA imposes additional requirements upon domestic and foreign vessels and facilities that the ISPS Code lacks, the MTSA also leaves many gaps in the security of container ships by failing to recognize the nature of modern-day terrorists.[316]

Identification requirements for seafarers, and limited access to secure areas on ships, ports, and, facilities may deter unsophisticated terrorists or saboteurs. These measures, however, do not contemplate the complicated terrorist threat that the United States faces today, particularly the patient and persistent threats presented by al Qaeda. The MTSA's identification cards will likely be inadequate to counter this threat. The cards will be generated based on presentation of mariner documents, but these documents can be counterfeited or forged by today's sophisticated terrorists. Furthermore, the greater concern is that today's recruited terrorists may obtain valid identification cards without triggering security concerns because they do not have a suspect past.[317] Just as there are concerns that terrorists may be involved in the flight industry,[318] terrorists already may be involved in the shipping industry. While identification cards may be a meaningful way to identify known terrorists, they will neither protect U.S. ports from sophisticated terrorists with counterfeit or forged identification cards, nor will they protect U.S. ports from terrorist recruits who lack a remarkable or known past. The MTSA and the ISPS Code's identification recommendations and mandates are a reasonable security layer, but they still leave U.S. ports exposed. In addition, the identification systems may provide a false sense of security and lead officials to ignore otherwise obvious actual or potential security breaches.

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[315] The author does not imply that the MTSA was specifically designed to address the nature of goods loaded in foreign ports, but simply points out that the MTSA does not provide adequate safeguards to address such security risks.

[316] Historically, the terms "terrorism" and "terrorist" are not well or consistently defined. This article uses the term "terrorist" interchangeably with "member of al Qaeda" in light of the 9/11 attacks.

[317] George Jonas, *Biometrics Won't Catch Disposable Terrorists*, NAT'L POST, Jan. 19, 2004, *available at* http://www.hspig.org/ipw-web/bulletin/bb/viewtopic.php?t=555.

[318] *Id*.

a. Identification Cards are Subject to Forgery or Counterfeiting

Recent events demonstrate the technological sophistication of terrorists. For example, individuals linked to al Qaeda operatives maintain that "'[i]f you have the right connection, you can get anything.'"[319] A former member of a terrorist cell in Detroit, Youssef Hmimssa, found it simple to obtain birth certificates, social security cards, driver's licenses, and U.S. passports.[320] According to Hmimssa, he easily purchased passports and social security cards on the black market.[321] Using a home computer and readily available "special" ink for government documents, he was able to forge identification documents for other members of his terrorist cell.[322] Although Hmimssa's fraud took place in 1994, similar means for breaching security measures may still exist today.

As part of an investigation, members of the Office of Special Investigations (OSI) in the Inspector General's (IG) office at the Government Accountability Office (GAO) obtained driver's licenses using forged documents in each of the eight states they visited.[323] The forged documents included licenses from other states created with inexpensive computer programs. Using these fake identification cards, the investigators drove a truck into a Justice Department courtyard.[324]

If social security cards, driver's licenses, and passports are readily available to terrorists, it follows that counterfeit mariner documents and, subsequently, seafarer identification cards will also be attainable, and that valid identification cards will be available for misuse and forgery. "[H]omeland security is vulnerable to identity fraud and, unless action is taken, individuals who intend to cause harm can easily exploit these vulnerabilities."[325]

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[319] *Fake U.S. IDs Easy for Terrorists*, CBS NEWS, Sept. 9, 2003, *available at* http://www.cbsnews.com/stories/2003/09/09/attack/main572405.shtml (quoting Youssef Hmimssa, former member of a terrorist cell).

[320] *See id.*

[321] *See* Jeff Johnson, *Federal Agents, Illegal Aliens Say IDs Easy to Forge*, THE NATION, Sept. 10, 2003, *available at* http://www.cnsnews.com/National/archive/200309/NAT20030909/NAT20030910a.html.

[322] *See Fake U.S. IDs Easy for Terrorists*, *supra* note 319.

[323] *See id.*; *see also* Johnson, *supra* note 321.

[324] *See Fake U.S. IDs Easy for Terrorists*, *supra* note 319.

[325] Johnson, *supra* note 321 (quoting Robert Cramer, the managing director of the GAO's IG-OSI).

b. Biometric Identification Systems Fail to Protect Against Today's Terrorists

There are ongoing efforts to improve identification systems by using biometric markers, including fingerprints. While identification containing biometric markers may be less susceptible to forgery or counterfeiting, it is questionable whether these technologically advanced forms of identification would address the threat of today's terrorists. First, a functional biometric system of identification may be years away.[326] Biometric identification "is a technology that has been thrust ahead of its growth curve."[327] Technology is "moving so fast that before it has a chance to be in front of a legislative panel . . . the technology has already been breeched."[328] Second, while biometric identification systems may prevent attacks by known or suspected terrorists, these security measures may be ineffective against threats in the post-9/11 world.[329] "Biometrics are yesterday's solution for today's problem."[330]

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[326] *See* FRITTELLI, *supra* note 3, at 21; *but see* Carol DiBattiste, Deputy Administrator for the Transportation Security Administrator, U.S. Department of Homeland Security, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005) (explaining that a prototype of the TWIC identification card for aviation should be complete by May 2005, but that combined efforts with the U.S. Coast Guard to create an identification card for maritime workers may be coordinated "next year").

[327] *See* Raj Nanavati, Partner with International Biometric Group, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 15, 2005).

[328] *Cf.* R. David Henze, Business Development Executive, IBM Global Services, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005) (discussing cyber-terrorism). While Mr. Henze's statement referred to cyber-terrorism, the underlying premise—that terrorists are sophisticated and creative enough to circumvent advances in technological security measures—applies equally to biometric identification systems. *Id. See* Jacques Duchesneau, President and Chief Executive Officer of Canadian Air Transportation Security Authority, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005) (stating that a growing dependence upon computer technology is not foolproof and pointing out that "our enemy [al Qaeda] has the same tools that we do").

[329] *See* Jonas, *supra* note 317.

[330] *Id. See* NATO PARLIAMENTARY ASSEMBLY, SUB-COMMITTEE ON THE PROLIFERATION OF MILITARY TECHNOLOGY, TECHNOLOGY AND TERRORISM (2001), *available at* http://www.tbmm.gov.tr/natopa/raporlar/bilim%200ve%20teknoloji/AU%20121%20STC% (discussing threats of WMDs or computer attacks by terrorists due to the changing nature and means of terrorists).

"If you know the enemy and know yourself, you need not fear the result of 100 battles."[331] This sage advice was provided 2500 years ago by Sun Tsu in *The Art of War*, and it still rings true today. Existing security measures fail to counter what the United States knows of the enemy. Unfortunately, the means by which the United States will learn more about the enemy facing it today will likely be through more attacks or breaches in existing security measures. Pre-9/11 terrorists often participated in multiple missions, while post-9/11 terrorists are characterized as "disposable."[332] Disposable terrorists, including suicidal militants recruited by al Qaeda, have no future, "but more importantly, they're without a past."[333] Consequently, if al Qaeda recruits members for suicide missions who have no past records, they will not trigger security alerts even assuming that the most advanced system of biometric identification is in place.

As an example, the "shoe bomber," Richard Reid, was traveling with a valid British passport under the Visa Waiver Program when he was discovered trying to ignite plastic explosives hidden in his shoes during a flight.[334] No form of biometric identification will protect against these disposable terrorists because they do not match any profiles contained in maintained database systems. "The most sophisticated scanning device is useless if it functions by comparing the present with the past."[335] Failure to acknowledge the limited usefulness of biometric identification may foster a false sense of security which is likely to be compounded as biometric systems advance in order to justify the expense and time devoted to developing them. "Like bees, disposable terrorists die as they sting—but unlike bees, they cannot be recognized for what they are until they've stung."[336] This illustrates the weakness in relying too heavily upon biometric identification cards as a layer in container ship security.

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[331] SUN TZU, THE ART OF WAR 37 (Lionel Giles trans. 1963) (circa 500 b.c.).
[332] Jonas, *supra* note 317.
[333] *See Oversight Hearing on "Should Congress Extend the October 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?" Before the House Judiciary Committee* (2004) (testimony of Secretary Powell) (stating that it was his understanding that Richard Reid had a legitimate French or British passport issued under the Visa Waiver Program).
[334] Lucy Sherriff, *U.S. Extends Biometric Passports Deadline*, REG. (U.K.), June 17, 2004, *available at* http://www.theregister.co.uk/2004/06/17/biometric_delayed/.
[335] Jonas, *supra* note 317 ("The more sophisticated the high-tech side becomes, the more it exposes itself to an end-run by the low-tech side.").
[336] *Id.*

Furthermore, reliance on a biometric system of identification may actually protect otherwise known terrorists. Biometric identification cards link a person to physical characteristics, e.g. fingerprints, retina, or iris patterns.[337] The identity of a person who obtains a TWIC identification card, however, will be based on other forms of identification presented at the time the biometric information is entered into the database.[338] Consider a terrorist whose name and picture are on a watch list, but who has no pre-existing biometric information entered into a governmental system. If he easily attains false documents linking him to a different identity, his biometric information will tie him to the name on the false documents rather than to his true identity. Carol DiBattiste, the Deputy Administrator of TSA, emphasizes that utilizing biometric identification and automated systems to screen passengers decreases the rate of human error and "reduces in half the number of passengers selected for pre-screening."[339] Focusing on technology to detect potential terrorists, however, may prove disastrous.

Not only does biometric focus promote reliance on a system that may not detect many of today's terrorists, but it also overlooks the necessary tool of a screener's gut instincts. Consider Jose Melendez-Perez, an immigration inspector at Orlando's International Airport, who denied airline access to al-Qahtani, the twentieth would-be hijacker in the 9/11 attacks.[340] As Mr. Melendez-Perez explains, "[t]he bottom line is: he gave me the creeps."[341] Emphasis on terrorist identification through biometric systems may have allowed al-Qahtani to slip through the cracks.

B. The Customs-Trade Partnership Against Terrorism and the Container Security Initiative

The C-TPAT and the CSI are creative initiatives involving the CBP, foreign ports, and businesses. The mission of both initiatives is to create a system of agreements among those interested in securing the integrity

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337 *See* Carol DiBattiste, *supra* note 326.
338 *Id*.
339 *See id*.
340 *Id*.
341 Seventh Public Hearing of the National Commission on Terrorist Attacks Upon the United States, Jan. 26, 2004 (statement of Jose E. Melendez-Perez), *available at* http://www.9-11commission.gov/hearings/hearing7/witness_melendez.htm.

of maritime trade, to avoid security breaches.[342] The C-TPAT and the CSI involve the active participation of the shipping community, but they still leave gaps in container ship security that could prove fatal and economically devastating if exploited by terrorists.

1. The Customs-Trade Partnership Against Terrorism

The C-TPAT, announced by Commission Bonner in November 2001 and initiated in April 2002, is a series of agreements between private businesses and governments designed to strengthen the maritime transportation system by improving the integrity of the supply chain.[343] The agreements focus on cargo security rather than vessels, ports, and facilities, by encouraging those engaged in carrying goods to share information about the supply chain and to become involved in efforts to assess the security risks.[344] The C-TPAT recognizes that the CBP is in a position to provide a high level of security only in concert with the individuals involved in the supply chain: "importers, carriers, brokers, warehouse operators and manufacturers."[345]

In order to participate, businesses sign an agreement to do the following: (1) assess their current supply chain security measures by applying guidelines developed by the trade community and the CBP; (2) provide the CBP with a completed supply chain security profile questionnaire; (3) create and implement a program to increase security throughout the supply chain and consistent with C-TPAT guidelines; and (4) inform other companies in the supply chain of the C-TPAT security guidelines in hopes of incorporating such guidelines into the working relationship with these companies.[346]

Currently, more than 9,000 companies participate in the C-TPAT program.[347] It is anticipated that business participants will contribute to

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[342] *See C-TPAT FAQ*, *supra* note 7; FRITTELLI, *supra* note 3, at 11.

[343] *See C-TPAT FAQ*, *supra* note 7.

[344] Robert G. Clyne, *Symposium: Admiralty Law Institute: Confused Seas: Admiralty Law in the Wake of Terrorism: Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L REV. 1183, 1197 (2003).

[345] *C-TPAT FAQ*, *supra* note 7.

[346] *See id.* Irvin Lim Fang Jau, *Not Yet All Aboard . . . But Already All at Sea Over the Container Security Initiative*, J. HOMELAND SECURITY 11 (Nov. 2002), *available at* http://www.homelandsecurity.org/journal/articles/jau.html.

[347] Robert C. Bonner, Commissioner of the U.S. Customs and Border Protection Remarks to the Kansas City Chamber of Commerce in Kansas City, Missouri (May 16,

a collective effort to secure the supply chain worldwide, thereby leading to a more secure transaction for the business's employees, suppliers, and customers.[348] As an added incentive, the CBP will provide participating businesses with other benefits, including access to a list of other C-TPAT members and a reduction in the number of inspections, which, consequently, results in less time spent at borders.[349] "The material benefit to membership in C-TPAT is that less verification by U.S. Customs should be necessary because more self-policing is expected to occur. This, in turn, should lead theoretically to fewer inspections and an attendant decrease in expense and delay in the C-TPAT member's commercial undertakings."[350] It is anticipated that the emphasis on self-policing rather than CBP inspections may appeal to many businesses.[351]

2. The Container Security Initiative

The CSI is an initiative that the CBP began in late 2002 to protect against the use of global trade containers for terrorist acts, including transportation of WMD.[352] CSI partnerships involve foreign governments that allow CBP agents in their ports to identify high-risk containers bound for the United States.[353] Currently, the CSI is operating at thirty-seven[354] ports in Europe, Asia, Africa, and North America, which "represent the world's major seaports."[355]

2005), *available at* http://www.customs.gov/xp/cgov/newsroom/commissioner/speeches_statements/05162005_kansas.xml.

348 *Id*.

349 *Id*.

350 Clyne, *supra* note 344, at 1199.

351 *See C-TPAT FAQ*, *supra* note 7.

352 *See id*; *see also* Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Ports for Transport to the United States, 67 Fed. Reg. 66,318 (Oct. 31, 2002) (to be codified at 19 C.F.R. pts. 4, 113, and 178).

353 FRITTELLI, *supra* note 3, at 11.

354 U.S. Customs and Border Protection, CBP's Container Security Initiative Provides Roadmap to International Trade Accord, U.S. CUSTOMS AND BORDER PROTECTION TODAY (July/Aug 2005), *available at* http://www.customs.gov/xp/CustomsToday/2005/Jul_Aug/csi.xml (stating that CSI is "operational at 37 ports around the world").

355 Bonner, *supra* note 2 (stating that CSI is operational in thirty-five of the largest ports); *see also* Press Release, U.S. Customs and Border Protection, U.S. Customs and Border Protection Achieves Container Security Initiative (CSI) Milestone of 25 Operational Ports (Aug. 25, 2004), *available at* http://www.customs.gov/xp/cgov/newsroom/press_releases/archives/2004_press_releases/08302004/08252004.xml (quoting Commissioner Bonner).

The CSI complements the C-TPAT and contains four major components: (1) to transmit automated information to identify and target containers that pose a high security risk; (2) to pre-screen high-risk containers before they arrive in U.S. ports; (3) to use cutting-edge technology to quickly assess and pre-screen high-risk containers; and (4) to develop "smart" tamper-resistant containers.[356]

To help target high risk containers and meet the first component, all CSI and non-CSI ports must submit cargo manifests twenty-four hours before loading containers on ships bound for U.S. ports.[357] When CBP receives electronic transmission of advance cargo manifests, the National Targeting Center considers the information in conjunction with data, intelligence, and the ship's history to target potentially high-risk cargo.[358] Under the theory of the CSI, pre-screened containers will be processed faster.[359] As part of this process, the CSI is designed to identify and process low-risk containers easily and quickly. By weeding out the low-risk containers, the CSI process of elimination helps define which containers may be high-risk, thereby accomplishing the CSI's second component.[360] Cutting-edge technology involving large x-ray and gamma ray machines, as well as radiation detection devices, are currently in use to meet the third component of the CSI—to quickly assess and pre-screen high-risk containers before they depart for the United States. These pre-screening methods only take ninety seconds.[361] Research into the fourth component of CSI, calling for "smart" and tamper-resistant

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[356] Bonner Speech, *supra* note 4 (announcing CSI).

[357] Advanced notice of arrival requirement differs from advanced submissions of cargo manifests. Notice of arrival must be submitted ninety-six hours before the vessel departs, or twenty-four hours before the vessel departs if the voyage will be less than ninety-six hours. Advanced cargo manifests must be submitted twenty-four hours before the containers are loaded onto a container ship. *See* 67 Fed. Reg. 66,318, 66,319-21. *See also* J. Ashley Roach, Container and Port Security: A Bilateral Perspective, Address to the Symposium on Interference with Navigation: Modern Challenges, International Tribunal for the Law of the Sea in Hamburg, F.R.G. 19 (Mar. 15, 2003) (explaining the ninety-six hour advanced notice requirement); U.S. Customs and Border Protection, Frequently Asked Questions: 24-Hour Advance Vessel Manifest Rule (Apr. 16, 2004), *available at* http://www.customs.gov/linkhandler/cgov/import/carrier/24hour_rule/cbp_24hr.ctt/cbp_24hr.doc.

[358] *See* Tom Ridge, Former Secretary of Homeland Security, Remarks at Port of Los Angeles (June 21, 2004), *available at* http://www.dhs.gov/dhspublic/display?theme=44&content=3728&print=true.

[359] *See* Roach, *supra* note 357, at 5, 6 (explaining how inspections done while containers are in storage will save time).

[360] *See id.* at 4.

[361] *See id.* at 6.

containers, is already underway. In particular, there has already been progress in designing tamper-resistant electronic seals.[362]

As with C-TPAT business participants, ports that join the CSI will enjoy certain benefits, including reduced transportation times and fast-lane access.[363] In trade, time is most certainly money, so any reduction in the length of time it takes to get goods to their final destination provides tremendous incentives for businesses. The mere presence of U.S. customs inspectors in foreign and domestic ports should expedite the processing of containers. Although most containers remain in a terminal for several days prior to being loaded onto a ship, U.S. Customs inspectors will be able to screen containers while they are sitting in the terminal during "down time."[364] Shipments from CSI ports will enjoy expedited inspections while in foreign ports and will be processed immediately.[365] In fact, "CSI-screened container[s] should be released immediately by U.S. Customs, which could shave hours, if not days, off of the shipping cycle. In this manner, the CSI should increase the speed and predictability for the movement of cargo containers shipped to the U.S."[366] CBP will not inspect containers sealed under CSI when they arrive in U.S. ports, absent "additional information affecting [the container's] risk analysis."[367]

3. The C-TPAT and the CSI Fail to Remedy Security Threats Presented by Containers

The C-TPAT and the CSI initiatives address many of the security gaps for container ships left by the ISPS Code and the MTSA. As Dr.

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[362] *See id*.

[363] *See* Fang Jau, *supra* note 346, at 11. However, the fast-lane or "green lane" access for C-TPAT and CSI businesses and ports is not yet in effect and is not anticipated to go into effect until the end of 2005. *See also* Ned Ahearn, Partner with North American Supply Chain Management, Unisys Corporation, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005).

[364] Roach, *supra* note 357, at 16 (stating that screening containers during "down time" will expedite the inspection process). *See* Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Ports for Transport to the United States, 67 Fed. Reg. 66,318, 66,319 (Oct. 31, 2002).

[365] *See* Flynn E-mail, *supra* note 28.

[366] 67 Fed. Reg. at 66,319. *See* Roach, *supra* note 357, at 16 (noting that CSI compliance will speed up the flow of trade, and explaining that pre-screened and sealed containers will not need further inspection when they reach U.S. ports).

[367] 67 Fed. Reg. at 66,319.

Flynn astutely points out, however, "none of these programs address [sic] the core cargo security imperative of confirming that the goods loaded into a container from the start are indeed legitimate and that the container has not been intercepted and compromised once it is moving within the transportation system."[368] In addition, while incentive for foreign ports and companies to agree to participate in the C-TPAT and the CSI is high, actual compliance with the initiatives is not subject to oversight or enforcement. "When everyone's responsible, there's a question of who's accountable."[369] Therefore, actual compliance remains a serious issue.

a. The C-TPAT Initiative Lacks Adequate Enforcement and Oversight

One of the problems with the C-TPAT is that it is not subject to governmental enforcement or oversight. Essentially, the agreement is self-policed. An additional problem with the C-TPAT is that it does little to fill gaps regarding the legitimacy of shipped cargo and, instead, creates yet another level of unjustified reliance on businesses based solely on their agreement to participate in the program.

Because C-TPAT is self-policed, enforcement and compliance are questionable. As discussed, the United States relies in large part on the cargo manifests and other documents that accompany container shipments.[370] These documents include statements by shippers, sellers, and port authorities, each of whom may have incentives to misrepresent the contents of their shipments. While C-TPAT businesses agree to participate voluntarily, they may also have an incentive to feign compliance. Furthermore, there is no enforcement mechanism against those who fail to abide by their agreements. It appears that the only leverage against C-TPAT participants who fail to honor their agreement is removal of their priority status upon discovery of noncompliance. It is unlikely that noncompliant businesses will be exposed until a security violation has already taken place, however, because no oversight of the C-TPAT program is in effect. Those ports and businesses who have agreed to comply with the C-TPAT may "prefer to adopt an

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[368] FLYNN, *supra* note 1, at 107.
[369] Edgar A. MacLeod, President of Canadian Association of Chiefs of Police, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 14, 2005).
[370] *See supra* Part II.C.2.

incrementalist wait-and-watch approach in actual implementation," to defer expense and inconvenience.[371] "The carrot of facilitation that comes from participating in these programs is not matched by a credible stick."[372]

Enticing private businesses with promises of efficiency is a creative approach to maritime security. However, it introduces another level of reliance and another level of unknowns, which further complicate, rather than strengthen, security of container ships. As the Stanford Study Group recognized in their Container Security Report, "measures adopted voluntarily by commercial operators are, in general, not adequate to the task of ensuring reliable detection of smuggled nuclear weapons and SNMs [Special Nuclear Material]."[373] The C-TPAT security layer functions according to a misplaced belief that there is sufficient market incentive for the public to protect itself.[374]

b. The CSI's Inadequate Implementation and Enforcement Mechanisms

Like the C-TPAT, the CSI is also difficult, if not impossible, to adequately implement or enforce, because CBP inspectors have no enforcement powers overseas.[375] Similarly, the CBP "lacks the manpower and resources to adequately staff the Container Security Initiative, to review the applications of companies who wish to participate in C-TPAT, and to move away from error-prone cargo manifests that remain the cornerstone of its targeting system."[376] Although CSI is operational in thirty-seven ports, the physical burden placed upon CBP agents to pre-screen containers does not address the

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[371] Fang Jau, *supra* note 346, at 5.

[372] FLYNN, *supra* note 1, at 107.

[373] CISAC THE STANFORD STUDY GROUP, *supra* note 7, at 5 (recognizing that "the permissible failure rate for commercial inspection systems falls short of a tolerable threshold for security . . . . [and] a more sophisticated strategy is required to fulfill the objective of preventing incidents of nuclear terrorism on U.S. territory."). *See* FLYNN, *supra* note 1, at 130 ("Relying on best practices and industry self-policing was acceptable for meeting our pre-9/11 regulatory needs, but they are simply inadequate in the post-9/11 security world.").

[374] *See* Stephen E. Flynn, Homeland Security Expert and Former U.S. Coast Guard Commander, Speech at the 4th Annual International Conference on Public Safety: Technology & Counterterrorism (Mar. 15, 2005).

[375] *See* Roach, *supra* note 357, at 7.

[376] FLYNN, *supra* note 1, at 107.

central threat. Assuming that it is possible to prescreen a substantial portion of the containers at CSI ports, failure to catch just one dangerous item contained in an otherwise low risk container could have the devastating consequences anticipated in Part III.[377]

c. Neither the C-TPAT nor the CSI Meets the Functional Objective of Keeping Ports Opened When There is a Breach in Security

Authorities maintain that the C-TPAT and CSI initiatives will help return the necessary flow of maritime commerce if an attack were to occur using a container.[378]

> [The CBP] believes the CSI network of ports will be able to remain operational because those ports will already have an effective security system in place—one that will deter and prevent terrorists from using them. Without such a network, the damage to global trade caused by a terrorist attack involving international shipping would be staggering.[379]

This argument, however, is counter-intuitive. An attack via container would prove either that the security measures relied upon were not in place, or that they were inadequate. Therefore, it would be necessary to close ports—and at least temporarily halt maritime transportation—to conduct a full review and determine which of the layers in the system failed. "When bad things happen, communications aren't there anymore."[380] Thus, the security measures implemented by the C-TPAT and CSI tend to create a false sense of security and, even in conjunction with the ISPS Code and the MTSA, do not provide a reliable security layer for container ships.

VI. Conclusion and Recommendations

The layers of container ship security must protect U.S. ports throughout the supply chain. Security measures must protect against the

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[377] *See* Fang Jau, *supra* note 346, at 8.
[378] 67 Fed. Reg. 66,318, 66,319-20.
[379] *Id.* Roach, *supra* note 357, at 16.
[380] Ahearn, *supra* note 363.

following: loading a container with illegitimate cargo while overseas; fraudulent reporting of cargo to the CBP; and tampering with or redirecting a container during transit.[381] The existing layered defense provides some protection, however, it does not resolve the blind faith reliance placed on the container ship supply chain. Instead, existing measures provide a number of additional levels of reliance upon statements made by foreign ports, individuals, and businesses who stand to gain substantially from their representations. There is no accountability or enforcement mechanism, however, to assure the reliability of these statements.

Existing security layers also fail to acknowledge today's terrorists. Today's terrorists may travel using their own names with valid documentation on container ships. They may travel on ships and through ports that comply with the ISPS Code and the MTSA. They may travel on container ships carrying goods loaded in foreign ports where CBP officials are stationed in accordance with the CSI. They also may travel on ships carrying goods from businesses that participate in the C-TPAT. Layered security defenses, however, may not detect or prevent the transportation of a WMD via container ship. The MTSA, ISPS Code, CSI, and C-TPAT promote a false sense of security in existing protections of U.S. ports, because they easily may be circumvented. In order to protect the integrity of container ships, authorities must recognize the nature of terrorist threats and acknowledge that security measures will be breached.[382] "[W]e need to plan for the eventuality that our security measures will be imperfect."[383] While maintaining existing security layers, authorities must now focus on and dedicate substantial resources to detection devices that keep the transportation system moving at an economically feasible rate. "Adopting smart and secure containers becomes the only way to stay competitive."[384]

The importance of smart containers with imbedded devices to detect certain contents, including nuclear and biological material, has been

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[381] FRITTELLI, *supra* note 3, at 17.

[382] *See* HART, *supra* note 2, at 18 ("If an explosive device were loaded in a container and set off in a port, it would almost automatically raise concern about the integrity of the 21,000 containers that arrive in U.S. ports each day and the many thousands more that arrive by truck and rail across U.S. land borders."); *see also* Bonner, *supra* note 2 (stating that 25,000 containers arrive in U.S. ports each day and that nine million containers arrive in U.S. ports annually).

[383] FLYNN, *supra* note 1, at 78.

[384] *Id.* at 104.

acknowledged.[385] Unfortunately, efforts have concentrated predominantly on creating tamper-resistant containers. For instance, the TSA and CBP are conducting the Operation Safe Commerce (OSC) pilot project.[386] OSC funds business initiatives to help "analyze security in the commercial supply chain and test solutions to close security gaps."[387] DHS awarded the private sector fifty-eight million dollars in grants since its inception, and awarded another seventeen million dollars during the summer of 2004.[388] Despite the fact that imbedded detection devices clearly fall within the realm of OSC, the project has focused on tamper-resistant containers and GPS tracking capabilities.[389]

Similarly, the MTSA authorizes ninety million dollars in grants devoted to research and develop improvements in cargo inspection, nuclear material detection devices, and improvements in the physical security of containers.[390] However, it appears that these grants also have been devoted to funding research on tamper-resistant container seals.[391]

While tamper-resistant containers provide a necessary layer in securing the supply chain, imbedded detection devices may be equally important. A partial solution to the missing layer of defense may already be well underway in both the public and private sectors. In fact, a wide array of anti-terrorism detection devices are currently being researched and developed.[392] Some of the most promising devices have multi-

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[385] *See, e.g.*, U.S. DEPARTMENT OF HOMELAND SECURITY: OFFICE OF STATE AND LOCAL GOVERNMENT COORDINATION AND PREPAREDNESS, OFFICE FOR DOMESTIC PREPAREDNESS, OPERATION SAFE COMMERCE PHASE III: PROGRAM AND APPLICATION GUIDELINES, *available at* http://www.ojp.usdoj.gov/odp/docs/FY05_OSC_revised.pdf [hereinafter DHS: COORDINATION AND PREPAREDNESS] (last visited Mar. 20, 2005) (providing grant funds for pilot projects involving the three largest container load centers in the U.S.: the Ports of Seattle and Tacoma; the Port Authority of New York and New Jersey; and the Ports of Los Angeles and Long Beach); *see also* FLYNN, *supra* note 1, at xv.

[386] *See* DHS: COORDINATION AND PREPAREDNESS, *supra* note 385.

[387] U.S. DEPARTMENT OF HOMELAND SECURITY, SECURE SEAS, OPEN PORTS: KEEPING OUR WATERS SAFE, SECURE AND OPEN FOR BUSINESS 5 (2004), *available at* http://www.dhs.gov/ interweb/assetlibrary/DHSPortSecurityFactSheet-062104.pdf.

[388] *See id. But see* FLYNN, *supra* note 1, at 108 (explaining that OSC is managed by TSA but has not received any 2005 fiscal year funding despite the fact that three of the largest US ports (NY, Seattle, and LA) are operating under OSC and adopting tests to fine-tune it).

[389] *See* FLYNN, *supra* note 1, at 108 (discussing the Smart Box Initiative designed to produce tamper-evident containers).

[390] *See* FRITTELLI, *supra* note 3, at 13.

[391] *See id.*; *see also* 46 U.S.C.S. § 70107 (2000).

[392] *See* Dep't of Energy, National Nuclear Security Administration Terrorism Technologies, http://www.au.af.mil/au/awc/awcgate/doe/nnsa_terrorism_tech_v.htm (last

sensor chemical and radiation detection monitors, as well as network capabilities for DHS.[393] While current funding may be insufficient to fine-tune these devices, such devices are necessary to provide a key missing layer in protecting U.S. ports from the threats presented by container ships.

In addition to imbedded detection devices, extensive and efficient radiological screening devices may provide a necessary layer to protect against the eventual breach of existing security defenses. Although CBP officers "already use[] scanning technology at hundreds of American ports as well as many land border crossings" and have "hand held radiation scanners . . . at every major U.S. port," these scans are used only on high risk containers. [394] Existing U.S. scanning techniques are considered "an alternative or precursor to physical inspections, and the scan images are never stored."[395]

In contrast, a pilot project in Hong Kong[396] provides an example of how expansive container scanning could work in the United States. The Container Terminal Operators Association of Hong Kong[397] sponsors a security regime project which scans each container arriving at "two of the busiest marine terminals in the world" with a "gamma ray machine, a radiation portal, and optical character recognition cameras which record the container number."[398] The startup equipment for such a screening

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visited Mar. 22, 2005) (explaining various devices being developed to detect nuclear, chemical, and biological agents).

[393] *See, e.g.*, RAE SYSTEMS INC., SECURING THE SUPPLY CHAIN: CONTAINER SECURITY AND SEA TRIAL DEMONSTRATION RESULTS (2005), http://www.raesystems.com/~raedocs/Securing_the_Supply_Chain_011205.pdf. Rae Systems is a leading global developer and manufacturer of container security devices that were tested at sea during October and November, 2004. *Id.*

[394] Alex Ortolani & Robert Block, *Hong Kong Port Project Hardens Container Security*, WALL ST. J., July 29, 2005, *available at* http://www.post-gazette.com/pg/05210/545822.stm.

[395] *Id*.

[396] *See Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative*, *supra* note 198, at 7.

[397] *See* Ortolani & Block, *supra* note 394 (noting that "the Hong Kong Terminal Operators Association . . . includes several private companies that manage the world's second-busiest port after Singapore").

[398] *Id*. *See* U.S. GOV'T ACCT. OFF., GAO-05-557, CONTAINER SECURITY: A FLEXIBLE STAFFING MODEL AND MINIMUM EQUIPMENT REQUIREMENTS WOULD IMPROVE OVERSEAS TARGETING AND INSPECTION EFFORTS (2005) (stating "nonintrusive inspection equipment at CSI ports, to include imaging and radiation detection devices, that help ensure that all equipment used can detect WMD"). *See also* Ortolani & Block, *supra* note 394 (explaining that "[t]rucks that haul the port's containers pass through two of the giant

system is costly, but the system is efficient and the estimated cost of ten dollars per container to run and maintain the screening procedure is nominal.[399]

The scanning system likely would increase the efficiency of CBP officials domestically and at foreign ports by allowing them to review the computer files and identify suspect cargo immediately, "before [the container] gets loaded onto a ship, or at any point along its journey."[400] Balancing costs and benefits of the system clearly weighs in favor of the screening system. Because the scanning process provides a potential method of detecting radiological devices or components, the process would likely deter terrorists.[401] Furthermore, if officials receive intelligence on a particular container or distributor, officials may virtually inspect the contents of that container, as well as containers loaded with goods from the same distributor, without having to remove the container(s) from a ship for landside inspection.[402] As an added benefit, "if an incident can be quickly isolated to a single supply chain[,] then there will be no need for a port-wide shut down."[403]

As discussed throughout this paper, the ramifications of a prospective security breach, and resulting gridlock, may present the largest threat to our maritime transportation system. The screening techniques employed in Hong Kong could reduce these potentially devastating consequences. Moreover, U.S. implementation of a similar scanning program could provide maritime security benefits domestically and abroad.

Admittedly, even wide-spread use of technological advances in the form of imbedded detection devices and scanning equipment will not provide a completely secure maritime transportation system. A comprehensive security regime is neither feasible nor the objective

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scanners. One checks for nuclear radiation, while the other uses gamma rays to seek out any dense, suspicious object made of steel or lead inside the containers that could shield a bomb from the nuclear detector").

[399] *See Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative*, *supra* note 198, at 7 (estimating a $6.50 cost for containers scanned in Hong Kong and a $10 cost for containers scanned in the U.S. with similar equipment).

[400] Ortolani & Block, *supra* note 394.

[401] *See Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative*, *supra* note 198, at 7.

[402] *Id*.

[403] *Id*.

behind protecting U.S. ports with layered security measures for container ships. Comprehensive security is impossible, and a system that tries to achieve it would compromise the essential flow of maritime commerce. The layers of maritime security must be flexible enough to evolve along with changing technology and to provide sufficient deterrents to prospective terrorists. While there are additional feasible methods to help resolve current weaknesses in container ship security, the effectiveness of the existing layered security defense still remains to be seen.

EMERGENCY POWERS AND TERRORISM

WAYNE MCCORMACK*

> *The moral strength, vitality and commitment proudly enunciated in the Constitution is best tested at a time when forceful, emotionally moving arguments to ignore or trivialize its provisions seek a subordination of time honored constitutional protections.*[1]
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> *If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.*[2]

I. Introduction

Does a national emergency grant unfettered power to the Executive, disrupt normal operation of tripartite government, or suspend civil liberties protections of the populace? In three cases decided in June 2004, the Supreme Court made a series of pronouncements on executive military power in time of national emergency,[3] with implications potentially eclipsing those from the Civil War and World War II eras. The House of Lords, in December 2004, responded to similar arguments in a remarkably similar case involving executive detention of aliens

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[1] United States v. Rahmani, 209 F. Supp. 2d 1045 (D. Cal. 2002)

[2] Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

[3] Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

suspected of terrorist links.[4] Five years earlier, the Supreme Court of Israel dealt with an argument for necessity as a defense to otherwise illegal interrogation techniques.[5]

All of these cases posit the difficulty of expecting restrained observance of individual liberty in times of crisis, particularly in time of war. There is nothing unusual or particularly threatening about heightened security and decreased mobility during time of war. But if war and civil liberties make strange bedfellows, what should be said about a "war" without a defined enemy or a defined end? The rhetorical flourish of "War on Terrorism"[6] has its historical roots in some loose use of language beginning with the "War on Poverty" and followed by the "War on Drugs." Maybe the "War on Poverty" did not do much to civil rights (although some conservatives would differ strongly), but the "War on Drugs" has raised very significant concerns both for civil liberties and for the wisdom of the effort. [7] Now, enhanced powers of law enforcement, legislated in response to the "terrorism" threat, are being deployed in pursuit of drug dealers and other "ordinary" criminals,[8] and the "wars" intersect.

