



NATIONAL SECURITY  
LAW JOURNAL

VOLUME 2

ISSUE 1

FALL/WINTER 2013



*National Security Law Journal*  
George Mason University School of Law  
3301 Fairfax Drive  
Arlington, VA 22201

**[www.nslj.org](http://www.nslj.org)**

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ISBN-13: 978-1497528420

ISBN-10: 1497528429



# NATIONAL SECURITY LAW JOURNAL

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THE LAWFULNESS OF AND CASE FOR COMBAT  
DRONES IN THE FIGHT AGAINST TERRORISM

*Heeyong Daniel Jang*

AN IMPERFECT BALANCE:  
ITAR EXEMPTIONS, NATIONAL SECURITY,  
AND U.S. COMPETITIVENESS

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TAKING CONFUSION OUT OF CRISIS:  
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AGENCIES TO PROVIDE LAW ENFORCEMENT SUPPORT TO  
STATE AND LOCAL GOVERNMENTS IN EMERGENCIES

*Alexander J. Yesnik, CEM*



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PUBLISHED BY GEORGE MASON UNIVERSITY SCHOOL OF LAW

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Cite as 2 NAT'L SEC. L.J. \_\_\_\_ (2013)

The *National Security Law Journal* ("NSLJ") is a student-edited legal periodical published twice annually at George Mason University School of Law in Arlington, Virginia. We print timely, insightful scholarship on pressing matters that further the dynamic field of national security law, including topics relating to foreign affairs, intelligence, and national defense.

The Editors of NSLJ can be contacted at:

National Security Law Journal  
George Mason University School of Law  
3301 Fairfax Drive  
Arlington, VA 22201

<https://www.nslj.org/>

**Publications:** Our print edition is available from retail bookstores, including Amazon and Barnes & Noble. Digital versions of our full issues are available on our website, [www.nslj.org](http://www.nslj.org).

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## NATIONAL SECURITY LAW JOURNAL

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### ACKNOWLEDGMENTS

The Editorial Board extends its thanks to our two new Faculty Advisors, Professors Jamil N. Jaffer and Jeremy A. Rabkin, who have helped guide and grow the academic acumen and scholastic potential of the journal.

Volume 2, Issue 1 of the *National Security Law Journal* marks a new milestone for our publication by including book reviews for the first time. Alongside professional articles and student comments, book reviews offer the enhanced opportunity to assess relevant and timely monographs in the national security law field.

In addition to producing this written publication, we also host events on emerging areas of national security law. During this Fall/Winter period, we held two symposia at the Arlington Campus of George Mason University:

- *Drone Wars: Challenges and Solutions*, a panel discussion on a framework for the use of unmanned aerial vehicles under the law of armed conflict, featuring panelists from the Heritage Foundation, *The New York Times*, BBC News, and George Mason University School of Law.
- *Blinking Red: Crisis and Compromise in American Intelligence After 9/11*, a conversation with author Michael Allen on his new book, with a panel discussion featuring General Michael V. Hayden (Ret.) and Mr. Chuck Alsup.

Videos of both events are available at [www.nslj.org](http://www.nslj.org). For more information or to sign up for our e-mail newsletter, please visit our website or contact us at [info@nslj.org](mailto:info@nslj.org).



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## PREFACE

### A WATERSHED YEAR IN NATIONAL SECURITY LAW

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**Jamil N. Jaffer<sup>1</sup> and Jeremy Rabkin<sup>2</sup>**

The inaugural issue of the *National Security Law Journal* appeared in March 2013 and much has changed since then in the field it covers. A number of the developments of the past year will almost certainly come to be seen as watershed moments in U.S. national security law. Among the most consequential was Edward Snowden's massive release of classified documents on the surveillance programs of the National Security Agency ("NSA"). These events have reenergized debate about the proper scope of government data collection on American citizens and stoked a new debate on government data collection against foreigners abroad. Similarly, the legal significance (and policy implications) of the President's request to Congress to authorize a limited military intervention in Syria—and the withdrawal of that request in light of evolving events abroad—is likely to be debated for years to come.

Other legal issues regarding war powers also moved to the forefront of public debate over the last year. Senator Rand Paul sought to filibuster the nomination of John Brennan to serve as

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<sup>1</sup> Adjunct Professor of Law and Director, Homeland & National Security Law Program, George Mason University School of Law.

<sup>2</sup> Professor of Law, George Mason University School of Law.

Director of the Central Intelligence Agency over concerns that the President could ostensibly assert his commander-in-chief authority to conduct drone strikes against Americans in the United States.<sup>3</sup> Senator Paul's effort generated a back-and-forth letter exchange between the Senator and the Attorney General,<sup>4</sup> the introduction of legislation seeking to regulate such strikes,<sup>5</sup> and a range of op-eds on the topic.<sup>6</sup>

The United States also captured Sulemain Abu Gaith, the most significant Al Qaeda leader to be apprehended in recent years. The Obama Administration, however, declined to hold and interrogate him in temporary military or intelligence custody—as it had with other terrorist leaders, such as Ahmed Warsame—instead bringing Abu Gaith to the United States to face federal charges immediately upon capture.<sup>7</sup>

Members of Congress also began discussing whether revisions to the September 18, 2001 Authorization for the Use of Military Force ("9/11 AUMF") were necessary and advisable.<sup>8</sup>

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<sup>3</sup> Lucy Madison, *Rand Paul Filibusters Vote on CIA Director Nominee John Brennan Over Drones*, CBS NEWS (Mar. 6, 2013, 4:45 PM), <http://www.cbsnews.com/news/rand-paul-filibusters-vote-on-cia-director-nominee-john-brennan-over-drones/>. See generally Noah Oberlander, Comment, *Executive Process: The Due Process of Executive Citizen Targeting by the Commander-in-Chief*, 1 NAT'L SEC. L.J. 124 (2013).

<sup>4</sup> Rachel Weiner et al., *Eric Holder Responds to Rand Paul with 'No,' Paul Satisfied*, WASH. POST (Mar. 7, 2013, 2:02 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/07/white-house-obama-would-not-use-drones-against-u-s-citizens-on-american-soil/>.

<sup>5</sup> A Bill to Prohibit the Use of Drones to Kill Citizens of the United States Within the United States, S. 505, 113th Cong. (2013).

<sup>6</sup> E.g., Editorial Board, Op-Ed., *More Oversight and Disclosure on Drones*, WASH. POST (Mar. 7, 2013), [http://www.washingtonpost.com/opinions/more-oversight-and-disclosure-on-drones/2013/03/07/2da5bd44-8756-11e2-98a3-b3db6b9ac586\\_story.html?hpid=z2](http://www.washingtonpost.com/opinions/more-oversight-and-disclosure-on-drones/2013/03/07/2da5bd44-8756-11e2-98a3-b3db6b9ac586_story.html?hpid=z2).

<sup>7</sup> Peter Finn, *Somali's Case a Template for U.S. as it Seeks to Prosecute Terrorism Suspects in Federal Court*, N.Y. TIMES (Mar. 30, 2013), [http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60\\_story.html](http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html).

<sup>8</sup> See John Bresnahan, *Senators Discuss Revising 9/11 Resolution*, POLITICO (May 7, 2013, 5:04 AM), <http://www.politico.com/story/2013/05/senators-discuss-revising-911-resolution-90989.html>; see also Press Release, Sen. Bob Corker, Corker: After 11

Proponents of an updated authorization note that the threat from terrorist groups appears to be diversifying, both in the range of U.S. and Western interests being targeted, and the types of entities engaged in such plotting.<sup>9</sup> This issue is likely to stir continuing public debate as the President seeks to wind down the “hot war” in Afghanistan and seeks to close the terrorist detention facility at Guantanamo Bay, Cuba.<sup>10</sup> The President has also publicly declared his intent to work with Congress to refine or repeal the 9/11 AUMF.<sup>11</sup> A number of our colleagues have joined the debate on this issue. Notably, Bobby Chesney, Jack Goldsmith, Ben Wittes, and Matt Waxman have called for a new resolution,<sup>12</sup> while Rosa Brooks,

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Years, Time to Consider Updating Authorization for Use of Force Against Al Qaeda to Address New and Emerging Threats (Mar. 20, 2013), <http://www.corker.senate.gov/public/index.cfm/2013/3/corker-after-11-years-time-to-consider-updating-authorization-for-use-of-force-against-al-qaeda-to-address-new-and-emerging-threats> (excerpting from hearings on counterterrorism policies before the Senate Foreign Relations Committee); Akela Lucy, *AUMF: Reasserting the Role of Congress*, DIPLOMATIC COURIER (Aug. 8, 2013), <http://www.diplomaticcourier.com/news/topics/security/1640-aumf-reasserting-the-role-of-congress>.

<sup>9</sup> Edith M. Lederer, *U.N. Experts Say Al-Qaida Affiliates Remain A Threat*, ASSOCIATED PRESS (Aug. 7, 2013, 4:19 PM), <http://bigstory.ap.org/article/un-experts-say-al-qaeda-affiliates-remain-threat>.

<sup>10</sup> Press Release, White House, Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. The President stated:

In Afghanistan, we will complete our transition to Afghan responsibility for that country’s security. Our troops will come home. Our combat mission will come to an end. . . . As President, I have tried to close GTMO. . . . [T]here is no justification beyond politics for Congress to prevent us from closing a facility that should have never have been opened. . . . [O]nce we commit to a process of closing GTMO, I am confident that . . . legacy problem[s] can be resolved, consistent with our commitment to the rule of law.

*Id.*

<sup>11</sup> *Id.* In his remarks at the National Defense University, the President stated:

I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.