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[4] A. v. Sec'y of State for the Home Dep't, 3 Eng. Rep. 169 (2005).

[5] Public Comm. Against Torture in Isr. et al. v. The State of Isr. and the Gen. Security Service, HCJ 5100/94 (1999).

[6] The language of "war on terrorism" is problematic for several reasons, the most obvious of which is that there is no cognizable entity with whom to be at war. *See* Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325, 327-28 (2003). For the view that the distinction between war and crime is more nuanced, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002).

[7] Judge Richard Posner takes the interesting view that this is a good time to recognize that the "war on drugs has been a big flop" and to "redirect law-enforcement resources from the investigation and apprehension of drug offenders to the investigation and apprehension of international terrorists." Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY (Dec. 2001). Meanwhile, Senator Orrin Hatch has suggested conflating the two "wars" into a war on "narco-terrorism." *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the Senate Comm. On the Judiciary* (2003) (statement of Sen. Orrin Hatch, Chairman), *available at* http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=784&Month=5&Year=2003. Senator Hatch was widely reported to have floated a draft bill entitled "Vital Interdiction of Criminal Terrorist Organizations" or VICTORY Act, but the measure never was introduced. *See, e.g.*, Dean Scharner, *Draft Bill Seeks Broad Power in Naco-Terror Fight*, ABC NEWS, Aug. 20, 2003, http://abcnews.go.com/US/story?id=90316&page=1.

[8] David Caruso, *Critics Cite Patriot Act Abuse and Misuse—Dodson: Act Stretches Beyond Terrorism Cases*, DAILY TEXAN (Austin), Sept. 14, 2003, *available at*

Much has happened in United States law since 11 September 2001 (9/11), and the turmoil has produced some uncomfortable postures for the U.S. legal system. The confusion to be expected in a time of major public security threats was exacerbated when the misnamed "war on terror" was followed by two real wars in Afghanistan and Iraq. The arenas of law enforcement against terrorism and fighting on foreign soil became blended in both the public debates and in some government policy. In fact, the two efforts became physically blended when suspected terrorists captured in places such as Bosnia were imprisoned in Guantanamo along with Taliban militia members captured in Afghanistan.[9]

Federal judges frequently have apologized for having to enforce the constitution as they have struggled with questions involving the rights of executive detainees,[10] judicial review over executive demands for information,[11] and mens rea in criminal prosecutions.[12] This is a puzzling and troubling posture for a judiciary grounded in the rule of law, and it reflects a genuine difficulty in responding to emergency situations through judicial proceedings.[13]

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http://www.dailytexanonline.com/media/paper410/news/2003/09/14/StateLocal/Critics.Cite.Patriot.Act.Abuse.And.Misuse-465391.shtml. According to this story, a county prosecutor in North Carolina charged a methamphetamine manufacturer with making chemical weapons in violation of the state's terrorism statute. *Id.* In November 2003, John Allen Muhammad (the "Beltway Sniper") was convicted in Virginia under that state's terrorism statute, VA. CODE ANN. § 18.2-46.4 (2004), for an "act of violence . . . committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation." *See* Muhammad v. Commonwealth, 269 Va. 451, 486 (2005).

[9] It has been argued that there is a third paradigm in addition to those of war and crime. That paradigm draws from customary international law to describe a number of military actions that do not rise to the level of a state of "armed conflict." Michael Hoffman, *Rescuing the Law of War: A Way Forward in an Era of Global Terrorism*, 35 PARAMETERS 18 (2005). That paradigm suffices to explain military actions outside the domestic arena, but it does not provide a source of law for dealing with civilians on home soil.

[10] *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004); *In re* Guantanamo Detainee Cases, 355 F. Supp. (D.D.C. 2005).

[11] *See* Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

[12] *See* United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Gregory, J., dissenting) ("I do not seek to give comfort to terrorist organizations, or to diminish the reality of clear and present threats posed by such groups.").

[13] Virtually no academic voices can be heard in favor of the more extreme measures of the Bush administration such as executive detentions or aggressive interrogation techniques. Nevertheless, there is some support for "deferential" review by the courts.

As noted judges such as Learned Hand[14] and Robert Jackson[15] have pointed out, the judiciary is not the final bulwark against government repression. "We the People" ultimately must decide to what extent we are willing to sacrifice freedom for security.[16] Each generation's emergency tends to become the fuel for the next generation's resistance to encroachments on civil liberties, perhaps because Americans have survived each emergency and realized that extreme encroachments may not have been necessary.[17] As war is too important to be left to the generals,[18] so also are civil liberties too important to be left to the courts.[19] Most of the issues ultimately are not about the law so much as they are about the people, both those enforcing the law and those involved in the political process. "We the People" ultimately must decide to what extent we are willing to sacrifice freedom for security. Much of the discussion inevitably will involve political judgments. How well "We the People" respond to these challenges is up to "Us."

See Robert Pushaw, *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004). There has also been some support for the use of military tribunals to try cases against alleged terrorists. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002). The only court to address this issue found that the military tribunals as constituted did not comport with congressional mandates. *Hamdan*, 344 F. Supp. 152 (D.D.C. 2004).

[14] LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189-90 (Irving Dilliard ed., 3d ed. 1960).

[15] Korematsu v. United States, 323 U.S. 214, 248 (Jackson, J., dissenting).

> If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

Id.

[16] This is not to say that courts shouldn't be expected to protect minority interests against the "tyranny of the majority," but just to recognize that the rest of us have an obligation in this regard as well.

[17] Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 284-85 (2002).

[18] "War is much too serious a business to be entrusted to the military." *Attributed to* Charles Maurice de Talleyrand-Perigord, BARTLETT'S FAMILIAR QUOTATIONS 354:9 (16th ed. 1992).

[19] The extreme version of this view is that the courts should stay out of the fray and that "redress must be achieved politically if it is to be effective." George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 27, 65 (1984).

Much of the public controversy about the Bush administration's domestic responses to terrorism has focused on the wiretap and record-seizing powers under the Patriot Act.[20] The Patriot Act, however, was not really an emergency action and its existence is currently being debated in Congress.[21]

In contrast to the public debate, most of the post-9/11 academic discussion references emergency powers as a single general topic, sometimes using preventive detention or torture as the paradigmatic example. Generalization, however, carries only so far. This article starts with consideration of some specific claims of emergency power: domestic use of the military, preventive detentions, investigations and government secrecy, and interrogation techniques. Paying attention to the specifics will help demonstrate that there is a strong role for both the legislature and the courts even in times of crisis. Next, the article canvasses the options available for a general answer to the question of emergency powers, considering answers of "Yes," "No," and "Maybe."

Most advocates for the "No" position tend to argue that it is important for constitutional norms to remain fixed, even if officials will violate those norms without consequence during emergencies.[22] The "Yes" advocates tend to become advocates for "Maybe" because they conclude that there must be some method for legitimizing what would otherwise be unlawful, such as by legislative[23] or electoral[24] ratification.

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[20] Unifying and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

[21] The Patriot Act was passed under the impetus of public outrage and fear, but it consisted of packages of proposals that had been in the works for years. Most of the controversial measures consist of amendments to the Foreign Intelligence Surveillance Act (FISA), which has been around since 1978. *See* Patriot Act § 218, 115 Stat. 272 (amending 50 U.S.C. § 1804(a)(7)(B), 1823(a)(7)(B) (2000)). Other provisions amended elements of the criminal code that had been under more or less constant revision since 1992. *See id.* § 802 (amending 18 U.S.C. § 2331).

[22] David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1785 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1867 (2004); Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

[23] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

[24] Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003). One argument for virtually plenary power is that courts should stay out of the fray and allow the executive and legislature to carry forward. George Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1 (1984).

The most attractive option, for reasons that will be spelled out at the conclusion of this article, is what might be called the "Prego" option—"It's in there"—that emergency powers are built into some constitutional provisions and carry their own limitations. It remains true, however, that the most powerful voices in times of social-political stress will be those of a vigilant citizenry.

II. Specific Claims of Emergency Power

Emergencies can be classified as "natural," "technologic," or "complex."[25] Natural emergencies include hurricanes, earthquakes, and similar happenings. Technologic emergencies include destruction or immobilization of facilities or infrastructure, whether intentional or not. Complex emergencies have been described as "situations in which the capacity to sustain livelihood and life is threatened primarily by political factors, and in particular, by high levels of violence."[26] Sustained terrorist attacks thus fit within the rubric of a complex emergency.

It would be a serious mistake to forget that there are centuries of experience in Anglo-American law in dealing with emergencies. Emergency power to deal with disasters of the natural or technologic variety is fully recognized in U.S. law and has been exercised on a number of occasions. In response to "complex emergencies," Congress has explicitly authorized military involvement in domestic affairs when civilian authorities are overwhelmed.[27] Moreover, doctrines of necessity have developed to excuse governmental actions taken in time of complex emergencies such as wartime. The important point to remember,

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[25] Thomas F. Ditzler, *Malevolent Minds: The Teleology of Terrorism*, *in* FATHALI M. MOGHADDAM & ANTHONY J. MARSELLA, UNDERSTANDING TERRORISM 187, 188 (2004).

[26] *Id*. at 189 (attributing the definition to the London School of Health and Tropical Medicine).

[27] 10 U.S.C.S. § 332 (LEXIS 2005).

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.
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> *Id.*

however, is that these doctrines all carry within them stated, or inferable, limitations on the scope of the emergency power.

A. Domestic Use of Military Power

A scenario of domestic use of military resources may help focus the issues. Imagine that someone has unleashed botulin toxin into the water supply of New York City. To make this a little more interesting, suppose that Federal Bureau of Investigation (FBI) agents believe this was not the work of a foreign group but a domestic militia out of the hills of West Virginia. There is no way of knowing what city the militia may strike next and no way that domestic police forces can patrol all the vulnerable locations of water supplies in the country. When the President calls out the military to patrol the water supplies of the nation, is there any prospect of judicial intervention? Who would be the plaintiff in a lawsuit?

Carry the scenario to the next level. *General Smith*, who is commanding the U.S. forces involved, issues orders creating a 200 meter perimeter around every access point to municipal water supplies. Military police are under orders to immediately arrest and incarcerate any unauthorized person entering the perimeter. Individuals remain in custody until officials determine why they entered the unauthorized area. *Space Cadet* wanders into the perimeter while listening to his iPod and playing a video game on his hand-held personal data device. *Ned Turner* decides to intentionally challenge this excessive display of federal power and strides purposefully up to the fence and waits to be arrested. Military police take both into custody. The following discussion does not attempt to directly answer the questions raised in this scenario, but the reader may find it useful to think about how to deal with this situation at each stage of the discussion.

1. Necessity in Takings Law

The United States has a complete federal agency devoted to civil emergency response. The Federal Emergency Management Agency (FEMA) traces its history to the Depression and the New Deal in much

the same fashion as the accretion of federal power in many areas.[28] The current version of FEMA was created by executive order in 1979,[29] amalgamating the activities of over 100 federal agencies that were engaged in some form of "disaster relief,"[30] and then transferred to the Department of Homeland Security in 2002. Disaster relief encompasses coordinating disaster recovery and mitigation in conjunction with other federal agencies and state government.[31] The FEMA is not specifically authorized to commandeer resources from unwilling owners, but it does have authority to incur obligations for use of resources such as vehicles, food, clothing, and facilities for shelter.[32]

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[28] Congress provided relief for natural disasters by ad hoc legislation beginning as early as 1803. The FEMA describes its precursor history as follows:

> By the 1930s, when the federal approach to problems became popular, the Reconstruction Finance Corporation was given authority to make disaster loans for repair and reconstruction of certain public facilities following an earthquake, and later, other types of disasters. In 1934, the Bureau of Public Roads was given authority to provide funding for highways and bridges damaged by natural disasters. The Flood Control Act, which gave the U.S. Army Corps of Engineers greater authority to implement flood control projects, was also passed. This piecemeal approach to disaster assistance was problematic and it prompted legislation that required greater cooperation between federal agencies and authorized the President to coordinate these activities.

Fed. Emergency Mgmt. Agency, FEMA History, http://www.fema.gov/about/history.shtm (last visited Aug. 5, 2005).

[29] Exec. Order No. 12,148 (1979), 44 C.F.R. § 2.3 (2005).

[30] *Id.*

[31] "In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government." 42 U.S.C.S.. § 5149(a) (LEXIS 2005). "Immediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area." *Id.* § 5143(a). "When the President determines assistance under this Act is necessary, he shall request that the Governor of the affected State designate a State coordinating officer for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government." *Id.* § 5143(c).

[32] Any federal agency involved in disaster relief is authorized "to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President." *Id.* § 5149(b)(3).

What happens if a federal agency believes that it must have something that the owner is not willing to provide? Not surprisingly, the majority of cases dealing with this phenomenon occur in the context of claims for compensation for private property that was used, damaged, or destroyed in the course of governmental response to an emergency.

In Great Britain, executive takings of private property for public use occurred in the early stages mostly as responses to emergencies. The privilege to damage or destroy private property to prevent a greater harm was recognized in early British cases so that there was no tort when the Crown dug saltpeter from the plaintiff's land to make gunpowder[33] or tossed articles overboard to save a ship.[34] The British cases seem to make the necessity a complete defense regardless of whether the property damaged was itself threatened by the emergency.[35]

The American version of the defense of necessity has taken a slightly different turn from the British practice. When the property itself is reasonably believed to be threatened as part of the emergency—when a house stands in the way of a fire—there is no reason to compensate the owner for its destruction.[36] When the property is not itself threatened by the emergency, there is a split of opinion. *The Restatement (Second) of Torts* (*Restatement*) takes the position that the privilege is complete so long as the actor acts reasonably.[37] Several commentators, however, take the position that the owner should be compensated by the public on whose behalf the property was used.[38]

The U.S. Supreme Court cases are inconclusive. In a number of cases involving wartime destruction of property, the Court has simply

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[33] King's Prerogative in Saltpetre, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (1607).
[34] Mouse's Case, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1609).
[35] *See* Hall & Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 525 (1907). The doctrine was sufficiently ill-defined that the Mayor of London is said to have allowed the city to burn to the ground in 1666 rather than risk a trespass action for destroying forty houses that might have prevented spread of the fire. Hall and Wigmore, however, doubt the accuracy of this claim, and say that the claim is "of no significance." *Id.* at 502 n.2.
[36] RESTATEMENT (SECOND) OF TORTS § 196 cmt. b (1965).
[37] *Id.* §§ 196, 262.
[38] The public in this view substitutes for the actual beneficiaries of the use to resolve the administrative problem of finding those persons who have benefited and adjudicating their collective liability. W. PROSSER & P. KEETON, TORTS 146-47 (5th ed. 1984); Hall & Wigmore, *supra* note 35, at 523-24.

dictated that citizens take the risk of property loss due to war.[39] The emergency is still considered sufficient justification even if the officers involved had the opportunity to make a calculated choice about the matter.[40] Conversely, the government has often "requisitioned" supplies and materials and acted as if compensation were required. For example, in evacuating the Philippines the Army paid for petroleum products it used but not for those destroyed to prevent their capture by the Japanese.[41] The basis for the distinction is probably not the benefit to the public. The products used were not subject to capture by the enemy while those destroyed were. In the case of something that is subject to capture, destruction is not any greater loss to the owner. The reason for the distinction might also be that consumables are more likely to be the subject of a bargained exchange than capital goods, although this determination would not support payment of rent for occupied premises.

The notion of public necessity takes on greater dimension in the opinions of the Court of Claims. This court frequently awards compensation in cases of military use or occupation of property while refusing compensation for wartime destruction of property. The difference seems to lie in the degree of urgency or compulsion from outside sources. For example, in another case from the wartime South Pacific,[42] owners were kept away from their land because ammunition dumps were based there, then later because some live ammunition remained in the area. When the land owners were finally allowed on their property some twenty-two years after the war ended, they received the fair market rental value of the land for the duration of their exclusion,[43] but obtained no compensation for the destruction of coconut trees during the invasion of the island.[44] It seems that military necessity existed as much with respect to the occupation as with the destruction of the coconut trees; the most likely distinction is the degree of likelihood that some third party, the enemy, would have destroyed or taken the trees or that the destruction was an inadvertent happenstance of war.

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[39] Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (destruction of factory to prevent spread of smallpox); United States v. Pac. RR, 120 U.S. 227 (1887) (destruction of bridges by retreating Union Army).

[40] Castro v. United States, 500 F.2d 436 (Ct. Cl. 1974); United States v. Caltex Inc., 344 U.S. 149 (1952).

[41] *Caltex*, 344 U.S. at 151.

[42] *Castro*, 500 F.2d 436.

[43] *Id.* at 440.

[44] *Id.* at 443.

These cases on military necessity seem to reject the *Restatement* position that a privilege exists to destroy property for military necessity, and adopt the commentators' view of a privilege to destroy only property that is itself threatened. With respect to property that would not otherwise be lost, the public representatives have the power to take the property, but must provide compensate for its use. This is a pragmatic adjustment reflecting notions of causation and carries no hint of impropriety in executive responses to emergency conditions.

2. Posse Comitatus Limitations

Another doctrine bearing on the existence of emergency powers is the concept of *posse comitatus*, or the ability of the Executive to call on members of the community to engage in law enforcement operations.[45] The phrase, roughly translated as "power of the county," refers to the inherent discretion of civil authorities to call on the entire population to assist in maintaining order or apprehending criminals.[46]

The federal posse comitatus statute[47] prohibits employment of the military in civil law enforcement. Congress first adopted the statute in 1875 as part of the end of the Reconstruction Era, motivated by a desire to prevent a recurrence of military presence when civil authority had been restored at the end of the Civil War. Although the statute could be read as building a wall between military and civilian authorities, subsequent Congresses have not given it that effect. Indeed, Congress has authorized a wide array of military assistance to federal, state, or local authorities in pursuit of maintaining order or law enforcement, so long as military personnel are not directly engaged in searches or arrests.

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[45] *See* Scott v. Vandiver, 476 F.2d 23, 240-41 (4th Cir. 1973).

[46] *See* BLACK'S LAW DICTIONARY 1183 (7th ed. 1999).

[47] 18 U.S.C.S. § 1385 (LEXIS 2005).

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Id. These provisions were extended to the Navy and Marines by 10 U.S.C.S. § 375, which also provides for the Secretary of Defense to promulgate regulations "to ensure that any [assistance to state and local authorities] does not include or permit direct participation . . . in a search, seizure, arrest, or other similar activity."

Courts have routinely upheld "passive" engagement of military personnel in support of civilian criminal investigations and have upheld "active" participation of military personnel in criminal enforcement when the offense concerns a military facility or activity.[48]

The use of federal troops,[49] or even presidential activation of state National Guard (NG) units,[50] to aid civilian authorities in response to insurrection is specifically provided by statute. Use of these forces to protect against violence or looting during the recovery period of natural disasters has never been seriously questioned. President Eisenhower used federal troops and overrode the governor's authority with the state NG to enforce court orders dealing with school desegregation.[51] The principal Supreme Court precedent for use of military force in this situation unfortunately came from a federal court injunction against labor organizing activities and socialist campaigning by Eugene Debs,[52] but the practice of using federal military force in aid of court orders is nevertheless well-established. Attorney General Brownell advised President Eisenhower that the posse comitatus statute was not intended to limit the President's authority to deal with mob violence or similar threats to enforcement of federal law.[53]

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[48] *See, e.g.*, United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (military transport of air hijacker back to United States for trial); United States v. Hartley, 486 F. Supp. 1348 (D. Fla. 1980) (civilian DoD investigation of military supplier).

[49] 10 U.S.C.S. § 332.

[50] *Id.* § 331.

[51] Then-Attorney General Herbert Brownell delivered a formal opinion to President Eisenhower dealing with a range of issues regarding the desegregation of the Little Rock schools. 41 Op. Atty. Gen. 313 (1957). The federal court had issued an order requiring desegregation of Central High School, but Arkansas Governor Orval Faubus mobilized the state militia and highway patrol with orders to "place off limits to colored students those schools heretofore operated and recently set up for white students." *Id.* at 317.

[52] *In re* Debs, 158 U.S. 564, 582 (1894).

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

Id.

[53] Indeed, the Brownell opinion expressed "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate." 41 Op. Atty. Gen. 313, 331 (1957).

The most extensive analysis of the posse comitatus statute came in a series of cases arising out of the three-week occupation of Wounded Knee by members of the American Indian Movement in 1973. Various defendants were prosecuted for offenses such as trespass, assault, and interference with federal officers in the discharge of their duties.[54] The defendants pointed to the involvement of military units in what could have been viewed as an ordinary law enforcement operation and asserted that this involvement violated the posse comitatus statute. This defense was relevant at least to the question of whether the federal officers were "lawfully engaged in the discharge of their duties."[55]

The FBI and Bureau of Indian Affairs had closed off the town to prevent additional sympathizers from joining those dissidents already on the scene.[56] As part of the control operation, military units assisted with advice, aerial reconnaissance, and the loan of equipment.[57] The district judges dealing with the defense of posse comitatus violation reached different conclusions with different standards for testing the validity of military involvement.[58] To Chief Judge Ubrom, the statute would be violated if military personnel influenced the decisions of the civilian officers or actively maintained and operated the equipment provided.[59] Chief Judge Nichol went "one step further" than Chief Judge Ubrom and held that there was no evidence justifying submission of issues to the jury regarding the nature of the military involvement.[60] Judge Bogue provided a more nuanced analysis by concentrating on whether military personnel were "actively engaged in law enforcement."[61]

> Based upon the clear intent of Congress, this Court holds that the clause "to execute the laws", contained in 18 U.S.C. § 1385, makes unlawful the use of federal

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[54] *See, e.g.*, United States v. Red Feather, 392 F. Supp. 916 (D. S.D. 1975); United States v. Means, 383 F. Supp. 368, 374-77 (D. S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974)

[55] 18 U.S.C.S. § 231(c).

[56] *Jaramillo*, 380 F. Supp. 1375.

[57] *Id.* at 1377.

[58] *Red Feather*, 392 F. Supp. 916; *Means*, 383 F. Supp. at 374-77; *Jaramillo*, 380 F. Supp. 1375.

[59] *Jaramillo*, 380 F. Supp. 1375.

[60] United States v. Banks, 383 F. Supp. 368 (D. S.D. 1974).

[61] *Red Feather*, 392 F. Supp. at 925 (stating that the phrase "'uses any part of the Army or the Air Force as a posse comitatus or otherwise' means the direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel").

> military troops in an active role of direct law enforcement by civil law enforcement officers. Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities. Such use of federal military troops to "execute the laws", or as the Court has defined the clause, in "an active role of direct law enforcement", is unlawful under 18 U.S.C. § 1385. . . .[62]
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> Activities which constitute a *passive* role which might *indirectly* aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities.[63]

For Judge Van Sickle, the prior judges' opinions were not sufficient.[64] He assessed the history and purposes of the statutes and concluded not only that Americans are suspicious of military involvement because military training is not designed to take into account civilian rights, but also that military specialization could be useful in unusual situations of civil disturbance.[65] To summarize his

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[62] *Id.*

[63] *Id.*

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> [M]y concern with Judge Urbom's analysis is that I feel his rule requires a judgment be made from too vague a standard. At the same time, my concern with Judge Bogue's analysis is that it is too mechanical, and inevitably when the rule is applied to borderline cases, it will crumble at the edges.

United States v. McArthur, 419 F. Supp. 186, 194 (D. N.D. 1975).

[65] *Id*. at 193.

conclusions, Judge Van Sickle stated that "the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority."[66]

In this sequence of cases, the judges took varying approaches to interpreting the statute's prohibition on the use of the military to execute the laws. Although there were constitutional concerns lurking in the background of the analyses, the courts focused on whether Congress had authorized or prohibited the use of military force in domestic disturbances. The constitutional issues are more forcefully stated in the next section.

3. Martial Law

The effect of the posse comitatus statute on the question of declaring martial law essentially is to preserve the power to make such a declaration in Congress. The military can be used to assist directly in civil law enforcement only when authorized by statute. This approach codifies, with some clarification, the results reached following the Civil War and the Reconstruction Era. Prior to that time, the Judiciary Act of 1789 had authorized federal marshals to call on the military to serve as a posse whenever it was useful for execution of the law.[67]

In *Texas v. White*,[68] the Supreme Court upheld the occupation of southern states by federal military force following the Civil War. In *Ex parte Milligan*,[69] the Court invalidated the trial of civilians by military tribunals in areas in which the civilian courts were open and operating. One could read the combination of these cases as permitting martial law in areas that are in a state of war, but not allowing it elsewhere. As Colonel Winthrop points out, however, this interpretation is an oversimplification.[70]

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[66] *Id*. at 194.
[67] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 866-67 (2d ed. 1920).
[68] 74 U.S. 700 (1868).
[69] 71 U.S. 2 (1866).
[70] WINTHROP, *supra* note 67, at 799.

It is important to distinguish between military government and martial law. The former is the result of occupation of hostile territory, whether foreign or rebellious, while the latter is a condition that provides a military complement to the civil authorities on home soil because of an emergency.[71] Military government completely supplants civil government while martial law provides a type of self-defensive use of force commensurate with the necessity. The Supreme Court adopted this view in *Duncan v. Kahanamoku*[72] when it overturned a conviction by a military tribunal in Hawaii during a time of declared martial law because the civilian courts were open and operating. Thus, martial law can allow the military commander to override some of the normal operations of the civil authorities, to provide for law enforcement and maintenance of order, without supplanting the civil judicial function.

The most significant aspect of *Duncan*, however, is that it was a statutorily based, rather than constitutionally based, decision. Justice Black's opinion for the Court first pointed out what the case *did not concern*, such as enforcement of the law of war, exercise of military government in occupied lands, or preventing interference with lawful military functions.[73] The Court recognized the basic distinction between military government and martial law, the former having to do with enemy territory and the latter with home turf. The Court then went on to decide whether the Hawaii Organic Act authorized martial law to the point of excluding the civilian courts. "These petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts."[74]

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[71] *Id*. at 817.

[72] 327 U.S. 304 (1946).

[73] Justice Black identified a number of issues that were not implicated in the case:

> Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function . . . . Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war.

Id. at 313-14.

[74] *Id*. at 314.

After canvassing the history of the Hawaii Organic Act, which was admittedly a bit checkered but stabilizing in the direction of allowing military force to be used without supplanting civil authority, the Court declared:

> We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.[75]

Justice Black may have been a bit overly enthusiastic about what "our people have always believed" or about what "responsible military and executive officers had heeded," but his message is clearly stated—martial law does not itself close the civilian courts nor authorize diversion of civilian defendants to military tribunals.[76] Referring to the Court's martial law opinion in *Sterling v. Constantin*,[77] Justice Black stated that "this Court 'has knocked out the prop' on which" earlier lower court approvals of military tribunals had been based.[78]

Justice Murphy was even more emphatic and did not rest his opinion on statutory grounds.

> Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States. . . . Indeed, the unconstitutionality

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[75] *Id.* at 324.
[76] *See id.*
[77] 287 U.S. 378 (1932).
[78] *Duncan*, 327 U.S. at 321 n.18 (quoting FREDERICK WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 116 (1940)).

> of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action.[79]

Justice Murphy referred to criticism of the "so-called 'open court' rule of the *Milligan* case" and responded vigorously:

> The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation.
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> . . . .
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> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.[80]

Duncan does not deny the possibility of using military presence to supplement or even replace some functions of civilian government in time of actual emergency. The examples cited in *Duncan* of martial law to quell civil disturbances stemming principally from labor disputes do not seem to have taken into account the posse comitatus statute.[81] Given the tacit approval of the use of troops in those cases, so long as crimes were tried in the civilian courts, it is not clear how the Court would deal with this statutory argument.

Some further insight might be gleaned from *Youngstown Sheet & Tube v. Sawyer*,[82] in which the Court struck down President Truman's attempt to seize the steel mills to avert labor strife during the Korean

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[79] *Id.* at 325 (Murphy, J., concurring).
[80] *Id.* at 329.
[81] *Id.* at 320-22.
[82] 343 U.S. 579 (1952).

War. Only the three dissenting Justices were impressed by the argument that there was a sufficient level of national emergency justifying unilateral seizure without congressional authorization.[83] In his classic concurrence analyzing separation of powers, Justice Jackson pointed out that the President is on strongest ground when he acts with congressional authorization, may or may not have constitutional powers when acting in congressional silence, and must have strong independent constitutional grounds when going against the will of Congress.[84] Under that reasoning, to justify military force to perform civil law enforcement after passage of the posse comitatus legislation, the President would have to persuade a majority of the court that a genuine emergency existed sufficient to justify departure from specific congressional direction. After the experience of *Korematsu*, *Duncan*, and *Youngstown*, it is doubtful that anything short of imminent invasion could justify unilateral action in violation of the statute.

This is not to say that Congress could not be persuaded to authorize martial law under threat of war-time conditions. That it did not do so under the extreme stress of the early stages of World War II is highly instructive. Declaring martial law does not require supplanting the normal processes of the civilian courts. Whether *Milligan* and *Duncan* express constitutional norms as well as statutory decisions may ultimately have to be addressed, but at minimum, those cases, combined with *Quirin*[85] reflect a disposition to require rather specific statutory authorization for military tribunals.

Quirin was a wartime decision, made after the existence of military trials, and involved actions that probably should not be repeated, at least not in the absence of a real war with real saboteurs. How do we know it was a real war with defendants who were agents of the enemy? In *Quirin*, the defendants admitted to that status, a fact that Justice Scalia found to be a critical distinction in *Hamdi.* [86] That status could also be determined by judicial review. Before we reach that stage, however, one

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[83] *Id*. at 679 (Vinson, C.J., dissenting) ("Even ignoring for the moment whatever confidential information the President may possess as 'the Nation's organ for foreign affairs,' the uncontroverted affidavits in this record amply support the finding that 'a work stoppage would immediately jeopardize and imperil our national defense.'").

[84] *Id*. at 635-38.

[85] *See Ex parte* Quirin, 317 U.S. 1 (1942). How *Milligan* and *Duncan* are affected by the subsequent cases of *Quirin* and *Hamdi* is considered below.

[86] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2670, 2643 (2004).

should really ask why ordinary civilian courts are not fully equipped to handle a trial of this type.

Justice Murphy's concurrence in *Duncan* addressed seven different arguments in favor of military courts over civilian courts in time of war and rejected each of them.[87] Several of the arguments he dismissed as smacking of racism, despotism, viciousness, or just petty military carping about the civil justice system. The only argument that appears to have any facial validity today is that the civilian courts are likely to take longer in reaching judgment than would a military tribunal.[88] If anything, the intervening half-century has brought the military judicial system closer to the civil system and made it more difficult to justify diverting cases to it. With regard to the delay argument, Justice Murphy had this to say: "Civil liberties and military expediency are often irreconcilable. . . . The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws."[89]

Perhaps the best way to approach the issue of martial law within the borders of the United States is with utter pragmatism. If a national emergency is so severe that the civilian courts are not able to meet and enjoin the declaration of martial law, then probably the emergency justifies the declaration. Anything short of that eventuality will give rise to a justiciable controversy of the type seen in *Youngstown*.

In this pragmatic vein, comparing *Korematsu*[90] and *Endo*[91] with *Milligan* and *Duncan* is particularly instructive. The majority in *Korematsu* claimed that it was not ruling on detention of anyone because it was only dealing with exclusion of a particular ethnic group from militarily sensitive areas.[92] In the companion case of *Endo* the Court

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[87] Duncan v. Kahanamoku, 327 U.S. 304, 329-35 (1946).
[88] *Id.* at 331.
[89] *Id.*
[90] Korematsu v. United States, 323 U.S. 214 (1944).
[91] *Ex parte* Endo, 323 U.S. 283 (1944).
[92] The Court described the issue by stating the following:

> We are . . . being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in

held that detention of a concededly loyal citizen was unauthorized by Congress or Presidential order. In scathing opinions in both cases, Justices Murphy and Roberts blistered the Court for ducking the constitutional questions of racism and failing to examine the public record for facts that would belie the military judgment to which the Court purported to give deference.[93] Justice Jackson provided the pragmatic notion that the Court should not even rule on *Korematsu* if it were going to give such great deference because now the Court had written into posterity its approval of an unreviewed race-based internment.[94]

If the War Relocation effort truly had an emergency behind it, the Supreme Court should have been able to look at the record and make that determination. If deference meant lack of review, then it would be a serious affront to the judicial authority and constitutional strictures. In some degree, however, the Court did review the findings of the military authorities. The Court noted that an invasion of the West Coast rationally could have seemed imminent—a rational commander could have thought that an unknown number of Japanese-Americans might be loyal to the Emperor and thus threaten to commit acts of sabotage or espionage, and that the numbers of persons involved would have made it difficult to do individual loyalty screenings in the limited amount of time available.[95] The major problem with this review was that it hardly met the concept of "strict" scrutiny. Instead, the Court conducted only a minimal scrutiny with the burden of proof on the challenger. Nevertheless, it was a review and not a capitulation under the heading of deference to executive authority.

Moreover, both *Milligan* (whether on constitutional or statutory grounds) and *Duncan* emphatically embrace the "open court" rule to

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> a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others.

Korematsu, 323 U.S. at 221.

[93] *Id.* at 225 (Roberts, J.); *id.* at 239 (Murphy, J.).

[94] *Id.* at 245-46 (Jackson, J., dissenting).

[95] *See id*. ("I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor would I say that they were. But even if they were permissible military procedures, I deny that it follows that they were constitutional.").

insist on civilian judicial processes when available. *Quirin* allowed departure from this approach in light of a number of factors: pragmatically, the military prosecution had already occurred and the political fallout of setting that conviction aside could have been enormously fearsome;[96] the defendants were avowed agents of an enemy nation;[97] as soldiers out of uniform, the defendants had violated the "law of war" in a direct fashion.[98] By contrast, if a future Executive attempts to supplant civilian courts with military tribunals in derogation of the principles of *Milligan* and *Duncan*, it should be hoped that the courts would stand firmly behind those cases. As Chief Justice Taney and Justice Jackson both noted, however, the courts are powerless against the "superior force" of the military and must look "to the political judgments of their contemporaries and to the moral judgments of history."[99]

4. Military Assistance in Time of Insurrection

Other than martial law as an emergency measure, some use of the military to assist civilian authorities in times of civil disturbance is also possible and its limits are found in the statutes that prevent use of the military in direct search and arrest of offenders. Although the posse comitatus statute seems to imply that the military can have no involvement in civilian law enforcement, another federal statute offers assistance to state governments in time of "insurrection."[100] The "insurrection" statute amounts to a standing delegation from Congress of the power to make an exception to the posse comitatus statute when a state government requests assistance and the President finds that there is

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[96] *Ex parte* Quirin, 317 U.S. 1 (1942).

[97] *Id*. Justice Scalia is right to place emphasis on the "avowed" part of this statement because that fact removes a major element of the need for judicial review. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2670 (2004).

[98] *Quirin*, 317 U.S. at 31.

[99] *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

[100] The insurrection statute provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 U.S.C.S. § 331 (LEXIS 2005).

a need for military force to "suppress the insurrection."[101] It does not, however, appear to be a standing delegation of the power to declare martial law. That power remains implicitly within Congress unless it cannot meet.

The authority of the President under the insurrection statute has come before the Supreme Court on only two occasions, and one of those did not involve insurrection.[102] In *Martin v. Mott*,[103] a member of the New York militia refused to answer the President's call to arms during the War of 1812. He was fined, his belongings were seized, and he brought a replevin action claiming that the President was without authority to order him into service prior to an actual invasion of the territory of the United States.[104] Mott first argued that a military emergency should have been shown to the court, to which the Supreme Court seemed to respond that the President's determination was conclusive on the courts as well as on military personnel.[105] All of the

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[101] *See id.*

[102] Luther v. Borden did not involve the validity of a military call-out. With regard to Shea's Rebellion, the Court held that it had no power to determine which of the contending parties was the legitimate government of a state. Luther v. Borden, 48 U.S. 1 (1849).

[103] 25 U.S. 19 (1827).

[104] *Id.*

[105] The Court first seemed to make the President's decision final, but then seemed to imply that the complainant might be allowed to shoulder the burden of showing lack of emergency:

> [T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.
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> . . . The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the fact which bring the exercise within the purview of the statute. . . . When the President exercises an authority confided to him by law, the presumption that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, a fortiori, this presumption ought to be favourably applied to the chief

arguments put forth by the Court referred to the need for immediate unquestioning obedience by military personnel. Whether those same arguments would hold when a court was faced with a more doubtful situation, one in which the presence of a military threat was less clear, could yield a slightly different analysis as can be seen with *Youngstown Sheet & Tube*.

The *Prize Cases* similarly contained language seeming to grant the President unreviewable discretion to engage in acts of war.[106] In this case, several ships owned by foreign nationals and flagged by neutral countries had been seized by United States forces during a blockade against the Confederate states.[107] The owners of the ships argued that the President lacked authority to enforce a blockade against neutrals. The Court's language of deference to the President, however, was unnecessary because there was no question about the state of armed conflict between the Union and the Confederacy, and the only significant arguments in the case had to do with the status of the contending sides under international law.[108] Whether the President needed deference regarding the fact of armed conflict was hardly in issue.

> magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.

Id. at 30-33.

[106] The Court was quite emphatic that the presidential decision was binding on the courts:

> Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The Brig Amy Warwick, 67 U.S. 635, 670 (1863).

[107] *Id.* at 635.

[108] *Id*. at 666-67.

The only twentieth century case citing the insurrection assistance statute is a federal court case dealing with property damage in the District of Columbia during the riots following the 1968 assassination of Dr. Martin Luther King.[109] Insurers who had paid out damage claims brought suit against the United States alleging that the government had been negligent in failing to call out the militia or use military force to suppress the riots. The district court simply pointed out the following:

> [T]he decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President. The Courts also have made it clear that presidential discretion in exercising those powers granted in the Constitution and in the implementing statutes is not subject to judicial review.[110]

It is one thing to say that there is no constitutional duty on the part of the President to call out military force, at least not a duty enforceable by judicial damage action, but it is quite another to say that there is no judicially enforceable limit on the President's ability to call out military force when no state of insurrection justifies it. The limiting case would be one in which the President was alleged to be resorting to despotic measures to subdue the populace for whatever nefarious reasons may be motivating him or her. This is the case to which Justice Jackson's language in *Korematsu* is addressed[111]

Taken as a lecture in civic responsibility, Justice Jackson surely has a salient point. When his opinion is viewed as a recommended limit on the constitutional role of the courts, however, it requires more careful analysis. If it were taken to imply that courts should stay out of emergency cases, it would be highly suspect. Surely if the power of the President is limited to times of genuine emergency, then the courts must be willing to state whether such an emergency exists. To be true to the rationale of *Marbury*, recognizing an unfettered discretion in the President to use military force on the domestic arena is to say that there

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[109] Monarch Ins. Co. v. Dist. of Columbia, 353 F. Supp. 1249 (D.D.C. 1973).
[110] *Id.* at 1255.
[111] "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

is no constitutional *law* constraining that discretion.[112] Maybe there is a constitutional exhortation, but it is not a legal restraint.[113]

Justice Jackson made exactly this point himself, saying that the danger of deferential review is that the courts then validate executive action in the eyes of the public. "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority."[114]

Justice Jackson's statement also carries a familiar pragmatic warning in its reference to "the physical forces of the country."[115] There always exists the prospect that a court's decree could be ignored, thus damaging its credibility (or, depending on the circumstances, the President's credibility). Indeed, President Lincoln ignored Chief Justice Taney's decree in *Merryman*.[116] On the other hand, a President might accede to even the most distasteful order. President Nixon's lawyers hinted that he might not obey an order to deliver the tapes from his office, but within hours of the decision the President issued a statement that said "I respect and accept the court's decision."[117]

As a practical matter, certainly if there is *any level* of threatened violence to the community, the courts will accept the Executive's decision to involve the military. The proposition preserves the rule of law and simply states an evidentiary standard that should be perfectly satisfactory for any President acting in good faith. Putting forward some evidence of a threat of violence should not be difficult in any situation that calls for military force. The presence of an emergency can be shown

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[112] Marbury v. Madison, 5 U.S. 137, 155-56 (1803).
[113] *See generally* Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HAST. CONST. L.Q. 595 (1987).
[114] *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).
[115] *Id.* at 248.
[116] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 38 (1998); *see also Ex parte Merryman,* 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (holding that only Congress had the authority to suspend the writ of habeas corpus.). In this case, Merryman, a Confederate sympathizer, was suspected of sabotaging main transportation routes, which delayed Union troops, virtually cutting off the seat of government in Washington, D.C. After President Lincoln suspended habeas corpus, Soldiers broke into Merryman's home and arrested him without a warrant upon general charges of treason and rebellion. *Id.* at 147. President Lincoln ignored Chief Justice Taney's opinion, and Merryman remained imprisoned. REHNQUIST, *supra*, at 38-39.
[117] Frank Strong, *President, Congress, Judiciary: One Is More Equal than the Others*, 60 A.B.A. J. 1050 (1974).

factually with very little effort, and if the only action contemplated is calling out the military to patrol the streets, then the courts can leave that judgment to the Executive because at that point there is no clear countervailing threat to individual liberty. What if, however, the action taken by the Executive involves isolation of persons by race, or detention of alleged conspirators without a hearing? As soon as military action threatens values protected by equal protection or due process, then surely more is required of the courts.

Now return to the scenario in which military forces, following a release of botulin toxin in the New York City water supply, have established a perimeter around municipal water supplies and decreed that any person entering that perimeter will be arrested immediately and detained until it can be determined why the persons entered the unauthorized area. Suppose further that the two persons detained filed a writ of habeas corpus. For at least some period of time, the President would not even need to suspend the writ of habeas corpus to make these orders effective. A court presented with a habeas petition during the first few weeks after the initial attack would not likely thwart the defense of the entire populace by releasing persons who had violated the perimeter ban. Of course, the violation of the perimeter would need to be shown to the satisfaction of the judge as a simple matter of due process.

The point of this scenario is simply that the overblown hyperbole of unreviewable military discretion is unnecessary as a matter of law. Good faith executive-military decisions in any genuine emergency are not going to be overturned by any sensible judge. But what if the claim of emergency drags on for many months, maybe years, with no further threat of violence? How is a judge to accept a claim of emergency without being persuaded with hard evidence that a person violating the perimeter ban was actually engaged in at least a conspiracy to commit an observable crime?

Why did Chief Justice Taney not pursue the *Merryman* case? He said it was because his "power has been resisted by a force too strong for me to overcome."[118] The Civil War was just beginning when Merryman was arrested—Union Soldiers were en route to Washington D.C. to defend the city from a suspected Confederate attack, and acts of sabotage, presumably committed by Merryman, virtually cut off the seat of government from its loyal states and delayed the arrival of Union troops.

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[118] *Id.*

During this time, there was no hope of enforcing an order to release Merryman. After the war ended, however, it was safe for the Court to issue its opinion in *Milligan*. If the government had made a return to the habeas petition in *Merryman* reciting its evidence of Merryman's involvement in blowing up railroad bridges, and asserting an intent to conduct a trial, even a military trial in an active theater of combat, then there would have been no violation. The suspension of the writ by President Lincoln was really overkill. There was no need for the suspension because most judges and the people would have willingly accepted military law enforcement in the face of a genuine emergency and the government could easily have made satisfactory returns to habeas corpus petitions after the emergency passed.[119]

Disputing a President's declaration of emergency might appear to require Herculean courage on the part of the judges, but the judge should realize that he will not single-handedly cause the "suicide" of the nation. Just as with Chief Justice Taney's order in *Merryman*, there is always the possibility that the President will disregard a court order, particularly one issued in the grey area between genuine emergency and lasting peace. In that instance, Justice Jackson's civics lecture has real bite. Once the court rules, if the President does not obey, the political will of the people must be the final recourse—either the legal and political culture of the United States will stand on the side of the judiciary, or the understandings of constitutional power allocations will change.

The more frightening prospect is that the President will obey, and then a disaster will occur under circumstances that make possible the argument that it is the judge's fault. This prospect is really just a strong argument that the judge must be circumspect in disputing the executive's conclusion that an emergency exists.

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[119] Maybe Chief Justice Taney would have still disagreed, but the President's position with the populace would have been impregnable and his position with later observers much stronger. Merryman never faced a trial, neither by military tribunal nor civilian court. He was released on bail some months after Chief Justice Taney's opinion and never brought to trial. Chief Justice Taney allegedly stalled any potential trial in the civilian courts. REHNQUIST, *supra* note 116, at 39. The implication may be that President Lincoln and his advisors accepted Chief Justice Taney's belief that Merryman could only be tried in civilian courts or it may be that they simply lost interest when more urgent matters of warfare occupied the attention of the administration.

B. Executive Detentions

Generally speaking, the Constitution does not allow departures from peace-time norms except in times of national emergency and only to the extent required by that emergency. But the facts of what constitutes an emergency often will be in the control of the military and subject to claims of needs for secrecy. So how are the courts to review claims of military necessity and emergency? The experience thus far with military tribunals and detention is mixed.

Yaser Esam Hamdi and Jose Padilla were held in military custody for over two years before their habeas corpus cases reached the Supreme Court.[120] Hamdi is a U.S. citizen who was captured by military action during wartime in Afghanistan.[121] The government first chose not to disclose the circumstances of his capture—whether he was actively engaged in carrying arms against U.S. troops. Under pressure from the district court,[122] the government produced an affidavit containing very summary statements about the circumstances of his capture.[123] Padilla was arrested by civilian authorities when deplaning in Chicago after a trip to Pakistan, during which he allegedly made plans to detonate a "dirty bomb" in the District of Columbia.[124] After habeas proceedings in New York initially challenged his detention as a material witness, he was

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[120] Hamdi was captured in the fall of 2001 and his petition for a writ of habeas corpus was argued before the Supreme Court on 28 April 2004. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003), *aff'd*, 124 S. Ct. 2633 (2004). Padilla was arrested on 8 May 2002 and his petition for a writ of habeas corpus was also argued before the Supreme Court on 28 April 2004. Padilla v. Bush, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002), *aff'd*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

[121] *See* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002)

[122] The district court first ordered that counsel be allowed to meet with Hamdi, but the Fourth Circuit reversed and insisted that the district court should first determine, with "deference to the political branches," if Hamdi was indeed an illegal enemy combatant before proceeding any further. *Id.* at 283. The district court then ordered production of additional material regarding the detainee's status. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528-29 (E.D. Va. 2002), *rev'd* 316 F.3d 450 (4th Cir. 2003), *aff'd*, 124 S. Ct. 2633 (2004). The government petitioned for interlocutory review and the Fourth Circuit reversed and remanded, holding that Hamdi was not entitled to habeas review beyond the government's statement of his status. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). That was the decision on which the Supreme Court then granted certiorari. 124 S. Ct. 2633.

[123] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2637 (2004).

[124] *Padilla*, 233 F. Supp. 2d. at 572-73.

transferred to military custody in South Carolina.[125] In both cases, the Justice Department took the position that the government was not required to disclose to a court the basis for the detention beyond the conclusion that each was an "enemy combatant."[126]

1. Hamdi

Understanding the Supreme Court holding in *Hamdi* is aided by understanding the government's argument in the lower courts. The government first took the position that Hamdi could be held without judicial review. "Especially in a time of active conflict, a court considering a properly filed habeas action generally should accept the military's determination that a detainee is an enemy combatant."[127] Even granting the wiggle room of the word "generally," this is at best an astonishing statement. If made by the government of any number of third-world countries over the last half century, it would bring instant rebuke from both left and right political allegiances. The United States government, apparently recognizing the enormity of the statement, immediately asserted that its position "does not nullify the writ."[128]

The government suggested two checks on the military. First, a court could insist on a statement of the detainee's status, and second, the courts would be assured of the efficacy of political checks on the executive branch.[129]

On the first question, whether there is judicial review authority to determine whether the detainee is an "enemy combatant," the *Hamdi*

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[125] The district court ruled that the President would have authority to detain Padilla if there were "some evidence" of his being an "enemy combatant." *Id.* at 569-70. The Second Circuit reversed, holding that absent specific congressional authorization the Non-Detention Act prohibited the President's detention of an American citizen on American soil as an enemy combatant. Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

[126] *Hamdi*, 296 F.3d at 283; *Padilla*, 352 F.3d at 715-16 (The Second Circuit dealt with this argument obliquely because of its holding that the Authorization for Use of Military Force (AUMF) did not authorize detention.).

[127] Brief of Respondents-Appellants at 31, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), *available at* http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61902gbrf.pdf [hereinafter Brief for Respondents-Appellants].

[128] *Id.* at 32.

[129] *Id.* at 33.

brief in the Fourth Circuit attempted reassurance by stating the following:

> [A]lthough a court should accept the military's determination that an individual is an enemy combatant, a court may evaluate the legal consequences of that determination. For example, a court might evaluate whether the military's determination that an individual is an enemy combatant is sufficient as a matter of law to justify his detention even if the combatant has a claim to American citizenship. In doing so, however, a court may not second guess the military's determination that the detainee is an enemy combatant, and therefore no evidentiary proceedings concerning such determination are necessary.[130]

Thus, the government took the position that its status determination would be "sufficient as a matter of law to justify his detention."[131] If a court were to decide as the government wished, then the combatant determination effectively isolates the detainee from any judicial oversight whatsoever. The Supreme Court never hesitated in either *Quirin* or *Eisentrager*[132] to assert its authority to determine whether the determination of the prisoner's status was reasonable. Anything less would undercut the entire structure upon which this nation's jurisprudence is built.[133]

The Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[134] That statement hardly ends the matter, however, because then the government must decide what its next step should be.

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[130] *Id.* at 32.

[131] *Id.*

[132] Johnson v. Eisentrager, 339 U.S. 763 (1950).

[133] At the outset, Chief Justice Marshall's explication of judicial-executive relations in *Marbury v. Madison* described areas in which the Executive would have unfettered discretion as being those of purely political choices. Marbury v. Madison, 5 U.S. 137 (1803). All other areas, in which there is law to control executive discretion as if affects individuals, would be subject to judicial review. "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166.

[134] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004).

The government can either turn to proof of combatant status in the habeas proceeding or to another avenue, such as trial for specific criminal conduct. Pursuing the first course requires asking what sort of evidence would be required for the United States to justify holding a citizen without trial. If the government sought to show that Hamdi was bearing arms against the United States, the Supreme Court's due process demands would allow Hamdi an opportunity to rebut the government's evidence. Because bearing arms against the United States by a citizen violates any number of statutes,[135] it is difficult to see why the government's evidence and Hamdi's rebuttal should not take place in a full-blown trial, either in the civilian criminal justice system (such as John Walker Lindh) or in the military criminal justice system. In the latter instance, a person captured bearing arms in the "theater of operations" would rather clearly be subject to the jurisdiction of a military commission.[136]

The government made two arguments against the need for a trial. The first argument—regarding the desirability of detention for interrogation—a plurality of the Supreme Court answered with the flat statement that "indefinite detention for interrogation is not authorized."[137] The government next argued that combatants could be held to prevent their rejoining the enemy.[138] The plurality's partial agreement with this argument stated their "understanding" that Congress had authorized military detention without trial only for:

> [T]he duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.[139] But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals

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[135] *See, e.g.*, 18 U.S.C. §§ 2381, 2383, 2390 (2000).
[136] Brief for Respondents-Appellants, *supra* note 127, at 30.
[137] *Hamdi*, 124 S. Ct. at 2641.
[138] *Id.* at 2638.
[139] The question of what happens when a resistance fighter confronts a military occupation force will be considered later in this article.

> legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States."[140]

By contrast, Justice Scalia said that there was nothing in Anglo-American law since the Magna Carta to authorize executive detention of a citizen without trial.[141] He distinguished *Quirin* on the ground that "in *Quirin* it was uncontested that the petitioners were members of enemy forces,"[142] to which the plurality responded that Hamdi was picked up on a foreign battlefield and the proof of enemy status would be forthcoming in the hearing envisioned on remand.[143] With all due respect, this dialogue between Justices Scalia and O'Connor misses the point that Hamdi was being held *without trial* and would continue being held even after the hearing contemplated by the plurality. In *Quirin*, the individual was at least granted a military tribunal because of his status as a member of "enemy forces."[144] Justice Scalia surely has the better of the argument that indefinite detention without trial is alien to our constitutional underpinnings.[145]

The plurality's position carried the day only because Justice Souter, joined by Justice Ginsburg, would have preferred to reach a similar position to Justice Scalia on statutory rather than constitutional grounds, but relented to vote with the plurality because otherwise there would have been no resolution of the case.[146] It would have been an extremely odd situation for eight Justices to reject the lower court's acceptance of the government's position and yet leave the Court unable to reverse the lower court for failure to agree on a disposition.

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[140] *Hamdi*, 124 S. Ct. at 2641-42.
[141] *Id.* at 2661 (Scalia, J., dissenting).
[142] *Id.* at 2670.
[143] *Id.* at 2643.
[144] *Ex parte* Quirin, 317 U.S. 1, 45 (1942).
[145] The plurality at this point also accuses Justice Scalia of creating a "perverse incentive" to hold citizens abroad rather than bringing them back to the United States, because Scalia would deny U.S. courts jurisdiction to issue habeas corpus to persons held abroad. *Hamdi*, 124 S. Ct. at 2643. But this ignores the one critical feature of citizenship that remains in the modern world—a citizen cannot be held in exile. *See*, *e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) ("No one shall be subject to arbitrary arrest, detention, or exile.") The right of a citizen to enter his country of nationality would be the only apparent reason why Hamdi was brought to Virginia and then South Carolina.
[146] *Id*. at 2660 (Souter, J., concurring).

The government also made an argument to the Fourth Circuit for executive discretion based on original intent, an argument that flowed from the Fourth Circuit's own earlier opinion involving the "don't ask, don't tell" policy on homosexuality in the military.[147] Coupling two different statements from the Federalist Papers, the Fourth Circuit had asserted that "the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President."[148] The government asserted that this represented a "hands-off approach taken by the courts in reviewing military decisions or operations."[149] The first statement from the Federalist Papers is that, with regard to military affairs, "if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it."[150] This quote comes from a passage by Hamilton providing assurances that Congress will have control of the military by virtue of its inability "to vest in the executive department permanent funds for the support of an army" and by action of the "party in opposition."[151] When the Executive claims authority to hide information

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[147] Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

[148] *Id.* at 924. It is not apparent how many members of the Fourth Circuit shared this view. Nine judges voted to uphold the "don't ask, don't tell" policy. *Id.* at 918. The statement about the judicial role appears in Chief Judge Wilkinson's opinion for the Court. *See generally id.* at 923-25. Judge Luttig, however, concurred in an opinion also joined by five other judges, so it is not clear the extent to which six of the nine votes embraced the statements regarding judicial deference.

[149] Brief for Respondents-Appellants, *supra* note 127, at 33

[150] THE FEDERALIST NO. 26, 188-89 (Alexander Hamilton) (Jacob E. Cooke ed., 1984). The language chosen by the government is italicized:

> The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition and *if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it.* Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

Id. (emphasis added).

[151] *Id.* at 164-71.

from the other branches and the public, as in *Hamdi*, it is difficult to place much reliance on the power of the Loyal Opposition.

The second quote, Hamilton's statement that the judiciary would have "no influence over either sword or purse," related to assurances that the judiciary would not be able to rule by fiat.[152] It does not serve as a mandate for unfettered executive power any more than a mandate for unfettered judicial power.

Using these quotes to support plenary military authority is far from fair to the authors of the Federalist Papers, who could hardly have been arguing in favor of rule by military fiat. They had just fought a war against a runaway monarch, had drafted a constitution full of checks on executive power, and were consistently reminding the public of the need to be vigilant against the abuses of a standing army.

The Fourth Circuit responded to these arguments by straddling both sides of the fence, an uncomfortable if not downright painful position. After reciting the reasons for judicial deference to executive military decisions and praising American reliance on the Bill of Rights and habeas corpus, the court held that Hamdi could be detained because he had been captured bearing arms against the United States in an active combat zone.[153] "We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces."[154]

The Fourth Circuit seemed to hold that a court must accept the factual determinations of the military without judicial review,[155] but it

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[152] THE FEDERALIST NO. 78 (Alexander Hamilton).
[153] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).
[154] *Id.* at 465.
[155] The court overstated the situation by speculating about the degree of factual inquiry that could be required to determine whether Hamdi was engaged in levying war against the United States, but he was not on trial for that offense.

> The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be

backed off the most extreme implications of this position by gratefully accepting the government's "voluntary" submission of some factual information.[156] A fair reading of the Fourth Circuit's opinion is that the judiciary must defer to the military and that the military must defer to the judiciary, which shows the extraordinarily difficult position in which the court found itself.

The Supreme Court rejected the arguments for unreviewed discretion by a vote of 8-1.[157] In neither military law nor civilian law is there any justification for indefinite detention of an American citizen once he is removed from the theater of operations.[158] Accepting the government's

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> diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

Id. at 471.

[156] The court claimed some authority to review the "basic facts" justifying detention.

> This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has voluntarily submitted—and urged us to review—an affidavit from Michael Mobbs. Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

Id. at 472.

[157] The Hamdi votes were: O'Connor (4), Souter (2), and Scalia (2). The Scalia (and Stevens) opinion was labeled a dissent because they would have required that Hamdi be released of prosecuted. Justices Souter (with Ginsburg) argued that there was no authority for his detention but joined the plurality to avoid stalemating the Court.

[158] The Fourth Circuit saw the problems of conducting a trial as being insurmountable in light of an ongoing war effort. *Id.* at 471. But this argument is simply unpersuasive in light of modern communications and transportation, especially a year after the military

position in *Hamdi*, that civilian courts may not inquire into the bases of classifying a person as an enemy combatant, would have constituted a radical change in the American way of doing government business. As Justice Souter stated, "[w]hether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by 'the law of the land.'"[159]

In one sense, *Hamdi* is an example of an easy case with the potential for making bad law. If Hamdi had been detained in a militarily occupied zone, then he would have been subject to the law either of the occupied state or the occupying forces.[160] Once brought to the United States, however, he was rather obviously entitled to whatever due process entailed under the circumstances. The harder questions are those that were lurking in Justice O'Connor's statement that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [regarding detention for the duration of the conflict] may unravel."[161] This is the quintessential example of how the combining of the misnamed "war on terror" with the circumstances of a real war brought confusion into the handling of persons who were alleged to have acted against the peace and security of the United States.[162]

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operation has reached the majority of its objectives and now consists of something closer to occupation than active engagement.

[159] *Hamdi*, 124 S. Ct. 2633, 2659 (2004).

[160] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF WAR para. 362 (15 July 1956).

> Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions on account of the military occupation, or the undesirability of allowing it to do so.

Id.

[161] *Hamdi*, 124 S. Ct. at 2641.

[162] *See* Hoffman, *supra* note 9. Hoffman argues for application of customary international law to nonstate actors who violently attack the interests of the state. *Id.* at 27. This approach can work to some extent with foreign nationals overseas but does not provide a source of law by which to deal with domestic situations. Hoffman's own examples involve situations in which the perpetrators of acts on U.S. soil were handed over to civilian authorities. *E.g.*, *id.* at 30.

2. Padilla

Unfortunately, the Court stopped short of the logical implications of its *Hamdi* position when it turned to the case of Jose Padilla. Padilla, a U.S. citizen, was arrested on U.S. soil.[163] He was carrying no weapons, having just stepped off a secure airplane, but was allegedly hoping to carry out an attack on U.S. soil at an undisclosed date in the future.[164] The government first held him as a "material witness" before a grand jury in New York, but later transferred him to military custody in South Carolina as an "enemy combatant."[165] A habeas corpus petition in New York was met with claims by the United States that isolation of Padilla was necessary "to bring psychological pressure to bear on him for interrogation."[166]

On the merits, following *Hamdi*, the *Padilla* habeas petition seemed an even easier case. Padilla presented the added dimension of an arrest on U.S. soil for alleged activities not connected to an enemy nation. Even if one assumed that this made Padilla similar enough to defendant Haupt in the *Quirin* case so that military jurisdiction would arguably be proper, there was nothing to indicate that Padilla should not be given a military commission hearing, such as the hearing that Haupt received, or at least a *Hamdi*-style review in the civil courts.

But the Court ducked the implications of its holding in *Hamdi* by holding that Padilla's petition should have been filed in South Carolina rather than in New York because he had been transferred to a South Carolina facility two days before the filing.[167] In a routine case, this might be an appropriate result. But this was no ordinary case. As Justice Stevens pointed out in dissent,[168] Padilla was already represented by counsel when he was held in New York pursuant to a material witness warrant.[169] When the New York court ruled that his status under that

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[163] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 (2004).

[164] *See id.* at 2715, 2716 n.2.

[165] *See id.* at 2715-16.

[166] Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (The government contended that "[o]nly after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla."). This argument probably flies in the face of much of due process law, but that issue need not be explored now in light of how the case developed.

[167] Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[168] *Id.* at 2732-33.

[169] *Id.* at 2730 (Stevens, J., dissenting).

warrant gave him rights to meet with counsel, the Attorney General transferred him to the Secretary of Defense, who designated Padilla an unlawful combatant and authorized his transfer from New York to South Carolina.[170] Padilla's New York counsel filed the habeas corpus petition promptly on his behalf in New York.[171] If the petition had been filed in New York before his transfer to South Carolina, then the New York court could have retained jurisdiction.[172] Requiring the case to be refiled in South Carolina seemed at the time a mere formality because a judge in either New York or South Carolina could conduct the sort of due process review required by *Hamdi*.

Padilla's lawyers filed in South Carolina against Padilla's immediate custodian and moved for summary judgment on the habeas petition.[173] The district court determined that the Authorization for Use of Military Force Joint Resolution, Pub. L. 107-40, 115 Stat. 224 (AUMF), as a general statement of authority, did not exempt detention of citizens on home soil from operation of the Non-detention Act, a very specific statement of Congress on the matter at hand.[174] The court went on to point out that there was a plethora of criminal statutes under which Padilla might be charged and that due process required either charging or releasing him.[175] The Fourth Circuit, however, disagreed.[176] Referring to the plurality opinion in *Hamdi* as the "controlling opinion," the court of appeals held that the AUMF authorized military detention of an "enemy combatant" for the duration of hostilities in Afghanistan.[177]

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170 *Id.* at 2715-16.

171 *Id.* at 2711, 2716.

172 *See id.*

173 *See* Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 *29 (D.S.C. 2005), *rev'd* Padilla v. Hanft, 2005 U.S. App. LEXIS 19465 (4th Cir. S.C., 2005).

174 "[W]hereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in this case, that the same is true when a United States citizen in arrested in a civilian setting such as an United States airport." Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 *29 (D.S.C. 2005).

175 *See id.* at *40.

176 Padilla v. Hanft, 2005 U.S. App. LEXIS 19465 (4th Cir. 2005).

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> Under *Hamdi*, the power to detain that is authorized under the AUMF is not a power to detain indefinitely. Detention is limited to the duration of the hostilities as to which the detention is authorized. 124 S. Ct. at 2641-42. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.

Although the lead opinion in *Hamdi* was a mere plurality, Justice Thomas agreed with the interpretation of the AUMF, and the Fourth Circuit essentially followed a majority of the Supreme Court.[178] On this issue, the district court's position is persuasive but goes against five votes at the Supreme Court.

At this point, one would expect the next question to be whether military detention without a hearing violated due process. That did not happen, however, because according to the Fourth Circuit, Padilla's counsel had agreed to the statement of facts presented by the government in the course of the summary judgment proceedings.[179] Given such a stipulation, there was no further need for a *Hamdi*-style due process determination, and the only issues related to whether the AUMF covered U.S. citizens arrested on U.S. soil, a distinction that the Fourth Circuit declined to make.[180]

The contrast of the opinions of the District Court in South Carolina and the Fourth Circuit are very enlightening on the question of what constitutes emergency power and how far it extends. The district court emphasized that the AUMF was passed in urgency as a wartime measure and did not address detentions whereas the Non-detention Act was a deliberate statement specifically addressed to detentions.[181] The district court could have added that the Non-detention Act was prompted by the very type of situation presented (*i.e.*, the Japanese internment of World War II). Unfortunately for the district judge's position, the Supreme Court in *Hamdi* had read the AUMF as if it incorporated a long-standing tradition of military detention power in wartime, and the Fourth Circuit incorporated that tradition to the *Padilla* situation by analogy to *Quirin*.[182]

This sequence of opinions shows very clearly the dangers in responding to emergency situations without being clear that it is an emergency that is prompting departure from normal operations. The

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Id. at *17 n.3.

[178] *See generally id.*

[179] *Id.* at *8 n.1. From the district court's opinion, however, it appears that the stipulation covered only the circumstances of his arrest, not the contentions of the government that he was engaged in a mission for a terrorist organization. *See Padilla*, 2005 U.S. Dist. LEXIS 2921, at *5-7.

[180] *See Padilla*, 2005 U.S. App. LEXIS 19465, at *17-30.

[181] *See Padilla*, 2005 U.S. Dist. LEXIS 2921, at *29-30.

[182] *See Padilla*, 2005 U.S. App. LEXIS 19465, at *15-16.

Fourth Circuit, arguably taking a lead from the *Hamdi* plurality, wrote as if it were perfectly normal for the military to detain U.S. citizens arrested on U.S. soil for actions to be taken within the United States.[183] This rhetoric is almost plausible if one reads the plurality in *Hamdi* and the majority in *Quirin* as if those situations reflected long-standing traditions. Long-standing traditions, yes, but those are traditions drawn from the battlefield as the district judge in *Padilla* emphasized.[184] Extending the battlefield to U.S. soil is an enormous stretch.

Now, instead of Jose Padilla, let us hypothesize the arrest of a U.S. citizen alleged to be acting as an agent of the Iraqi government in a zone of combat during time of armed conflict. In this context, the government arguments make complete sense. There is an identified enemy nation, an identified battlefield, and the prospect of a cessation of hostilities that would carry "repatriation." In that situation, the U.S. citizen would not be merely "repatriated" at the conclusion of hostilities but could be tried for any number of offenses.

Next, take the same scenario without U.S. citizenship, so that the detainee is an Iraqi soldier arrested on U.S. soil before the close of hostilities. Pursuant to the law of war, he would be punishable by processes complying with international law or could be detained until the close of hostilities.[185] Similarly, a civilian who takes up arms unlawfully in a state of "armed conflict" may be charged and tried pursuant to the same laws[186] with opportunity for a "determination by a competent tribunal"[187] Battlefield abuse and executions of both combatants and civilians certainly occur, but they are violations of international law and conventions. To round out the picture with insurgencies, the Geneva Conventions also provide for detaining persons in occupied or contested territory when they present a reasonable security threat to an active military force.[188] If the military holds such persons "in country," there is

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[183] *See, e.g.*, *id.* at 11-15.

[184] *See Padilla*, 2005 U.S. Dist. LEXIS 2921, at *29.

[185] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 84, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III).

[186] *See, e.g.*, Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[187] Geneva Convention III, *supra* note 185, art. 5.

[188] *See id*. Even Protocol I to the Geneva Conventions, to which the United States is not a party, recognizes the ability of an active armed force to detain persons for security reasons. Protocol Additional to the Geneva Conventions of 12 August 1949, and

no need for judicial review. If it subjects such a person to military trial for violation of the law of war, then *Quirin* and *Eisentrager* are ample precedent. What happened with Padilla, however, is none of these situations.

There are several bases on which to distinguish Jose Padilla from those who went before him. Unlike Hamdi, Padilla was not arrested on the battlefield by military units. Unlike Haupt in *Quirin*, Padilla did not concede that he was acting as an agent of a foreign government or even an insurgent entity. Like Milligan, he was arrested on domestic soil at a time when the civilian courts were open and operating even though there was a war going on. All of this shows that some judges and courts facilely accepted principles from wartime as if they applied universally rather than recognizing that the powers of the Executive in wartime are designed for that occasion and no others. As Justice Souter paraphrased from Justice Jackson, the "President is not Commander in Chief of the country, only of the military.[189] For the sake of both the military and civilian processes, it is important to keep the two separate so that both limitations and extra-normal powers inherent in the military operation are congruent. In other words, it is wise to remember that "it's in there."

Padilla shows very clearly that it is up to Congress to clarify the intent of "We the People" as to what is included in the scope of emergency authorizations. Without that clarity, there is a great temptation on the part of the unelected judiciary to accede to assertions that Executive power includes the unusual, an exercise of the "it's in there" position that reverses the normal operation of the presumption.

3. Guantanamo Detainees

Several habeas corpus and related petitions challenging detentions at Guantanamo Bay were presented to federal courts in the District of Columbia[190] (DC) and the Ninth Circuit[191] on behalf of nationals of nations other than Afghanistan,[192] and each essentially challenged the

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Relating to the Protection of Victims of International Armed Conflicts arts. 46 & 75, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[189] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2659 (2004).

[190] *See, e.g.*, Khaled al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

[191] *See, e.g.*, Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003).

[192] The named individuals on whose behalf relief was sought in the District of Columbia included twelve Kuwaitis, two Australians, and two Britons. *See generally id.*, *Khaled al*

authority of the United States to hold the detainees without due process. The DC Circuit held that habeas corpus is not available to aliens held outside the "sovereign territory" of the United States for the simple reason that those persons have no constitutional rights under U.S. law.[193] The Ninth Circuit disagreed, however, holding that Guantanamo is subject to U.S. control and jurisdiction, and that the rights of the detainees would need to be determined after consideration of the government's response to the habeas petitions.[194] The Ninth Circuit expressed astonishment at what it considered the government's "extreme position."[195]

Under the heading of *Rasul v. Bush*,[196] the Supreme Court essentially agreed with the Ninth Circuit. Although these detainees were being held outside the United States, they were under federal custody.[197] Thus the "immediate custodian" rule would not apply, the Secretary of Defense

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Odah, 321 F.3d 1134. The individuals claimed to have been in Afghanistan for various personal or humanitarian reasons, to have been kidnapped by locals, and to have ended up in the hands of U.S. military forces without having taken up arms against the United States. *See generally Khaled al Odah*, 321 F.3d 1134. The Ninth Circuit did not indicate the nationality of Gherebi.

[193] *Id.* at 1141.

[194] *Gherebi*, 352 F.3d at 1284.

[195] *Id.* at 1300.

> [U]nder the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition. Accordingly, we view Guantanamo as unique not only because the United States' territorial relationship with the Base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles - a position so extreme that it raises the gravest concerns under both American and international law.

Id. at 1299-00.

[196] 124 S. Ct. 2686 (2004).

[197] *Id*. at 2695.

would be an adequate defendant, and the D.C. district court could exercise jurisdiction. The Supreme Court went about as far as the Ninth Circuit in expressing an opinion on the merits of the petitions, but in a slightly different direction. In a mere footnote, Justice Stevens stated the following for the Court:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."[198]

Unfortunately, the Court did not elaborate on what the Constitution, laws, or treaties might require in this situation. Without any indication of what law might apply, it is difficult to know whether the habeas petitions stated a claim on which relief could be granted.[199] That leaves wide-open questions of what law to apply to the Guantanamo detainees, which the next section addresses.

4. Finding the Law Applicable to Military Detainees

The Supreme Court left open some very important questions to be resolved on remand in the three 2004 cases. What law should the "neutral decision maker" apply to determine if a citizen such as Hamdi or Padilla can be held indefinitely without trial? What law applies to the

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[198] *Id.* at 2698 n.15.

[199] Although 28 U.S.C. § 2243 continues to contemplate immediate issuance of the writ or an order to show cause why the writ should not be issued, at which point the writ requires a "return" in which the custodian would set out the circumstances justifying detention, the courts routinely treat the petition and answer as if they were an ordinary civil case. If the pleadings do not call for a hearing for factual determinations, then the entire matter can be treated as if the defendant had filed a motion to dismiss or motion for summary judgment. If the writ issues, it usually takes the form of an order to release the prisoner or conduct a new trial. Although this procedure has become widespread, it carries only an inferential approval by the Supreme Court. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 498 (1974).

claims of the Guantanamo detainees that they are in "custody in violation of the Constitution or laws or treaties of the United States?"

The lower courts did not deal with the first of these questions in Hamdi's case because he was released in a negotiated arrangement by which he was remitted to Egypt with assurances of future behavior that amounted to a set of parole conditions.[200] Padilla's application for habeas corpus produced a holding by the district court—that Padilla is being held in violation of federal statutes[201]—which is still pending on appeal.

The Guantanamo cases, however, have produced an interesting division of opinion. Justice Stevens did not explore the "merits" of the Guantanamo detentions. "In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States."[202] Justice Scalia said essentially that there is no law that protects these persons, making a distinction between citizens and noncitizens,[203] much as he did in *Hamdi*. On remand in these cases, or in ruling on any future habeas corpus petitions, what law will apply to determine whether a detainee in U.S. military custody is being held "in violation of the Constitution or laws" of the United States? Each of the possibilities presents some difficulties.

Constitutional rights—It is not clear that an alien held in federal custody outside the United States would have constitutional rights other than perhaps some rights regarding conditions of confinement, or perhaps the due process right to a determination of status similar to that accorded to *Hamdi*. In one of the cases reviewed in *Rasul*, the D.C. Circuit stated:

> We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional

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[200] Yaser Esam Hamdi v. Donald Rumsfeld**,** Settlement Agreement, Sept. 17, 2004, http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html.

[201] Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 (D. S.C. 2005), *cert. denied*, 2005 U.S. LEXIS 4813 (2005). The district court held that the Authorization for Use of Military Force, which justified military action in Afghanistan and which was read by the Supreme Court plurality to authorize initial detention of Hamdi, did not apply in the case of *Padilla*, who was arrested by civilian authorities in the United States. Thus, his detention by military authority was in violation of the Non-Detention Act, 18 U.S.C.S. § 4001(a) (LEXIS 2005).