*Id.*

<sup>12</sup> Robert Chesney, Jack Goldsmith, Matthew C. Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. (2013),

Jennifer Daskal, and Steve Vladeck question the need for a new, more flexible AUMF.<sup>13</sup> And yet others have directly called for repeal of the existing authorization in the near-term.<sup>14</sup>

The current administration, meanwhile, revealed the legal analysis underlying its decision to target for lethal action Anwar al-Awlaki, a key Al Qaeda leader who also happened to be an American citizen.<sup>15</sup> The terrorist attacks in Boston and their aftermath likewise renewed significant legal and policy debates on the appropriate handling of terrorism suspects, particularly with respect to their capture, detention, and interrogation, and whether and when they ought to be provided *Miranda* warnings.<sup>16</sup>

While direct American military operations in Afghanistan are scheduled to end in December 2014, some counterterrorism efforts may continue, and whether or not Afghanistan reverts to its pre-2001 status as a haven for terrorists, Syria will likely continue to

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available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

<sup>13</sup> See, e.g., Rosa Brooks, *Mission Creep in the War on Terror*, FOREIGN POL'Y (Mar. 14, 2013), [http://www.foreignpolicy.com/articles/2013/03/14/mission\\_creep\\_in\\_the\\_war\\_on\\_terror](http://www.foreignpolicy.com/articles/2013/03/14/mission_creep_in_the_war_on_terror); Jennifer Daskal & Steve Vladeck, *After the AUMF, III: A Surreply to Jack*, LAWFARE BLOG (Mar. 19, 2013, 12:28 AM), <http://www.lawfareblog.com/2013/03/after-the-aumf-iii/>.

<sup>14</sup> See e.g., Editorial Board, Op-Ed., *Repeal the Military Force Law*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/repeal-the-authorization-for-use-of-military-force-law.html>; Andrew Cohen, *This is Congress's Chance to Rein in the War on Terror*, ATLANTIC (May 16, 2013), <http://www.theatlantic.com/politics/archive/2013/05/this-is-congresss-chance-to-rein-in-the-war-on-terror/275902/>.

<sup>15</sup> Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?hp&r=0>; see Oberlander, *supra* note 3, at 126-134.

<sup>16</sup> See Richard A. Serrano, *Senators Say Tsarnaev Should Be Declared 'Enemy Combatant'*, L.A. TIMES (Apr. 20, 2013), <http://articles.latimes.com/2013/apr/20/nation/la-na-nn-miranda-boston-bombing-suspect-20130420>; see also Bill Chappell, *Miranda Rights And Tsarnaev: Ex-U.S. Attorney General Weighs In*, NAT'L PUBLIC RADIO (Apr. 21, 2013, 12:07 PM), <http://www.npr.org/blogs/thetwo-way/2013/04/21/178254784/miranda-rights-and-tsarnaev-ashcroft-says-u-s-move-is-the-right-one>; *Transcript of the Boston Bombing Suspect's Bedside Hearing* (Apr. 22, 2013), N.Y. TIMES, [http://www.nytimes.com/interactive/2013/04/22/us/tsarnaev-court-appearance.html?\\_r=0](http://www.nytimes.com/interactive/2013/04/22/us/tsarnaev-court-appearance.html?_r=0).

serve as a training ground for violent jihadis. And there can be little doubt that the threat from Al Qaeda and other terrorist groups will continue to morph as the groups themselves evolve in response to external and internal pressures. Thus, the need to confront terrorism in a flexible and agile manner is unlikely to disappear in the near term and the legal and policy issues raised by such efforts will continue to stir debate.

But for most of the past year, legal issues surrounding offensive operations against terrorism were eclipsed by debate about surveillance programs. The middle of the year saw the initial disclosure by Edward Snowden<sup>17</sup>—since confirmed by the federal government—of the telephony metadata program conducted under the Foreign Intelligence Surveillance Act (“FISA”), as amended by Section 215 of the USA PATRIOT Act (“Section 215”).<sup>18</sup> Over the ensuing months, additional leaks by Mr. Snowden—assisted by various media outlets around the globe—provided more alleged details about the government’s surveillance efforts. Assuming they are accurate, these leaks (which continue unabated)—combined with other information disclosed by various media sources as a result of Mr. Snowden’s theft of government files—arguably represent the largest and most damaging disclosure of highly classified information in the nation’s history.

These recent leaks have also resulted in a major declassification of information about such programs and the legal regime supporting them. The Director of National Intelligence established a separate website, “IC on the Record,” to provide a home for various declassified documents from the Intelligence Community and other government agencies.<sup>19</sup> This repository has since been

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<sup>17</sup> Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN* (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>18</sup> Primary Order, In re: Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. 13-80 (FISA Ct. Apr. 25, 2013), *available at* [http://www.dni.gov/files/documents/PrimaryOrder\\_Collection\\_215.pdf](http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf).

<sup>19</sup> Dara Kerr, *NSA and Intelligence Community Turn to Tumblr – Weird but True*, *CNET NEWS* (Aug. 21, 2013), [http://news.cnet.com/8301-1009\\_3-57599622-83/nsa-and-intelligence-community-turn-to-tumblr-weird-but-true/](http://news.cnet.com/8301-1009_3-57599622-83/nsa-and-intelligence-community-turn-to-tumblr-weird-but-true/).

populated with, among other items, numerous declassified pleadings and briefs filed by the U.S. government in surveillance cases, along with the details of various court orders and opinions issued by the Foreign Intelligence Surveillance Court (“FISC”). The declassified court opinions highlight a range of compliance issues at the NSA, including judicial complaints about the federal government’s implementation of its authority under the FISC’s orders, but generally endorse the government’s collection authority under FISA.<sup>20</sup>

These declassified materials also provide information about the government’s collection programs targeting the content of communications of non-U.S. persons located outside the United States conducted under the FISA Amendments Act of 2009,<sup>21</sup> and the collection of Internet metadata conducted pursuant to the pen register/trap and trace provision of FISA.<sup>22</sup> They also filled in some historical details about the surveillance program initiated by President George W. Bush soon after the terrorist attacks of September 11, 2001.<sup>23</sup>

These declassified materials have provoked a wide-ranging public and academic debate about the adequacy of legal controls exercised by the FISC.<sup>24</sup> There has also been wider debate about the

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<sup>20</sup> See generally Office of the Dir. of Nat’l Intelligence, *Declassified*, IC ON THE RECORD, <http://icontherecord.tumblr.com/tagged/declassified> (last visited Feb. 18, 2014).

<sup>21</sup> Office of the Dir. of Nat’l Intelligence, *Section 702 of the Foreign Intelligence Surveillance Act*, IC ON THE RECORD, <http://icontherecord.tumblr.com/topics/section-702> (last visited Feb. 18, 2014).

<sup>22</sup> James R. Clapper, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act: Additional Information on the Discontinued PR/TT Program*, IC ON THE RECORD (Nov. 18, 2013), <http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence>.

<sup>23</sup> Office of the Dir. of Nat’l Intelligence, *DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001*, IC ON THE RECORD (Dec. 21, 2013), <http://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the>.

<sup>24</sup> *U.S. Domestic Surveillance*, COUNCIL ON FOREIGN REL. (Dec. 18, 2013), <http://www.cfr.org/intelligence/us-domestic-surveillance/p9763>.

legality and propriety of the programs themselves, the value of these collection efforts, the appropriate legal constraints on such collection, and the appropriate scope and depth of oversight over the U.S. intelligence community.<sup>25</sup> Legislation to significantly curtail or alter this collection has been introduced in Congress,<sup>26</sup> and the telephony metadata program narrowly survived a test vote of 217-205 in the U.S. House of Representatives.<sup>27</sup>

These programs have likewise provoked a broad debate in foreign nations regarding the scope of intelligence collection conducted by the United States (and allegedly by certain allied governments), including significant criticism of U.S. surveillance efforts by European politicians.<sup>28</sup> Interestingly, little of this criticism—at least on a comparative basis—has focused on the surveillance efforts of those nations themselves, even though many of these nations lack anywhere near the protections and legal restrictions the disclosed American programs operate under. President Obama responded to the range of domestic and international criticism by providing a limited defense of the contours of certain surveillance programs,<sup>29</sup> while embracing some (though

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<sup>25</sup> *Id.*

<sup>26</sup> See generally Michelle Richardson & Robyn Greene, *NSA Legislation Since Leaks Began*, AM. CIV. LIBERTIES UNION (Aug. 15, 2013), <https://www.aclu.org/blog/national-security/nsa-legislation-leaks-began> (providing a summary of NSA-related legislation introduced through August 2013).

<sup>27</sup> Donna Cassata, *House Narrowly Rejects Effort to Halt NSA Program*, ASSOCIATED PRESS (July 24, 2013, 8:17 PM), <http://bigstory.ap.org/article/backers-surveillance-program-battle-challenge>.

<sup>28</sup> See Josh Levs & Catherine E. Shoichet, *Europe Furious, 'Shocked' by Report of U.S. Spying*, CNN (July 1, 2013), <http://www.cnn.com/2013/06/30/world/europe/eu-nsa/>; see also Leslie Bentz, *EU Delegation Meeting at White House Over NSA Spying Concerns*, CNN (Oct. 30, 2013), <http://www.cnn.com/2013/10/30/politics/nsa-eu-delegation/>.

<sup>29</sup> See Press Release, White House, Statement by the President (June 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president>. The statement reads, in part:

I welcome this debate. . . . I think it's important for everybody to understand—and I think the American people understand—that there are some tradeoffs involved. I came in with a healthy skepticism about these programs. My team evaluated them. We scrubbed them thoroughly. We actually expanded some of the oversight, increased some of safeguards. But my assessment and my team's assessment was that they help us prevent

not all) of the reforms proposed by a review panel he appointed to examine these activities.<sup>30</sup> Pressure remains on both the legislative and executive branches to act further, with outside groups continuing to call for stronger reforms, and even the President himself calling on Congress to consider legislative modifications to existing programs and statutes.<sup>31</sup> Alongside the issues surrounding the war on terror, these surveillance matters are likely to remain in the headlines and be an active topic of discussion in the halls of Congress and the Executive Branch.