[202] Rasul v. Bush*,* 124 S. Ct. 2686, 2698 (2004).

[203] *Id.* at 2702, 2706.

> protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.[204]

Statutory rights—An alien seeking admission to the United States may have claims to statutory rights under the immigration laws, but the only statute generally protecting against incarceration is the anti-detention statute considered in Hamdi, which almost certainly applies only within the United States. Other statutes protecting the interests of the Guantanamo detainees would be those that protect generally against such behavior as torture or murder, none of which on its face grants any claim of release from incarceration.

Treaty rights—There is a significant question about whether the Geneva Conventions are self-executing in the sense that they create rights on behalf of individuals as opposed to institutional claims subject to diplomatic solutions. The government argued in the lower courts that the Conventions created diplomatic remedies and not individual remedies.

Customary international law—There is a strong argument that both treaties and customary international law entitle a person to freedom from "arbitrary" detention, which implies some level of judicial review over the propriety of detention or at least a regularized administrative proceeding.[205]

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[204] Al Odah v. United States, 355 U.S. App. D.C. 189 (D.C. Cir. 2003).

[205] Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003). The most directly applicable statement of law would be the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, art. 9, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." It is easily arguable that this provision codifies existing customary international law in the context of foreign nationals. Customary international law may place terrorists in a paradigm somewhere between war and crime, but that does not remove the requirement of nonarbitrariness. *See* Hoffman, *supra* note 9. Presumably, even this third paradigm would still carry an obligation of finding through some neutral process that an individual in fact is a security threat to the interests of a military force in the field or has committed an offense warranting detention.

Following *Rasul*, and in response to the government's motion to consolidate the various applications for habeas corpus, the case management committee of the D.C. district court left it open to federal judges hearing these cases whether they wished to transfer their cases to Judge Green for plenary or partial consideration of the issues.[206] Judge Leon chose to retain his own cases and issued a ruling that there was no law protecting any cognizable interests of the Guantanamo detainees.[207] In his view, due process did not attach to aliens detained outside the United States (relying on *Eisentrager*), the Geneva Conventions were not self-executing, and no other source of international law created rights of individuals to be free of detention under these circumstances.[208]

Judge Green issued her ruling less than two weeks later, holding that the detainees did have rights to due process, that the review panels set up to review their status after *Rasul* did not satisfy due process standards, and that the Taliban detainees had rights under the Geneva Conventions to be repatriated at the end of hostilities in the absence of individualized prosecutions for war crimes.[209] On this last point, Judge Robertson earlier had ruled that the military commissions established to conduct trials of alleged war crimes did not satisfy Congressional standards because they lacked notice to the defendant of all the evidence against him and did not provide for effective assistance of counsel.[210]

Of the six federal courts that heard the military detention cases prior to the Supreme Court, not one accepted the government's insistence on an unreviewable discretion to classify persons as "enemy combatants" and thus avoid judicial review. The Supreme Court seemed to hold that no person, even an alien alleged to have taken up arms against the United States, could be held without at minimum an opportunity to rebut the government's evidence against him.[211] In the follow-up cases, however, Judge Leon in the D.C. district court has held that there is no law to apply in the case of the alien captured and held offshore[212] while Judge Green has held that due process mandates the minimum opportunity of

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[206] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D. D.C. 2005).
[207] Khalid v. Bush, 355 F. Supp. 2d 311 (D. D.C. 2005).
[208] *Id*. at 322-29.
[209] *In re Guantanamo*, 355 F. Supp. 2d 443.
[210] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D. D.C. 2004).
[211] Rasul v. Bush, 124 S. Ct. 2686 (2004).
[212] *Khalid*, 355 F. Supp. 2d 311.

rebuttal.[213] This issue will ultimately be resolved by the D.C. Circuit, if not the Supreme Court.

By way of comparison, the British House of Lords dealt with a similar situation in a similar fashion. In *A. v. Home Secretary*, the House of Lords was presented with a petition on behalf of several aliens who were being detained under statutory authorization because they were suspected of ties to terrorist organizations and were unwilling to be deported to their country of origin.[214] Parliament had responded to a request from the government to allow certification of a person as a terrorist based on "links to an international terrorist organization," which in turn required that "he supports or assists it."[215] Once certified, an alien who could not be deported could be detained indefinitely. This mechanism was challenged as being in violation of European Convention on Human Rights (ECHR), Article 5, which protects "liberty and security of person" except in circumstances such as detention "with a view to deportation."[216] Because the plaintiffs could not be deported against their will, they argued that the detention was not undertaken with a view to deportation.

The government argued that Article 5 was subject to the "derogation" principle of Article 15, which allows departure from ECHR requirements in "time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation."[217]

All but one of the Lords speaking to the appeals would have followed the lead of Lord Bingham and held that there was no sufficient explanation for why aliens should be treated differently from anyone else for this purpose- the alien was no more likely to be a threat to the public peace and security than a citizen and the government had not chosen to imprison citizens under the same conditions.[218] To Lord Bingham, the presence of an emergency and a threat of future terrorist action was a political question reserved to the Parliament and government, but the choice of means was a legal question. Lord Hoffmann also noted that the failure to imprison suspected terrorist citizens was relevant, but that it

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[213] *In re Guantanamo*, 355 F. Supp. 2d 443.
[214] 3 All E.R. 169 (2005).
[215] *Id.*
[216] *Id.*
[217] *Id*. para. 68.
[218] *Id*. para. 43.

related to the question of whether there was an emergency that "threatened the life of the nation."[219] Only one member of the panel was willing to accord full deference to the judgment of the political branches.

The ECHR is a paradigm of the "it's in there" principle. Article 15 specifically permits derogation of most provisions when the life of the nation is on the line.[220] No derogation is allowed, however, from the prohibitions on intentional deprivation of life (except in lawful execution of warfare), torture, slavery, or punishment by ex post facto legislation. Two points deserve emphasis. First, it is possible to set out in advance the provisions from which no derogation will be allowed because the document specifies the rights of each person—there are no unenumerated or general principles of liberty. Because the catalog of rights is limited and written, it is possible to identify in advance which ones are not to be derogated in an emergency. Second, under the reasoning of Lord Hoffmann, the presence of a threat to the "life of the nation" is amenable to judicial review. This is a critical step in determining whether the provision is a part of the law to be interpreted by a court operating under the mandate of *Marbury v. Madison*. Without that step, the provision could be "in there," but not part of the rule of law in the sense that *Marbury* speaks of law that is binding on the judiciary.

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[219] A. v. Sec'y of State for the Home Dep't, 3 Eng. Rep. 169 (2005).

> There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours."
>
> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

Id. ¶ 95-96.

[220] European Convention on Human Rights (ECHR), 213 U.N.T.S. 221, *available at* http://www.hri.org/docs/ECHR50.html [hereinafter European Convention] (last visited Sept. 26, 2005).

In the United States cases, Judge Leon's ruling is particularly troubling because it could be taken to imply that there is no law restraining U.S. agents acting overseas, but that is not quite the case. In oral argument before the Ninth Circuit, the government conceded that its "no law" position would mean that U.S. agents could summarily execute prisoners at Guantanamo without recourse.[221] At most, that position could refer to there being nothing in U.S. domestic constitutional law to restrain violence overseas and no application of the "law of war" in the absence of "armed conflict." But ordinary rules against murder and assault would apply to military actors by virtue of the Uniform Code of Military Justice (UCMJ), and they would lack combat immunity in the absence of armed conflict. [222] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) speaks to treatment of prisoners and it is enforced against U.S. actors overseas by statute.[223] In the view of the International Criminal Tribunals, customary international law includes criminal sanctions for crimes against humanity.[224] The International Covenant on Civil and Political Rights (ICCPR) protects against "arbitrary" loss of liberty and mistreatment of prisoners.[225] There are rules, even if their enforcement leaves open many questions of allocation of power.

At this point, it would make sense to return to Justice O'Connor's suggestion that "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [of the rules regarding detention] may unravel."[226] Some of the political commentary in this arena would make it seem that there is a gap in the law of war that leaves the United States unable to respond to clandestine attacks on civilian populations. But the law of war is far from the only source of law capable of dealing with terrorism. Various international covenants[227] and numerous domestic

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[221] Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003).

[222] 10 U.S.C.S. §§ 918, 928 (LEXIS 2005). *See* United States v. Calley, 48 C.M.R. 19 (1973).

[223] 18 U.S.C.S. § 2340A (LEXIS 2005); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

[224] Prosecutor v. Tadic, ICTY (Trial Chamber May 7, 1997); (Appeal Chamber July 15, 1999).

[225] *See supra* note 205, at art. 9.

[226] Rasul v. Bush, 124 S. Ct. 2686 (2004).

[227] *See* United Nations, Office on Drugs and Crime, Convention Against Terrorism, http://www.unodc.org/unodc/terrorism_conventions.html (last visited Aug. 8, 2005).

statutes with extraterritorial reach[228] provide many opportunities for application of law to the threat. Cooperative arrangements with other countries may resolve most of the problems attendant on transnational criminal investigations, but lack of that cooperation is hardly cause for abandoning adherence to the rule of law.

Despite political statements asserting that terrorism is a "new kind of threat," historians point out that terrorism has been around since the beginning of recorded history.[229] The international law of war has no difficulty with security detention of insurgents or clandestine resistance fighters by occupation forces.[230] This is a far cry, however, from

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[228] Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, __ AM. U. INT'L L. REV. __ (forthcoming 2005).

[229] *See* CALEB CARR, THE LESSONS OF TERROR (2002).

[230] *Field Manual 27-10* provides this following information concerning the Geneva Convention for the Protection of Civilian Persons in Time of Armed Conflict:

> 248. Derogations
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> a. Domestic and Occupied Territory.
>
> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case such persons shall nevertheless be treated with humanity, and in ease of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be. (GC, art. 5.) (See also par. 73.)
>
> b. Other Area. Where, in territories other than those mentioned in a above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under GC as would, if exercised in favor of such individual person, be prejudicial to the security of such State.

capturing a suspected terrorist on foreign soil outside the context of armed conflict and holding that person without trial. In that instance, the capturing parties may well have violated the law of the country on whose soil the capture took place[231] as well as customary international law.[232] To emphasize, there are rules restraining governmental action under all circumstances. These rules do not hamstring law enforcement, they just make it difficult in some situations and require diplomacy as well as force.

For purposes of this article, the central point with respect to treatment of prisoners in time of emergency is that most of the rules addressing treatment of prisoners were crafted specifically with emergencies in mind. Thus, the international law regarding torture cannot be derogated in time of emergency because it was designed precisely to deal with emergency situations. With regard to nonjudicial detentions of a state's own citizens, international law may allow for derogation in time of emergency, but prisoners taken in conflict with other nations are subject to the rules of the Geneva Conventions, whatever those may be in specific circumstances. Thus, the Executive claim of unreviewable discretion vastly overstates the proposition. As Justices Scalia and Stevens said, there simply is no room for nonjudicial domestic military detention in U.S. law.[233] It is frankly unfortunate that Justice Scalia did not apply this basic proposition to aliens and left the Supreme Court's rulings in a state of suspended flux for the time being. To the extent that "armed conflict" constitutes "emergency," there is no dearth of rules and no need for undefined exceptions. In the language of our preferred alternative, "It's in there."

> c. Acts Punishable. The foregoing provisions impliedly recognize the power of a Party to the conflict to impose the death penalty and lesser punishments on spies, saboteurs, and other persons not entitled to be treated as prisoners of war, except to the extent that that power has been limited or taken away by Article 68, GC (par. 438).

FM 27-10, *supra* note 160, para. 438.

[231] Italy issued an arrest warrant for thirteen alleged CIA agents who allegedly captured an alleged terrorist in Milan and transported him to Egypt in exercise of what has come to be known as "extraordinary rendition." *Italy Seek Americans over Abduction*, CNN.COM, June 24, 2005, http://www.cnn.com/2005/WORLD/Europe/06/24/italy.arrest/index.html.

[232] This action could be considered a violation of the host state's sovereignty as well as a violation of the rules against arbitrary detention of the individual.

[233] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660 (2004).

C. Government Claims for Secrecy

One feature of intelligence gathering is that it most often works by assembling massive amounts of information, each piece of which may be seemingly innocent, until a malevolent pattern emerges. Modern high-tech artwork offers analogies that might be helpful in understanding the process. It is possible to take hundreds or thousands of utterly innocent pictures, reduce them to miniature scale, and reassemble them into a pattern that produces an image totally unrelated to the component pictures. In this instance, the critical information exists only as a pattern produced by assembling all the innocent images, no one of which would be suspicious on its own. Conversely, there are pictures, usually in children's books, that ask you to find a character buried in an elaborate drawing. In this instance, all the irrelevant information is masking the one piece of critical information.

This general problem is what the government refers to as the "mosaic" phenomenon. In court proceedings involving both the closing of "sensitive" deportation hearings[234] and the government's refusal to release the names of persons detained for questioning,[235] the government produced affidavits from high-level law enforcement officials detailing concerns over releasing information.[236] Some level of secrecy has

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[234] *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (rejecting claim for secrecy); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (accepting claim for secrecy).

[235] *See* Ctr. for Nat'l Sec. Studies v. United States DOJ, 331 F.3d 918 (2003).

[236] The two affidavits were provided by James Reynolds of the Justice Department and Dale Watson of the FBI. The Sixth Circuit excerpted this much of the Reynolds affidavit:

> 1. Disclosing the names of 'special interest' detainees . . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses . . . and terrorist organizations . . . could subject them to intimidation or harm.
> 2. Divulging the detainees' identities may deter them from cooperating [and] terrorist organizations with whom they have connection may refuse to deal further with them, thereby eliminating valuable sources of information for the government and impairing its ability to infiltrate terrorist organizations.
> 3. Releasing the names of the detainees . . . would reveal the direction and progress of the investigation. Official verification that a member [of a terrorist organization] has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals.

always been part of law enforcement, but the aura of secrecy is heightened substantially when government action shifts more toward prevention of future terrorist activity from prosecution of past activity.[237]

Center for National Security Studies v. U.S. Department of Justice[238] involved a Freedom of Information Act (FOIA) request for information about three categories of persons: those questioned and detained for immigration violations, those detained on criminal charges, and those held on material witness warrants. The government produced the Reynolds affidavit and argued that each bit of information could be part of a mosaic that would yield a bigger picture when combined with other bits. "[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."[239] To the majority of the court of appeals, the experts' opinion of the mosaic danger should be given such deference as almost to amount to unreviewable discretion: "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security."[240] By contrast, the dissent read the FOIA exception of "could reasonably be expected to interfere" with government operations to mean that a mere possibility of harm was not enough to justify intrusion on the public right to know.[241] The dissent also pointed out that the government attempted to exempt broad categories of information from disclosure without identifying the potential harm from specific information.

> 4. Public release of names, and place and date of arrest . . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence.
> 5. The closure directive is justified by the need to avoid stigmatizing 'special interest' detainees, who may ultimately be found to have no connection to terrorism.

Ashcroft, 303 F.3d at 705-06.

[237] The question of government action against the interests of an individual or organization by the use of secret evidence is beyond the scope of this article. Suffice to say that the courts are currently struggling with the due process ramifications of nondisclosure in criminal or punitive proceedings. *See, e.g.*, United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004) (attempting to prosecute without providing access to witnesses in custody); Holy Land Found. for Relief & Dev. v. Ashcroft, 357 U.S. App. D.C. 35, 333 F.3d 156 (D.C. Cir. 2003) (upholding designation of organization as supporting terrorism and blocking its funds without disclosure of all evidence).

[238] *Ctr. for Nat'l Sec. Studies*, 331 F.3d 918.

[239] CIA v. Sims, 471 U.S. 159, 178 (1985).

[240] *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

[241] *Id.* at 937 (Tatel, J., dissenting).

This last point, whether the government is required to identify specific reasons for nondisclosure rather than maintaining secrecy over categories of information, came to the for with regard to the closure of deportation proceedings to the press and public. In the wake of 9/11, during the "round-up" of young men from Arab countries, the Department of Justice initiated "removal" proceedings against hundreds of aliens who had allegedly overstayed their visas. For those who were considered individuals of "special interest," a departmental directive ordered that all proceedings be closed and that no information on their cases could be given to anyone but an attorney or other formal representative. When newspapers and Michigan Congressman Conyers filed suit to gain access to one of these proceedings, the Sixth Circuit recognized that aliens are not entitled to the protections of much of the Bill of Rights but insisted that this realization made the role of the press even more important rather than less.[242] Responding to the Reynolds affidavit, the Court stated its willingness to defer to the executive judgment that it had a compelling interest in secrecy but insisted that that interest did not extend to all of a hearing in the absence of "particularized findings" about the need to close certain portions of a hearing. "While the risk of 'mosaic intelligence' may exist, we do not believe speculation should form the basis for such a drastic restriction of the public's First Amendment rights."[243] In a virtually identical setting, the Third Circuit disagreed with the Sixth Circuit and held that the mosaic scenario fully justified a determination that a hearing should be closed to the public.

These cases demonstrate the interaction of the political branches with the anti-democratic character of judicial review. In the FOIA, Congress provided for an emergency exception when information "could reasonably be expected to interfere" with government needs.[244] The judges of the D.C. circuit disagreed on whether this meant a mere possibility or a likelihood. In the deportation cases, the Third and Sixth Circuits disagreed over whether a hearing could be closed without a particularized finding of harm from public disclosure. Both claims of the need for secrecy, however, were subjected to some level of judicial scrutiny of the government's justifications for secrecy.

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[242] "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment 'did not trust any government to separate the true from the false for us.' They protected the people against secret government." Detriot Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

[243] *Id.* at 709.

[244] 5 U.S.C.S. § 552 (b)(7)(A) (LEXIS 2005).

"It's in there" means that the review itself can take account of the bases for concern about national security, but that does not mean an absence of all review. With respect to the mosaic argument itself, it is perfectly understandable that the courts would give an extreme level of deference because even requiring the government to do the "particularized" showing demanded by the Sixth Circuit or by Judge Tatel, could reveal information that would be useful to a terrorist organization. Moreover, if the mosaic argument presents a compelling state interest, as the Sixth Circuit acknowledged, then how would the government advocates themselves know which piece of information would be critical to the watching terrorist organization? The difficulty of these decisions does not exempt them from judicial review entirely, but merely informs the degree to which the courts should be willing to hold a factual showing to be inadequate.

D. Racial and Ethnic Profiling

The choice of subjects to detain and question as part of the response to 9/11 has been argued to be a virulent form of ethnic profiling, although defended by the government both as an emergency response and as having been based on "country of origin" rather than ethnicity.[245] Racial and ethnic profiling as part of an emergency response could be a ground of invalidation for a practice otherwise lawful, but in another sense it can also represent a claim for additional power or a claim for an exception to otherwise applicable rules in an emergency. In other words, preventive detention may be doubly problematic if it is based on ethnicity—or the ethnic application could be part of an argument for the power as an exception to otherwise prohibited behavior because the particular ethnic group is claimed to be the source of an identified threat (*Korematsu* revisited).

It should be apparent that the more intrusive on individual freedom a measure is, then the stronger the emergency justification must be. Returning to the scenario above describing an armed perimeter around a city's water supply, what if the perimeter was set at one place for most of

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[245] *See* David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913; Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002).

the population, but was more restrictive for members of specific ethnic groups?

Racial and ethnic profiling has been the target of intense scrutiny in legal academic writing for the past couple of decades[246] and has prompted both significant court decisions[247] and administrative changes.[248] As the Department of Justice points out in its "Guidance Regarding the Use of Race in Federal Law Enforcement" ("Guidelines"), profiling carries costs to the individuals targeted and to the national commitment to equality.

The Supreme Court, however, has advised caution in the manner of litigating claims of racial or ethnic profiling. Before a defendant can even obtain discovery to examine prosecutorial decisions for evidence of racial bias, "to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'"[249] This creates the dilemma that the defendant must have clear evidence of bias before being able to obtain evidence of bias—the defendant must have strong extrinsic evidence before obtaining access to the prosecution's own records. The reasons for this cautious approach are that diversion of resources (mainly time of supervisory personnel and lawyers) into litigation over prosecutorial motives can itself have socially undesirable consequences.[250]

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[246] *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 149 (1998); David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. at 3 (1999) ("Legitimacy is one of the law's most powerful tools, and when the law forfeits legitimacy, its only alternative is to rely on brute force. . . . It is not surprising that virtually all the riots we have experienced in this country since World War II have been sparked by racially charged police-citizen encounters.").

[247] *See, e.g.*, Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157 (10th Cir. 2003); Price v. Kramer, 200 F.3d 1237 (2d Cir. 2000); Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); Nat'l Cong. of Puerto Rican Rights v. City of New York, 191 F.R.D. 52 (S.D.N.Y. 1999).

[248] *See* U.S. Department of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (2003), http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm [hereinafter Guidance].

[249] United States v. Armstrong, 517 U.S. 456, 465 (1996).

[250] *See* United States v. Wayte, 470 U.S. 598, 607 (1985) ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy.").

In a recent case in which the Tenth Circuit reversed a grant of summary judgment for the police in a damage action based on a traffic stop, the court suggested that importunate judicial oversight could induce police "to direct their law enforcement efforts in race-conscious ways by focusing law enforcement on neighborhoods with relatively few low-income, minority persons."[251] That case is instructive, however, for the type of extrinsic evidence that may be available. The police officer making the stop and search had been fired from a previous position with another police department for "an extensive pattern of misconduct and violation of citizens' constitutional rights."[252] The problem with most claims of discriminatory application of the law is that the discrimination cannot be shown until the pattern has become apparent, potentially leaving the first victims' harms unredressed. Thus, selective-prosecution and biased-stop cases will have prospective impact but often little compensatory effect. This is one strong reason for the emphasis in racial profiling on administrative solutions through guidelines and training.

The Department of Justice Guidelines proclaim that they extend protection in ordinary law enforcement activities beyond what is required by the laws and the Constitution.[253] With regard to terrorism-related investigations, however, the Guidelines leave open the possibility of considering race or ethnicity,[254] at least when specific information makes it relevant to a crime of "national security."[255] The Guidelines'

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[251] *Id.* at 1167.

[252] *Id.* at 1162.

[253] Guidance, *supra* note 248, at introduction.

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> In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

Id. sec. II.

[255]

> The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in [terrorism] investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.

limitations simply pose the question of the extent to which the laws or the Constitution prohibit racial or ethnic profiling under exigent circumstances. In the examples provided, the Department of Justice asserts that information that persons of a particular ethnic or national group are plotting a terrorist incident will justify intensifying scrutiny of members of that group.[256]

The Guidelines present two problems: first, what level of threat justifies treatment of a threat as a matter of "national security," and second, what level of intrusion into individual autonomy is warranted in a given circumstance. On the first point, the Guidelines treat threats of "devastating harm" as if they were all terrorist threats.[257] The concept "devastating harm" is used in the Guidelines as a justification rather than a description and could be spelled out a bit more clearly (*e.g.*, threats involving use of certain kinds of weapons or explosives, or threats contemplating great bodily harm to more than one person). The problem with that approach is that it seems to place a premium on creative employment of new weaponry or conversely to discount the loss of a single life. At the other side of the connection, the examples used in the Guidelines identify varying levels of intrusion into the lives of individuals. In one example, where heightened scrutiny is merely deployment of increased investigatory resources and presumably unknown to any member of the public, it could be a relatively mild imposition on the ideal of equality. But in another example, heightened screening of individuals at an airport, it has a direct and immediate impact on the individuals and the perceptions of every member of that group.

Taking both of these problems in tandem, however, may suggest a solution. If nothing else, the Guidelines should state that the level of threat affects the level of intrusion permitted. In this formulation, level of threat would have to include the degree of specificity of identified

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Id.

[256] *See id.*

[257]

> Since the terrorist attacks on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means.

Id.

ethnic connection to the threat. In other words, just as it is not prohibited profiling for the description of a specific suspect in a specific crime to include ethnic identifiers, it may not be prohibited profiling for the identification of a threat to include the specific ethnic group that is implicated in the plot. This is a position, however, that can be justified only by highly specific information about the threat and a clear correlation between the threat and an ethnic group with specific identifying characteristics. If it were to become a blank check for detention of all members of a given ethnic group, then the exigency has swallowed the norm.

One of the few examples on which almost all critics can agree that racial actions are warranted is prison officials' segregation of inmates by race to quell a race riot.[258] In its most recent pronouncement on the use of race under exigent circumstances, the Supreme Court, however, held that a state prison practice must be subjected to strict scrutiny rather than a mere rationality review.[259] California had an informal policy of segregating new or transferred prisoners by race for up to sixty days to determine whether the prisoner was at risk from gang violence or likely to be a member of a gang. The lower courts had upheld the policy giving deference to the prison officials, but the Supreme Court reversed and remanded for review to determine whether the policy was narrowly tailored to serve a compelling state interest.[260] In their dissent, Justices Thomas and Scalia asserted that the desire to save lives should prevail over the desire to preserve dignity and avoid racial stereotyping.[261]

Recall Justice Jackson's comment in *Korematsu* with which this article began, but look now at the full context of his comments. Speaking of the prior case of *Hirabayashi*,[262] in which the Court had already upheld the curfew order, Justice Jackson pointed out that the following:

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[258] Justice Scalia, in opposing most affirmative action plans, has stated that "only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.'" Richmond v. J. A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

[259] Johnson v. California, 125 S. Ct. 1141 (2005).

[260] *Id.* at 1144-46.

[261] *See id.* at 1157.

[262] Hirabayashi v. United States, 320 U.S. 81 (1944).

> [I]n spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. . . . Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.[263]

Next follows his language about reliance on the courts to curb the military:

> I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.[264]

For racial profiling in exigent circumstances to be justifiable, two conditions must be met: the statement of the limitations must be built into the rule itself, and the actor must be aware that he or she is acting at risk of being wrong. Just as with exigent circumstances for searches without a warrant or the defense of necessity in a criminal prosecution, if the actor perceives the circumstances differently from a person acting with some degree of hindsight, then the law of exigency provides no relief.

E. The Torture Debacle

The interrogation of prisoners starkly poses the problem of emergency powers. In the famous "ticking bomb" hypothetical, the

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[263] Korematsu v. United States, 323 U.S. 214, 247 (1944).
[264] *Id.* at 248.

question is presented of whether it should be legal to torture the person who knows the location of the bomb. As a result of the display of abuse by U.S. prison guards and interrogators, the U.S. public must now face the question of the extent to which it wants to hold military or civilian public officials accountable for violations of both domestic and international law.[265]

Abu Ghraib presents the precise slippery slope problem that was forecast. What began as marginal levels of improper interrogation for those who might have had some knowledge of terrorist organizations expanded outward until it became policy at rather high levels.[266] Memoranda from the Pentagon and Justice Department during 2002 and 2003 discuss the degree to which interrogation techniques can be accelerated in a climate of emergency,[267] during which it became increasingly acceptable in the field to treat prisoners in ways that had no justification under either domestic or international law.[268]

The most visible memorandum is one from the Justice Department to White House Counsel—the Bybee Memorandum[269]—which attempted to

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[265] Under military tradition, the chain of command through the Secretary of Defense and even the President could be held responsible if policy positions prompted abuse. One close observer quotes a "senior Pentagon consultant" as saying that the President and Secretary of Defense "created the conditions that allowed transgressions to occur." SEYMOUR HERSH, THE CHAIN OF COMMAND 71 (2004). Another states that "knowledge about 'interrogation techniques' leads to knowledge about the official doctrine that allowed these techniques, doctrine leads to policy, and policy leads to power." MARK DANNER, TORTURE AND TRUTH 42 (2005).

[266] HERSH, *supra* note 265, at 71.

[267] *See* KAREN GREENBERG & JOSHUA L. DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (2005) (providing an extensive collection of the documents); WashingtonPost.com, Bush Administration Documents on Interrogation, (June 23, 2004), http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html (providing an online catalogue of the memoranda addressed to methods of interrogation).

[268] *See* Major General Antonio M. Taguba, Army Regulation 15-6 Report of Investigation on the 800th Military Police Brigade, *available at* http://www.agonist.org/annex/taguba.htm (last visited Aug. 16, 2005). General Taguba's report in March 2004 found "That between October and December 2003, at the Abu Ghraib Confinement Facility, numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force." *Id.* at 15.

[269] Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002),

legitimize aggressive interrogation techniques at two levels. At the first level, the memorandum argued that many interrogation techniques would not constitute torture under the Convention against Torture or its implementing statutes.[270] The memorandum, however, did not explain that the Convention also requires steps to prevent "cruel, inhuman or degrading treatment."[271] At the second level, the Memorandum argued that even torture could be excused because military actions in wartime are not subject to the requirements of law or because "necessity or self-defense" could justify what would otherwise be illegal conduct.[272] The Bush Administration first attempted to distance itself from the memorandum by stating that no decisions were ever made to implement its conclusions,[273] and finally withdrew the Memorandum in late 2004.[274]

This article does not deal with the first level of argument, the degree to which certain techniques could be valid,[275] other than to point out that

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available at http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf [hereinafter Bybee Memorandum].

[270] *See id.*

[271] The ICCPR also prohibits "cruel, inhuman, or degrading treatment." ICCPR, *supra* note 205, art. 7.

[272] *See* Bybee Memorandum, *supra* note 269. "The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison." Anthony Lewis, *Making Torture Legal*, 51 N.Y. REV. OF BOOKS 12, at 4 (2004).

[273] *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A03.

> White House Counsel Alberto R. Gonzales said in a May 21 interview with The Washington Post: "Anytime a discussion came up about interrogations with the president, . . . the directive was, 'Make sure it is lawful. Make sure it meets all of our obligations under the Constitution, U.S. federal statutes and applicable treaties.'"

Id.

[274] Memorandum, Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to James B. Comey, Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/dagmemo.pdf (last visited July 15, 2005).

[275] The Bybee Memorandum, *supra* note 269, describes aggressive versions of some of the interrogation techniques later authorized by the Secretary of Defense that were previously labeled by the ECHR as constituting not torture, but "cruel, inhuman or degrading treatment." Republic of Ireland v. United Kingdom, 2 EHRR 25 (ser. A) (1979-80). The "five techniques" considered included "wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink." *Id.* The United States is a signatory to the ICCPR, which condemns both torture and "cruel, inhuman, or degrading treatment or punishment" and whose language, which is the same as the ECHR, was interpreted by the ECHR in the *Ireland* case. The Bybee memorandum emphasized that both the Executive and Congress had endorsed an

Pentagon lawyers were careful to label some techniques as skirting on "inhumane" treatment and that care should be taken in their application.[276] Nor does the article attempt to assess claims that political forces contributed to a climate in which abuses were tolerated.[277] The focus here is on the justifications for emergency departures from normal operations.

In that regard, the Bybee Memorandum makes the rather unexceptional point that the Constitution vests the President with the Commander in Chief power and that the Supreme Court has recognized that the Executive has a "unity in purpose and energy in action" that makes it better suited to conduct the strategy and tactics of warfare.[278] The military has the obligation to capture, detain, and interrogate enemy combatants and, some might argue, criminals such as terrorists, to obtain valuable information to prevent further harm. The Bybee Memorandum, however, then goes on to say:

> Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. . . . Just as statutes that order the President to

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"understanding" when ratifying the Convention that "torture" was an "extreme form of cruel, inhuman or degrading treatment" and further stating that "cruel, inhuman or degrading treatment" would be considered limited to those acts that would be unconstitutional under the U.S. Eighth Amendment. The Convention states that Parties "undertake to prevent" the lesser category of "cruel, inhuman or degrading." So far, the Bybee memorandum is on solid ground in distinguishing between torture and other acts, the first category to be criminalized and the other to be prevented by other means. But the Bybee memorandum fails to point out that "cruel, inhuman or degrading treatment" would violate not only the Eighth Amendment, but also the obligation under the Convention to "prevent" those acts. In other words, the United States has obligated itself as a matter of law to prevent an array of actions in addition to those that are criminalized under the Torture Statute.

[276] WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM (2003), *reprinted in* DANNER, *supra* note 265, at 187; Memorandum, Donald Rumsfeld, Secretary of Defense, to Commander, US Southern Command, subject: Counter-Resistance Techniques in the War on Terrorism, tab A (Apr. 16, 2003), *reprinted in* DANNER, *supra* note 265, at 199.

[277] "Given the known facts, the notion that the photographed outrages at Abu Ghraib were just the actions of a few sick men and women, as President Bush has repeatedly argued, is beyond belief." Lewis, *supra* note 272.

[278] Bybee Memorandum, *supra* note 269. For this proposition, the memorandum cites a number of cases with dicta to the effect that the President is better suited than Congress to conduct military operations. The memorandum does not cite cases such as *Youngstown* or *Milligan* that place restraints on the Presidential powers.

> conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.[279]

Under this argument, would the Uniform Code of Military Justice be unconstitutional? Is it unconstitutional for Congress to ratify treaties prohibiting war crimes and cruel, inhuman, or degrading treatment of prisoners? Was it even unconstitutional for Congress to authorize and set goals for the invasion of Iraq? If the Bybee Memorandum had suggested any limits on its sweeping statement of Presidential autonomy, then it might be possible to address it seriously. As it stands, however, it is impossible to imagine what the limits might be and thus impossible to describe these conclusions as warranted.

The Bybee memorandum concludes by proferring potential defenses of necessity or "defense of others" that could be raised in criminal prosecutions under the torture statutes. The Bybee Memorandum recognizes the argument that the defense of necessity is not available with regard to any offense in which the legislative body has already made the decision that there shall be no defense.[280] The Torture Convention contains the provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[281] The Bybee Memorandum responds to this by pointing out that this provision was not enacted into the U.S. Code, so because "Congress omitted CAT's effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense."[282] It is just as plausible to believe that Congress did not enact this section because it was already part of the framework of the statute. Moreover, just because a defense might be allowed under domestic law does not make that defense available in any setting other than domestic courts.[283] The Bybee

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[279] *Id*.

[280] *See id.*

[281] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

[282] Bybee Memorandum, *supra* note 269.

[283] United States courts typically take the view that Congress's statutory law stands on a higher footing than a treaty where the two conflict. Although some treaties are self-executing, most will require some legislative action to put their provisions into effect as

Memorandum subjects a U.S. interrogator to prosecution by another signatory nation, or possibly by any nation under the doctrine of universal jurisdiction,[284] in which the necessity or wartime defense clearly would be unavailable. This seems irresponsible lawyering at best.

The Israeli Supreme Court dealt with similar arguments in its most recent decision on these issues.[285] The Court rather matter-of-factly recognized that any interrogation while in custody occasions some level of discomfort and loss of dignity, but that a "reasonable" interrogation would not countenance brutality.[286] Thus, a number of practices producing extreme discomfort or excessive sleep deprivation would not be allowed by either Israeli or international law. With regard to the defense of necessity, the Court merely stated that the defense would have to be proved to the satisfaction of a decision maker in a given criminal prosecution of the interrogator.[287] The Court did not hold out any hope of defining in advance the precise measures that could be taken under a given claim of emergency.

The Bybee Memorandum and the Israeli handling of the necessity defense at first glance appear to present a strong case against the "it's in there" position because they both defer the question to the future. There is a slight difference, however, in that the Israeli Court believed that it would not be possible to set out guidelines for the use of force because

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domestic law. When Congress does act, it can decide to modify the terms of international law.

> Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law. 'Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.

United States v. Yunis, 288 U.S. App. D.C. 129; 924 F.2d 1086 (DC Cir. 1991) (quoting Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988)).

[284] *See generally Ex parte* Pinochet Ugarte (No. 3), [2000] 1 AC 147, [1999] 2 All ER 97 (House of Lords 1999).

[285] Public Comm. Against Torture in Isr. et al. v. The State of Isr. and the Gen. Security Service, HCJ 5100/94 (1999).

[286] *Id.* para. 22-23.

[287] *Id.* para. 36.

the defense was one to be established after the fact by reference to the specific circumstances confronting the interrogator. The Bybee Memorandum pointed out that availability of the defense would be affected by the imminence of the threatened harm and by its severity. These two propositions at least acknowledge that there is a body of law to which one could refer in assessing a claim of necessity. The subtle difference is not over whether the limits are "in there," but over "how much is in there." In both instances, the claim of necessity is left to the future evaluator to determine whether otherwise unlawful conduct should be excused.

The Dershowitz proposal[288] for a torture warrant at least provides for judicial review of each claim of necessity, but it has not been enacted and would be impossible to get through the international bodies. The counter view that is more likely to prevail is that it is better to state and hold to the legal principle that torture is criminal conduct, while recognizing the inevitable place of discretion in the functions of prosecutor, judge, and jury. Discretion necessarily will dispense a rough sort of justice without promoting the idea of a legal excuse. With regard to those interrogations that are taking place in "undisclosed locations" around the world, some degree of "see no evil, hear no evil" also is inevitable in this arena. That U.S. citizens can tolerate a generalized knowledge of the existence of illegal behavior, however, does not mean that they wish persons should condone it. To this extent, then, the "it's in there" position can co-exist with the "illegal with prosecutorial discretion" position.

Some arguments have been made for an "extra-legal subject to ratification" position, which would allow decision-makers to depart from the law subject to being wrong or right depending on how matters turn out. Even in that position, however, there is nothing to suggest that the policy makers ought to be immune from the consequences of clandestine authorization of illegal conduct. Moreover, even when their conduct is disclosed, they are subject to the ultimate type of prosecutorial discretion, namely the response of the voters at the next election.

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[288] ALAN DERSHOWITZ, WHY TERRORISM WORKS 140 (2002).

II. The General Question: Do Emergency Powers Exist?

A. The Available Answers

The essential issue in a discussion of emergency powers is whether departures from legal norms should be countenanced in the name of public safety. Of the three possible answers (yes, no, and maybe), it is difficult to find pure "yes" or pure "no" advocates. The "Yes" answers are mostly in the form of arguing that emergencies justify extra-legal measures to a certain extent. The "No" answers sometimes insist on rigid adherence to norms under all circumstances, but more often they reflect the knowledge that the courts will adjust those norms to fit the circumstances. The "Maybe" answers have prompted at least two proposals for ratification by supermajorities of what would otherwise be invalid actions.

Observers differ sharply over what can be learned from prior experience with national emergencies. Professor Oren Gross asserts emphatically that emergency powers suspend civil liberties, whether we like it or not:

> Experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned. Emergencies suspend, or at least redefine, de facto, if not de jure, much of our cherished freedoms and rights.[289]

Although he ends up in the "Maybe" camp, Gross' view of the history is that an "emergency" departure from norms constitutes a "slippery slope" on which the emergency becomes the norm, and in the meantime the response threatens the very democratic values for which the State intends to stand.[290] Prior to 9/11, Justice William Brennan had acknowledged that the Ship of State may right itself as the crisis eases, but asserted that the ship would tend to founder again in the next crisis.[291]

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[289] Gross, *supra* note 24, at 1019.
[290] *Id*. at 1046-52.
[291] William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 Isr. Y.B. HUM. RTS. 11 (1988).

Professor Mark Tushnet, by contrast, emphasizes the "social learning" of history, in which not only does protection for civil liberties regenerate as the crisis eases, but the message for future generations is that a previously validated action was a very bad idea.[292] In the process, the United States should learn to be skeptical of claims of the need for extraordinary powers.

The Supreme Court's own view of emergencies has varied. The Court stated in response to an apparently fraudulent effort on the part of the Governor of Texas to declare martial law to limit production from oil wells, "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."[293] In American experience, only a small handful of emergency actions have been upheld, and those mostly as authorized by established law in wartime. Lincoln's blockade of Southern ports was upheld as an ordinary incident of civil war in the *Prize Cases*,[294] the World War II expulsion of Japanese from the West Coast was upheld in *Korematsu*,[295] and the use of military tribunals for saboteurs in the service of a foreign enemy was upheld in

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[292] Tushnet, *supra* note 22, at 295 ("We ratchet down our reaction to what we perceive to be a threat each time we observe what we think in retrospect were exaggerated reactions to threats.").

[293] The Court presaged many of the issues of the current situation in a few short statements:

> What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. "But we are clearly of opinion," said the Court speaking through Chief Justice Taney, "that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

Sterling v. Constantin, 287 U.S. 378, 401 (1932) (quoting Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852)).

[294] The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, The Schooner Brilliante, 67 U.S. 635, 670 (1863).

[295] Korematsu v. United States, 323 U.S. 214 (1944).

Quirin,[296] which was more an application of traditional military law in wartime than an exercise of emergency power. By contrast, executive actions were struck down in major cases such as *Milligan*,[297] *Youngstown*,[298] and *In re Endo*[299] (attempting to limit the impact of *Korematsu*).

1. Variations on "No"

To start with the "No" camp, Professor David Cole argues that basic morality as well as constitutional doctrine demand recognition that times of crisis present the strongest argument for adherence to protection of the individual.[300] Variations on the "No" answer, however, are so encompassing that they may be the norm. The two most prominent are the "discretionary enforcement" approach and the notion that "it's in there."

Discretionary enforcement posits that although no special rules should be recognized in the law, discretionary decisions not to prosecute or not to convict a perpetrator who acted in the best interests of the community should be permissible. In this approach, the behavior still remains illegal although sanctions are not applied in all settings.[301] Professor Mark Tushnet argues that "it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized."[302]

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[296] *Ex parte* Quirin, 317 U.S. 1 (1942).
[297] *Ex parte* Milligan, 71 U.S. 2 (1866).
[298] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).
[299] *Ex parte* Endo, 323 U.S. 283 (1944).
[300] Cole, *supra* note 22, at 1785.
[301] In response to Professor Ackerman's version of the "Maybe" answer, Professors Tribe and Gudgridge argue that steadfastness is a virtue, but they provide no specific guidance on how the courts and legislature should respond to genuine emergencies declared by the executive. Tribe & Gudridge, *supra* note 22, at 1867. In praising Justice Jackson's dissent in *Korematsu*, Tribe and Gudridge come close to advocating the turning of a blind eye to some excesses of the moment. Professor Gross's argument for ratification of otherwise illegal conduct leads to insisting that conduct be considered illegal no matter what the circumstances while still acknowledging that some circumstances will lead to a lack of enforcement. Oren Gross, *Are Torture Warrants Warranted*?, 88 MINN. L. REV. 1481, 1486-87 (2004).
[302] Tushnet, *supra* note 22, at 306.

The "it's in there" approach is closely related and may be the most widely-held view of emergency powers. A rule limiting power could be stated with exceptions for extreme circumstances, or at least allow for the inference of exceptions. As an alternative, a rule granting power could be stated as being applicable only in the exceptional case. For example, rules of search and seizure under the fourth amendment carry the built-in allowance for exigent circumstances when seizure of an item is necessary for public safety.[303]

In the "it's in there" camp, Chief Justice Rehnquist has written:

> It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[304]

Almost all observers recognize that the necessity for action in a manifest emergency will permit exercise of granted powers in unusual ways that may threaten individual liberties. A rigorous adherent to the demands of individual rights, however, will strike the balance with greater weight to the language of rights than to the language of power.[305]

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[303] As a practical matter, it really should not matter whether the rule requiring a warrant is limited to non-exigent situations or whether exigent circumstances are considered an exception to the normal rule. *But see* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991). Professor Schauer points out that a law prohibiting Nazi propaganda could be pictured as either an exception to usual laws protecting free expression or as a limitation built into the law of free expression. *Id*. at 887. He then argues that the proper way to view the matter is context-specific. *Id*. at 892. In contemporary Germany, Nazi propaganda could be defined out of the operation of the law protecting free expression without raising significant concerns because expression simply should not include Nazi propaganda. In the United States, that approach does not carry the same contextualized justification; meanwhile, any proposal to create an exception to free expression so as to disallow certain content leads to fears of a "slippery slope" on which there are no sensible stopping points. *Id.* at 888. In this sense, an exception may be a bit more dangerous than a built-in limitation.

[304] REHNQUIST, *supra* note 116, at 224-25.

[305] Justice Douglas' opinion in *Endo* is worth particular note:

> Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of

2. Difficulties with "Yes"

It is difficult to find an outright adherent to the "Yes" answer because almost everyone recognizes the need for controls at some point. Cicero's *Silent enim leges inter arma* translates roughly as "Law stands mute in the midst of arms."[306] Only in preliminary arguments before the lower courts in cases such as *Hamdi* and *Padilla* has the government argued for unfettered discretion on the part of the President to take such actions as imprisonment of citizens without trial, and these arguments were quickly abandoned in the face of obvious judicial hostility.[307]

Outright recognition of emergency powers without checks should be rejected at least with regard to any rules that have already contemplated the presence of emergencies in the formulation of the rule. An unabashed Realpolitik approach could lead to the utterly outlandish statement that the President of the United States could authorize violations of domestic and international law and that Congress and the courts would be constitutionally disenfranchised from applying legal norms to the President while acting as Commander in Chief. There is really no "slippery slope" problem here; there is only the question of whether the king is above the law, a question that was answered hundreds of years ago and should not be rethought in the nuclear age. To the extent that exigent circumstances require action for the public good, then every adherent to the Rule of Law will take either the absolutist

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> wartime problems have been sustained. And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government.
>
> This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Ex parte Endo, 323 U.S. 283, 299-300 (1944).

[306] Marcus Tullius Cicero, Pro Milone, *quoted and translated in* BARTLETT'S FAMILIAR QUOTATIONS 87 n.6 (16th ed. 1992); *see* REHNQUIST, *supra* note 116, at 218.

[307] *See* Wayne McCormack, *Military Detention and the Judiciary: Al Qaeda, the KKK, and Supra-State Law*, 5 S.D. INT'L L.J. 7, 58-63 (2004).

approach that the behavior is illegal (with room for prosecutorial discretion) or the it's-in-there approach to say that the limits of power have already been stated (either contained within the statement of the rule or as exceptions).

3. Proposals for "Maybe"

The two leading proposals for general initiatives in this area are put forth by Professors Gross and Bruce Ackerman. In some sense, they are variations on the theme of "it's in there" but they propose additional articulation of how built-in controls should be structured. Gross suggests that extra-legal action could be validated if it were subsequently ratified by an informed public.[308] The argument is that, like Tushnet's actor with knowledge of risk, the governmental actor is at risk if the action is not ratified. Ackerman suggests an added dimension that he calls a "supermajoritarian escalator" in which the longer a given action is to continue, the larger the supermajority required for ratification must be (*e.g.*, executive alone for two weeks, fifty-one percent majority for two months, sixty percent for the next two months, seventy percent for the next month, etc.).[309] He goes on to suggest that this requirement could be implemented by a "framework statute" spelling out the level of majority needed for given periods of time.[310]

Professor Alan Dershowitz has received a lot of publicity for his advocacy of a third "Maybe" answer, judicially authorized torture in the "ticking bomb" scenario.[311] The hypothetical is that a person in custody admits to knowing where a bomb is planted, claims that it will explode in the next two hours, but refuses to divulge where it is located. The interrogator, Dershowitz argues, should be able to apply for a judicial torture warrant to force the information from the suspect,[312] a variation of the "it's in there" approach. Gross argues that this approach will lead to a "slippery slope" in which the legality of torture under a warrant will lead to torture without warrants in situations that are thought to present "exigent circumstances" with no time to go before a judge, and then a climate of officially sanctioned torture will have been created. Gross's

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[308] Gross, *supra* note 24, at 1123-24.
[309] Ackerman, *supra* note 23, at 1047.
[310] *Id.* at 1089.
[311] DERSHOWITZ, *supra* note 288. *See, e.g.*, *Dershowitz: Torture Could be Justified*, CNN.COM, March 4, 2003, http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/.
[312] DERSHOWITZ, *supra* note 288, at 141.

general position is to countenance "extra-legal" behavior if the actor could persuade the public after the fact that the action was justified, but in dealing with torture specifically he has adhered to the absolutist approach with discretion for non-enforcement.[313]

Dershowitz insists that torture will occur whatever legal approach the United States takes and that it would be better controlled by judicial authority than by *post hoc* evaluation.[314] By contrast, journalist Mark Bowden, in a very thorough review of interrogation techniques that forecast the Abu Ghraib debacle, argues that because torture will occur regardless of the legal posture, it is better to say that torture is criminal under all circumstances, but that prosecutorial discretion can appropriately allow some offenses to go unpunished.[315]

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[313] Gross argues for assumption of the risk of illegality coupled with prosecutorial discretion:

> The officials must assume the risks involved in acting extralegally. Rather than recognize ex ante the possibility of a lawful override of the general prohibition on torture, as suggested by the presumptive approach, official disobedience focuses on the absolute nature of the ban while accepting the possibility that an official who deviates from the rule may escape sanctions in exceptional circumstances.

Gross, *supra* note 301, at 1522.

[314] DERSHOWITZ, *supra* note 288.

[315] Bowden argued for prosecutorial discretion as the ultimate check:

> Candor and consistency are not always public virtues. Torture is a crime against humanity, but coercion is an issue that is rightly handled with a wink, or even a touch of hypocrisy; it should be banned but also quietly practiced. Those who protest coercive methods will exaggerate their horrors, which is good: it generates a useful climate of fear. It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work. It is also smart not to discuss the matter with anyone.
>
> If interrogators step over the line from coercion to outright torture, they should be held personally responsible. But no interrogator is ever going to be prosecuted for keeping Khalid Sheikh Mohammed awake, cold, alone, and uncomfortable. Nor should he be.

Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51. Bowden was writing before the revelations following Abu Ghraib and stated that "The Bush Administration has adopted exactly the right posture on the matter." That statement

Dershowitz, Gross, and Bowden all agree that the slippery slope is something to be avoided, but they differ over how best to avoid it. The most probable reality is that no approach will avoid it entirely. But the prospect of illegal behavior does not mean that we throw up our hands. All of criminal law is based on the realization that illegal conduct will occur. American responses to emergencies similarly should be premised on the realization that officials often will do what they think necessary in an emergency situation. The criminal law deals with this phenomenon by creating only minimal exceptions for duress and the excuse of necessity. In dealing with the actions of those low in the chain of command, criminal and military law typically exclude the defense of superior orders to the extent that the defendant should have known that an order was illegal.

B. Separation of Powers, Civil Liberties and the Public

Having set out the possibilities, now we should turn to the competing considerations in selecting a preferred alternative. There are a number of considerations to inform Americans on whether emergency powers in fact will exist or whether they should. Some of these considerations relate to structural issues within government, some relate to understandings of individual rights, and most cut across both spheres.

Constitutional norms that relate to separation of powers often overlap those that relate to individual liberties. Whether the Executive is encroaching on the powers that the Legislature would normally exercise may be a slightly different question from whether either or both is exceeding limits that are explicitly crafted for protection of the individual. For example, in ordinary times private property is not subject to use restrictions except as established by law subject to the due process clause.[316] Absent an emergency or threat to public safety, the Executive could not unilaterally declare a private facility closed to the public without legislative action, and even with legislative action individual rights to use and access of the facility are likely to prevail.[317] During an

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would have to be reconsidered in light of what has since surfaced about the willingness of some within the administration to skirt the rules of law.

316 *E.g.*, Nollan v. Calif. Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304 (1987).

317 Denying an owner "all beneficial use" of a property will in most circumstances constitute a "taking" that would require compensation. *See* Dolan v. City of Tigard, 512

emergency, however, law enforcement might declare a certain facility off limits for the purpose of clearing away dangerous conditions.[318] The Executive in this situation has not encroached on legislative powers if the existing organic law allows unilateral executive action to meet emergencies. With regard to individual rights, the executive action would be tested by the doctrine of necessity to determine whether it was legal and, even if legal, the "takings" doctrine might require compensation for a lawful taking.[319] The question of emergency powers is much more complex than a simple yes or no question.

The titles, if not the substance, of some treatments of these issues suggest that responses to crises need not always be constitutional. But that is quite simply not possible. At the outer limits of valid governmental action, the Constitution stands as an impermeable barrier. The question is not whether the Constitution applies but where the barrier will be located under given circumstances. Short of that, however, a world of options exist and they need not all be treated as equally valid. To say that something is within constitutional powers is not to say that it is a good idea.[320] Several Justice Department responses to critics of the Patriot Act have pointed out that particular techniques have been upheld by the courts as being constitutional.[321] This "constitutional therefore valid" argument says only that a particular practice has not been found to be beyond the pale, not that it is a good idea. It is unresponsive to the political concern of whether a practice has encroached on liberty to a point that the populace finds unacceptable.

The Constitution can be interpreted easily to authorize emergency mobilization of resources by the President in extreme situations. It is very difficult to dispute the propriety of Justice Jackson's analysis in *Youngstown* that there are areas of executive discretion in which the President's powers standing alone will be sufficient, at least when

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U.S. 374, 384-85 (1994); Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1019 (1992).

[318] *See Dolan*, 512 U.S. at 385.

[319] *See* text accompanying notes 54-62 *supra*.

[320] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 203 (1961).

[321] The Justice Department launched a separate website in 2005 to defend the Patriot Act. U.S. Department of Justice, The USA PATRIOT Act: Myth v. Reality, http://www.lifeandliberty.gov/subs/add_myths.htm (last visited July 15, 2005) (showing that some tools allowed in the Patriot Act have been used in other settings such as pursuit of drug cases).

Congress has been silent on the subject.[322] Certainly one of those is to preserve the nation from attack, and even the War Powers Resolution recognizes this responsibility.[323] Because this responsibility is within constitutional limits, there is no need for extra-constitutional measures to carry it out. ("It's in there.")

Justice Robert Jackson wrote more about these issues than most Supreme Court Justices, perhaps not surprising given his experience with the Nuremberg Tribunal prosecutions. In a slightly obscure "fighting words" case, Justice Jackson, recently returned from the Nuremberg trials, characterized the clash between communists and radical conservatives in that day as a crisis similar to the early stages of the Nazi rise to power. In his view, government needed to intervene early in incitement cases to avoid a slide toward fascism. "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[324]

In Justice Jackson's framework, however, there are two areas in which Congress has addressed the particular exercise of power in question. One is when Congress has explicitly rejected a claimed power. In this instance, Justice Jackson's approach says that the President's power must be found within Article II or implied from the nature of the executive.[325] Of course, once past that hurdle of lack-of-power, the President would still face a challenge from the direction of individual liberty.[326] The obverse situation occurs when Congress has authorized the action. In this instance, both Congress and the President still must face the challenge of individual liberty.[327] Either way, the challenge of

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[322] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[323] 50 U.S.C.S. § 1542(c) (LEXIS 2005).

[324] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Justice Goldberg borrowed Justice Jackson's phrase in another case during the Cold War: "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963) (Goldberg, J., dissenting).

[325] *Youngstown*, 343 U.S. at 637-38.

[326] For example, Justice Douglas in *Youngstown*, implied that the executive could never exercise unilateral seizure power because only the legislature has the authority to pay compensation for the taking. *Id.* at 887.

[327] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2643 (2004) ("Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.").

claims of individual liberty do not go away because of the emergency. They may change and morph to meet the times, but they do not disappear just because there is authority for the action.

It is true that the pressures to modify the demands of liberty in time of emergency will be very strong. The Constitution makes many of the demands of liberty contextual by using phrases such as "due" process, or "unreasonable" searches and seizures. Virtually all Supreme Court expressions of liberty in the past half-century have been contextualized by asking whether governmental justifications for an action serve a compelling or important governmental interest. Surely, a genuine emergency will present a strong case for a compelling governmental interest, such as in the example of racial segregation to quell a prison race riot.[328]

Because emergencies generate strong demands for "erosion" of civil liberties, there is a rhetorical gap to bridge so that we can speak a common language. Take the familiar example of not being allowed to publish ship sailing times during time of war.[329] Assuming the validity of the proscription so that my expectations of free expression are diminished, does that mean that my first amendment liberties have been curtailed or does it mean that my first amendment liberties are different depending on the context? Based on the analysis here, the preferred alternative should be the "it's in there" approach, which avoids saying that government is allowed to do something unconstitutional. It requires that we seek a way to read the constitutional language, history, and structure in light of the emergency involved. Again, it must be remembered that a contextualized statement that an action is not unconstitutional is hardly a ringing endorsement of its wisdom or even validity as a matter of statutory authorization. That conclusion simply refers the matter back to the political process in which "We the People" must decide what "We" choose to allow.

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[328] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., dissenting).

[329] Near v. Minnesota, 283 U.S. 697, 716 (1931).

III. Conclusion

The counter-terrorism measures of the Bush administration have produced a great deal of dialogue in the popular press and even to some extent in the courts about the existence and scope of emergency powers.

In the 2004 detainee cases, the Supreme Court firmly rejected the argument that an emergency provided unrestrained executive or military authority to imprison anyone without a hearing, not even aliens who might have carried arms against the United States. In that instance, the limits were built into the Constitution in the form of the due process clause. But the due process clause, the Court reminded us, is addressed to whatever process is due under the specific circumstances. It is difficult to quarrel with the proposition that the limits on executive authority are built into the due process clause itself.

Emergency powers surely exist in some parts of the constitutional framework. They are not to be found in authority to violate the law but in the very statement of the law itself. When a set of laws is designed specifically to restrain governmental power, then courts are capable of making those limits clear in specific situations. When the limits are to be inferred from the interstices of constitutional provisions, as in the clash of military authority and due process, it is again the traditional role of the judiciary to say what the law is.

As an extreme example, the Bybee Memorandum argued that the President could authorize actions that would otherwise violate statutory or international law either because of the Commander-in-Chief power or because of defenses such as necessity. The reaction to these propositions has been overwhelmingly negative. The whole point of statutes and treaties setting out the rules of law to govern use of force and conduct of war are to prevent claims of necessity or emergency from overriding the dictates of law. Limits on executive power are not just built in, they are the very substance of the rules.

Finally, the public debates now occurring over extension or modification of the Patriot Act have reaffirmed the central role of the electorate in American civil liberties. As Justice Jackson said, if the electorate hands over unrestrained power, then it is at least likely that the courts would be powerless to prevent tyranny. That is not to say that courts should throw up their hands and tolerate whatever is not voted down. The electorate and the courts both have roles to play in this

continuing dynamic. But the courts and the built-in constitutional limits on executive authority cannot be the sole source of protection for civil liberties in time of emergency. In those situations in which the Constitution itself does not set limits against what government is doing, the electorate must exercise independent review of governmental action and make its voice heard.

TALK THE TALK; NOW WALK THE WALK: GIVING AN ABSOLUTE PRIVILEGE TO COMMUNICATIONS BETWEEN A VICTIM AND VICTIM-ADVOCATE IN THE MILITARY

MAJOR PAUL M. SCHIMPF, USMC*

> *The actions we take to enhance victim support and improve the manner in which we account for the actions taken will encourage more victims to come forward and report these tragic incidents. With time, an increased number of reported cases will build victim confidence in our investigative and military justice systems . . . .*[1]
>
> *And 'tis a kind of good deed to say well*
> *And yet words are no deeds.*[2]

I. Introduction

"You just testified that Staff Sergeant _____ did not have any form of permission from you to do what he did. Isn't it true, though, that you told Mrs. _____, YOUR VICTIM ADVOCATE, that you felt responsible for what happened? Isn't it also true that you also told Mrs. _____ that you feel bad about what Staff Sergeant _____'s family is going through right now? And when you told this to YOUR VICTIM ADVOCATE, isn't it true that you two were alone? That you were telling the truth? That you had no reason to lie?"

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[1] Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov. 2004) [hereinafter JTF-SAPR-002].

[2] WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH act 3, sc. 2, l. 153.

The previous paragraph describes the cross examination of a sexual assault victim at an Article 32 hearing. More than simple impeachment, the cross examination represents part of an overall campaign to re-victimize a sexual assault survivor during the legal process. This questioning reflects a calculated defense tactic to aggravate the effects of the "second rape" on the victim, making the personal costs of the criminal process too great for her[3] to bear. Bringing the victim advocate into the discovery process sends the distinct message to the victim that no area of her life is safe from defense examination. It is also a tactic that would be eliminated if a privilege existed to cover communications between a sexual assault victim and a victim advocate.

Sexual assault traumatizes by removing an element of control from an intimate aspect of the victim's life.[4] The actual commission of the crime, however, only represents the start of a victimization process that does not conclude until months or years later.[5] Surprisingly, the criminal process, rather than the offender, often inflicts a large portion of the trauma the victim experiences.[6] Part of this trauma derives from the increasing realization by defense attorneys that the psyche of the victim represents another front, along with member selection or admissibility of evidence, in the legal campaign to avoid conviction of the accused. As recently seen in the Kobe Bryant case, the defense wins if they can intimidate a victim into refusing to testify in the courtroom.[7]

Defense tactics targeting the victim in a sexual assault case with psychological warfare are especially suited to the litigation of sexual assault cases under the Uniform Code of Military Justice (UCMJ), which contains procedures and rules not present in civilian criminal systems.[8] Unfortunately for victims, most of these procedures and rules, such as the Article 32 investigation and liberal discovery, form an integral part of the military's criminal justice system. Consequently, they are unlikely to

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[3] The author recognizes that rape, sexual assault, and domestic violence are not gender specific crimes. In the interests of brevity, however, feminine and masculine pronouns are used for the victim and perpetrator, respectively, reflecting rates of prevalence.

[4] *See* Section II.A, *infra*.

[5] *Id*.

[6] *See* Section V.B.1., *infra*.

[7] *See generally* Jill Smolowe & Vickie Bane, *Too High a Price? After Kobe Bryant's Accuser Refuses to Testify and the Laker Star Walks Free, Prosecutor Dana Easter Defends the Accuser—and Describes Her Ordeal*, PEOPLE, Sept. 20, 2004, at 200.

[8] *See* Section V.B.1., *infra*.

change, regardless of any public or congressional demands.[9] This article argues that one way of improving the military's treatment of sexual assault victims is to create a privilege for their communications with victim advocates. The President can achieve this by expanding Military Rule of Evidence (MRE) 513 to provide an absolute privilege for confidential communications between a victim and a victim advocate who has been appointed by an installation commander or commanding officer (hereinafter referred to as "advocate-victim privilege" or "proposed privilege").[10] This article also demonstrates that an evidentiary privilege for victim advocates in the Department of Defense (DOD) does not violate the Sixth Amendment rights of the accused.

Confidentiality is a controversial subject as it pertains to the victims of sexual assault crimes within the DOD.[11] The DOD has, however, recognized that confidential reporting increases the percentage of sexual assaults that are reported.[12] This article's proposed privilege, while subsuming the issue of reporting, is geared towards the advocate's interaction with the military judge and defense counsel, rather than a victim's initial consultations about whether to report the crime.[13] This article addresses the relationship between victim advocates and victims in the context of sexual assault survivors. The justifications for the proposed privilege would also apply to victims of domestic violence; therefore, the proposed privilege would also include the relationship between domestic violence victims and their advocates.

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[9] Some of the conditions which make victims vulnerable to increased emotional trauma during the criminal process evolve from the lack of privacy that will always exist in military life. This article considers the liberal discovery rules and Article 32 investigation requirements set forth by the *Manual for Courts-Martial* to be assets of the military criminal process. Abuses of these provisions are discussed in Section IV.A.3.a., *infra*, as justification for creating an advocate-victim privilege—not as a recommendation for abolishing the Article 32 investigation or curtailing military discovery.

[10] Most states that have codified this privilege refer to it as a victim advocate-victim privilege. For purposes of clarity and brevity, this article uses the term advocate-victim privilege.

[11] *See* Section II.D., *infra*.

[12] Dr. David Chu, Undersecretary of Defense for Personnel and Readiness, Special Defense Department Briefing on New Sexual Assault Policy (Jan. 4, 2005), *available at* http://www.dod.mil/transcripts/2005/tr20050104-1922.html [hereinafter Dr. Chu Briefing].

[13] A confidential report of sexual assault to rape crisis personnel that is not reported to law enforcement authorities will still have relevance in any subsequent case where the victim has been assaulted a second time.

II. Background

An analysis of the dynamic that exists between the military, sexual assault victims, and victim advocates must occur prior to evaluating the worthiness of a privilege between victims and their advocates. The inherent conditions of military service amplify the already staggering effects on the victim of a sexual assault. An understanding of the role of victim advocates and the means by which they assist sexual assault survivors in the military is necessary to correctly evaluate the arguments for creating a privilege covering the survivor-advocate relationship.

A. Sexual Assault and its Victims

Sexual assault represents a crime that is unique in its ability to harm victims. Rape and sexual assault, probably among the most underreported crimes in America,[14] psychologically impact their victims well beyond the duration of the actual crimes.[15] Studies have indicated that rape victims suffer from greater post-event anxiety than victims of other violent crimes.[16] Victims of rape and sexual assault also show an

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[14] U.S. DEP'T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 63 (Apr. 2004) [hereinafter DOD TASK FORCE REP.]. In a Department of Justice study covering 1992 to 2000, less than 40% of sexual assault offenses were reported to authorities. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS—RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002). The actual numbers are that only 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police between 1992 and 2000. *Id*.

[15] Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERPERSONAL VIOLENCE 223, 225 (1993).

> Most rape victims experience a strong acute reaction that lasts for several months. By 3 months postcrime, much of the initial turmoil has decreased and stabilized. Some victims continue to experience chronic problems for an indefinite period of time. These problems fall under the categories of fear/PTSD, depression, loss of self-esteem, social adjustment problems, sexual disorders, and other anxiety disorders.

Id. D. J. WEST, SEXUAL CRIMES AND CONFRONTATIONS 201 (1987) ("A group of 31 victims were followed up two to three years after an assault. Anger was still being expressed by half these victims, as was embarrassment and over one third were fearful of being alone . . . .").

[16] Resick, *supra* note 15, at 227.

increased risk of suicide compared to non-victims.[17] These symptoms also place a strain on society through the secondary victimization of family members, co-workers, and treatment personnel.[18] Studies have shown that the strains of coping with sexual assault destroy a significant portion of existing relationships.[19]

Experts in treating victims of sexual assault recommend the establishment of a safe haven for the victim.[20] Treatment also focuses on the concept of "empowerment" or increased sense of self control, where victims realize, psychologically, that they have regained control of their lives.[21] Empowerment involves, among other things, control over whether the crime is reported to police and whether victim assistance personnel release information.[22] Sexual assault assistance personnel help victims understand what took place and clarify their feelings to facilitate the making of informed choices.[23] Confidentiality represents an absolute requirement for both victim empowerment and effective rape crisis counseling.[24]

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[17] *Id*. at 229.

[18] *See generally* REBECCA CAMPBELL, EMOTIONALLY INVOLVED: THE IMPACT OF RESEARCHING RAPE 70 (2002); Patricia A. Furci, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend That Far?*, 5 QUINNIPIAC HEALTH L.J. 229, 233 (2002).

[19] For example, studies indicate that over half of female victims of rape lose their husbands or boyfriends. Theresa L. Crenshaw, M. D., *Counseling of Family and Friends, in* RAPE: HELPING THE VICTIM; A TREATMENT MANUAL 51 (Susan Halpern ed., 1978).

[20] DOD TASK FORCE REP., *supra* note 14, at 30.

[21] Malkah T. Notman & Carol C. Nadelson, *Psychodynamic and Life-Stage Considerations in the Response to Rape, in* THE RAPE CRISIS INTERVENTION HANDBOOK 139 (Sharon L. McCombie ed., 1980). *See generally* LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE; SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 129 (1991); Jennifer Bruno, Note: *Pitfalls for the Unwary; How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. ILL. L. REV. 1373, 1377 (2002), *referencing* MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS 133-35 (2d ed. 1991). Reporting the offense is viewed as an "empowering" activity. MADIGAN & GAMBLE, *supra*. at 123.

[22] REPORT OF PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 80 (2003) [hereinafter AIR FORCE ACADEMY REP.]. "Giving victims choices helps them regain a sense of control over their lives and promotes the healing process." *Id.*

[23] Rachel M. Capoccia, Note: *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 S. CAL. L. REV. 1335, 1349 (1995).

[24] E-mail from Christine Hansen, Executive Director, The Miles Foundation, to Maj. Paul Schimpf, USMC (Feb. 7, 2005, 3:40 pm) [hereinafter CHRISTINE HANSEN] (on file with author). The Miles Foundation is a not for profit organization that advocates on behalf of sexual assault and domestic violence victims in the military. Miles Foundation, *at* http://hometown.aol.com/milesfdn (last visited Nov. 16, 2004).

B. Sexual Assault and the Military: Same Problem—Different Decade

As a microcosm of our broader society, the military, not surprisingly, also grapples with sexual assault. What is counterintuitive, however, is that military service exacerbates many of the consequences of sexual assault. Despite the recent media attention on the problem, the military has faced the challenge of widespread sexual assaults by and on its service members for decades.

1. Sexual Assault in the Military Setting[25]

Empirical evidence indicates that sexual assault in the military is widespread[26] and more damaging to its victims than assaults in the civilian sector.[27] Several studies suggest that women in the United States military face a higher risk of sexual assault than their civilian counterparts.[28] This increased risk may result from the services recruiting in demographics whose females are more prone to

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[25] Anyone wishing to truly appreciate the military's sexual assault problems should read the series of articles that ran in the Denver Post on 16, 17, and 18 November 2003, which paint an extremely bleak picture of the military's treatment of women. Miles Moffett & Amy Herdy, *Betrayal in the Ranks*, DENVER POST, *available at* http://www. denverpost. com/betrayal (last visited Mar. 20, 2005) [hereinafter DENVER POST ARTICLES]. While highly inflammatory, the articles are relevant to understanding the intent behind the new DOD sexual assault policy, discussed in Section II.B.3., *infra*. The policy seems written to directly respond to most of the allegations made in the series of *Denver Post* articles.

[26] Multiple studies have shown a high prevalence of sexual assault in the military. A study of female hospital patients between 1994 and 1995 showed that 23% reported that they were a victim of sexual assault sometime during their military careers. DOD TASK FORCE REP., *supra* note 14, at 32. A 2003 study interviewed 558 women who were veterans of the Vietnam and Persian Gulf eras and found that 28% had experienced a rape or attempted rape during their military service. *Id*. at 58. Records taken by the Veteran's Administration appear to confirm these findings: "Of the almost three million veterans screened between March 2002 and October 2003, approximately 20.7% of females . . . screened positive for a history of military sexual trauma." *Id*.

[27]

> Sexual Assault can have a powerful and potentially long term effect on a victim's ability to cope. It often destabilizes a victim's sense of control, safety and well being, particularly if the victim lives in the same building, is assigned within the same command, and frequents the same base support and recreation facilities as the offender.

DOD TASK FORCE REP., *supra* note 14, at 32.

[28] Lee Martin, M.A., et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MIL. MED. 213, 214 (1998).

victimization and whose males are more prone to perpetration when compared to national averages.[29] Exposure to combat conditions may increase the likelihood of service members to commit sex crimes.[30] Consistent with civilian society, military sexual assault victims have a low likelihood of reporting the crime.[31]

2. Prior DOD Responses to Sexual Assault Issues

National concern over issues of sexual assault in the military is not a new phenomenon. The armed services have acknowledged and struggled with issues of sexual assault for nearly twenty years. The most notorious incident remains the 1991 Tailhook Convention, which elevated the awareness of the military's sexual assault problems to the national level.[32] In response, congressional hearings, beginning in 1992, have probed sexual harassment and gender discrimination within the military on nearly a yearly basis.[33] In 1997, service members engaged in rape, sexual assault, and sexual harassment at Aberdeen Proving Ground, Maryland.[34] In 2003, allegations of systematic sexual assaults at the Air Force Academy prompted a congressional inquiry.[35]

The current military sexual assault crisis began in 2003 with a series of articles in the *Denver Post* describing assaults on female service-members in the Iraq and Afghanistan theatres.[36] The media reports

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[29] Lex L. Merrill, Ph.D., et al., *Prevalence of Premilitary Adult Sexual Victimization and Aggression in a Navy Recruit Sample*, 163 MIL. MED. 209, 211 (1998); "Women who enter the military may have experienced more childhood and adolescent sexual assaults than comparable female civilians." Martin, et al., *supra* note 28, at 214.

[30] Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 661 (1996). Empirical evidence from the current war supports this theory, as well. Kelley Beaucar Vlahos, *Sex Assaults Against Women GIs Increase in War Time*, May 31, 2005, FOXNEWS, http://www.foxnews.com/story/0,2933,158098,00.html.

[31] In 2003, military data showed a reporting rate of only 70 sexual assaults per 100,000 active duty members. DOD TASK FORCE REP., *supra* note 14, at 59. Also in 2003, a DOD Inspector General survey found that less than 20% of the sexual assaults occurring at the United States Air Force Academy were reported. AIR FORCE ACADEMY REPORT, *supra* note 22, at 52.

[32] DOD TASK FORCE REP., *supra* note 14, at 93.

[33] *Id*.

[34] *Id*. at 94.

[35] Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, §§ 501-503, 117 Stat. 559, 609-10 (2003); DOD TASK FORCE REP., *supra* note 14, at 96.