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terrorist attacks. And the modest encroachments on the privacy that are involved in getting phone numbers or duration without a name attached and not looking at content, that on net, it was worth us doing. Some other folks may have a different assessment on that. But I think it's important to recognize that you can't have 100 percent security and also then have 100 percent privacy and zero inconvenience. We're going to have to make some choices as a society. And what I can say is that in evaluating these programs, they make a difference in our capacity to anticipate and prevent possible terrorist activity. And the fact that they're under very strict supervision by all three branches of government and that they do not involve listening to people's phone calls, do not involve reading the emails of U.S. citizens or U.S. residents absent further action by a federal court that is entirely consistent with what we would do, for example, in a criminal investigation—I think on balance, we have established a process and a procedure that the American people should feel comfortable about. . . . I know that the people who are involved in these programs, they operate like professionals. And these things are very narrowly circumscribed. They're very focused. And in the abstract, you can complain about Big Brother and how this is a potential program run amuck, but when you actually look at the details, then I think we've struck the right balance.

*Id.* See also, e.g., Shane Harris, *NSA Veterans: The White House Is Hanging Us Out to Dry*, FOREIGN POL'Y (Oct. 10, 2013), [http://www.foreignpolicy.com/articles/2013/10/10/nsa\\_veterans\\_the\\_white\\_house\\_is\\_hanging\\_us\\_out\\_to\\_dry](http://www.foreignpolicy.com/articles/2013/10/10/nsa_veterans_the_white_house_is_hanging_us_out_to_dry).

<sup>30</sup> Press Release, White House, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

<sup>31</sup> See Julie Pace, *Obama Tightens Reins on Surveillance Programs*, ASSOCIATED PRESS (Jan. 17, 2014), <http://bigstory.ap.org/article/obama-back-modest-govt-surveillance-reforms>. As the *Associated Press* reported:

Privacy advocates said they were troubled that Obama's proposals did not go further. . . . Many of the president's recommendations were aimed at increasing the American public's trust in the spying operations. He called on Congress to approve a panel of outside advocates who could represent privacy and civil liberty concerns before the FISA court.

*Id.*



The past year's developments in national security law, moreover, were not limited to the defense and intelligence arenas. Several serious legal issues arose from foreign policy challenges in the Middle East. In Egypt, the Obama Administration sought to walk a fine legal line following the military takeover of that nation's popularly-elected, but increasingly power-hungry (and unpopular) Muslim Brotherhood-backed government. In Syria, Congress sought to authorize overt military assistance and other aid to the Syrian opposition and then—at the President's request—to authorize direct military intervention in response to the Syrian regime's use of chemical weapons. In dealing with Iran, the President employed existing statutory sanctions waivers to complete an interim nuclear deal, while Congress sought to buttress the existing sanctions regime and constrain the President's use of such waivers. Whether Egypt, Syria, or Iran, each of these significant foreign policy developments resulted in a regular back-and-forth over the course of the past year between the two ends of Pennsylvania Avenue about how new or existing laws might apply to U.S. foreign policy decisions.

For example, in Egypt, the Obama Administration ultimately determined it would operate “consistent” with a prior legal prohibition on funding to coup governments by limiting certain U.S. funding, while avoiding making a formal determination on whether in fact a coup had taken place.<sup>32</sup> At the same time, after a lengthy

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<sup>32</sup> See Josh Gerstein, *Barack Obama's Egypt Coup Conundrum*, POLITICO (Oct. 20, 2013), <http://www.politico.com/story/2013/10/barack-obamas-egypt-coup-conundrum-98552.html>. As *Politico* reported:

The United States is treating Egypt's summer revolution as a coup—even if the White House won't call it that. It's the only-a-lawyer-could-love approach the Obama administration has settled on taking toward the thorny question of whether some aid to the country must be cut off by law because of the military's role in toppling elected President Mohamed Morsi in July. “Consistent with the law, we will only provide assistance to Egypt that could be provided regardless of whether the military coup restriction has been triggered,” said National Security Council spokeswoman Bernadette Meehan. . . . In meetings on Capitol Hill in recent weeks, administration officials said they have decided not to disburse aid subject to a rider in the State Department Appropriations bill that seeks to halt aid after a coup.

*Id.* See also Margaret Talev & David Lerman, *White House Shields Aid to Egypt by Avoiding Talk of Coup*, BLOOMBERG (Jul. 26, 2013), <http://www.bloomberg.com/>

process and with little fanfare, the White House sought relief from Congress from the coup restrictions in order to provide more robust funding.<sup>33</sup> In Syria, on the other hand, press reports suggested serious debates within the current administration about whether and how to support the Syrian opposition,<sup>34</sup> but when Congress sought to provide overt military assistance and training to the opposition (along with funding for humanitarian assistance), the White House remained fairly aloof.<sup>35</sup>

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news/2013-07-26/white-house-shields-aid-to-egypt-by-avoiding-talk-of-coup.html. As *Bloomberg* reported:

The Obama administration, in a move that may protect U.S. aid to Egypt, has concluded that it doesn't have to make a formal determination on whether the ouster of President Mohamed Mursi was a coup, a State Department official said. . . . "Our national security interests influence our policy as it relates to aid with Egypt," [State Department spokeswoman Jennifer] Psaki told reporters at a State Department briefing. "We reviewed the legal obligations and determined we did not need to make a determination one way or the other."

*Id.*

<sup>33</sup> See Gerstein, *supra* note 32. As *Politico* reported:

Congressional aides said this week that the administration is quietly lobbying lawmakers to provide Obama waiver authority to allow direct economic aid to Egypt to continue. Executive branch officials hoped that such a waiver would be part of the continuing resolution passed to end the government shutdown, but that did not occur, the aides said. . . . "Nothing has changed in terms of approaching what you called the coup restriction; didn't make a determination, haven't made a determination, don't think we need to make a determination, are acting consistent with the provisions of the law and we'll continue to do so," a senior administration official said last week in a press briefing announcing the withholding of some U.S. aid to Egypt.

*Id.*

<sup>34</sup> See Mark Mazzetti, *Obama's Uncertain Path Amid Syria Bloodshed*, N.Y. TIMES (Oct. 22, 2013), <http://www.nytimes.com/2013/10/23/world/middleeast/obamas-uncertain-path-amid-syria-bloodshed.html>. As *The New York Times* reported:

Yet after hours of debate in which top advisers considered a range of options, including military strikes and increased support to the rebels, the meeting ended the way so many attempts to define a Syrian strategy had ended in the past, with the president's aides deeply divided over how to respond to a civil war that had already claimed 100,000 lives.

*Id.*

<sup>35</sup> See Patricia Zengerle, *Key U.S. Senators Strongly Criticize Obama's Syria Policy*, REUTERS (Oct. 31, 2013), <http://www.reuters.com/article/2013/10/31/syria-crisis-usa-idUSL1N0IL1OG20131031>; see also Josh Rogin, *Senate Moves Toward Arming the Syrian Rebels*, DAILY BEAST (May 22, 2013), <http://www.thedailybeast.com/articles/2013/05/22/senate-moves-toward-arming-the-syrian-rebels.html>; Josh

The response to the Syrian government's use of chemical weapons was even more tangled. On August 31, 2013, the President announced from the Rose Garden that as Commander-in-Chief, he had determined that a limited military strike on Syria was an appropriate response to the Syrian regime's use of chemical weapons on its own people and that, even though he could ostensibly take action on his own, he would seek congressional approval to conduct such a strike.<sup>36</sup> In response to the President's call to action, the Senate Foreign Relations Committee, in short order, drafted and approved an authorization for the limited use of military force in Syria, reporting it to the Senate floor on September 6, 2013.<sup>37</sup> The very next day, in his weekly radio address, the President made the case for military action and once again called on the full Congress to swiftly pass an authorization for the use of force.<sup>38</sup> Yet, on September

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Rogin, *Democrats and Republicans Unite around Calls for More Aggressive Syria Policy*, CABLE (Mar. 21, 2013), [http://thecable.foreignpolicy.com/posts/2013/03/21/democrats\\_and\\_republicans\\_unite\\_around\\_criticism\\_of\\_obama\\_s\\_syria\\_policy](http://thecable.foreignpolicy.com/posts/2013/03/21/democrats_and_republicans_unite_around_criticism_of_obama_s_syria_policy).

<sup>36</sup> See Press Release, White House, Statement by the President on Syria (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>. The statement reads, in part:

Now, after careful deliberation, I have decided that the United States should take military action against Syrian regime targets. . . . [O]ur action would be designed to be limited in duration and scope. . . . But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress. . . . Yet, while I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective. We should have this debate, because the issues are too big for business as usual.

*Id.*

<sup>37</sup> Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons, S.J. Res. 21, 113th Cong. (as reported as an original bill, Sept. 6, 2013); Anne Gearan, et al., *Senate Committee Approves Resolution Authorizing U.S. Strike on Syria*, WASH. POST (Sept. 4, 2013), [http://www.washingtonpost.com/world/national-security/officials-press-lawmakers-to-approve-syria-strike-obama-invokes-congress-credibility/2013/09/04/4c93a858-155c-11e3-804b-d3a1a3a18f2c\\_story.html](http://www.washingtonpost.com/world/national-security/officials-press-lawmakers-to-approve-syria-strike-obama-invokes-congress-credibility/2013/09/04/4c93a858-155c-11e3-804b-d3a1a3a18f2c_story.html).

<sup>38</sup> Press Release, White House, Weekly Address: Calling for Limited Military Action in Syria (Sept. 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/07/>

10, 2013, in a prime-time speech to the nation—during which, until a day or so earlier, it was expected the President would make a final, aggressive press for Congress to approve the authorization to use military force—the President instead called on Congress to “postpone” its consideration of the authorization in order to provide the Obama Administration time to work on a Russian offer to assist in removing Syria’s chemical weapons.<sup>39</sup> Congress ultimately acceded to the President’s request and did not act on the Foreign Relations Committee-approved authorization. Whether Congress would have actually voted to authorize military action remains uncertain. And the wisdom (and necessity) of the President’s decision to go to Congress, as well as the motivation behind his abrupt change of direction—despite his claim of constitutional authority to act on his own—will continue to be debated.