[36] DENVER POST ARTICLES, *supra* note 25; *see also* Miles Moffeit, *Activists Question Speed of Military Rape Reforms*, DENVER POST, July 12, 2004, at A1.

depicted a military institution that fostered an environment of sexual assault and treated victims callously.[37] Over eighteen months, victims reported more than 100 allegations of sexual assault in the Iraq, Afghanistan, and Kuwait theatres.[38] By 8 December 2004, the Miles Foundation, a support group for military sexual assault and domestic violence victims, claimed to have received 273 reports of sexual assault in Iraq, Kuwait, Afghanistan, and Bahrain.[39] Congressional response to the allegations followed swiftly.[40] In February of 2004, Defense Secretary Donald Rumsfeld ordered a task force to investigate sexual assaults against service members in the Iraqi combat theater.[41] The task force subsequently expanded its scope to a DOD-wide review.[42] This task force issued a comprehensive report in April of 2004.[43] Among other things, the task force recommended that the DOD establish avenues to increase the privacy of sexual assault victims.[44] Congress reacted to the report, ordering the DOD to review its sexual assault policy, under threat of congressional action.[45] The DOD conducted its corresponding review in secret sessions (to the chagrin of victims' rights groups and congressional leaders).[46]

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[37] U.S. DEPT. OF THE ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES 11 (May 27, 2004) [hereinafter ARMY TASK FORCE REP.].

[38] Daniel Pulliam, *Pentagon Criticized for Closed-door Meeting on Sexual Misconduct*, Sept. 24, 2004, *at* http://www.govexec.com/dailyfed/0904/0924304dp1.htm.

[39] Daniel Pulliam, *Pentagon Blames Air Force Academy Leaders for Sexual Misconduct Scandal*, Dec. 8, 2004, *at* http://www.govexec.com/ dailyfed/1204/120804p1.htm.

[40] *See generally* Moffeit, *supra* note 36, at A1.

[41] George Cahlink, *Pentagon Chided for Failure to Prevent Sexual Assaults*, June 3, 2004, *at* http://www.govexec.com/dailyfed/0604/0603004g1.htm.

[42] Daniel Pulliam, *Task Force to Iinvestigate Navy and Army Academies*, Sept. 23, 2004, *at* http://www.govexec.com/dailyfed/0904/092304dp1.htm.

[43] DOD TASK FORCE REP., *supra* note 14, at cover page.

[44] *Id*. at 49. Another recommendation suggested development of a full spectrum sexual assault response capability for military locations. *Id*.

[45] Daniel Pulliam, *Congress Orders Pentagon to Review Sexual Misconduct Policies*, Oct. 12, 2004, *at* http://www.govexec.com/ dailyfed/1004/101204dp1.htm ("According to a congressional aide, if the Defense Department is not able to come up with a better means of providing aid to soldiers who have been sexually assaulted . . . then the [Congressional Caucus for Women's Issues] will work to get Congress to rewrite the Pentagon's policy.").

[46] Pulliam, *supra* note 38.

3. The New DOD Sexual Assault Policy

These secret deliberations yielded the DOD's new sexual assault policy, presented in a press conference on 4 January 2005.[47] Undersecretary of Defense for Personnel and Readiness, Dr. David Chu, issued the policy as a series of eleven directive-type memorandums.[48]

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[47] Dr. Chu Briefing, *supra* note 12.

[48] Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collateral Misconduct in Sexual Assault Cases (JTF-SAPR-001) (12 Nov 2004) [hereinafter JTF-SAPR-001 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov 2004) [hereinafter JTF-SAPR-002 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Data Call for CY04 Sexual Assaults (JTF-SAPR-003) (22 Nov 2004) [hereinafter JTF-SAPR-003 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Review of Administrative Separation Action Involving Victims of Sexual Assault (JTF-SAPR-004) (22 Nov 2004) [hereinafter JTF-SAPR-004 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Commander Checklist for Responding to Allegations of Sexual Assault (JTF-SAPR-005) (15 Dec 2004) [hereinafter JTF-SAPR-005 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Department of Defense (DOD) Definition of Sexual Assault (JTF-SAPR-006) (13 Dec 2004) [hereinafter JTF-SAPR-006 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for DoD Personnel on Sexual Assault Prevention and Response (JTF-SAPR-007) (13 Dec 2004) [hereinafter JTF-SAPR-007 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Response Capability for Sexual Assault (JTF-SAPR-008) (17 Dec 2004) [hereinafter JTF-SAPR-008 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collaboration with Civilian Authorities for Sexual Assault Victim Support (JTF-SAPR-010) (17 Dec 2004) [hereinafter JTF-SAPR-010 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Sexual Assault Response Training (JTF-SAPR-011) (17 Dec 2004) [hereinafter JTF-SAPR-011 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Pre-Deployment Information on Sexual Assault and Response Training (JTF-SAPR-012) (undated) [hereinafter JTF-SAPR-012 Memo]. Three additional memoranda were added to the policy on the subjects of confidentiality, essential training tasks, and evidence collection on Mar. 16, Apr. 26, and June 30, 2005, respectively. Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009) (16 Mar 2005) [hereinafter JTF-SAPR-009 Memo]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Essential Training Tasks for a Sexual Assault Response Capability (JTF-SAPR-013) (26 Apr.

The new policy included a diverse assortment of training and organizational requirements. First, the new DOD policy encouraged commanders to defer adjudicating issues of collateral misconduct on the part of the sexual assault victim until after the conclusion of the criminal case.[49] Also related to victim misconduct, the policy directed that each military service establish a system for reviewing the administrative discharge of all sexual assault victims.[50] The policy also required that each service implement measures to ensure that all sexual assault incidents are properly investigated and adjudicated.[51] To assist in preparing a pending DOD report to Congress, the policy mandated that each service report numbers and dispositions of sexual assault cases during 2004.[52] The DOD also promulgated a list of response protocols for commanders who are responding to a sexual assault allegation.[53] These guidelines enjoin the commander to "[s]trictly limit the fact or details regarding the incident to only those personnel who have a legitimate need to know"[54] and "[e]nsure the victim understands the role and availability of a Victim Advocate."[55] In response to past confusion of sexual assault with sexual harassment, the new policy also provided a definition for sexual assault.[56] The policy also required the services to implement yearly, accession, and pre-deployment training sessions on sexual assault prevention and response.[57] The new policy touches upon the role of civilian sexual assault resources, tasking military installations with enhancing coordination with them through "collaboration."[58] Most

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2005) [hereinafter JTF-SAPR-013 Memo]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Sexual Assault Evidence Collection and Preservation Under Restricted Reporting (JTF-SAPR-014) (30 June 2005) [hereinafter JTF-SAPR-014 Memo].

[49] JTF-SAPR-001 Memo, *supra* note 48 ("One of the most significant barriers to reporting of a sexual assault is the victim's fear of punishment for some of the victim's own actions . . . (i.e., underage drinking or other alcohol offenses, adultery, fraternization or other violations of certain regulations or orders).").

[50] JTF-SAPR-004 Memo, *supra* note 48.

[51] JTF-SAPR-002 Memo, *supra* note 48.

[52] JTF-SAPR-003 Memo, *supra* note 48.

[53] JTF-SAPR-005 Memo, *supra* note 48.

[54] *Id.* at attachment.

[55] *Id*.

[56] JTF-SAPR-006 Memo, *supra* note 48 ("Sexual assault is a crime. Sexual assault is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent.").

[57] JTF-SAPR-007 Memo, *supra* note 48; JTF-SAPR-011 Memo, *supra* note 48; JTF-SAPR-012 Memo, *supra* note 48. Pre-deployment training must identify victim advocates as a resource that will be available to victims of sexual assault. JTF-SAPR-012 Memo, *supra* note 48.

[58] JTF-SAPR-010 Memo, *supra* note 48.

relevant to this article, the new policy requires each service to create Sexual Assault Program Coordinators and "establish the capability of a Victim Advocate to respond to each report of sexual assault."[59] Finally, the last policy memorandum purports to create a mechanism for confidential reporting.[60]

C. Victim Advocates in the DOD

The new DOD sexual assault policy did not create the profession of victim advocates. Other DOD task forces had already commented on the presence of victim advocates.[61] Instead, the new DOD policy officially recognized what was already widely known in civilian circles: victim advocates play an essential role in a sexual assault victim's recovery process.

1. Purpose of Victim Advocates

Victim advocates assist victims of sexual assault and domestic violence in coping with the unfamiliar tensions of the treatment and criminal processes. Victims who receive advocacy services have an increased likelihood of receiving medical information and treatment.[62] The average sexual assault victim is woefully uneducated about the

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[59] *Id.*

[60] JTF-SAPR-009 Memo, *supra* note 48. "This reporting option gives the member access to medical care, counseling and victim advocacy, without initiating the investigative process." *Id*. The memorandum states that improper disclosure of confidential communications may result in discipline under the UCMJ. *Id*.

[61] The DOD Task Force on Sexual Assault focused specifically on Victim Advocates. Recommendation 6.5 addressed the need for victim advocates: "Establish a DoD-wide policy requiring victim advocates be provided to victims of sexual assault and create a mechanism for providing victim advocates in deployed environments." DOD TASK FORCE REP., *supra* note 14, at 52. To implement this recommendation, the task force recommended that the DOD "ensure Victim Advocates can assist in providing a range of coordinated services and support to victims which may be used to help the victim in reducing the effects of trauma." *Id*. The task force recommended the provision of victim advocates in both CONUS installations and deployed locations. *Id*. The Task Force investigating sexual assault at the Air Force Academy also recognized the important role of victim advocates. AIR FORCE ACADEMY REP., *supra* note 22, at 80.

[62] Rebecca Campbell & Patricia Yancey Martin, *Services for Sexual Assault Survivors: The Role of Rape Crisis Centers*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 232 (Claire M. Renzetti et al. ed., 2001).

mechanics of the legal process.[63] Victim advocates provide general information about the legal process and reduce the level of intimidation felt by victims as a result of their participation in this process.[64] This victim advocate role is equivalent to that of workers at rape crisis centers who provide "dissemination of information, active listening, and emotional support."[65] Victim advocates also play a critical role in reducing secondary victimization, the term assigned to "insensitive, victim-blaming treatment from community system personnel."[66] Interaction with victim advocates reduces the severity of stress symptoms endured by sexual assault victims.[67] Rather than technical skills, successful advocacy is based on absolute loyalty and trust:

> The crux of advocacy is identifying the site of problems and the standpoint from which to articulate and pose solutions to those problems. . . . This standpoint of advocacy is unattainable when the advocate has only partial loyalty to the woman. *Advocates must offer absolute confidentiality*, a clear commitment to the safety needs of a woman, and the ability to speak out on behalf of women . . . . (emphasis added).[68]

This guidance is critical because the criminal process itself often re-traumatizes the victim.[69]

The new DOD sexual assault policy provides significant detail on the intended purpose of victim advocates serving the military: "The victim advocate shall provide crisis intervention, referral and ongoing non-clinical support to the victim of a sexual assault. Support will include providing information on available options and resources so the victim

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[63] Amanda Konradi, *Too Little, Too Late: Prosecutors' Pre-Court Preparation of Rape Survivors*, 22 L. & SOC. INQUIRY 1, 4 (1997).
[64] *Id*. at 49.
[65] Edna B. Foa et al., *Treatment of Rape Victims*, 8 J. INTERPERSONAL VIOLENCE 256, 259 (1993).
[66] Campbell & Martin, *supra* note 62, at 231.
[67] *Id*. at 235.
[68] Ellen Pence, *Advocacy on Behalf of Battered Women*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 339-40 (Claire M. Renzetti, et al. ed., 2001).
[69] MADIGAN & GAMBLE, *supra* note 21, at 7 ("The second rape is when the survivor is strong enough, brave enough, and even naive enough to believe that if she decides to prosecute her offender, justice will be done. It is a rape more devastating and despoiling than the first.").

can make informed decisions about their case."[70] This role of providing guidance to victims and advocacy on their behalf contrasts with the victim's commander's responsibilities under the policy. Rather than helping his or her victim make "informed decisions," the commander must "[l]isten/engage in quiet support of the victim."[71]

2. Victim Advocates in the Armed Services

Prior to the new DOD sexual assault policy, victim advocate services varied amongst the different branches of the armed forces.[72] Victim advocacy services in the armed forces varied by service, installation, and command.[73] The services consistently directed their victim advocates to engage in what amounted to crisis intervention, but to refrain from treatment.[74] The Marine Corps also moves its policy towards

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[70] JTF-SAPR-008 Memo, *supra* note 48.

[71] JTF-SAPR-005 Memo, *supra* note 48, at attachment.

[72] One of the goals of the new policy is standardization. *Id.*

[73] DOD TASK FORCE REP., *supra* note 14, at 15. Prior to the new DOD policy, the U.S. Navy and Marine Corps utilized the Sexual Assault Victim Intervention (SAVI) or, as known by its acronym, the SAVI program, to handle response to sexual assault and set guidelines for victim advocates. NAVY SEXUAL ASSAULT VICTIM INTERVENTION ADVOCATE TRAINING COURSE, MODULE THREE, *at* http://www.persnet.navy.mil/pers66/savi/savitrng/Role%20sg.doc (last visited Jan. 30, 2005) [hereinafter SAVI MODULE]. The Air Force refers to victim advocates as victim support liaisons. Air Force victim support liaisons exist separate and apart from the Victim Witness Assistance Program. The stated purpose of victim support liaisons is to "focus solely on the alleged victim of the sexual assault and to support him/her throughout the process, ensure continuity of care without regard to the outcome of legal or administrative actions, and close the seams among the many AF functions that must respond to the victim's needs." Memorandum, The Secretary of the Air Force, to ALMAJCOM, subject: Interim Measure for Victim Support (1 Apr. 2004) [hereinafter Secretary of Air Force Memo]. Prior to the recent focus on sexual assault in the military, the Army utilized its victim advocates to assist domestic violence survivors. ARMY COMMUNITY SERVICE FAMILY ADVOCACY PROGRAM, *at* http://www.lewis.army.mil/DPCA/ACS/FAP/ (last visited Mar. 16, 2005). "The primary purpose of the Victim Advocate (VA) is to provide comprehensive assistance and liaison to and for victims of spouse abuse . . . . Military spouses who are victims of spouse abuse and are ID card holders are eligible for services of the VA." *Id.*

[74] The Marine Corps recognizes a slightly more expansive view of the role of victim advocates, clearly specifying their purpose as "crisis intervention." U.S. MARINE CORPS, ORDER 1752.5, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM para 6.a(8) (28 Sept 2004) [hereinafter MCO 1752.5]. Victim advocates in the Navy are prohibited from engaging in crisis intervention and counseling, regardless of their expertise. SAVI MODULE, *supra* note 73. Instead, victim advocates are directed to "provide empathy, to listen, and to offer emotional support." *Id.* The Air Force victim support liaison is prohibited from providing any form of treatment to victim or soliciting details of the

empowerment.[75] The services all direct their victim advocates to keep services confidential.[76] A unique Army development, however, involves the prospective establishment of active duty victim advocates.[77] These unit victim advocates will be active duty soldiers and must be deployable and between the ranks of staff sergeant and first lieutenant (inclusive).[78] The new DOD policy specifically approves this type of victim advocate.[79]

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assault. SECRETARY OF AIR FORCE MEMO, *supra* note 73. "The liaison does not need to know any details of the alleged assault and should not solicit them. . . . Victim support liaisons are not counselors, legal officials, or investigators, and should not attempt to provide any type of clinical counseling or guidance . . . ." *Id*.

[75] MCO 1752.5, *supra* note 74, para. 6.i.(6). ("All Marine Corps personnel shall: (6) Ensure that a person who is sexually assaulted is treated . . . in a manner that does not usurp control from the victim, but enables the victim to determine their needs and how to meet them;").

[76] The fourth canon of the Navy's SAVI program requires advocates to "[b]e confidential." SAVI MODULE, *supra* note 73. This enjoinder is limited by recognizing that the victim advocate may have to reveal information and, therefore, confidentiality should never be promised to a victim. *Id*. In its entirety, the training course states:

> The issue of confidentiality is complicated. As an Advocate, confidentiality means that you must not discuss with friends, family members, etc. any details of your interaction with the victim. However, the Advocate may be required to provide information to individuals with the 'need to know' (e.g., medical personnel, legal personnel). Therefore, Advocates must not promise a victim that he/she will never release information.

Id.

[77] Eric Cramer, *Army to Train 1,000 Advocates to Help Sexual Assault Victims*, Mar. 18, 2005, SOLDIERS ONLINE, http://www.pica.army.mil/Voice2005/050325/050325%20Sexual%20assault.htm.

[78] *Id*. This arrangement clearly solves the problem of providing advocate assistance to victims who are deployed. Whether or not active duty soldiers can function effectively as victim advocates appears problematic, however. For instance, an effective advocate must be willing to confront a commanding officer who is not treating a victim properly. It is difficult to imagine soldiers antagonizing their chain of command on behalf of a victim. It is also unclear whether sexual assault victims would trust a member of the chain of command. Regardless, the first active duty advocate who fails to effectively provide support has the potential to permanently maim the program's reputation with victims.

[79] JTF-SAPR-008 Memo, *supra* note 48 ("The victim advocate can be . . . staff assigned as a collateral duty . . . .").

D. Confidentiality, Confidantes, and Privilege

Multiple victim organizations and military task forces have recommended "confidential reporting" for victims of sexual assault.[80] They cite guarantees of confidentiality as the best way to encourage victims to report sexual offenses. Studies have shown that confidential reporting procedures increase the number of sexual assaults that are actually reported.[81] Department of Defense leaders have recently rejected an expansive definition of "confidential reporting" that would allow the charging of a service member with sexual assault while his victim remained anonymous.[82]

In promulgating its new sexual assault policy, the DOD has committed itself to a policy that will provide for confidential reporting.[83] Although recognizing the importance of confidentiality to victims in reporting and treatment, the DOD apparently believes that such options already exist.[84] For instance, an Army task force found that satisfactory levels of privileged and confidential avenues of communication already exist, but the avenues are not widely recognized.[85] This acceptance of the status quo apparently relies on a belief that chaplains and psychotherapists can satisfy any victim needs for confidentiality.[86] This reliance is misplaced and based on flawed assumptions.

Foremost among these assumptions is the belief that military chaplains possess an absolute evidentiary privilege for *all* communications they receive and can, therefore, provide an avenue of

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[80] *Hearing to Examine Policies and Programs for Preventing and Responding to Incidents of Sexual Assault in the Armed Forces Before the Personnel Subcommittee, Senate Armed Services Committee*, 107th Cong., 150 Cong. Rec. D 111 (Feb. 25, 2004) (statement Christine Hansen, Executive Director, The Miles Foundation, *at* http://www.globalsecurity.org/military/library/congress/2004_hr/040225-hansen.pdf).

[81] Pam Zubeck, *Report Draws Line On Confidentiality*, COLO. SPRINGS GAZ., Nov. 30, 2004, at A1.

[82] Dr. Chu Briefing , *supra* note 12.

[83] JTF-SAPR-009 Memo, *supra* note 48. The new DOD sexual assault policy apparently settles a prior debate over the concept of "confidentiality." Previous service task forces have sometimes questioned the value of confidential reporting. Officials at the Air Force Academy viewed a confidential reporting policy as giving the victim "a disparate amount of control over the situation" and working "at odds with the need for investigation and punishment of offenders." AIR FORCE ACADEMY REP., *supra* note 22, at 19.

[84] *See generally* DOD TASK FORCE REP., *supra* note 14, at 30-32.

[85] THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES 17 (27 May 2004).

[86] *See generally* DOD TASK FORCE REP., *supra* note 14, at 30-32.

confidential reporting for sexual assault victims.[87] The notion of absolute chaplain confidentiality is based on MRE 503, the Communications to Clergy privilege.[88] While chaplains may, due to their own professional standards, keep communications confidential, their legal ability to withhold sexual assault victim communications from disclosure is unclear. Chaplains possess a privilege limited only to statements made by the declarant as an act of conscience or religion.[89] In the past, the Court of Appeals for the Armed Forces (CAAF) has stated, even more bluntly: "A communication is not privileged, even if made to a clergyman, if it is made for emotional support and consolation rather than as a formal act of religion or as a matter of conscience."[90] More recently, the CAAF focused on the role of the chaplain, rather than the nature of the statement: "When a chaplain questions a penitent in a confidential and clerical capacity, the results may not be used in a court-martial because they are privileged."[91] The limited nature of MRE 503 does not address the other question of whether a victim would desire or

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[87] The Deputy Secretary of Defense's memorandum on confidentiality for sexual assault victims references the protections of privileged communications with a chaplain. JTF-SAPR-009 Memo, *supra* note 48. The United States Army Sexual Assault website promises confidentiality when a victim speaks with a chaplain concerning a sexual assault. United States Army Sexual Assault Prevention and Response Website, Response and Care, I Have Been Sexually Assaulted. What Should I Do?, http://www.sexualassault.army.mil/ResponseandCare.cfm (last visited Jan. 13, 2005) ("[C]haplains are confidential counseling channels: they will not reveal the sexual assault to anyone else without a victim's consent."). The Air Force model for sexual assault victim support states that "the liaison may provide information on the availability of confidential counseling provided by the installation chaplains." SECRETARY OF AIR FORCE Memo, *supra* note 73. The Air Force Academy report also recognizes that chaplains "play an important role in responding to the needs of individual facing a personal crisis." AIR FORCE ACADEMY REP., *supra* note 22, at 77.

[88] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2002) [hereinafter MCM].

[89] United States v. Napoleon, 46 M.J. 279, 285 (1997).

[90] *Id*. *Cf*., United States v. Isham, 48 M.J. 603, 606 (N-M. Ct. Crim. App. 1998) (holding that the declarant must only view the chaplain as a spiritual advisor and intend that the communication remain confidential in order for the communication to be privileged). Under this expansive reading of the privilege, communications from a sexual assault victim to a chaplain would almost certainly be privileged.

[91] United States v. Benner, 57 M.J. 210, 212 (2002). The CAAF possesses an opportunity to resolve ambiguities about MRE 503 in the immediate future. The Army Court of Criminal Appeals refused to expand the privilege to cover statements made during a marriage counseling session. United States v. Shelton, 59 M.J. 727, 732 (Army Ct. Crim. App. 2004). The CAAF has granted a petition for review to determine whether the privilege was incorrectly interpreted. United States v. Shelton, 60 M.J. 314 (2004).

seek the services of a chaplain to report an offense.[92] Furthermore, MRE 503 was clearly not intended as a vehicle for the reporting of sexual assaults.[93] Its use in this manner would need to survive Sixth Amendment scrutiny in the matter discussed in Section V, *infra*. In addition to questionable reliance on chaplains, dependence on psychotherapists for confidential reporting is also problematic. First, a strong stigma still exists in America to avoid engaging in psychotherapy for fear of being labeled as crazy.[94] Second, the accessibility of psychiatrists or psychologists to deployed victims is unclear.[95]

The new DOD sexual assault policy provides a laundry list of reforms.[96] Only the future will tell whether any of these measures will actually reduce the number of military sexual assaults. On a sobering note, some studies suggest that education programs produce little effect on rates of victimization.[97] Furthermore, reducing the sexual assault rate still does nothing to ease the daunting challenges, discussed in Section

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[92] Military chaplains, overwhelmingly male and usually in their mid-thirties or older, represent a different social demographic than the typical sexual assault victim. Studies have shown that female sexual assault victims prefer to relate to other females. Daniel Silverman, *The Male Counselor and the Female Rape Victim*, *in* THE RAPE CRISIS INTERVENTION HANDBOOK 193 (Sharon McCombie ed., 1980). It is unclear how the religious preferences of a victim affect whether they are inclined to report a sexual assault to a chaplain. DOD TASK FORCE REP., *supra* note 14, at 31. Furthermore, the relationship between a non-religious person and a chaplain may not survive the Utilitarian tests for a privilege. *See* Section III.A., *infra*.

[93] Military Rule of Evidence 503 was intended to follow proposed FRE 506(a)(2). MCM, *supra* note 88, MIL. R. EVID. 503 analysis, at A22-39. Federal Rule of Evidence 506(a)(2) was intended to follow the common law practice of the states on the priest-penitent privilege. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE 223 (4th ed. 2001). Most state evidentiary codes contain both some type of clergy privilege and sexual assault counselor privilege, indicating two distinct roles. Consequently, the common law priest-penitent privilege is not a vehicle for reporting sexual assaults.

[94] Resick, *supra* note 15, at 249.

[95] The U.S. Navy only began adding a clinical psychologist to medical department of aircraft carrier battle groups in 1998. Captain Dennis P. Wood, *Psychiatric Medevacs During a 6-Month Aircraft Carrier Battle Group Deployment to the Persian Gulf: A Navy Force Health Protection Preliminary Report*, 168 MIL. MED. 43, 46 (2003). The aircraft carrier medical department is responsible for the needs of over 12,000 personnel. *Id*. at 43.

[96] *See* Section II.B.3., *supra*.

[97] Karen Bachar & Mary P. Koss, *From Prevalence to Prevention: Closing the Gap Between What We Know About Rape and What We Do*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 133 (Claire M. Renzetti et al. ed., 2001). "[I]t has not been empirically established that these programs can accomplish the mutually exclusive goals of rape prevention and rape avoidance/resistance education in a way that is effective and that does not polarize program participants." *Id*. at 136.

IV.A.3.a., *infra*, faced by someone already victimized. Increasing the effectiveness of victim advocates, on the other hand, would provide tangible benefits to victims of sexual assault.[98] A meaningful victim advocate system for the military requires that a grant of absolute confidentiality protect the advocate-victim relationship. This can only be achieved through codification of an unqualified evidentiary privilege within the MRE.

III. Privileges in the Military

Creation of a privilege involves more than issuing a policy memorandum directing a confidential relationship. The only way to remove the conversations between advocates and victims from the criminal process is the creation of an evidentiary privilege recognizing the confidentiality of the victim-victim advocate relationship. This privilege, under the MRE, would preclude the defense exploring this relationship during discovery or trial.

A. Privileges Under the MRE

Military Rules of Evidence codify specific privileges, many deriving from the common law.[99] These include a lawyer client privilege,[100] a privilege for communications to clergy,[101] a husband-wife privilege,[102] a privilege for classified information,[103] an informant privilege,[104] and a psychotherapist-patient privilege.[105] Professor Lederer described the theory behind this specific enumeration of the different privileges as arising "because many military personnel were stationed in places where they did not have easy access to legal advice, accessibility and certainty required the adoption of specific privilege rules."[106] Controlling the admissibility of evidence in courts-martial, the MRE currently do not

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[98] *See infra* Section IV.A.
[99] United States v. McElhaney, 54 M.J. 120, 131 (2000); Fredic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 15 (1990).
[100] MCM, *supra* note 88, MIL. R. EVID. 502.
[101] *Id.* MIL. R. EVID. 503.
[102] *Id.* MIL. R. EVID. 504.
[103] *Id.* MIL. R. EVID. 505.
[104] *Id.* MIL. R. EVID. 507.
[105] *Id.* MIL. R. EVID. 513.
[106] Lederer, *supra* note 99, at 15.

contain a privilege concerning the interactions between a victim advocate and a sexual assault victim.

The lack of an expressly codified advocate-victim privilege does not categorically preclude its recognition in a court-martial. Courts-martial may still apply rules of evidence from the federal system. The military rules are closely related to the federal criminal system. Article 36 of the UCMJ requires that military courts-martial follow the Federal Rules of Evidence (FRE) and procedure to the extent that the President considers them practicable to the military.[107] Military Rule of Evidence 101(b) directs military courts to utilize "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[108] Military Rule of Evidence 1102 provides that changes to the FRE are automatically reflected in the MRE after the passage of two years.[109]

Despite these connections, changes to the FRE do not automatically translate into changes in the MRE.[110] Military courts should use caution when applying federal statutes and rules of evidence to the military system.[111] Some commentators and judges have argued that the existence of a separate military criminal justice system apart from the federal system proves congressional intent to keep the two systems separate.[112] This indicates a preference for deliberate changes as put forth by the President, rather than application of civilian statutes.[113] When interpreting whether to apply a federal evidentiary rule, the CAAF has examined the degree of uniformity in the federal courts.[114] Uniformity alone, however, does not guarantee the transfer of an evidentiary rule. The CAAF has rejected interpretations that run contrary to the principles of the *Manual for Courts-Martial* or the UCMJ.[115]

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[107] UCMJ art. 36 (2002).
[108] MCM, *supra* note 88, MIL. R. EVID. 101(b).
[109] *Id.* MIL. R. EVID. 1102.
[110] United States v. McElhaney, 54 M.J. 120, 124 (2000).
[111] *Id*. at 126.
[112] *Id*.
[113] *Id*.
[114] United States v. McCollum, 58 M.J. 323 n.3, 337 (2003).
[115] *Id.* at 341.

B. Privileges Under the FRE

If the FRE recognize a privilege between victim advocates and victims, the MRE might apply the privilege, as well. One of the largest diversions between the FRE and the MRE, however, occurs in the area of privilege law. Unlike the MRE, the Federal Rules are deliberately vague on the parameters of privilege law.[116] In approving FRE 501, Congress rejected nine proposed areas of privileged communications.[117] When analyzing privileges in criminal cases under the FRE, Rule 501 states that principles of common law, as interpreted by the federal courts, govern the law of privileges.[118] The Supreme Court has explained that this allows a development of privilege law to evolve with the nation's history.[119] The Federal common law on privilege rarely addresses the issue of communications between victim advocates and sexual assault victims.[120] When this issue has been litigated, federal courts have treated the advocate-victim privilege as an expansion of the psychotherapist-patient privilege.[121] Consequently, an understanding of the psychotherapist-patient privilege is required for analysis of an advocate-victim privilege.

C. Psychotherapist-Patient Privilege in Federal Courts

When codified, the FRE did not enumerate a specific psychotherapist-patient privilege. Instead, the psychotherapist-patient privilege gradually grew on a case-by-case basis. Eventually, the United States Supreme Court ruled on the scope of the privilege in 1996.[122] Since then, federal courts have gradually expanded the contours of the privilege.

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116 WEISSENBERGER & DUANE, *supra* note 93, at 198.
117 *Id*.
118 FED. R. EVID. 501.
119 Jaffee v. Redmond, 518 U.S. 1, 9 (1996).
120 Federal courts seldom handle sexual assault cases. *See generally* Lederer, *supra* note 99, at 21.
121 United States v. Lowe, 948 F.Supp. 97, 99 (Mass. Dist. Ct. 1996).
122 Jaffee v. Redmond, 518 U.S. 1 (1996).

1. Jaffee v. Redmond

As discussed earlier, the FRE left the development of privilege law to the federal courts. By 1996, a split had developed amongst the circuits regarding the recognition of a psychotherapist-patient privilege.[123] In *Jaffee v. Redmond*, the Supreme Court resolved the split by creating an unqualified federal psychotherapist-patient privilege.[124] The case originated from a police shooting in 1991.[125] On 27 June 1991, Mary Lu Redmond, a police officer for the Village of Hoffman Estates in Illinois, shot and killed Ricky Allen.[126] Subsequent to the incident, Ms. Redmond attended approximately fifty counseling sessions with a licensed clinical social worker.[127] These counseling sessions were for treatment purposes.[128] Litigation of the privilege arose when Ms. Redmond and the social worker refused to provide the counseling notes or answer questions about the counseling sessions during the discovery process.[129]

The case eventually made it to the United States Supreme Court which recognized a federal psychotherapist-patient privilege in a 7-2 opinion.[130] Writing for the majority, Justice Stevens relied on a utilitarian[131] analysis to support the creation of the psychotherapist-patient privilege.[132] Justice Stevens conducted a balancing test, finding that the privilege's benefits outweighed the cost in lost evidence.[133] He also cited a nearly unanimous trend among state evidentiary codes.[134] In recognizing the privilege, however, he left the burden of defining its parameters to the lower federal courts, preferring instead to allow other courts to "delineat[e] [its] contours."[135] Justice Stevens did say, however, that privilege, when existing, was absolute.[136]

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[123] *Id.* at 7.
[124] *Id*. at 1.
[125] *Id*. at 3.
[126] *Id*.
[127] *Id*. at 5.
[128] *Id*. at 7 n.5.
[129] *Id*.
[130] *Id*. at 15.
[131] See Section IV.A., *infra*, for a discussion of the Utilitarian rationale for privileges.
[132] Carolyn Peddy Courville, *Rationales For the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 HOUS. L. REV. 187, 197 (1998).
[133] *Jaffee*, 518 U.S. at 15.
[134] *Id*. at 14.
[135] *Id*. at 18. In dissenting, Justice Scalia disagreed with the majority on a number of points. First, Justice Scalia looked at the same cost-benefit analysis as the majority and reached a different result, believing instead that the privilege could become a mechanism

2. Expansion of the Federal Psychotherapist-Patient Privilege

The federal courts have not significantly expanded the scope of the psychotherapist-patient privilege since the *Jaffee* decision.[137] Some federal case law does, however, support recognition of an evidentiary privilege for victim advocates.[138] Other cases expand the psychotherapist-patient privilege to apply to communications made to members of employee assistant programs.[139] Employee Assistance

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for injustice. *Id*. at 19 (Scalia, J., dissenting). Justice Scalia also took issue with the majority's analysis of the importance of a privilege to the psychotherapist-patient relationship, noting that the relationship had flourished without a federal privilege up to that time. *Id*. at 24 (Scalia, J., dissenting). He also noted that other, more critical relationships exist without the assistance of a privilege. *Id*. Justice Scalia also disagreed with the decision to expand the privilege to social workers, arguing that no consensus on the definition of or need for social workers existed. *Id*. at 29-35 (Scalia, J., dissenting). *See generally* Courville, *supra* note 132, at 217, for a rebuttal of Justice Scalia's assertions about the validity of the psychotherapist-patient privilege.

[136] *Jaffee*, 518 U.S. at 18.

[137] In the immediate aftermath of *Jaffee*, the Seventh Circuit refused to expand the new privilege in a criminal case to statements made by a defendant to workers at an Alcoholics Anonymous hotline in the case of *United States v. Schwensow*. 151 F.3d 650 (7th Cir. 1998). The *Schwensow* court based its decision on a finding that the purpose of the hotline workers involved facilitation and encouragement, rather than treatment or diagnosis. *Id*. at 658. Likewise, the Eighth Circuit refused to expand *Jaffee* to encompass an "ombudsman privilege" in *Carman v. McDonnell Douglas Corp.*. 114 F.3d 790, 791 (8th Cir. 1997). The *Carman* court stated that, although alternative dispute resolution benefits society, "far more is required to justify the creation of a new evidentiary privilege." *Id*. at 793. The court also stated that the benefits of the ombudsman program would still accrue without the presence of an evidentiary privilege. *Id*. at 794.

[138] *United States v. Lowe* is most closely on point. In it, the district court held that a federal privilege exists for communications between a victim and a rape crisis counselor as defined by Massachusetts. 948 F.Supp. 97 (Mass. Dist. Ct. 1996). As defined by Massachusetts, a rape crisis counselor was not a licensed social worker or psychotherapist. *Id*. at 99.

[139] The Ninth Circuit has expanded the psychotherapist-patient privilege to include workers from employee assistance programs (EAPs) in the case of *Oleszko v. State Compensation Ins. Fund*. 243 F.3d 1154, 1159 (9th. Cir. 2001). District courts outside the Ninth Circuit have also recognized the importance of EAPs. *Greet v. Zagrocki* involved an attempt by a plaintiff to discover files from a police department's EAP program. The court characterized the EAP program as "engag[ing] in sensitive counseling on problems of alcohol dependency." 1996 U.S. Dist. LEXIS 18635 (E. Dist. Pa., 1996).

Programs perform roles analogous to those performed by victim advocates in the military.[140]

D. Psychotherapist-Patient Privilege in Courts-Martial

As discussed previously, the MRE contain a psychotherapist-patient privilege. One would have expected that, given the close proximity between the military and FRE, the psychotherapist-patient privilege would have become immediately effective upon the decision in *Jaffee v. Redmond*.[141] Instead, the psychotherapist-patient privilege did not exist in courts-martial until 1998 and operates differently today than its operation in federal courts.

1. United States v. Rodriguez

The CAAF evaluated the applicability of the *Jaffee* decision to courts-martial in the case of *United States v. Rodriguez*.[142] Writing for the majority, Judge Crawford began her analysis by examining the relationship between the MRE and the FRE.[143] Judge Crawford noted that, unlike the FRE, the MRE were issued by the President.[144] In contrast to the Federal Rules' empowerment of courts to develop privilege law, the President specified a number of privileges for military courts to recognize, reflecting a belief in the importance of certainty for

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[140] The *Oleszko* court described an EAP's job description as "extract[ing] personal and often painful information from employees in order to determine how to best assist them." *Oleszko*, 243 F.3d at 1157.

[141] See Section III.A., *supra*, for a discussion on the relationship between the MRE and the FRE.

[142] 54 M.J. 156, 157 (2000). The case arose after Specialist (SPC) Hector Rodriguez, U.S. Army, shot himself in the stomach, allegedly to avoid duty. *Id*. at 156. While recovering from the wound, Specialist Rodriguez received treatment from a civilian psychiatrist to whom he admitted intentionally shooting himself. *Id*. at 157. SPC Rodriguez's defense counsel attempted to suppress this statement under the psychotherapist-patient privilege recognized in *Jaffee*. *Id*. Unlike previous cases in military service courts that examined the scope of *Jaffee v. Redmond* in relation to courts-martial, the *Rodriguez* case occurred after the President promulgated MRE 513, the military version of the psychotherapist-patient privilege. *Id*. at 160. For another military appellate court case on this issue, *see United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999).