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weekly-address-calling-limited-military-action-syria. As the President stated:

That’s why, last weekend, I announced that, as Commander in Chief, I decided that the United States should take military action against the Syrian regime. This is not a decision I made lightly. Deciding to use military force is the most solemn decision we can make as a nation. As the leader of the world’s oldest Constitutional democracy, I also know that our country will be stronger if we act together, and our actions will be more effective. That’s why I asked Members of Congress to debate this issue and vote on authorizing the use of force. . . . [W]e can’t ignore chemical weapons attacks like this one—even if they happen halfway around the world.

*Id.*

<sup>39</sup> Press Release, White House, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>. The statement reads, in part:

[A]fter careful deliberation, I determined that it is in the national security interests of the United States to respond to the Assad regime’s use of chemical weapons through a targeted military strike. . . . That’s my judgment as Commander-in-Chief. But I’m also the President of the world’s oldest constitutional democracy. So even though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress. [O]ver the last few days, we’ve seen some encouraging signs. In part because of the credible threat of U.S. military action, as well as constructive talks that I had with President Putin, the Russian government has indicated a willingness to join with the international community in pushing Assad to give up his chemical weapons. . . . I have, therefore, asked the leaders of Congress to postpone a vote to authorize the use of force while we pursue this diplomatic path.

*Id.*

And finally, in late November, the Obama Administration announced the outlines of a nuclear deal with Iran. The announcement followed many months of both clandestine and overt negotiations between Iran and the United States, in partnership with the four other permanent members of the U.N. Security Council and Germany. The interim agreement with Iran, embodied in a brief “Joint Plan of Action” (“JPOA”), provides Iran with limited relief from economic sanctions in exchange for particular concessions and limitations on Iran’s nuclear program.<sup>40</sup>

This agreement was greeted with significant skepticism on Capitol Hill. Even prior to the announcement of the interim deal, leaders from both parties had been mobilizing support for a further tightening of sanctions on Iran and imposing new limits on the President’s ability to alleviate sanctions in the absence of particular final deal parameters.<sup>41</sup> Indeed, prior to the conclusion of the JPOA, the House of Representatives cleared legislation by a significant bipartisan margin to further tighten sanctions on Iran.<sup>42</sup> In the

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<sup>40</sup> Press Release, White House, Statement by the President on First Step Agreement on Iran’s Nuclear Program (Nov. 24, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/23/statement-president-first-step-agreement-irans-nuclear-program>; White House, *Joint Plan of Action [agreed to by the P5+1 and Iran in Geneva, Switzerland, on November 24, 2013], Preamble*, available at <http://www.whitehouse.gov/sites/default/files/foreign/jointplanofaction24november2013thefinal.pdf>.

<sup>41</sup> See, e.g., *Capitol Hill Skepticism Over Iran Nuclear Deal Results in Sanctions Threat*, FOXNEWS.COM (Nov. 25, 2013), <http://www.foxnews.com/politics/2013/11/25/capitol-hill-skepticism-over-iran-nuclear-deal-results-in-bipartisan-call-for/>; see also Bernie Becker, *Top Democrats, Republicans Blast Obama’s Nuclear Deal with Iran*, HILL (Nov. 24, 2013), <http://thehill.com/blogs/global-affairs/middle-eastnorth-africa/191286-bipartisan-skepticism-meets-iran-deal>; Howard Lafranchi, *Senators, Defying White House, Push a New Iran Sanctions Bill*, CHRISTIAN SCI. MONITOR (Dec. 19, 2013), <http://www.csmonitor.com/USA/Foreign-Policy/2013/1219/Senators-defying-White-House-push-a-new-Iran-sanctions-bill>; Jordain Carney, *Corker Rolls Out Sanctions Legislation*, NAT’L J. (Nov. 21, 2013), <http://www.nationaljournal.com/defense/corker-rolls-out-sanctions-legislation-20131121>.

<sup>42</sup> Nuclear Iran Prevention Act of 2013, H.R. 850, 113th Cong. (2013); see also, e.g., Timothy Gardner, *U.S. House Passes Iran Sanctions Bill to Slash Oil Exports*, REUTERS (Aug. 31, 2013), <http://www.reuters.com/article/2013/08/01/us-usa-iran-sanctions-idUSBRE96U1GK20130801>.

Senate, legislation was introduced on both issues but was never marked up in committee.<sup>43</sup>

To date, Congress has been unable to either further tighten sanctions or limit the President's authority to relieve sanctions. At the same time, in implementing the JPOA, the President has provided Iran with some measure of relief from key sanctions using existing statutory waivers.<sup>44</sup> As the process of reaching a further agreement (or renewing the interim agreement) proceeds forward, the question of whether additional sanctions ought be relieved—and whether they can be lifted on a permanent (or semi-permanent) basis under a long-term deal without further Congressional action—will continue to be actively debated.

So the second volume of this journal appears when key debates on law and national security are broadening and intensifying. The second volume's combination of articles, book reviews, and student comments likewise span a broad range of national security law matters.

In Heeyoung Daniel Jang's article, *The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism*,<sup>45</sup> this former South Korean army soldier and U.N. peacekeeper (who counts a Yale law degree amongst his credentials) argues that not only does the use of armed unmanned aerial vehicles to combat terrorism comply with the principles of the laws of armed conflict, the use of such technologies—if properly supervised—can actually achieve critically important policy objectives in an era marked by asymmetric

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<sup>43</sup> Burgess Everett, *Tim Johnson Won't Consider Iran Bill During Talks*, POLITICO (Jan. 6, 2014), <http://www.politico.com/story/2014/01/iran-sanctions-bill-tim-johnson-101812.html>.

<sup>44</sup> Press Release, U.S. Dep't of State, Overview of Temporary Suspension of Certain U.S. Sanctions Pursuant to the Initial Understanding Between the P5+1 and Iran (Jan. 20, 2014), <http://www.state.gov/r/pa/prs/ps/2014/01/220046.htm> ("To implement this limited sanctions relief, the U.S. government has executed temporary, partial waivers of certain statutory sanctions and has issued guidance regarding the suspension of sanctions under relevant Executive Orders and regulations.").

<sup>45</sup> Heeyoung Daniel Jang, *The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism*, 2 NAT'L SEC. L.J. 1 (2013).

conflict.<sup>46</sup> The article walks through the difference between *jus ad bellum* and *jus in bello*, noting the error of many scholars and policymakers in conflating the two. Jang points out that this conflation can often lead to misunderstandings about the application of the laws of war to particular policy decisions—including the use of specific tactics—and can therefore incorrectly shape policy outcomes.<sup>47</sup> This problem of legal misconceptions affecting national security decisionmaking is not new. Indeed, a similar issue was described by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. The Commission’s final report discussed the detrimental and corrosive effect that the proliferation of “legal myths” and confusion about legal requirements can have on the national security apparatus of our government.<sup>48</sup>

Jang goes on and argues that—contrary to the popular narrative of combat drones being an “unfair” weapon—such platforms can actually serve to meet and exceed international law requirements by limiting civilian and other non-combatant casualties.<sup>49</sup> Jang suggests that, if used appropriately, these weapons can significantly contribute to efforts to meet the core law of armed conflict requirements of distinction, proportionality, necessity, and humanity based on the precision and efficiency they offer.<sup>50</sup> Jang is

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<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.* at 4-7.

<sup>48</sup> FINAL REPORT OF THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, 335 (Mar. 31, 2005), <http://www.gpo.gov/fdsys/pkg/GPO-WMD/pdf/GPO-WMD.pdf>. As the Commission reported:

Throughout our work we came across Intelligence Community leaders, operators, and analysts who claimed that they couldn’t do their jobs because of a ‘legal issue.’ . . . And although there are, of course, very real (and necessary) legal restrictions on the Intelligence Community, quite often the cited legal impediments ended up being either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications. Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative. Moreover, over time, it can breed uncertainty about real legal prohibitions.

*Id.*

<sup>49</sup> Jang, *supra* note 45, at 8-10, 39-40.

<sup>50</sup> *Id.* at 10-22.

cautious in his assessment of these weapons platforms, repeatedly noting that *how* these tools are used—from an arming, targeting, and oversight perspective—is just as, if not more, important than the tools themselves and their capabilities, particularly when it comes to legal compliance.<sup>51</sup> Finally, Jang argues that armed unmanned aerial vehicles are not only lawful, but are actually the right weapon of choice for use against armed terrorist groups, in part because of the deterrence benefits they offer.<sup>52</sup>

In *An Imperfect Balance: ITAR Exceptions, National Security, and U.S. Competitiveness*,<sup>53</sup> Clinton Long discusses the ways in which we balance our national security interests with our commercial interests in the export control arena. In evaluating U.S. arms export controls, Long argues that even though these export control laws and regulations—particularly as currently structured—have a significantly negative effect on the competitiveness of the U.S. defense sector, the importance of the national security interests at stake make the current model of providing certain exemptions a reasonable, yet sometimes imperfect, compromise.<sup>54</sup> Long further contends that this compromise can be improved through the provision of export control exemptions to additional countries beyond the three that enjoy them today, provided we can be assured that these countries will appropriately protect the advanced technologies provided.<sup>55</sup> In many ways, Long's argument mirrors the current debate surrounding the controversy over the Section 215 program—how to balance U.S. national security interests against others that the nation holds close.

In *Taking Confusion Out of Crisis: Making Sense of the Legal Framework for Federal Agencies to Provide Law Enforcement Support to State and Local Governments in Emergencies*,<sup>56</sup> Alexander Yesnik, a

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<sup>51</sup> *E.g.*, *id.* at 12-15, 22, 26.

<sup>52</sup> *Id.* at 23-34.

<sup>53</sup> Clinton Long, *An Imperfect Balance: ITAR Exemptions, National Security, and U.S. Competitiveness*, 2 NAT'L SEC. L.J. 43 (2013).

<sup>54</sup> *Id.* at 44-46, 51-55, 60-62.

<sup>55</sup> *Id.* at 62-63.

<sup>56</sup> Alexander J. Yesnik, Comment, *Taking Confusion Out of Crisis: Making Sense of the Legal Framework for Federal Agencies to Provide Law Enforcement Support to State and Local Governments in Emergencies*, 2 NAT'L SEC. L.J. 111 (2013).



senior FEMA emergency management official (and current George Mason University law student), seeks to bring some measure of coherence—if such can even be imagined possible—to the chaotic structure of federal support to state and local entities in crisis situations. Yesnik spends a significant portion of his piece sorting through the various laws and government bureaucracies that bear on such support,<sup>57</sup> and for good reason: the catalog of laws, processes, and entities that have evolved to address these issues and how they interact is convoluted and complex at best, and represents a Rube Goldberg-like federal machine at worst. The examples that Yesnik discusses—Hurricanes Katrina, Gustav, and Ike—simply highlight the major dysfunction of the federal response in crisis situations.<sup>58</sup> While, undoubtedly, the response in the latter two scenarios was somewhat better—perhaps in part because a handful of lessons were learned and because the later incidents were of relatively smaller magnitude—the reality is that legal issues still remained and drove significant challenges in the timely and appropriate delivery of federal assistance.<sup>59</sup> Yesnik suggests some basic fixes, in an effort to rationalize federal delivery of assistance, including the consistent use of one set of authorities and the use of enhanced coordinating mechanisms, while also acknowledging the practical challenges—including funding—of actually implementing such reform absent statutory fixes by Congress.<sup>60</sup>

The problems Yesnik raises—of coordination and cooperation between our state and local agencies and the relevant federal entities—are far from limited to the disaster response function of the U.S. national security community. The article should be seen as a broader call for the federal government to anticipate such challenges, rather than responding in hastily improvised ways after each disaster.

*In Nonjudicial Punishment in the Military: Why a Lower Burden of Proof Across All Branches is Unnecessary,*<sup>61</sup> Kathrine Gorski

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<sup>57</sup> *Id.* at 114-27.

<sup>58</sup> *Id.* at 127-38.

<sup>59</sup> *Id.* at 138-39.

<sup>60</sup> *Id.* at 139-43.

<sup>61</sup> Katherine Gorski, Comment, *Nonjudicial Punishment in the Military: Why a*

discusses the burden of proof requirement for nonjudicial punishment in the military. Gorski argues that the particular circumstances aboard a naval vessel counsel in favor of permitting a lower burden of proof for nonjudicial punishment on Navy ships, and that absent such circumstances elsewhere, such a lower burden is not necessarily appropriate in other branches.

In particular, Gorski discusses the important and historic role of nonjudicial punishment in maintaining discipline and good order in the military ranks.<sup>62</sup> She describes the flexibility that such procedures provide by offering a menu of limited punishments for minor offenses, as well a lower burden of proof.<sup>63</sup> Gorski notes that such procedures still adhere to basic principals to ensure due process is provided and only appropriate levels of punishment are employed.<sup>64</sup> Some readers might be surprised to learn that the nonjudicial punishments available under such procedures include, among other things, for officers, measures including restriction for up to sixty days (or, in certain cases, arrest in quarters for up to thirty days), limitation or loss of pay, reduction in pay grades, and for enlisted members, confinement on bread and water for no more than three consecutive days, further correctional confinement within limits, and significant reductions in rank.<sup>65</sup> Even though some of these punishments may seem at first blush somewhat harsh for a nonjudicial proceeding marked by a relatively low burden of proof, Gorski argues that a higher burden of proof is unnecessary and, in the particular case of a naval vessel, choosing not to apply a higher burden is an appropriate use of the discretion afforded by the Uniform Code of Military Justice.<sup>66</sup>

Finally, the two book reviews in this issue present important issues of note for the national security community. The authors of the two books reviewed—Juan Zarate and Michael Allen—are both

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*Lower Burden of Proof Across All Branches is Unnecessary*, 2 NAT'L SEC. L.J. 83 (2013).

<sup>62</sup> *Id.* at 88-89.

<sup>63</sup> *Id.* at 89-99.

<sup>64</sup> *Id.* at 86-93.

<sup>65</sup> *Id.* at 92-95.

<sup>66</sup> *Id.* at 89-91, 109-10.

former senior government officials who served in key national security positions in the prior Bush Administration. Both remain substantially engaged in the public debate over our national security policy even though each has now left the government. Zarate, for example, remains engaged as a senior advisor at the Center for Strategic and International Studies, a visiting lecturer at Harvard Law School, and a regular contributor on CBS, as well as on the board of advisors at the National Counterterrorism Center. Allen also remains engaged in the national security debate, having only recently left his post on Capitol Hill as staff director for the House Intelligence Committee to found a national security strategic consulting firm and having previously served as the intelligence team lead for the nascent Romney for President transition team.

These authors present a unique perspective, with Zarate having served as a key advisor to the President and in a senior role at the Treasury Department and Allen as a legislative advisor to the President and later as a key Capitol Hill insider. Indeed, in writing their books, both authors employ their experience working in the government and seek to evaluate the policy processes in which they played key roles. Zarate focuses on what he describes as the new era of financial warfare undertaken by the Bush and Obama Administrations, while Allen focuses on the politics, agendas, personalities, and policies at issue in enacting the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), the major intelligence reform of the last decade.<sup>67</sup>

The reviewers—esteemed in their own right—provide helpful summaries of the books and raise questions to help readers distinguish between the objective and subjective arguments and assessments made by the authors. For example, Amit Kumar, in reviewing Zarate’s *Treasury’s War*,<sup>68</sup> wonders whether the claims about financial warfare can truly be supported by measurable

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<sup>67</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 50 U.S.C.).

<sup>68</sup> Amit Kumar, *Counter-Threat Finance and National Security: Treasury’s Inimitable and Indispensable Role*, 2 NAT’L SEC. L.J. 72 (2013) (book review) (reviewing *Treasury’s War: The Unleashing of a New Era of Financial Warfare* by Juan C. Zarate).

outcomes, and whether the benefits of such efforts outweigh the costs.<sup>69</sup> Kumar also questions whether the United States ought to do more in the international arena and raises specific issues about our existing sanctions regime, from asset freezes to terrorism-related measures.<sup>70</sup> These are, of course, issues very much at stake today, perhaps nowhere more so than in the debate over the Iranian nuclear program and the U.S. negotiating strategy.

Similarly, Genevieve Lester, in reviewing Allen's *Blinking Red*,<sup>71</sup> argues that a more explicit conceptual framework for the book would have been useful and, without explicitly saying so, seems to suggest that perhaps a more dispassionate assessment of the intelligence reform Allen discusses might have provided additional value.<sup>72</sup> Of course, as Congress once again looks at the potential for major intelligence reform in the aftermath of the NSA disclosures, building a rational framework for analysis, taking a dispassionate view of the issues at stake, and remembering the lessons of the drag down fight that Allen describes surrounding IRTPA, will be valuable lessons for policymakers to keep in mind.

In sum, volume two of the *National Security Law Journal* comes to fruition in a turbulent and interesting time for our field and provides a series of articles, book reviews, and student comments that engage the reader on a wide range of topics that all have significant import for ongoing legal and policy debates. Enjoy the reading.



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<sup>69</sup> *Id.* at 79-80.

<sup>70</sup> *Id.* at 80-81.

<sup>71</sup> Genevieve Lester, *Symbolism and Security: The Politics of Post-9/11 Intelligence Reform*, 2 NAT'L SEC. L.J. 65 (2013) (book review) (reviewing *Blinking Red: Crisis and Compromise in American Intelligence After 9/11* by Michael Allen).

<sup>72</sup> *See id.* at 70-71.



## THE LAWFULNESS OF AND CASE FOR COMBAT DRONES IN THE FIGHT AGAINST TERRORISM

**Heeyong Daniel Jang\***

### INTRODUCTION: COMBAT DRONES AGAINST TERRORISM

The recent proliferation of unmanned aerial vehicles (“UAVs”),<sup>1</sup> more commonly referred to as drones, have spawned intellectual debates on whether a country has the right under the international law to unilaterally deploy these remotely or autonomously controlled aircraft abroad for military purposes. An increasing number of countries—more than seventy—have access to this novel technology to fulfill various military objectives, including

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<sup>1</sup> For the purpose of this paper and reflecting the general usage, *combat drone* and Unmanned Combat Aerial Vehicle (“UCAV”) will be used interchangeably. *Drone* refers to both UAV and UCAV. UAVs are “operated remotely or fly autonomously based on pre-programmed flight paths or other systems designed to allow them to operate autonomously. UAVs are a category of aircraft, for they use aerodynamic forces to provide vehicle lift and are designed for sustained, level flight.” PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 54 (2010) [hereinafter COMMENTARY ON THE HPCR MANUAL], available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>.

surveillance, reconnaissance, and targeted killing.<sup>2</sup> The most controversial use of drones is that of unmanned combat aerial vehicles (“UCAVs”),<sup>3</sup> also known as combat drones, for striking terrorist suspects in a foreign country.

In the wake of the September 11, 2001 terrorist attacks, the U.S. government began to actively employ UCAVs to assassinate suspected terrorists abroad. Since taking office, President Obama has greatly increased the use of combat drones. In fact, President Obama “during his first year in office oversaw more drone strikes in Pakistan than occurred during the entire Bush presidency.”<sup>4</sup> According to *The Long War Journal*, an estimated 801 militant deaths in Pakistan occurred from U.S. drone strikes in 2010, which is significantly higher than the 195 drone-caused deaths from 2004 to 2007.<sup>5</sup> Drones are gradually evolving into the centerpiece of the U.S. counterinsurgency program. On August 8, 2009, General Stephen Lorenz, the commander of Air Education and Training Command, stated that the U.S. Air Force will train more UAV operators in that year than pilots to fly manned aircraft.<sup>6</sup> Such increasing reliance on UAVs is likely to continue, but not without apprehension. Critics argue that dreadful stories of civilian collateral damage belie assertions that drones afford greater precision than other weapons. For example, in an attack that targeted Baitullah Mehsud, an infamous leader of a Taliban umbrella group, twelve civilians in the

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<sup>2</sup> According to the U.S. Government Accountability Office, the number of countries that possess drones has risen from forty-one to seventy-six since 2005. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-536, NONPROLIFERATION: AGENCIES COULD IMPROVE INFORMATION SHARING AND END-USE MONITORING ON UNMANNED AERIAL VEHICLE EXPORTS 9 (2012), available at <http://www.gao.gov/assets/600/593131.pdf>.