[143] *Rodriguez*, 54 M.J. at 157.

[144] *Id*.

military courts on evidentiary rules.[145] Judge Crawford then turned her attention to MRE 501.[146] Military Rule of Evidence 501 allows a party to claim a privilege if it is provided in "principles of common law generally recognized in the trial of criminal cases in the United States district courts . . . insofar as the application . . . is practicable and not contrary to or inconsistent with the code, these rules, or this manual."[147] Judge Crawford explained that the President intended to provide flexibility for military courts through the use of this provision.[148] Judge Crawford held that the President did not intend for military courts to follow *Jaffee*, as it was decided, holding that MRE 501(d), which expressly prevents a doctor-patient privilege in the military, prevented military courts from recognizing the psychotherapist-patient privilege until the promulgation of MRE 513, via executive order.[149]

United States v. Rodriguez clearly stands for the proposition that the FRE and the MRE are distinct. This interpretation precludes the notion that the MRE simply mirror the federal rules and should be interpreted in the same way. The decision also limits the ability of military courts-martial to apply privileges that are not expressly codified.[150] This interpretation appears to conflict with MRE 501,[151] which the drafters of the MRE felt allowed adoption of privileges that had not been codified.[152]

2. Scope of MRE 513

Military Rule of Evidence 513 establishes the psychotherapist-patient privilege for evidence in courts-martial.[153] Military Rule of

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[145] *Id*.
[146] *Id*.
[147] MCM, *supra* note 88, MIL. R. EVID. 501(a)(4).
[148] *Rodriguez*, 54 M.J. at 158.
[149] *Id*. at 161.
[150] *Cf*., U.S. v. McCollum, 58 M.J. 323, 341 (2003) which implies that the MRE can be interpreted outside their express scope, assuming a uniformity in federal and state interpretation.
[151] MCM, *supra* note 88, MIL. R. EVID. 501.
[152] Lederer, *supra* note 99, at 27. When describing MRE 501, Professor Lederer stated: "As a result, military law has a body of specific privileges and may adopt other new privileges that are accepted by the federal district courts." *Id*.
[153] MCM, *supra* note 88, MIL. R. EVID. 513. Military Rule of Evidence 513 was promulgated via executive order in 1998. For general discussion on the applicability of MRE 513, *see* Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to*

Evidence 513 consists of five portions: the general rule, definitions, the owner of the privilege, exceptions to the privilege, and a procedure for determining the privilege's applicability.[154] The provisions of MRE 513 make the military's psychotherapist-patient privilege significantly more limited in scope than the corresponding expansive federal privilege. Military Rule of Evidence 513 states the privilege does not apply to evidence of certain crimes. These circumstances include when the communication constitutes evidence of "spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse."[155] Additionally, the military psychotherapist-patient privilege contains broad escape clauses for safety purposes. Subparagraph (d)(6) states that the privilege does not apply when the safety of military personnel, dependents, or security of classified information is at stake.[156] Likewise, no privilege exists when the patient either poses a danger to another person or themselves.[157] Military Rule of Evidence 513 specifies that disputes over its privilege are settled with a hearing[158] and, if necessary, an *in camera* review.[159] This methodology of revealing confidential information to the military judge amounts to a qualified, rather than an absolute, psychotherapist-patient privilege for the military. It also establishes MRE 513 as a second-tier privilege; unlike the attorney-client, marital, and communications to clergy privileges which have no provision for *in camera* review.

Some would argue that MRE 513, as it presently exists, already covers victim advocates. This proposition is incorrect for several reasons. First, the plain language of MRE 513 does not include victim advocates. Subparagraph (b)(2) defines psychotherapist as a "psychiatrist, clinical psychologist, or clinical social worker who is licensed . . . to perform professional services."[160] Generally, courts construe statutes and rules according to their plain language which

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Protect Communications of Victims and Witnesses to Psychotherapists, ARMY LAW., Sept. 2003, at 1; Lieutenant Colonel R. Peter Masterton, *The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?*, ARMY LAW., Nov. 2001, at 18.

[154] Military Rule of Evidence 513 may be viewed in its entirety in app. A, *infra*.

[155] MCM, *supra* note 88, MIL. R. EVID. 513(d)(2).

[156] *Id.* MIL. R. EVID. 513(d)(6).

[157] *Id.* MIL. R. EVID. 513(d)(4).

[158] The military judge must conduct a hearing outside the presence of members. *Id.* MIL. R. EVID. 513(e)(2).

[159] If necessary to make a decision on the motion, the military judge must also conduct an *in camera* review of the evidence in question. *Id.* MIL. R. EVID. 513(e)(3).

[160] *Id.* MIL. R. EVID. 513(b)(2).

would, in this case, omit victim advocates.[161] The CAAF has already stated that, owing to the President's flexibility in drafting executive orders, it will only apply changes to rules based on "express language, rather than [language that is] pressed or squeezed" from the text.[162]

Another reason to doubt that MRE 513 already encompasses victim advocates stems from the reluctance of the CAAF to make what is, in essence, a policy judgment on the degree of confidentiality that the victim advocate-victim relationship should enjoy. The CAAF has already held that policy issues are best left to "the political and policy-making elements of the government."[163] Finally, MRE 513 limits the scope of the privilege to statements "made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[164] As discussed in Section II.C.2., *supra*, service regulations prohibit victim advocates from providing any form of treatment or professional counseling to sexual assault or domestic violence victims.

IV. Justification For Expanding MRE 513 to Include Victim Advocates

As discussed above, MRE 513 clearly does not encompass the advocate-victim relationship. Furthermore, the *Rodriguez*[165] case stands for the proposition that the codification of specific privileges in the MRE restricts the ability of military courts to recognize new privileges. Therefore, recognition of an advocate-victim privilege requires an executive order modifying MRE 513. Modifying MRE 513, rather than codification of a new MRE, is proposed in keeping with the trend in federal courts to expand the psychotherapist-patient privilege to cover this relationship.[166] This section discusses the justifications for the promulgation of a new MRE 513 via executive order. As discussed in Section III.C.1., *supra*, the Supreme Court demonstrated the framework for evaluating the recognition of a new evidentiary privilege in the case of *Jaffee v. Redmond*.[167] In evaluating the psychotherapist-patient

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[161] United States v. McCollum, 58 M.J. 323 (2003).
[162] *Id*. at 340.
[163] *Id*. at 342.
[164] MCM, *supra* note 88, MIL. R. EVID. 513(a).
[165] 54 M.J. 156 (2000).
[166] *See supra* Section III.C.2. Regardless of whether MRE 513 is modified or a new MRE is created, the justifications for the privilege remain the same.
[167] 518 U.S. 1 (1996).

privilege, the Supreme Court conducted both a balancing test and an evaluation of emerging state evidentiary trends.[168]

A. Utilitarian Balancing Test Supports the Proposed Privilege

The traditional Utilitarian Model for evaluation of the worthiness of an evidentiary privilege is attributed to Dean John Henry Wigmore. Dean Wigmore evaluated privileges on the basis of four conditions.[169] The Utilitarian Model for a privilege allows for the empirical evaluation of the privilege's validity by applying a cost-benefit type analysis to the exclusion of evidence.[170] In other words, benefit from the privilege must outweigh the cost from excluding the particular evidence. The examination of the societal benefit as proposed by the privilege is, in fact, a two part analysis. First, the court evaluates the magnitude of the proposed benefit.[171] The second portion of the analysis involves determining the extent to which the aforementioned benefits would decline if the relationship were stripped of a portion of its confidentiality.[172] In developing Federal common law on privilege, Federal courts have interpreted the Utilitarian Model and Supreme Court guidance as placing a significant burden on parties seeking to establish a new privilege; the party advocating the new privilege bears the burden of showing a public good worth the cost of excluding evidence.[173]

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[168] *Id*. at 11-13.

[169] Dean Wigmore proposed that a privilege existed if four conditions could be met. They were:

> (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation (emphasis in original).

JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

[170] Courville, *supra* note 132, at 197.

[171] Carman v. McDonnell Douglas Corp., 114 F.3d 790, 793 (8th. Cir. 1997).

[172] *Id*.

[173] Trammel v. United States, 445 U.S. 40, 50 (1979).

In the case of our proposed privilege, the loss to society consists of a potentially relevant witness (the victim advocate) and evidence (statements by the victim) in sexual assault trials. The harm suffered by the defense from the loss of this evidence is minimal. Since victim advocates are discouraged from discussing details of the case with the victim, the lost evidence will relate to impeachment material such as a victim's self-blame or regret over the legal process. This evidence has limited probative value since it is a common emotional reaction for victims of sexual assault, regardless of whether it is true or not.[174] Furthermore, the defense is losing out on evidence that will not exist, but for the presence of a privilege. Without assurances of confidentiality, victim communications with advocates will decrease significantly.[175] Additionally, this evidence could be obtained by questioning the victim directly.[176] Rather than truly harm the defense, the privilege will deprive the accused of one odious potential tactic in their campaign of psychological warfare against the victim (if they choose to wage one).[177] As demonstrated below, this loss of evidence is clearly outweighed by the multiple benefits of granting a privilege to the advocate-victim relationship.

1. Privilege Benefits Society By Aiding Victim Recovery

Numerous benefits result from affording a privilege to the advocate-victim relationship. First and foremost, the privilege will provide the essential element of confidentiality to the relationship.[178] The DOD's new sexual assault policy relies heavily on victim advocates to improve the plight of sexual assault victims.[179] Empirical evidence indicates that sexual assault victims view the assistance provided by victim advocates

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[174] Notman & Nadelson, *supra* note 21, at 135.

[175] Leslie A. Hagen & Kim Morden Rattet, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T.M. COOLEY L. REV. 183, 189 (2000).

[176] The proposed privilege would not prohibit the defense from asking the victim at the Article 32 hearing or other interview whether she feels guilty or at fault for the sexual assault. What would be prohibited is defense interviews of the victim advocate to inquire about these topics.

[177] Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARV. WOMEN'S L.J. 14, 15 (1997).

[178] Dean Wigmore's second element is that "confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties." WIGMORE, *supra* note 169, § 2285.

[179] JTF-SAPR-008 Memo, *supra* note 48.

as the most important component in their recovery.[180] Confidentiality is an essential component in the relationship between the advocate and victim.[181] Removing guarantees of confidentiality will decrease the likelihood that victims will seek the support of a victim advocate and obtain future medical treatment.[182] Confidentiality remains paramount throughout the relationship until its conclusion.[183] Second, a guarantee of an absolute privilege will assist victims in overcoming the lack of trust that they place in the system. Studies have shown that interactions with treatment and legal personnel foster feelings of distrust among sexual assault victims.[184] Providing victim advocates with an absolute evidentiary privilege represents one potential way for advocates to establish the trust of a victim. The victim advocate represents an important gatekeeper in encouraging the victim to seek psychological treatment, as often more than mere crisis action is required for the victim.[185] This method of gaining trust may be even more critical in the advocate-victim relationship as contemplated by the Army, where active duty soldiers will serve as victim advocates.[186] In all likelihood, successful implementation of the Army's victim advocate program will require a privilege for its active duty victim advocates.[187]

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[180] Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 265 (1995).

[181] HANSEN, *supra* note 24.

[182] Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695, 698-700, 709 (2001).

[183] Hagen & Rattet, *supra* note 175, at 189 ("drastic change in the dynamics between healer and victim . . . ").

[184] Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 268 (1999). Mental health professionals perceived that interactions with "community professionals" left rape victims "feeling distrustful of others." *Id*.

[185] Foa, et al., *supra* note 65, at 271.

[186] *See supra* Section II.C.2, for a discussion of the Army's planned utilization of victim advocates.

[187] An active duty victim advocate will already be operating at a disadvantage. The 2004 task force found that service members prefer to report incidents of sexual assault to agencies outside of the military. DOD TASK FORCE REP., *supra* note 14, at 29. The 2004 task force also made a finding that victim advocacy programs operated by full-time civilians are more effective than their military counterparts. *Id*. at 35.

2. Privilege Benefits Society by Allowing for Collaboration

The new DOD sexual assault policy requires that commanders take affirmative steps to collaborate with civilian agencies in responding to sexual assaults.[188] A large disparity currently exists, however, between the rules of privilege between the two systems.[189] Effective collaboration will require uniformity between the two systems. The issue of an advocate-victim privilege can effectively derail cooperation between military and civilian systems.[190] Demands for military discovery may potentially subject civilian response personnel to loss of funding, certification, and even criminal penalties for violating state or federal privacy law.[191] If victims have interacted with civilian advocates they may have an expectation of privacy in their interactions with victim advocates. Civilian victim advocates often advertise an absolute privilege of confidentiality.[192]

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[188] JTF-SAPR-010 Memo, *supra* note 48.

[189] *See infra* app. C, for a listing of state evidentiary privileges that apply to victim advocates (as opposed to the MRE which do not recognize the privilege).

[190] The author has been in the interesting position of attempting to enforce a military judge's order that a victim advocate employed by a California county disclose victim communications to a defense counsel. The state district attorney supervising the victim advocate adamantly refused to have the victim advocate comply. More recently, a military judge threatened to have a Colorado rape counselor arrested for refusing to turn over records of sessions with a victim. Associated Press, *Cadet Rape Halted Over Refusal On Files*, NEW YORK TIMES, June 25, 2005, http://www.nytimes.com/2005/06/25 /national/25rape. html?ex=1124424000&en=ed3ae11f705e26d9&ei=5070.

[191] Discussion of the effects of the Health Insurance Portability and Accountability Act (HIPAA) on rape crisis centers is beyond the scope of this article. For a general discussion of HIPAA, *see* Tamela J. White & Charlotte A. Hoffman, *The Privacy Standards Under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos*, 106 W. VA. L. REV. 709, 726-27 (2004).

[192] The City of San Diego Police Department, Your Rights as a Survivor of Sexual Assault, http://www.sannet.gov/police/prevention/rights.shtml (last visited Jan. 30, 2005).

> *You have the right to CONFIDENTIALITY with your victim advocate***.** Anything that is said between you and your victim advocate is held in the strictest confidence. Your advocate from the Rape Crisis Center *DOES NOT* work for the police department or the district attorney's office, and will not disclose any information you discuss in private without your written consent.

Id. (emphasis in original).

3. Privilege Benefits Society by Reducing Re-Victimization

The legal redress that society provides to its sexual assault victims may sometimes result in their re-victimization.[193] Some studies even indicate that participation in the legal process impairs the recovery of a sexual assault victim.[194] Due to the inherent trauma present in testifying against their attacker, it is nearly impossible to prevent the criminal process from adversely affecting the victim.[195] Military conditions place sexual assault victims in the military at a disadvantage, relative to their counterparts in civilian society. Expanding the scope of MRE 513 to include victim advocates represents a necessary step in helping sexual assault survivors cope with re-victimization.

a. Re-Victimization Through the Military Criminal Process

The military's increased re-victimization of sexual assault survivors occurs due to multiple conditions. First, the rules of discovery in the military contribute to re-victimization. This re-victimization often occurs due to the increased access to the victim that military defense counsel, as opposed to their civilian counterparts, enjoy.[196] Junior enlisted victims endure a disparate power status when they interact with commissioned officers serving as defense counsel. Discovery also impacts a broader spectrum of the military victim's life than her civilian counterpart's. Unlike civilian society, service members in the military often do not possess a social sphere outside of the work environment.

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[193] Campbell & Raja, *supra* note 184, at 262 ("Secondary victimization is the unresponsive treatment rape victims receive from social system personnel."). Some of the agencies within the DoD have begun to recognize this problem. Marine Corps Order 1752.5 recognizes the problem with potential re-victimization. Marine Corps Order 1752.5, *supra* note 74, para. 3.c. ("Sexual assault victims have at times been considered responsible for their predicament and are sometimes re-victimized by those in a position to assist.").

[194] Patricia Cluss et al., *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 CRIM. JUST. & BEHAV. 354-55 (1983). "[D]ata analyses support the suggestion that participating in the prosecution of a rape case may be disruptive for the victim." *Id*. at 354.

[195] Resick, *supra* note 15, at 243 ("'testifying in court' emerged as one of the most fear-provoking stimuli reported by victims").

[196] *See generally* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 395 (5th ed. 1999). As part of the military discovery process, the author believes that trial counsel should routinely encourage all government witnesses, including victims, to speak with the defense counsel.

Phrased another way, junior service members live in close proximity to their colleagues and experience little separation in their professional and private lives. Empirical evidence substantiating this problem exists in the reasons given for low reporting rates of sexual assault at the Air Force Academy. The top two reasons for failing to report were fear of embarrassment and fear of ostracism by peers.[197] This interconnection of social and professional lives allows a defense counsel to completely destroy the privacy of a sexual assault victim, through interviewing her entire social network, spreading and lending credibility to what are often spurious rumors. Consequently, this amounts to a unique form of trauma for sexual assault victims as they observe all their friends and colleagues meeting with defense counsel to discuss any and all rumors of unsavory conduct.

The discovery process can also lead to victims experiencing a sense of betrayal. Service members who are not accused of a crime do not have a choice regarding whether they will talk with a defense counsel.[198] According the victim's perception, however, their fellow service members who provide innocuous good military character evidence to the defense are still taking sides in the case.[199] Victims who view members of their social circle as non-supportive often experience an increased amount of trauma symptoms.[200] Victims also can feel betrayed by the military prosecutor. Although victims sometimes mistakenly view the trial counsel as their attorney, the trial counsel represents the government.[201] Therefore, statements made by a victim to a government prosecutor must be disclosed to the defense if they contain any exculpatory information, leading to a sense of betrayal on the part of the victim.[202] Additionally, the trial counsel's duty in evaluating the

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[197] AIR FORCE ACADEMY REP., *supra* note 22, at 52 (referencing the May 2003 Inspector General survey).

[198] SCHLUETER, *supra* note 196, at 303 ("commanders should take extra care to ensure military members know and understand they have a positive duty to provide any information relevant to an accused's case whether it is favorable or not").

[199] The good military character defense is uniquely available to an accused in the military. *See generally* Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999).

[200] Resick, *supra* note 15, at 244.

[201] UCMJ art. 38 (2002).

[202] MCM, *supra* note 88, RCM 701(a)(6). In addition to its commonly understood definition, exculpatory material also includes impeachment evidence. Knowing these discovery requirements, most trial counsel are loathe to have the victims prepare any type of written statement beyond what has already been taken by criminal investigators. Discovery obligations, however, apply to oral and electronic communications as well.

strength of the case forces a critical evaluation of the victim's credibility, rather than unconditional support.[203]

Finally, Article 32 investigations serve as the crown jewel of re-victimization in the military. Article 32 of the UCMJ requires an "investigation" of charges before the convening of a general court-martial.[204] While representing an important procedural safeguard for the accused, the Article 32 investigation can quickly deteriorate into an exercise in re-victimization when the defense counsel is ruthless.[205] During their Article 32 testimony, victims are routinely questioned about drug use, drinking habits, and sexual behavior.[206] Coupled with demeaning questions, victims often must endure theatrics from defense counsel attempting to satisfy twin goals of browbeating the victim and posturing for their client.[207] Some may argue that the presence of the

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Any correspondence from a victim that indicates frustration with the process, guilt, or reluctance to testify may yield impeachment evidence and should be provided to the defense. Consequently, the trial counsel should automatically turn over to the defense any email or letters they receive from a victim that espouse these sentiments.

[203] *See generally* Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 224 (1991).

[204] MCM, *supra* note 88, RCM 405. As a part of the discovery process, the Article 32 investigation is designed to uncover facts in the case so that the investigating officer may make a recommendation to the general court-martial convening authority on the disposition of charges.

[205] In the author's experience, this problem is more prevalent with retained civilian counsel.

[206] Military Rule of Evidence 412 ostensibly applies at an Article 32 hearing. MCM, *supra* note 88, R.C.M. 405(i). Application of MRE 412 is usually avoided by couching the evidence as "constitutionally required." The discovery-driven purpose of an Article 32 investigation allows defense counsel to delve into areas of limited relevance that would not be admissible at the trial. For example, defense counsel frequently ask questions about victims' sexual practices that would be prohibited under MRE 412 at trial.

[207] The procedural composition of the Article 32 investigation offers no practical form of protection to victims. Although the investigation is usually conducted by a judge advocate, he or she is seldom a military judge. More importantly, no members are present for the investigation. The absence of these individuals, who could easily become inflamed if they felt someone was mistreating a victim, from the proceeding removes any incentive for a defense counsel to treat a victim respectfully. On the other hand, multiple incentives exist for a defense counsel to mount a psychological assault on a victim during an Article 32 exam. First and foremost, a scathing and humiliating cross examination may convince a victim that the limited satisfaction gained from the legal process is not worth its emotional and psychological cost. This humiliation stems from numerous factors ranging from question topics to being laughed at by the accused. Second, the consequence-free Article 32 hearing provides the perfect opportunity for defense counsel to posture and grand-stand for their client. Unfortunately for the victim, much of this conduct comes at her expense.

trial counsel at the Article 32 investigation protects the rights of victims. On the contrary, a shrewd defense counsel understands instead that cross examination of a victim at an Article 32 represents a chance to drive a wedge between the victim and the prosecutor.[208] In response to objectionable questioning, the trial counsel faces two unappealing options. The trial counsel can either object to the questions, knowing he or she will probably be overruled, losing credibility with the victim, or remain silent, making the victim think that no one is standing up for her.[209]

b. Presence of a Confidante Reduces Re-Victimization

Creating a privilege for the relationship between sexual assault victims and their victim advocates provides the victim with one unequivocal ally in the legal process. Refusing to allow an advocate-victim privilege deprives the victim of a confidante. As discussed previously, this deprival eliminates a critical element in the recovery of the sexual assault victim. It also magnifies re-victimization. The Executive Director of the Miles Foundation, Christine Hansen, described the importance of the relationship between a victim and victim advocate by stating: "The presence of a 'confidant' to a victim of domestic or sexual violence is vital to the care and treatment of victims, physically and emotionally."[210] Studies show that sexual assault victims benefit from social support.[211] In the case of victim advocates, this support does not take the form of treatment, but rather an ability to present oneself as an absolute confidante. As discussed above, the trial counsel is utterly incapable of providing the emotional safe-harbor necessary for a victim's emotional health during the criminal process. Relying on chaplains for

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[208] Military Rule of Evidence 412 states that evidence of a sexual assault victim's past sexual activities or character at trial is inadmissible at trial by court-martial. MCM, *supra* note 88, MIL. R. EVID. 412 (2002). This exclusionary rule, unlike an evidentiary privilege, does nothing to keep this information confidential during the discovery process. On the contrary, this material must be given to the defense in order to evaluate the Constitutional validity of its exclusion.

[209] Some readers will respond that the trial counsel can avoid this dilemma through preparation of the victim. The author contends, however, that no amount of preparation will allow a novice victim to understand the true (and sometimes farcical) nature of Article 32 proceedings.

[210] HANSEN, *supra* note 24. The Miles Foundation is a not for profit organization that advocates on behalf of sexual assault and domestic violence victims in the military. Miles Foundation, *at* http://hometown.aol.com/milesfdn (last visited Nov. 16, 2004).

[211] Resick, *supra* note 15, at 246.

absolute confidentiality is also a mistake.[212] Unless the victim is married, she possesses no safe outlet to express her thoughts and feelings about her life and the legal process.[213] The marital relationship provides a privileged outlet for the victim to discuss the case.[214] Unfortunately, studies indicate that over half of female victims of rape ultimately lose their husbands or boyfriends as a result of the psychological strain on the relationship.[215]

B. Proposed Privilege Reflects an Emerging Trend in State Rules

As recognized by the United States Supreme Court in *Jaffee v. Redmond*[216] and by the CAAF in *United States v. McCollum*,[217] trends in state evidentiary law provide persuasive authority for the validity of a privilege.[218] A consensus among states also provides evidence of the common law's "reason and experience" referenced by FRE 501.[219] Owing to the nature of the privilege in question here, state law is even more persuasive. Outside of the District of Columbia, most sexual assault cases are tried under state law, rather than federal law.[220]

State evidentiary codes vary on the degree of confidentiality and privileges that protect the relationships between sexual assault victims and victim advocates. Despite this variance, it is possible to discern a trend toward protecting the communications victims and victim advocates. As of January of 2005, a person providing services in the civilian sector that are equivalent to those provided by a military victim advocate would be covered by an evidentiary privilege in twenty-five of the fifty states.[221] Of these, thirteen states have expressly codified the

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[212] The priest-penitent privilege only applies in cases a formal act of religion or a matter of conscience. See Section II.D., *supra*, for a more thorough discussion of this issue.

[213] A lack of positive support from a spouse may sometimes inhibit the emotional recovery of a victim. Resick, *supra* note 15, at 244.

[214] MCM, *supra* note 88, MIL. R. EVID. 504.

[215] Crenshaw, *supra* note 19, at 51.

[216] 518 U.S. 1 (1996).

[217] 58 M.J. 323 (2003).

[218] In fact, the Supreme Court has stated that "policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 518 U.S. at 12.

[219] *Id*. at 13.

[220] Lederer, *supra* note 98, at 21.

[221] *See infra* app. C.

victim advocate-victim privilege.[222] Another twelve possess expansive sexual assault counselor-victim privileges that would encompass statements made by victims to personnel functioning in a role equivalent to military victim advocates.[223] Nine more states possess restrictive sexual assault counselor-victim privileges that would not include victim advocates.[224] One distinguishing factor in determining whether these privileges would apply to military victim advocates is whether the relationship involves "assistance," rather than "treatment." As discussed in Section II.C.1., *supra*, victim advocates in the DOD do not provide "treatment." Consequently, any state privileges that required that the advocates provide treatment were not construed to cover military victim advocates. Another factor involved whether the employee was operating under the direct supervision of a licensed psychiatrist, psychologist, or social worker. This condition will probably apply to military victim advocates who work for family advocacy programs headed by credentialed personnel; privileges requiring this condition were assumed to apply to military victim advocates. Only sixteen states have no privilege beyond that of the psychotherapist-patient privilege in place to assist victims of sexual assault or domestic violence.[225] Interestingly, three states grant evidentiary privileges to peer support counselors who, while not supporting crime victims, arguably provide the same type of services as military victim advocates.[226]

Some will argue that a fraction of twenty-five of fifty states does not represent enough of a trend to justify a new evidentiary privilege. At the time of its promulgation, the psychotherapist-patient privilege enjoyed significantly more support than the sexual assault counselor-victim privilege currently possesses.[227] Currently, only one United States circuit court has ratified the expansion of the psychotherapist-patient to a broad scope that would include facilitators of mental services.[228] In past

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[222] Alaska; Arizona; Colorado; Florida (domestic violence victim advocate); Kentucky; Maine; Montana; Nevada; Pennsylvania; Vermont (crisis worker); Washington; Wisconsin; Wyoming. *See* app. C, *infra*.

[223] California; Florida; Hawaii; Illinois; Massachusetts; Michigan; Minnesota; New Hampshire; New Jersey; New Mexico; New York; Utah. *See* app. C, *infra*.

[224] Alabama; Connecticut; Indiana; Missouri; Nebraska; Ohio; South Carolina; Virginia; West Virginia. *See* app. C, *infra*.

[225] Arkansas; Delaware; Georgia; Idaho; Iowa; Kansas; Louisiana; Maryland; Mississippi; North Carolina; North Dakota; Oklahoma; Oregon; Rhode Island; South Dakota; Tennessee; Texas. *See* app. C, *infra*.

[226] Hawaii; Louisiana; North Carolina. *See* app. C, *infra*.

[227] Jaffee v. Redmond, 518 U.S. 1 (1996).

[228] Oleszko v. State Compensation Ins. Fund, 243 F.3d 1154 (9th. Cir. 2001).

holdings, the CAAF has hesitated to make changes to privilege law based on only one circuit court.[229] This objection fails, however, due to a lack of proper perspective. If the perspective is changed to analyze how many states provide more protections for sexual assault victims during the legal process than the military's criminal system the answer will be quite uniform- all of the states provide greater protection. An overwhelming majority possess some degree of privileged communications for victims beyond the psychotherapist-patient privilege. In contrast, the military only provides a weakened version of the psychotherapist-patient privilege.[230]

V. Sixth Amendment Ramifications of Expanding MRE 513

Defendants whose cases are harmed by the operation of privileges may attack the validity of the privilege on Constitutional grounds.[231] The Sixth Amendment to the United States Constitution states that "the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."[232] Through the cases of *Davis v. Alaska*,[233] *Washington v. Texas*,[234] and *Pennsylvania v. Ritchie*,[235] the Supreme Court has interpreted this language as giving an accused the right to compulsory process (for the production of evidence) and the right to confront and cross examine witnesses.[236] Additionally, the government possesses an obligation, under *Brady v. Maryland*,[237] to provide all potentially exculpatory material to the defense.[238]

During the 1970s, rape reform laws were enacted to combat the practice of re-victimizing victims during the trial.[239] With their advent, the scope of the defense's areas for cross examination of the sexual assault victim was severely reduced. This reduction places an increased

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229 United States v. McCollum, 58 M.J. 323, 341 (2003).
230 *See supra* Section III.D.2.
231 MCCORMACK ON EVIDENCE 279 (John William Strong ed., 4th ed., 1992).
232 U.S. CONST. amend. VI.
233 415 U.S. 308 (1974).
234 388 U.S. 14 (1967).
235 480 U.S. 39 (1987).
236 MCCORMACK, *supra* note 231, at 279.
237 373 U.S. 83 (1963).
238 *Id.* at 87.
239 Michigan v. Lucas, 500 U.S. 145, 150 (1991).

emphasis on the defense counsel's need to actively seek out any inconsistent statements that the victim may have made concerning the rape or sexual assault.[240] These inconsistent statements represent potential evidence to prove bias or motive to fabricate an allegation.[241]

A. Rights of an Accused Under the Confrontation Clause

The Confrontation Clause involves the right of an accused to confront witnesses against him or her through face-to-face testimony and cross examination.[242] Since the sexual assault victim will be the main witness in the government's case, confrontation concerns regarding in person testimony will ordinarily be satisfied.[243] The accused will argue, though, that the proposed privilege reduces the ability to effectively cross-examine the alleged victim. With rape shield laws already limiting his ability to defend himself, an accused will argue that the Sixth Amendment requires that he be given access to these statements between victims and victim advocates in the hope of finding inconsistencies. The normal emotional reactions of a sexual assault victim include doubts, insecurity, and self blame—all emotions that a defense counsel will classify as exculpatory evidence for impeachment of the victim.[244] Resolution of this issue involves determining whether confrontation only applies at trial or if it applies to the entire courts-martial process, including discovery.[245] The United States Supreme Court sought to delineate the contours of the right to effective confrontation in the case of *Davis v. Alaska*.[246] Here, the Court stated that in order to be effective, cross examination had to be meaningful.[247] The Court took up the issue again in *Pennsylvania v. Ritchie*.[248] This time the Court determined that restrictions on the discovery process did not render cross-examination ineffective.[249]

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[240] Capoccia, *supra* note 23, at 1345.
[241] *Id*. at 1349.
[242] Pennsylvania v. Ritchie, 480 U.S. 39 (1987).
[243] An exception to this would occur if the victim recants and the government attempts to prove the offense through prior testimony or hearsay evidence. The proposed privilege would preclude the victim advocate from testifying for this purpose.
[244] Joo, *supra* note 180, at 264.
[245] Capoccia, *supra* note 23, at 1355.
[246] 415 U.S. 308 (1974).
[247] *Id*. at 320.
[248] 480 U.S. 39 (1987).
[249] *Id*. at 52.

Despite the presence of an advocate-victim privilege, the constitutional right of the accused to effective cross examination is still satisfied. The content of the statements made by the victim to the victim advocate will contain limited probative value if the guidelines of the advocacy program are being followed which preclude discussion of the facts of the case or providing active counseling.[250] The Illinois Supreme Court expressly relied on this lack of probative content while holding that an absolute privilege for sexual assault counselors did not violate the Constitutional rights of a defendant.[251]

B. Rights of an Accused Under the Compulsory Process Clause

The Compulsory Process Clause requires the government to turn over exculpatory information. It also guarantees the accused's right to produce favorable witnesses. Regarding the proposed privilege, the accused would argue that his compulsory process rights are violated through the inability to call the victim advocate as a witness and the failure to provide the statements made by the alleged victim to the victim advocate. The Supreme Court established the right to compulsory process in the case of *Washington v. Texas*.[252] In this case, the Court held that the prohibition on calling witnesses, coupled with a limited scope of cross examination, operated to deny a fair trial to a Texas defendant.[253] One objection to granting an absolute privilege to victim advocates stems from the fact that this privilege would preclude the testimony of a potential defense witness, the victim advocate.[254] In the case of *Ritchie v. Pennsylvania*,[255] the Court compared the compulsory process clause with the due process clause.[256] The Court found that the due process clause afforded protections that were at least equal to the compulsory process clause.[257]

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[250] *See supra* Section II.C.
[251] People v. Foggy, 521 N.E. 2d 86, 91 (Ill. 1988).
[252] 388 U.S. 14 (1967).
[253] *Id*. at 23.
[254] Maureen B. Hogan, Note, *The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling*, 30 B.C. L. REV. 411, 416 (1989).
[255] 480 U.S. 39 (1987).
[256] *Id*. at 51-2.
[257] *Id*. at 56.

The proposed advocate-victim privilege does not violate the Compulsory Process Clause of the Sixth Amendment. The service guidelines for victim advocates generally preclude their exposure to truly probative exculpatory evidence. Instead, the advocate-victim relationship simply creates a potential confidante for sexual assault victims. A privileged confidante is readily available to victims who possess the economic means to hire their own attorney or are presently married. If, *arguendo*, one believes that advocate-victim conversations contain probative impeachment evidence, the proposed privilege should still survive Constitutional scrutiny due to the military's needs as a separate society under *Parker v. Levy*.[258] From an equity standpoint, the accused's rights in the military are already bolstered through the available defense of good military character[259] and procedural protections.[260]

VI. Mechanics of the Proposed Victim Advocate-Victim Privilege

Once one agrees with the imperative need for an advocate-victim privilege in the United States military, the question of how to implement it remains. While most state evidentiary rules enumerate separate sexual assault counselor, victim advocate, and psychotherapist privileges,[261] federal courts recognizing this type of privilege have expanded the federal psychotherapist-patient privilege created by *Jaffee v. Redmond*.[262] Similarly, the author of this article recommends the expansion of MRE 513 to include the proposed advocate-victim privilege, rather than the promulgation of an entirely new MRE.[263] This expansion must exempt victim advocates from the normal mechanics of MRE 513, however, which include an *in camera* review by the military judge of any privileged material in dispute.[264] Defining the privilege requires two variables: the privilege's scope and its parties. The author's proposal for a modified MRE 513 is contained in Appendix B, *infra*. The proposed

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[258] "[M]ilitary society has been a society apart from civilian society . . . ." 417 U.S. 733, 744 (1974).

[259] *See generally* Hillman, *supra* note 199, at 879.

[260] The accused is protected through liberal discovery rules and the Article 32 investigation. *See supra* Section V.B.

[261] *See infra* app. C.

[262] 518 U.S. 1 (1996).

[263] This approach is also consistent with Art. 36, RCM 1102, and MRE 102. *See supra* Section III.A.

[264] *See supra* Section IV.B.2.a.

modifications are contained in bold font. The author's intent is to propose a privilege that is strong enough to accomplish the purpose of giving sexual assault victims a confidante without violating the Sixth Amendment.

A. Absolute, Unqualified Privilege

Regarding the scope of a privilege, the Supreme Court has stated: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[265] This principle argues for an advocate-victim privilege that is absolute. The operation of MRE 513, however, subjects its privilege to an *in camera* review by a military judge.[266] Consequently, in order to meet the needs of the advocate-victim relationship, MRE 513 must be modified in a way that places victim advocates outside of its normal mechanics. Otherwise, *in camera* reviews will completely eviscerate the privilege and the relationship that it seeks to foster.[267] The proposed rule addresses this concern by in subparagraph (e)(6) by removing advocate-victim communications from the delineated procedure to determine admissibility.[268]

The language additions in Subparagraph (d) remove victim advocates from most of the exceptions to the privilege that are enumerated.[269] A new exception, specifically applying to victim advocates, is present in Subparagraph (d)(9).[270] This exception states that the privilege will not apply in cases where the victim advocate works with the government in preparing a victim for testimony. This exception seeks to ensure that the government will not use the privilege as a means to conceal pre-trial preparation. For example, the privilege would not apply when a victim advocate coaches or alters the testimony of a victim.