<sup>3</sup> Unmanned Combat Aerial Vehicle refers to “unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target ... [It] may be remotely controlled and piloted.” COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 55.

<sup>4</sup> Robert Wright, Op-Ed., *The Price of Assassination*, N.Y. TIMES, Apr. 13, 2010, [http://opinionator.blogs.nytimes.com/2010/04/13/title-2/?\\_r=1](http://opinionator.blogs.nytimes.com/2010/04/13/title-2/?_r=1).

<sup>5</sup> Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004-2013*, LONG WAR J. (Sept. 5, 2013), <http://www.longwarjournal.org/pakistan-strikes.php>.

<sup>6</sup> Walter Pincus, *Air Force to Train More Remote than Actual Pilots*, WASH. POST, Aug. 11, 2009, [http://articles.washingtonpost.com/2009-08-11/politics/36824678\\_1\\_ground-troops-air-education-aircraft](http://articles.washingtonpost.com/2009-08-11/politics/36824678_1_ground-troops-air-education-aircraft).

vicinity also died.<sup>7</sup> The drone-launched missile strike on Aiman al-Zawahiri, Osama bin Laden's deputy, killed eighteen bystanders while altogether missing the intended target.<sup>8</sup> Unsurprisingly, people demand a legal justification for such killings.

The law in this instance has unfortunately fallen behind technical development. The law of armed conflict ("LOAC") is perhaps the clearest manifestation of this legal vacuum because the Hague Conventions,<sup>9</sup> the Geneva Conventions and Additional Protocols,<sup>10</sup> and other LOAC treaties are essentially *post factum* reactive initiatives to ameliorate earlier misconduct. Therefore, these rules often fail to regulate the use of the most current weaponry.

Despite their reactive nature, the Hague and Geneva Conventions embody the foundational normative framework applicable to evaluating the lawfulness of drones. For example, the

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<sup>7</sup> Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, at 10 (Notre Dame Legal Studies, Working Paper No. 09-43, 2010), available at <http://ssrn.com/abstract=1501144>.

<sup>8</sup> Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 150 (2010).

<sup>9</sup> The Hague Conventions of 1899 and 1907 are a series of multinational treaties that aimed at regulating the conduct of warfare. See Hague Convention for the Pacific Settlement of International Disputes, *adopted* July 29, 1899, 32 Stat. 1779, 1 Bevans 230; Hague Convention for the Pacific Settlement of International Disputes, *adopted* Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577.

<sup>10</sup> The term *Geneva Conventions* refers to four conventions in 1949. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; see also Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Protocols were added to the Geneva Conventions in 1977 and 2005. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *adopted* Dec. 8, 2005, 2006 A.T.N.I.F. 6., 45 I.L.M. 558.

Martens Clause inserted in the Hague Conventions highlights “the rule of the principles of the law of nations” as a guiding principle to legally oversee technological development.<sup>11</sup> Indeed, “this law [of war] is not static, but by continual adaptation follows the needs of a changing world.”<sup>12</sup>

In short, the proper use of combat drones is not only lawful, but also necessary for its policy implications in an era of asymmetric warfare. A rigorously supervised UAV can satisfy the four-pronged *jus in bello* test—distinction, proportionality, necessity, and humanity.<sup>13</sup> Furthermore, the use of UAVs could successfully achieve five important and interrelated policy objectives in light of maintaining the global order against terrorism: (1) safeguard national security in an era of asymmetric warfare; (2) combat insurgents defiant of the law of war; (3) serve as a deterrent against non-state actors residing in ineffective states; (4) protect troops from improvised explosive devices (“IEDs”); and (5) prevent more costly military actions.

I. SCOPE OF APPLICABLE LAW: *JUS IN BELLO*, NOT *JUS AD BELLUM*

Scholars and government officials often conflate *jus ad bellum* and *jus in bello* in their analysis of the legality of drones.<sup>14</sup>

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<sup>11</sup> According to Hague Convention IV:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Hague Convention IV Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention IV].

<sup>12</sup> TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, VOL. 1, at 221 (1947), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf).

<sup>13</sup> See Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT’L L. 1051 (1998).

<sup>14</sup> Both supporters and objectors of drones have discussed the validity of drones under *jus ad bellum*. See, e.g., Chris Jenks, *Law from Above: Unmanned Aerial*



Although it is important to evaluate whether the initiation of a particular military action conforms to the accepted principle of *jus ad bellum*, this question is irrelevant in assessing the lawfulness of a particular weapon. A lawful weapon used in an unlawful war is still lawful under *jus in bello*. Likewise, legitimacy under *jus ad bellum* can neither justify nor mitigate flagrant violations of *jus in bello*: “*In bello* rules and principles apply equally to all combatants, whatever each belligerent’s avowed *ad bellum* rationale for resorting to force.”<sup>15</sup> The discussion of lawfulness of a weapon should thus remain distinct from the law regulating the initiation of force because the qualification of the user has no effect on the lawfulness of the weapon itself. Whether the CIA has the legal authority to use combat drones is not only beyond the scope of this paper, but also irrelevant to establishing the lawfulness of drones.

Harold Koh, former Legal Advisor of the U.S. Department of State, conflated *jus in bello* with *jus ad bellum* when he justified the use of unmanned drones *vis-à-vis* targeted killing by saying that “the United States is in an armed conflict with Al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, [and the United States] may use force consistent with its inherent right to self-defense under international law.”<sup>16</sup> Regardless of the validity of Koh’s reasoning on whether the United States’ use of drones against terrorists and associated forces satisfies international law is correct, he fails to adequately defend the lawfulness of drones in general. There are two inherently different questions presented before him. First, can the United States be at war with a non-state actor as an act of self-defense? Debates on international and domestic legal authorizations, i.e., *jus ad bellum*, such as the U.N. Charter, self-defense, and the Authorization for Use of Military Force

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*Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 656 (2009); O’Connell, *supra* note 7, at 11.

<sup>15</sup> Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 49 (2009).

<sup>16</sup> Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Speech at Annual Meeting of the American Society of International Law: The Obama Administration and International Law III.B. ¶ 2 (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

(“AUMF”)<sup>17</sup> only relate to whether a state can wage war against a non-state actor. These factors cannot be used to measure the lawfulness of drones. Second, can targeted killing using UCAV conform to the law of armed conflict, i.e., *jus in bello*? Harold Koh’s response wrongly assumes that a positive answer to the *jus ad bellum* issue will vindicate the use of drones. The right for anticipatory, if not preemptory, self-defense cannot justify a particular weapon used in the armed conflict. Philip Alston, U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, criticizes such a “robust form of self-defense,” which “reflects an unlawful and disturbing tendency in recent times to permit violations of IHL [international humanitarian law] based on whether the broader cause in which the right to use force . . . is ‘just,’ and impermissibly conflates *jus ad bellum* and *jus in bello*.”<sup>18</sup>

Conflating *jus ad bellum* and *jus in bello* causes two detrimental consequences. First, the belligerent could perceive that no right arises from an illegal act—i.e., *ex injuria jus non oritur*. This notion is inimical to justice and antithetical to LOAC that emerged from eclectic treaties and customary international law. If all soldiers are equally liable in an unlawful war, motivation to respect LOAC plummets. Even an unlawful war triggers *jus in bello* responsibilities: “War victims need as much protection against the belligerent fighting in conformity with the [*jus*] *ad bellum* as against a belligerent who violated [*jus*] *contra bellum*.”<sup>19</sup> For instance, the use of “dum-dum” bullets or poisonous gas—widely accepted as unlawful weapons either under the Hague Conventions or customary international law<sup>20</sup>—is unlawful in all circumstances. In other words,

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<sup>17</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

<sup>18</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 42, U.N. Doc A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston], available at <http://www.refworld.org/docid/4c0767ff2.html>.

<sup>19</sup> Marco Sassoli, *Ius ad Bellum and Ius in Bello – The Separation Between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 241, 245 (Michael N. Schmitt & Jelena Pejic eds., 2007).

<sup>20</sup> See Hague Convention IV, Declaration III Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187

LOAC dictates that even if a state or organization complied with *jus ad bellum*, individual violators of *jus in bello* should still be punished. On the other hand, a righteous soldier, who abided by all laws in an unlawful war, is free of liability.

The second detrimental consequence of conflation is the notion that the justness of war could absolve unlawful acts. Using illegitimate means to achieve a legitimate end is still unlawful. A country is barred from illicit conduct even if the aggression is necessary and proportional to achieve the goal authorized by the U.N. Charter. Even the most vocal critics of drones will concede that the use of UAVs is acceptable when there is overwhelming evidence for nuclear terrorism. Although such an argument might be appealing on the surface, it is fundamentally unsound because *jus in bello* imposes certain limits on the conduct of warfare. Surely, *jus in bello* prohibits the dropping of a biological weapon or other unlawful means to prevent nuclear terrorism.<sup>21</sup> Amidst the 1999 NATO bombing campaign against Yugoslavia, a Pentagon official defended an attack on the electricity system, saying, “[w]e are aware this will have an impact on civilians, but we are in the midst of a military operation against Slobodan Milosevic.”<sup>22</sup> The “noble” objective of ousting Milosevic, or the authority under *jus ad bellum*, is immaterial in justifying questionable conduct under *jus in bello*. If the conduct violates *jus in bello*, the behavior is unlawful at all times.

The discussion about the lawfulness of combat drones should focus strictly on the LOAC applicable after the hostility has

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Consol. T.S. 459; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

<sup>21</sup> Article I of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction imposes an absolute ban on the possession of biological weapons: “Never under any circumstances to acquire or retain” biological weapons. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 587, 1015 U.N.T.S. 163, 166.

<sup>22</sup> Elizabeth Becker, *Crisis in the Balkans: Pentagon; NATO Calls Transformers a Key Target in War Plan*, N.Y. TIMES, May 25, 1999, at A16.

begun, regardless of how the hostility was initiated.<sup>23</sup> Hence, *jus in bello* will refer to relevant conventions and agreements, as well as customary international law on aerial warfare, mirroring the language of Article 31 of 1977 Geneva Protocol I that “[a] High Contracting Party is under an obligation to determine whether . . . employment [of a new weapon] would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”<sup>24</sup> In particular, the laws of air and missile warfare in both international and non-international armed conflicts are applicable considering the potential use of combat drones.<sup>25</sup>

## II. THE LAWFULNESS OF COMBAT DRONES

The technological innovation of drones is lawful and preferable to archaic weapons. During World War II, technological limitations wreaked havoc during the attempt by the United States to engage in precision targeting of Axis forces.<sup>26</sup> The embryonic state of the equipment combined with high altitude bombing, which was intended to maximize the safety of the aircraft, drastically

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<sup>23</sup> See Legality of the Threat or Use of Nuclear Weapons, Advisory Op., 1996 I.C.J. 226, 263 (July 8) for how the International Court of Justice blurred the *ad bellum-in bello* distinction. This opinion not only undermined the effort towards nuclear disarmament as well as prohibition of weapons that cause unnecessary suffering, but also hinted that *ad bellum* necessity, e.g., self-defense, could render *jus in bello* extraneous. *Id* at 262.

<sup>24</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 36, June 8, 1977, 1125 U.N.T.S. 5 (entered into force Dec. 7, 1978) [hereinafter Geneva Protocol I].

<sup>25</sup> “However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.” Alston, *supra* note 18, at ¶ 79.

<sup>26</sup> The United States was not the only country with problems associated with precision bombing: “The very first employment of modern missiles in warfare – that of the German V-1s and V-2s in World War II was an epitome of an indiscriminate attack. Since these missiles were technologically incapable of being aimed at a specific military objective, they were pointed in the general direction of a large metropolitan area and . . . violated the cardinal principle of distinction.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 128 (2010).

compromised the accuracy of the missile.<sup>27</sup> Precision only slightly improved by the Vietnam War.<sup>28</sup> Although the advent of precision-guided munitions (“PGMs”) contributed to a drastic increase in accuracy, early PGMs fell far short of satisfying the modern standard for precision bombing.<sup>29</sup> In order to minimize collateral damage, devices that can better satisfy the requirements of LOAC must replace outmoded weapons.

This section will illustrate how drones can exceptionally meet the *jus in bello* requirements. In fact, hi-tech weapons designed to improve precision and efficiency can be expected to fulfill a higher duty of care, and can actually increase the rigor of the test of lawfulness. Michael Schmitt, the Chairman of the International Law Department at the United States Naval War College, refers to this phenomenon as *normative relativism*—when more information is available, the *jus in bello* responsibility is higher.<sup>30</sup> Parties using drones have sufficient time to scrutinize the particulars of the target. Failure to exploit this extra opportunity for precision targeting should trigger legal responsibility under *jus in bello*. Therefore, the introduction of PGMs and advanced weapons platforms, such as combat drones, raises the legal threshold beyond those distinction, proportionality, necessity, and humanity tests of the past.<sup>31</sup>

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<sup>27</sup> In WWII, only five percent of bombs fell within 1,000 feet of the target if the bomb was launched in excess of 27,500 feet. Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 445 (2004).

<sup>28</sup> In the Vietnam War, “the destruction of the Paul Doumer Bridge in Hanoi required 113 sorties by USAF F-105 fighter-bombers during 1966 and 1967 and the use of 380 tons of bombs.” *Id.* at 448.

<sup>29</sup> In the 1991 Gulf War, “as many as eighty-five percent of PGMs reportedly hit within ten feet of their aim point.” *Id.* at 451.

<sup>30</sup> “The result [of technological disparity] is normative relativism—the high tech belligerent is held to higher standards *vis-à-vis* precautions in attack than its opponent.” Michael N. Schmitt, *War Technology and the Law of Armed Conflict*, in 82 INTERNATIONAL LAW STUDIES: THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 137, 163 (Anthony M. Helm, ed., 2006).

<sup>31</sup> See *infra* Part II.A–D.

The Rome Statute of the International Criminal Court (“ICC”) promulgates violations of *jus in bello* as war crimes.<sup>32</sup> Despite the reluctance of major military superpowers to ratify the statute,<sup>33</sup> the establishment of the ICC was a major step forward to hold violators of *jus in bello* accountable. Article 8 of the Rome Statute pronounces that the intentional actions to cause indiscriminate, disproportionate, unnecessary, and inhumane injury constitute war crimes and that the perpetrators of such actions fall under the jurisdiction of the ICC.<sup>34</sup> Assessed in light of *normative relativism*, greater reliance on advanced weapons platforms not only diminishes the chance of launching unlawful attacks, but also revolutionizes the framework in which the lawfulness is measured. Since the relevant law can be applied more rigorously due to the input of greater information, controversial attacks that were exonerated in the past due to inadequate technology can now be condemned as a war crime.

Without speculating about other potentially illegitimate usage, this article assumes that combat drones continue to fire only PGMs. Drones are advanced weapons platforms, hence, the lawfulness of the system also depends on the equipped weapon. That is, the legal status of UCAVs upends if an unlawful weapon is employed. The evaluation proceeds with the premise that only variations of PGMs, specifically designed for targeting limited areas, are used. If so, UCAVs are lawful and their use must be encouraged as substitutes for old-fashioned weapons to induce better compliance with the LOAC.

#### A. *Distinction*

The principle of distinction is a cardinal element of LOAC that transcends technological advancement. Article 51 of Geneva

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<sup>32</sup> Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90, 94-96, *available at*

<http://treaties.un.org/doc/publication/UNTS/Volume%202187/v2187.pdf>.

<sup>33</sup> The United States, China, and Russia have not ratified the Rome Statute. *Id.* at 4-6.

<sup>34</sup> *Id.* at 90-96.

Protocol I stipulates that civilians may not be “the object of attack.”<sup>35</sup> This protocol prohibits both deliberate attacks against civilians and indiscriminate attacks that are not premeditated, but indifferent to the injury on civilian populations.<sup>36</sup>

Whenever possible, countries must not use out-of-date indiscriminate munitions such as unguided rockets in situations where aerial bombing is necessary. Instead, they should deploy the high-tech PGMs that can verify a target with greater precision. Contemporary war has no explicit geographical and temporal limits. Thus, unlike in earlier wars, physical distance of the aggressor from the target is no longer germane and cannot be the subject of criticism.<sup>37</sup> The crux of the debate must focus on whether, despite being controlled from Langley, Virginia, or elsewhere, drones can meet the distinction test in the battlefield.

LOAC affords special protection to certain groups of people. For instance, Articles 15, 41, and 79 of Geneva Protocol I immunize from attack civilian medical and religious personnel, belligerents recognized as *hors de combat*, and journalists, respectively.<sup>38</sup> Mortar shelling and high-altitude bombardment—among other haphazard means—are ill-equipped for distinguishing these special categories of participants entitled to protection. On the other hand, direct

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<sup>35</sup> “States must never make civilians the object of attack.” Geneva Protocol I, *supra* note 24, art. 51(2), 51(4). See also The Hague Rules of Air Warfare art. 22, Dec. 1922 – Feb. 1923 [hereinafter 1923 Hague Rules of Aerial Warfare], available at [http://lawofwar.org/hague\\_rules\\_of\\_air\\_warfare.htm](http://lawofwar.org/hague_rules_of_air_warfare.htm).

<sup>36</sup> Geneva Protocol I, *supra* note 24, art. 51(2), 51(4).

<sup>37</sup> Philip Alston fears that the physical distance could engender a “Playstation” mentality to killing—i.e., haste and injudicious targeting practice based upon unreliable information. See Alston, *supra* note 18, at ¶ 84. Similarly, critics argue that the use of drones dehumanizes the war and makes the act of killing easier. Such criticisms are speculative at best. Drone operators demur at such ungrounded assertions; in reality, these professionals are frequently traumatized by the experience. See also *Remote-control Warriors Suffer War Stress*, ASSOCIATED PRESS, Aug. 7, 2008 [hereinafter *Remote-control Warriors*], <http://www.nbcnews.com/id/26078087/#.Ulwb4Ra9Rbw>. Such a psychologically troubling task of killing—however remotely operated—combined with comprehensive rules of engagement enables further deliberation prior to launching the missile.

<sup>38</sup> Geneva Protocol I, *supra* note 24, art. 15, 41, 79.

participation in hostilities (“DPH”) by civilians strips them of their protected status, which allows them to be targeted.<sup>39</sup>

The current technological state of UCAVs guarantees enhanced ability to distinguish combatants from noncombatants. Two types of combat drones—the MQ-1B Predator and the MQ-9 Reaper—are widely deployed in targeting missions. According to the U.S. Air Force, one of the more salient features of these cutting-edge aircraft is the Multi-Spectral Targeting System (“MTS-B”), which integrates an infrared sensor, a color/monochrome video camera, an image-intensified video camera, a laser designator, and a laser illuminator to maximize precision.<sup>40</sup> The laser-guided AGM-114 Hellfire missiles employed in these drones further ensure the accuracy of targeting with minimum collateral damage.<sup>41</sup> Thus, UCAVs, unlike outmoded weapons platforms, allow for discriminate targeting. The operator can visually corroborate the target to conclude if a civilian has converted himself into a belligerent, or if a soldier is incapacitated or intends to surrender.<sup>42</sup>

The drone operators have a visual sight of the target over a prolonged time until its death or destruction is verified. Although these drones are not entirely fail-safe, they are far more discriminate than the vast majority of aerial or artillery bombardments, let alone ground soldiers acting hastily in life-threatening situations. According to Colonel Chris Chambliss, commander of the 432<sup>nd</sup> Wing at Creech Air Force Base, Nevada, drone operators are disposed to psychological trauma precisely due to the clarity of video:

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<sup>39</sup> See Geneva Protocol I, *supra* note 24, art. 50(3); see also Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 705-12 (2010) (discussing who qualifies as civilian DPH).