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[265] Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).
[266] MCM, *supra* note 88, MIL.R. EVID. 513.
[267] HANSEN, *supra* note 24. Under a simple relevance standard, provisions for *in camera* review amount to an almost automatic turnover of the evidence. "In every case in which consent is raised as the defense, a defendant will be able to assert that the complainant's records may contain information bearing on a motive to lie." Commonwealth v. Fuller, 423 Mass. 216, 228 (1996).
[268] Proposed MRE 513 (e)(6), app. B, *infra*.
[269] Proposed MRE 513 (d), app. B, *infra.*
[270] Proposed MRE 513(d)(9), app. B, *infra*.

B. Identifying the Parties to the Privilege

The proposed military victim advocate-victim privilege involves two parties, the crime victim and the victim advocate. In order to prevent the proposed privilege from becoming overbroad, the parties must be defined in limited terms.

1. Victim Advocates

The advocate-victim privilege, as proposed, is absolute and encompasses an extremely broad class of statements. This proposed privilege will possess a strength that is equivalent to that of the attorney-client or marital privileges. Consequently, a narrow definition of victim advocates is essential; otherwise, the proposed privilege would probably violate the Sixth Amendment of the United States Constitution, as discussed in Section V, *supra*.

The proposed privilege should include two classes of victim advocates. First, the privilege should apply to victim advocates in the civilian sector. The new DOD sexual assault policy's mandate on collaboration requires this inclusion of civilian victim advocates.[271] Second, the proposed privilege would also apply to military victim advocates who are designated in writing by an officer exercising General Court-Martial Convening Authority (GCMCA). Requiring appointment by a GCMCA prevents expansion of the proposed privilege into an unworkable system where numerous individuals within the family advocacy programs could claim coverage by the privilege. Military victim advocate status would depend upon appointment by the GCMCA, rather than any licensing requirement for the individual advocate. The need for a licensing requirement is eliminated by the military services' prohibition on victim advocates providing treatment. It also corresponds to the justification for the privilege--the relationship between advocate and victim--rather than the professional status of the victim advocate.[272] Distinguishing between victim advocates and those personnel who

[271] *See supra* Section IV.A.2.

[272] Focusing a privilege solely on the status of the victim advocate would potentially create social inequality. *See generally* Joo, *supra* note 179, at 266.

provide treatment is also necessary to shield the proposed privilege from erosion due to the use of rape trauma syndrome evidence.[273]

2. Victims

Most of the current debate over the roles of victim advocates stems from their role assisting victims of sexual assault. The proposed privilege is not intended to apply to all generic classes of victims under the UCMJ. The relationship between domestic violence victims and a victim advocate, however, is nearly identical to that of sexual assault victims. The justifications for protecting the privilege between a sexual assault victim and their victim advocate also apply to the advocate-domestic violence victim dynamic. Consequently, the new privilege utilizes language capable of encompassing victims of both sex crimes and domestic abuse.[274]

VII. Conclusion

While the numbers of purported sexual assaults and domestic violence in the military may shock the nation's conscience, the more sinister aspect of the equation involves the systematic re-victimization of sexual assault victims that occurs under the military's procedural and evidentiary rules--a re-victimization largely unrecognized by the DOD. Although the new DOD sexual assault policy strikes all the right chords regarding the seriousness of the problem, it offers little in its present form that will tangibly assist sexual assault victims in overcoming the challenges that they face. The policy does, though, seek to ensure that sexual assault victims receive the support of victim advocates. The support of a victim advocate can assist a sexual assault victim if the victim advocate can provide the victim with a confidante. Currently,

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[273] Use of rape trauma syndrome evidence potentially destroys the effectiveness of MRE 412 because it increases the relevance of past sexual evidence. *See generally* Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 N.W. U. L. REV. 1271, 1329 (1994). Use of Rape Trauma Syndrome evidence is widespread in courts-martial. Lieutenant Colonel Elspeth Cameron Richie, *Reactions to Rape: A Military Forensic Psychiatrist's Perspective*, 163 MIL. MED. 505 (1998). Likewise, communications made during post-assault treatment of a victim possess increased relevance when the government offers rape trauma syndrome evidence. Current DOD regulations preclude victim advocates from providing treatment to victims. *See supra* Section II.C.

[274] Proposed MRE 513 (b)(6), app. B, *infra*.

victim advocates cannot perform this mission because they do not possess any type of evidentiary privilege. Modifying MRE 513 to include an advocate-victim privilege represents a concrete measure towards aiding sexual assault victims. This privilege will enable victim advocates to act as true confidantes and provide victims with a safety zone where they are immune from defense harassment tactics. Giving victims an unconditional ally, a victim advocate armed with an evidentiary privilege, will do more than provide the wry knowledge that they are now a statistic or a training point. It will make an actual difference in helping the survivor recover from a sexual assault.

Appendix A

Military Rule of Evidence 513

MRE 513

(a) *General rule of privilege*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

Appendix B

Proposed Modification of MRE 513 (proposed changes in bold)

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege*. A **victim or a** patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between **a victim and victim advocate and a** patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made **by the victim** for the purpose of **seeking support or assistance or by the patient for** facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the

same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(6) A "victim" is a person who has been victimized by a crime of sexual assault or domestic violence.

(7) A "victim advocate" is a military employee who has been designated as a victim advocate in writing by an officer exercising general court-martial convening authority or a civilian worker in an organization that offers treatment to victims of sexual assault and/or domestic violence.

(c) *Who may claim the privilege*. The privilege may be claimed by the **victim or** patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The **victim advocate,** psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient **or victim** is dead;

(2) **between a patient and their psychotherapist or assistant to their psychotherapist** when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist **or victim advocate** are sought or obtained to enable or aid anyone to commit or

plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) **between a patient and their psychotherapist or assistant to their psychotherapist** when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) **between a patient and their psychotherapist or assistant to their psychotherapist** when admission or disclosure of a communication is constitutionally required~~.~~**;**

(9) when a victim advocate collaborates with the government in preparing a victim for court-martial testimony.

(e) *Procedure to determine admissibility of patient records or communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

(6) The foregoing procedures of this subparagraph for determining admissibility shall not apply to privileged communications between a victim and a victim advocate under this rule.

Appendix C

State Advocate-Victim Privileges

State	Privilege	Statute Cite	Comments
Alabama	Counselor-Client Privilege	ALA R. EVID. 503A (2005)	"Victim Counselor" is someone who provides treatment--therefore it would not cover military victim advocates
Alaska	Victims' Advocate Privilege	ALASKA STAT. § 24.65.200 (2004)	Applies to all crime victim advocates; would encompass DOD victim advocates
Arizona	Crime Victim Advocate Privilege	ARIZ. REV. STAT. § 13-4430 (2004)	Would encompass DOD victim advocates; *in camera* hearing upon showing of reasonable cause
Arkansas	Psychotherapist -patient only		No coverage of DOD victim advocates

California	Sexual assault victim counselor-victim privilege	CAL. EVID. CODE § 1035.4 (2005)	Expansive privilege for sexual assault counselors; any employee who provides assistance; privilege is qualified
Colorado	Victim's advocate-victim privilege	COLO. REV. STAT. § 12.63.6-115 (1) (2004)	A "victim advocate" means a person at a battered women's shelter or rape crises organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault; would cover DOD victim advocates
Connecticut	Battered women's or sexual assault counselor-victim privilege	CONN. GEN. STAT. § 52-146k (2004)	Must provide counseling to the victim; therefore, DOD advocates would not qualify; state courts have converted the legislature's absolute privilege into a qualified privilege

Delaware	Psychotherapist -patient only		No coverage of DOD victim advocates
Florida	Privileges for both Domestic violence advocate-victim and sexual assault counselor-victim	FLA. STAT. § 90.5035 (2004); FLA. STAT. § 90.5036 (2004)	Expansive privilege for sexual assault counselors; sexual assault counselor privilege encompasses any employee of a rape crisis center who provides *assistance* to victims. This would certainly encompass military victim advocates working within the Family Advocacy Program.
Georgia	Psychotherapist -patient only		No coverage of DOD victim advocates

Hawaii	Victim-counselor (applies to both sex. assault and domestic violence); peer support counseling (for law enforcement)	HAW. REV. STAT. § 505.5 (2004)	Expansive privilege for sexual assault counselors; This privilege will only cover military victim advocates if the head of the installation family advocacy program is a "social worker, nurse, psychiatrist, psychologist, or psychiatrist." Required to provide "assistance" (treatment is not required).
Idaho	Public Officer in Official Confidence	IDAHO CODE § 9-203.5 (2004)	No coverage of DOD victim advocates
Illinois	Confidentiality of statements made to rape crisis personnel	735 ILL. COMP. STAT. 5/8-802.1. (2004)	Absolute privilege; requirement for assistance only; would cover DOD victim advocates
Indiana	Victim counselor-victim privilege.	IND. CODE ANN. § 35-37-6-9 (2004)	Statute requires treatment for the privilege; no coverage of DOD victim advocates

Iowa	Privilege for professional counselors	IOWA CODE § 622.10 (2004)	No coverage of DOD victim advocates
Kansas	Psychotherapist-patient only		No coverage of DOD victim advocates
Kentucky	Counselor-client privilege	KY. REV. STAT. ANN. § 421.570 (2004)	Counselor only required to assist; victim advocate explicitly recognized as counsel; would include DOD victim advocates
Louisiana	Health care provider privilege and peer support member privilege	LA. CODE EVID. ANN. ART. 510 (2004) ; LA. CODE EVID. ANN. ART. 518 (2004)	No coverage of DOD victim advocates
Maine	Sexual assault counselor privilege; Victim advocate privilege; Gov't victim advocate privilege	16 ME. REV. STAT. ANN. § 53-A (2004) ; 16 ME. REV. STAT. ANN § 53-B (2004); 16 ME. REV. STAT. ANN. § 53-C (2004)	Will cover DOD victim advocates; Qualified privileges only
Maryland	Privilege for social workers		No coverage of DOD victim advocates
Massachusetts	Privileged communications between sexual assault victim and certain counselors	MASS. GEN. LAWS CH. 233 § 20J (2005)	State court qualified what had been an absolute privilege; will cover DOD victim advocates

Michigan	Privilege for sexual assault counselors	MICH. COMP. LAWS § 600.2157A (2004)	State court qualified what had been an absolute privilege; would cover DOD victim advocates
Minnesota	Privilege for sexual assault counselors	MINN. STAT. §595.02 (2004)	Counselor is someone who provides assistance and works under supervisor at rape crisis center; would cover DOD victim advocates
Mississippi	Psychotherapist-patient only		No coverage of DOD victim advocates
Missouri	Professional counseling privilege	MO. REV. STAT. § 337.540 (2004).	Not much more than basis psychotherapist privilege; no coverage of DOD victim advocates
Montana	Advocate privilege	MONT. CODE ANN. § 26-1-812 (2004)	Would cover DOD victim advocates
Nebraska	Physician-patient privilege; professional counselor-client privilege	NEB. REV. STAT. § 27-504 (2004)	No coverage of DOD victim advocates
Nevada	Victim-Victim Advocate privilege	NEV. REV. STAT. § 49.2547 (2004)	Would cover DOD victim advocates

New Hampshire	Sexual assault counselor privilege	N.H. REV. STAT. ANN. § 173-C:1 (2004)	Sexual assault counselor is anyone with requisite training that works in a rape crisis center; would cover DOD victim advocates
New Jersey	Victim counselor confidentiality privilege	N.J. STAT. ANN. § 2A:84A-22.14 (2004)	Victim counselor need only provide assistance; would cover DOD victim advocates
New Mexico	Victim counselor privilege	N.M. STAT. ANN. § 31-25-3 (2004).	Privilege covers anyone working in a victim counseling organization; would cover DOD victim advocates
New York	Rape crisis counselor privilege	N.Y. C.P.L.R. § 4510 (2004)	Privilege covers anyone working under the direction of a rape crisis center; would cover DOD victim advocates
North Carolina	Counselor privilege	N.C. GEN STAT. § 8-53-8 (2004)	Applies to professional counseling services; no coverage of DOD victim advocates
North Dakota	Psychotherapist-patient only		No coverage of DOD victim advocates
Ohio	Psychotherapist-patient only		No coverage of DOD victim advocates

Oklahoma	Psychotherapist-patient only		No coverage of DOD victim advocates
Oregon	Psychotherapist-patient only		No coverage of DOD victim advocates
Pennsylvania	Counselor/advocate privilege	23 PA.C.S. § 6116 (2004)	Would cover DOD victim advocates
Rhode Island	Psychotherapist-patient only		No coverage of DOD victim advocates
South Carolina	Professional counselor privilege		No coverage of DOD victim advocates
South Dakota	Lots of privileges, including school counselors, but apparently not one for victim advocates;		No coverage of DOD victim advocates
Tennessee	Psychotherapist-patient only		No coverage of DOD victim advocates
Texas	Physician-patient only		No coverage of DOD victim advocates
Utah	Sexual assault counselor-victim	UTAH CODE ANN. § 78-3C-3 (2004).	Counselor defined as a volunteer at a rape crisis center; would cover DOD victim advocates

Vermont	Victim-Crisis Worker	VT. STAT. ANN. TIT. § 1614 (2004)	"Crisis Worker" is defined as a provider of services to victims of abuse or sexual assault; would cover DOD advocates
Virginia	Counselor-client; social worker-client	VA. CODE ANN. § 8.01-400.2 (2004)	"counselor" privilege would probably not cover DOD victim advocates
Washington	Sexual assault advocate-victim	REV. CODE WASH. (ARCW) § 5.60.060 (2004)	Need only provide support; DOD victim advocates would qualify
West Virginia	Licensed professional counselor-client	W. VA. CODE § 30-31-13 (2004)	No coverage of DOD victim advocates
Wyoming	Family violence and Sexual assault advocate-victim	WYO. STAT. § 1-12-116 (2004)	"Advocate" or "family violence or sexual assault advocate" means a person who is employed by or volunteers services to any family violence and sexual assault program; would include DOD victim advocates

HIS EXCELLENCY GEORGE WASHINGTON[1]

REVIEWED BY LIEUTENANT COLONEL ROBIN JOHNSON[2]

Land baron. Slave holder. Revolutionary. General of the Continental Army. Father of his country. Pulitzer Prize-winning author Joseph J. Ellis' recent Washington biography brilliantly describes how Washington's character in the context of his circumstances drove him to be all these things and more. Our first president was in a large part driven to revolution by his appreciation of the value of land. On a personal level, he was driven by his belief that the British were trying to purloin land from him following the French and Indian War.[3] On a grander scale, he believed that the future of America lay to the west, beyond the Allegheny Mountains.[4] These beliefs and all the driving forces that made Washington "the most ambitious, determined, and potent personality of an age not lacking for worthy rivals"[5] are the raw material for Ellis' superb work, *His Excellency George Washington*.

In *His Excellency*, Ellis states his twofold goal for the book: first, "to write a modest-sized book about a massive historic subject,"[6] and second, to explore the driving internal forces and the forces externally

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[1] JOSEPH J. ELLIS, HIS EXCELLENCY GEORGE WASHINGTON (2004).

[2] U.S. Army. Currently serving as the U.S. Judge Advocate Exchange Officer to the Operational Law Branch, U.K. Army Legal Services, Land Warfare Centre, Warminster, England.

[3] ELLIS, *supra* note 1, at 39, 56-58, 64.

[4] *Id.* at 145, 209.

[5] *Id.* at xiv (listing among these worthy rivals Benjamin Franklin, Alexander Hamilton, John Adams, Thomas Jefferson, and James Madison).

[6] *Id*. at xi-xiii. His first goal was aided greatly and partially inspired by the modern edition of the *Washington Papers*. *Id.* at xi, 277. The *Washington Papers* to which Ellis refers are the *Papers of George Washington*, the product of a project undertaken by the University of Virginia in association with the Mount Vernon Ladies Association of the Union to compile all of Washington's papers in one usable source. Papers of George Washington, http:wwgwpapers.virginia.edu (last visited October 20, 2005). Eventually, this modern edition of the *Papers* will comprise 90 volumes, of which fifty-two are complete as of this writing. http:wwgwpapers.virginia.edu/project/index.html (last visited October 20, 2005) The project has collected 135,000 Washington documents in photographic form, including letters and papers written by him, as well as letters written to him. *Id*. The *Papers* are categorized into the Colonial Series (1744-75), the Revolutionary War Series (1775-83), the Confederation Series (1784-88), the Presidential Series (1788-97), and the Retirement Series (1797-99). *Id*. Ellis relied heavily on these catalogued, classified, and annotated *Papers* to compose *His Excellency*. *See* ELLIS, *supra* note 1, at 279 (describing the *Papers* as "the central focus of my inquiry and the home base from which all other explorations were launched").

present in the American revolutionary era that created the man famously eulogized as "First in war, first in peace, and first in the hearts of his countrymen."[7] Ellis accomplishes both of his goals admirably. At a mere 275 pages, *His Excellency* is, indeed, a "modest-sized book."[8] Yet, the compactness of the work is both a great strength and, ironically, a source of weakness. At its strength, *His Excellency* avoids the pitfalls of certain predecessor Washington biographies, namely those by Douglas Southall Freeman[9] and James Thomas Flexner,[10] which he implicitly describes by quoting Lytton Strachey's comment on the subject of Victorian biographies as "interminable tomes that had become an endless row of verbal coffins."[11] Ellis, after reading the entire *Washington Papers* compilation,[12] condensed this extraordinary amount material into a highly readable book. He successfully presents only that information which provides fascinating insights into Washington's character and leadership style. He describes how the events of Washington's day shaped the man and how the man helped shape several momentous events in American history. Ellis' capacity for distilling such an enormous amount of raw information into an engaging informative narrative is truly one of his strongest literary assets.

At its weak points, the natural path of Ellis' narrative leads the reader to segue down a secondary avenue, but Ellis terminates any such side trips with a "not the subject of this book" attitude. For example, Ellis addresses the Marquis de Lafayette, aside from factual recitations concerning Lafayette's conduct in battle,[13] only in so far as his relationship with Washington is concerned.[14] Ellis declines to address how Lafayette, a Frenchman, came to volunteer in the Continental Army,[15] how Lafayette later found himself imprisoned in Austria in the course of the French Revolution,[16] or his additional contributions to the

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[7] ELLIS, *supra* note 1, at 270 (quoting Henry Lee's eulogy of Washington).
[8] *Id.* at xii.
[9] DOUGLAS SOUTHHALL FREEMAN, WASHINGTON (1968). Originally published in seven volumes, Freeman's treatise reached modern audiences in a single 896-page abridged version in 1993.
[10] JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN (1969). Flexner's original work was a slightly more manageable four volumes, later distilled, in 1994, to a single 448-page text.
[11] ELLIS, *supra* note 1, at xiii.
[12] *Id*. at 277.
[13] *Id.* at 119, 132, 134, and 135.
[14] *Id*. at 115-116.
[15] *Id*. at 115.
[16] *Id*. at 115, 220.

young nation.[17] In light of the lifelong friendship between the two men,[18] additional insight into Lafayette's motivations and character would lend further insight into Washington's. Additionally, there were some matters in which Washington's views and the views of Washington's peers significantly differed which Ellis briefly discussed. Occasionally, a detour to survey these differences more closely would have contributed to a deeper understanding of Washington's perspective. For example, Ellis mentions George Washington's and Thomas Jefferson's disparate views of the French revolution, but he does not adequately address how their views differed, or, more importantly, why.[19]

Ellis also accomplishes his goal of presenting the internal and external forces that impacted Washington. Two important events, early in Washington's life, shaped the man that he would become—the man who would shape defining events in the revolutionary era. The first of these events is the premature death, at age thirty-four, of his half-brother, Lawrence Washington, in 1752.[20] Ellis notes Lawrence's death as producing, in Ellis' opinion, what was Washington's "greatest legacy," Mount Vernon.[21] More importantly, however, Lawrence's death created a vacancy in the adjutancy corps of the Virginia militia and thus began the military career of the future Commander in Chief of the Continental Army.[22]

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[17] For example, he donated $200,000 of his personal fortune to support American troops during the Revolutionary War and was instrumental in securing France's support for the Revolution resulting in the signing of the French Alliance in 1778. The American Friends of Lafayette, http://friendsoflafayette.org/data/27reasons.html (last visited October 20, 2005).

[18] During the course of their lifetimes, Washington and Lafayette exchanged hundreds of letters. *See The Washington Papers*, *supra* note 6. Ellis reports that Washington held Lafayette in great affection and thought of him as his "surrogate son." ELLIS, *supra* note 1, at 116. Lafayette's words at Washington's tomb at Mount Vernon further demonstrate their closeness: "The feelings which on this awful moment oppress my heart don't leave me the power of utterance. I can only thank you, my dear Custis, for your precious gifts and pay a silent homage to the tomb of the greatest and best of men my paternal friend." General Lafayette's words at the tomb of George Washington, October 17, 1824. THE ARTHUR H. AND MARY MARDEN DEAN LAFAYETTE COLLECTION, http://rmclibrary.cornell.edu/FRENCHREV/Layfayette/exhibit/Ampolimages/iampol_tomb.htm (last visited October 26, 2005).

[19] ELLIS, *supra* note 1, at 209-10.

[20] *Id*. at 10.

[21] *Id*.

[22] *Id*, at 12. Washington was twenty years old when Lawrence died.

The second key event in his early life was his marriage to Martha Dandridge Curtis, an extraordinarily wealthy widow.[23] Washington's marriage to Martha propelled Washington into the upper social echelons of the Virginia planter class.[24] At the time of the union, the Mount Vernon estate was a mere 3,000 acres;[25] the Curtis estate, on the other hand, encompassed three plantations on 18,000 acres of prime tobacco land, worked by more than 200 slaves.[26] Being a member of the colonial landed class shaped Washington's views toward English rule more than any other factor. His dealings with the mercantile system,[27] his belief that the English were trying to rob him of land rightly awarded to him for his service in the French and Indian War,[28] and the English oppression in the form of the Stamp Act,[29] the Townsend Act[30] and the "Intolerable Acts"[31] inspired Washington to independence. Ellis convincingly advocates the case that Washington's was not an ideological or social revolution, but an economic one.

Lawrence's premature death and the resulting vacancy in the Virginia militia were remarkable strokes of fate. Washington earlier had applied for a position in the militia but had no military qualifications to recommend him.[32] It is too easy to play "what if;" however, *if* Lawrence had not married into the influential Fairfax family,[33] and *if* Lawrence had not held a position in the militia,[34] and *if* he had not died prematurely,[35] *if* Washington had not happened to petition for a billet shortly before Lawrence's death,[36] and *if* William Fairfax had not supported his application, in spite of his lack of qualification[37] – if all these things had not converged in the summer of 1752, the future Command in Chief might well have spent the War of Independence safely ensconced in

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[23] *Id*. at 40.
[24] *Id*.
[25] *Id*. at 41.
[26] *Id*. at 41, 48.
[27] *Id.* at 48-50.
[28] *Id*. at 39, 56-58, 64.
[29] *Id*. at 51-52.
[30] *Id*. at 59-61.
[31] *Id*. at 61-62.
[32] *Id*. at 12.
[33] *Id*. at 10.
[34] *Id*. at 12.
[35] *Id*.
[36] *Id*.
[37] *Id*.

Mount Vernon, cheering for a successful insurgency in the interests of his pocketbook.

But, of course, all these events did converge and Mister Washington became Major Washington.[38] Military service drew out and polished Washington's natural leadership abilities. A significant portion of *His Excellency* is devoted to Washington's service in the French and Indian War and the War of Independence.[39] This emphasis is remarkable in light of the fact that Washington's other accomplishments include chairing the Constitutional Convention and nursing the nation through its infancy with stunning success as its first President. However, it is the development of Washington's character and innate talents during his military career that shaped him into a man capable of achieving his ultimate greatness; it is these attributes to which Ellis rightly devotes such attention.

Ellis highlights several of Washington's leadership attributes, including his steadfastness;[40] his ability to recognize when not to follow his instincts;[41] his ability to exploit talent in other men;[42] and his gift for knowing when to speak and when to keep quiet.[43] Ellis identifies Washington's remarkable steadfastness in fighting the War of Independence.[44] Ellis reminds the reader that the war was in many ways simply a matter of out-lasting the British and that the popular enthusiasm of the "Spirit of '76" did not last the eight years of war.[45] Ellis also recognizes Washington's shortcomings and does not ignore how Washington's steadfastness at times left Washington in a less than flattery light. Ellis relates a remarkable account of Washington's determination for land and its fruits: In 1784, Washington toured his western holdings and found several families working plots he owed in western Pennsylvania, and who had been doing so for many years.[46] Washington demanded that they leave or pay him rent as tenants and hired a lawyer to enforce his rights.[47] He viewed the defendants "as

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[38] *Id*. at 10-12.
[39] Approximately 140 pages of the 275-page book cover Washington's military service. *See id.* at 12-24, 73-153.
[40] *Id*. at 88, 157.
[41] *Id.* at 99-101.
[42] *Id.* at 80-82, 175, 198-200.
[43] *Id*. at 175, 198-200.
[44] *Id*. at 88.
[45] *Id.*
[46] *Id*. at 157.
[47] *Id*.

willful and obstinate Sinners, persevering after timely and repeated admonition, in a design to injure me."[48] For two years, arguably the most powerful man in the new nation vehemently prosecuted his case against a handful of impoverished farmers.[49] Nonetheless, Washington's unshakable determination to win the war—he simply could not envision *not* winning—was, in a large part, what won the war in the end. He maintained this conviction of victory in the face of lackluster recruits,[50] undependable financial support from the Continental Congress,[51] a smallpox epidemic,[52] and an awe-inspiring enemy.[53]

Washington's steadfastness coupled with his ability to put aside his instincts and natural inclinations resulted in his adopting a successful strategy for winning the war. Washington's natural inclinations were to take the war to the enemy. He viewed himself as a strong person, and the Continental Army as an extension of himself. Early in the war, his aggressive personality caused him to lead the army to a recklessly ambitious confrontation with the British in New York in July 1776, and to suffer a spectacular defeat.[54] His aggressive style fared better in Trenton (December 1776)[55] and Princeton (January 1777),[56] and refreshed his confidence that the Americans could win the war. However, he also came to realize that it was necessary for him to reject his natural offensive instincts and adopt a more defensive strategy. Washington's natural steadfastness and his ability to adopt a strategy completely contrary to his natural instincts led him to the defensive Fabian strategy that ultimately won the war.[57] Persisting in such a

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[48] *Id.*
[49] *Id.*
[50] *Id.* at 83-84, 99-100, 113-114.
[51] *Id.* at 124-126, 130.
[52] The War of Independence occurred during a smallpox epidemic that claimed approximately 100,000 lives. Washington was immune because he had been exposed during his youth. Remarkably, he recognized the need to address the issue, had the sense to quarantine soldiers afflicted, and was an early proponent of inoculation. *Id.* at 86-87.
[53] *Id.* at 90.
[54] *Id.* at 92-96.
[55] *Id.* at 97-98.
[56] *Id.* at 98-99.
[57] *Id.* at 99-101. A Fabian strategy, named after the Roman general Fabius Cunctator, is a strategy in which direct decisive battle with a superior enemy is avoided and a battle of attrition is fought by inflicting "military pin-pricks to wear down the (enemy's) endurance." Robert M. Cassidy, *Why Great Powers Fight Small Wars Badly*, COMBINED ARMS CENTER MILITARY REVIEW, Sept. – Oct. 2002 English Edition, *available at* http://leavenworth.army.mil/milrev/English/SepOct02/cassidy.htm, (citing HART B.H. LIDDELL, STRATEGY 27 (2d ed. 1967)).

strategy for eight long years, contrary to the very fiber of his being, is truly a tribute to Washington's leadership capability.

An additional leadership attribute that served Washington well was his uncanny ability to identify talent in the men around him and effectively utilize them. Ellis first identifies this ability in connection with Washington's hand-picked lieutenants in the war.[58] Two of his chief lieutenants, Nathanael Greene and Henry Knox, were inexperienced in military matters and joined the Army for patriotic reasons—to fight for independence.[59] Greene joined as a private Soldier and rose to the rank of brigadier general within a year.[60] Washington identified Greene's brilliance early and promoted him accordingly, without regard to Greene's lack of formal military training and experience.[61] Knox was a bookseller before the war, not a military man.[62] Nonetheless, Washington saw his capabilities and, as with Greene, exploited his capabilities to the fullest. After the war, Washington made Knox his Secretary of War in the 1790s.[63] Washington also quickly recognized the remarkable talents of Horatio Gates and Charles Lee, former British officers, both eccentric characters who were brilliant strategists, and who championed the guerrilla-style tactics and the Fabian strategy that ultimately won the war.[64]

Later having decided to participate in the Constitution Convention, which he would chair, Washington recognized his own lack of formal education in republican theory and sought instruction from the sharpest political minds of his time, including John Jay and James Madison.[65] As President, his cabinet membership included arguably the greatest statesmen in American history—James Madison, Thomas Jefferson, and

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[58] ELLIS, *supra* note 1, at 80-82.
[59] *Id*. at 81.
[60] *Id*.
[61] *Id.*
[62] *Id*.
[63] *Id*. at 81-82, (citing Hugh Rankin, Washington's Lieutenants and the American Victory, *in* The World Turned Upside Down: The American Victory in the War for Independence 71-90 (John Ferling ed. 1988) JOHN SHY, A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR INDEPENDENCE 133-62 (1976); GEORGE WASHINGTON'S GENERALS AND OPPONENTS: THEIR EXPLOITS AND LEADERSHIP (George Billias, ed., 1994).
[64] ELLIS, *supra* note 1, at 80-81.
[65] *Id*. at 175.

Alexander Hamilton—and his "B list" included Knox, Jay, and Edmund Randolph.[66]

But even as Ellis lauds Washington's gift to recognize talent and exploit it, he does not gloss over Washington's propensity for extinguishing even the brightest stars if they faltered in absolutely loyalty to him or threatened to dim his own light. Both Lee and Gates, though possessing brilliant military minds and who were proponents of the strategy that would ultimately lead to victory, challenged Washington "out-of-doors" and were eventually sacked.[67] Washington's fall out with Jefferson is truly the stuff of history. These two Virginia gentlemen farmers had played leading roles in the birth of their nation. Jefferson was one of Washington's "cherished surrogate sons;" when Jefferson retired from the cabinet Washington praised him for his integrity and trustworthiness.[68] Yet by 1797, the two men had severed all communications, in large part, because Jefferson, in his passion to defeat the Jay Treaty, became involved in a smear campaign against Washington, who supported the treaty.[69] The depth of their rift was so great that Washington attributed the creation of the two party system to it.[70] The problem lay in both men believing absolutely in their own greatness and making no allowances for anyone, even if equally great, challenging their perfect opinion of matters.[71]

Ellis also highlights Washington's gift for knowing when to speak out and when to remain silent. As President, Washington commanded the executive as he had commanded the army—by recruiting talented men to serve as staff officers, or cabinet members and giving them the responsibility to do their jobs, but all the time knowing when he, the commander, needed to be heard and when a decision or action was his to perform. Ellis describes this facet his leadership style as "knowing when

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[66] *Id*. at 198-200.
[67] *Id*. at 81-82.
[68] *Id.* at 231.
[69] *Id.* at 232.
[70] *Id.* One must not condemn Jefferson too severely for his conduct in regard to the Jay Treaty. He was outraged by the terms of the treaty which he viewed as "nothing more than a treaty of alliance between England and the Anglomen of this country against the legislature and people of the United States." JOSEPH J. ELLIS, AMERICAN SPHINX THE CHARACTER OF THOMAS JEFFERSON (1996), 188.
[71] ELLIS, *supra* note 1, at 38, 78; ELLIS, AMERICAN SPHINX, *supra* note 32 at 191 and 222, where Ellis describes President Jefferson's criteria for cabinet membership as "proven ability and complete loyalty to the Jeffersonian version of republicanism."

to remain the hedgehog who keeps his distance and when to become the fox who dives into the details."[72]

Perhaps the best illustration of Washington's gift at remaining silent is found in his conduct as the Chairman of the Constitutional Convention. While others were intensely debating states rights, powers of the central government, individual freedoms and slavery,[73] Washington remained silent and above the fray. However, he was not just a superfluous bystander; Washington's presence was necessary to provide leadership and legitimacy to the proceedings.[74] Interestingly, although the U.S. Constitution is one of the greatest political achievements in history, Washington was not so confident of its greatness. After the Convention adjourned, he wrote to his friend Lafayette:

> It is now a child of fortune, to be fostered by some and buffeted by others. What will be the General opinion on, or reception of it, is not for me to decide, nor shall I say anything for or against it—if it be good I suppose it will work its way good—if bad it will recoil on the Framers.[75]

In fact, Washington's concern that the convention would fail and that his reputation would be at risk fed his initial reservations about participating in the Convention at all.[76]

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[72] ELLIS, *supra* note 1, at 198.

[73] Like many of his peers, Washington's views on slavery were complex and, in some regard, contradictory. Ellis presents Washington's opinions and practices regarding slavery in an honest light. Washington, reports Ellis, viewed the institution of slavery "as the central contradiction of the revolutionary era." *Id.* at 161. He was troubled morally by his ownership of slaves, but for years believed that freeing them outright was not economically feasible. However in the 1790's he devised a plan that would ultimately result in their freedom when it was economically feasible to do so. *Id.* at 257. This plan did not come to fruition and Washington ultimately freed all his slave holding in his will. *Id.* at 263.

[74] *Id.* at 177-79. His silence should not be mistaken as indifference; his correspondence from Philadelphia reveals his attentiveness to the proceedings. *Id.*

[75] *Id.* at 179.

[76] *Id.* at 174.

Ellis makes clear Washington's confidence in his own greatness[77] and the great man's intense concern for his reputation and legacy.[78] This appears to have been a near lifelong concern; Ellis recounts Washington's efforts to rewrite history and change the facts of the Fort Necessity debacle during the French and Indian War to cast himself in a better light.[79] Indeed, all Washington's subsequent decisions about his public life, as in regard to participation in the Convention, take into account this concern. He clearly had a historic perspective of himself: after the war, when there were various plots afoot to crown him king of the new nation,[80] Washington, unlike Cromwell or Napoleon, was able to check his personal ambition and appreciate that his personal "place in history would be enhanced, not by enlarging his power, but by surrendering it."[81]

So what is Washington's legacy? What, in Ellis' view, made Washington "the most ambitious, determined, and potent personality of an age not lacking for worthy rivals?" [82] Ellis contends that Washington was the "rarest of men: a supremely realistic visionary."[83] Washington believed in the revolution and in the necessity and the goodness and beauty of the creation of the United States; he also appreciated the hard realities of waging a successful revolution and ensuring the survival of a new republic. For example, Washington considered slavery to be morally and politically wrong, but he also knew that to try to abolish it at the nation's birth would condemn it to be still born.[84] Likewise, Washington supported the Jay Treaty because Washington knew that even a treaty so unfavorable to the United States was preferable to war

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[77] Amazingly, Washington's birthday was recognized as a national holiday before he was even dead. It was recognized as early as 1778. He died on December 14, 1799.

[78] Preoccupation with one's legacy did not start with Twentieth Century politicians. *See* BILL CLINTON, MY LIFE (2004) for a modern classic of legacy-spin. But not all our Founding Fathers shared Washington's concern for it. *See* ELLIS AMERICAN SPHINX, *supra* note 70, at 350: "The true Jeffersonian legacy is to be hostile to legacies," quoting historian Joyce Appleby, noted Jefferson historian and author of THOMAS JEFFERSON: THE AMERICAN PRESIDENTS SERIES (2003); ARTHUR M. SCHLESINGER, JR., INHERITING THE REVOLUTION: THE FIRST GENERATION OF AMERICANS (2000).

[79] ELLIS, *supra* note 1, at 16, 273.

[80] *Id.* at 139-43.

[81] *Id.* at 143.

[82] *See* s*upra* note 6 and accompanying text.

[83] ELLIS, *supra* note 1, at 271.

[84] *Id*. at 202. U.S. CONST. art. 1, § 9, para 1, which provides, "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by any Congress prior to the year one thousand eight hundred and eight."

with England, a war he did not believe America could survive.[85] Without Washington's realism, the vision of a new American republic would have died on the vine.

His Excellency is an outstanding read. It is a fair and balanced look at a great man. Washington was a complex character, driven by both external and internal forces; his life was a striking example of the right man at the right place at the right time. Ellis admirably tells Washington's story by succinctly relating the facts of the places and times that affected Washington's life. More importantly, he then fairly describes how Washington's inner attributes caused him to react to those external forces and achieve such greatness. *His Excellency* should not be read as a history of the War of Independence, the Constitutional Convention or the early years of nationhood and readers who approach it as such will surely be disappointed. But to readers who are interested in the remarkable synergy between these revolutionary events and the man, George Washington, Ellis' work is strongly recommended.

[85] *Id*. at 227. Washington gave the United States "a generation" before he believed it was capable of prevailing in such a conflict. *Id.* at 226-227.

By Order of the Secretary of the Army:

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