<sup>40</sup> U.S. AIR FORCE, FACT SHEET: *MQ-9 Reaper*, (Aug. 18, 2010) [hereinafter *MQ-9 Reaper*], <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx>; U.S. AIR FORCE, FACT SHEET: *MQ-1B Predator*, (July 20, 2010) [hereinafter *MQ-1B Predator*], <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx>.

<sup>41</sup> *MQ-9 Reaper*, *supra* note 40.

<sup>42</sup> See *id.*



“You have a pretty good optical picture [from drones] of the individuals on the ground. The images can be pretty graphic, pretty vivid, and those are the things we try to offset. We know that some folks [drone pilots] have, in some cases, [psychological] problems.”<sup>43</sup>

Several countries are reluctant to accept the Geneva Protocol I in part due to its elaborate rules on discrimination.<sup>44</sup> Articles 48 to 67 of the Geneva Protocol I “caused concern in certain states because of fears that commanders might be subject to accusations of war crimes not based on an understanding of the fact that in war commanders have to take action on the basis of imperfect information.”<sup>45</sup> Such concerns are unwarranted with UCAVs because the detailed live video feed and outstanding information-gathering capacity of drones enable the operator to constantly verify the target to confirm utmost accuracy. While information can never be perfect, a clear visual sighting of the enemy can drastically reduce the chance of wrongfully targeting civilians:

UAVs can be a useful asset in complying with the obligation to take feasible precautions in attack. UAVs with on-board sensors will contribute to verification that an intended target is a lawful target. . . . Hence, if available and when their use is feasible, UAVs ought to be employed in order to enhance reliability of collateral damage estimates (especially when this can be done in real-time).<sup>46</sup>

Such accessibility and clarity of information demand a higher duty of care to fulfill the distinction requirement. Failure to satisfy the elevated duty of care standard should automatically create liability. The designated UCAV operator responsible for each targeting mission should be relatively easy to identify. That is, compared with locating the source of guns and mortars from chaotic barrage fires, the drone pilot who launched the missile at a particular time is traceable with reasonable effort. If a violation of the rules of engagement or indiscriminate targeting occurs, the operator could be

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<sup>43</sup> *Remote-control Warriors*, *supra* note 37.

<sup>44</sup> ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 420 (Oxford Univ. Press, 3rd ed. 2000) (1982).

<sup>45</sup> *Id.*

<sup>46</sup> COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 135.

tracked down and court-martialed. Such a high bar of responsibility will encourage meticulous selection and authentication of lawful targets. For instance, it would be more difficult to defend the U.S. bombing of the Chinese embassy in Belgrade as an accident if the official had a higher duty of care owing to the availability of clear visual information. Thus, when such information is available, the official engaged in unlawfully targeting civilians is more likely to be found liable under international law.<sup>47</sup> This is a distinct advantage of utilizing combat drones to ensure conformity with *jus in bello*:

Thus, as a factual matter, those employing precision weapons will have greater difficulty shielding themselves from allegations of indiscriminate attack than those who do not. Similarly, those with advanced [intelligence, surveillance and reconnaissance (“ISR”)] will have a much more difficult time convincing others that an attack striking civilians and civilian objects was a case of mistaken identity rather than an indiscriminate act of recklessness (or intent).<sup>48</sup>

Through increased accountability, the use of UCAVs supports cautious targeting. Of course, even the most state-of-the-art weapon can violate the principle of distinction when fired blindly. The United States needs to work on training UCAV operators and implementing strict guidelines for distinguishing combatants from noncombatants, which remains largely classified.<sup>49</sup> In any event, shortcomings of the operator and the targeting procedure are

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<sup>47</sup> Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 455 (2005). Although the use of drones raises the duty of care standard and improves the chance of prosecution, no UCAV operator has been convicted for violating *jus in bello* by an international tribunal. The likelihood of an international trial and meaningful punishment against a responsible officer in the near future is slim considering (i) the absence of an effective criminal tribunal on the subject, (ii) jurisdictional limits, and (iii) the possibility of state immunity.

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

<sup>49</sup> Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK MAG. (Feb. 13, 2011), <http://mag.newsweek.com/2011/02/13/inside-the-killing-machine.html> (quoting Michael Scheuer, who used to be in charge the CIA’s Osama bin Laden Unit, “[The dossier with information on targeting suspects] would go to the lawyers, and they would decide. They were very picky. . . . Very often this caused a missed opportunity. The whole idea that people got shot because someone has a hunch – I only wish that was true. If it were, there would be a lot more bad guys dead.”).

unrelated to the *just in bello* lawfulness of UCAVs, which are uniquely suited to uphold the principle of distinction. The probability of accidentally targeting a civilian with a PGM from a UCAV is drastically lower than the probability of accidentally targeting a civilian with outmoded weapons. Therefore, UCAVs used under a carefully proscribed protocol not only comply with but also act as a catalyst to uphold the distinction requirement.

### B. Proportionality

The right of belligerents to adopt means of injuring the enemy is not unlimited and the principle of proportionality is an essential consideration. *In bello* proportionality prohibits the use of weapons that cause “excessive [civilian collateral damage] in relation to the concrete and direct military advantage anticipated.”<sup>50</sup> The definition proposes a balancing test between lawful collateral damage and anticipated benefits. The former refers to “reasonable” civilian injury or death, and the latter “need not be confined to the time-frame of the attack or to the locale of its object.”<sup>51</sup> Hence, the term proportionality is cognizant of the reality that a certain degree of civilian casualty is inevitable in wartime. Reasonable incidental injury accompanying combat drones is acceptable if the target poses a sufficient, not necessarily imminent, threat.<sup>52</sup>

The visual information transmitted from combat drones opens up the possibility of conducting systematic cost-benefit analysis to satisfy the proportionality test. Traditionally, unsteadiness of surrounding conditions, along with imprecision, impaired the accuracy of air bombing.<sup>53</sup> Before the invention of

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<sup>50</sup> Geneva Protocol I, *supra* note 24, art. 57(2)(1)(iii).

<sup>51</sup> See DINSTEIN, *supra* note 26, at 133-38.

<sup>52</sup> As discussed in *Commentary on the HPCR Manual*:

In the context of the law of international armed conflict, harm to civilians and civilian objects that the attacker did not expect is not collateral damage included in proportionality calculations, so long as the lack of expectation of harm was reasonable in the circumstances. The key question with regard to such harm is whether there is compliance with the requirement to take feasible precautions in attack.

COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 33 (citation omitted).

<sup>53</sup> DINSTEIN, *supra* note 26, at 118.

UCAVs, target identification could be “detrimentally affected by poor visibility as a result of inclement weather, effective air defense systems, failure of electronic devices (sometimes because of enemy jamming), sophisticated camouflage, etc.”<sup>54</sup> The advent of drones largely removed these inadequacies. Unlike other conventional weapons used in air warfare, UCAVs allow ample opportunity to properly calculate proportionality, taking into account real-time changes and the projected civilian injury with much accuracy.<sup>55</sup> For example, the MQ-9 Reaper has four sensors that cover six square miles,<sup>56</sup> an area far broader than that affected by precision targeting. With adequate internal procedures for targeting, the data transmitted from sensors and cameras will translate into increased precaution. Although the ratio of civilian deaths per militant killed by UCAVs varies by count to count, the number is evidently more proportionate than attacks using kinetic weapons and the vast majority of conventional arms.<sup>57</sup>

Drones are already demonstrating their ability to launch highly proportionate attacks and the future advances of the technology are even more promising. With increased speed, maneuverability, and precision, UCAVs boast superior capacity to limit collateral damage in the vicinity of the target, unimpaired by

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

<sup>55</sup> Schmitt, *supra* note 47, at 457 (“The ISR upon which precision depends offers greater understanding of the target, the likely effect of the strike on the civilian population, and the need for restrike.”).

<sup>56</sup> Pincus, *supra* note 6.

<sup>57</sup> The ratio of civilian death per militant killed by UCAV is approximately 1 to 19.21, which is far superior to non-drone U.S. operations in Pakistan with a ratio of 1 to 0.375, as well as the estimated world armed combat average ratio of 1 to 0.125. Brian G. Williams et al., *New Light on the Accuracy of the CIA’s Predator Drone Campaign in Pakistan*, TERRORISM MONITOR, Nov. 11, 2010, at 8, available at [http://www.jamestown.org/uploads/media/TM\\_008\\_500185.pdf](http://www.jamestown.org/uploads/media/TM_008_500185.pdf). But there are limitations and criticisms to this data, such as its assumption that all children under thirteen years of age and women were assumed to be civilian. Others have estimated that between 31 and 33 percent of all casualties from drone strikes are civilians. Alexander Mayer, *Predators, Taliban, and Civilians*, THREAT MATRIX: A BLOG OF LONG WAR J. (Oct. 21, 2009, 10:16 AM), [http://www.longwarjournal.org/threat-matrix/archives/2009/10/predators\\_taliban\\_and\\_civilian.php](http://www.longwarjournal.org/threat-matrix/archives/2009/10/predators_taliban_and_civilian.php).

human error.<sup>58</sup> In terms of reconnaissance, UCAVs could ensure further prudence because of improved agility to perform prolonged scouting.<sup>59</sup> Subsequently gathered information will permit due diligence to ascertain proportionality in every attack; miscalculated orders can be rescinded as soon as more information is available. While UCAVs are not a panacea, the current and future capabilities of these innovations are exceptional in their competence to satisfy the proportionality test.<sup>60</sup>

Because combat drones bestow a definite military advantage in terms of time and breadth of available information, operators should be held to a higher legal standard of responsibility. Indeed, greater accountability promotes proportionate targeting. The NATO bombing of Yugoslavia in 1999 was marked by a large-scale air campaign at high altitudes to ensure the safety of the pilot at the cost of an increased number of civilian casualties.<sup>61</sup> Whether the strategic

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<sup>58</sup> See U.S. DEP'T OF DEF., FY2009-2034 UNMANNED SYSTEMS INTEGRATED ROADMAP 18, 19, 30 (2009) [hereinafter UNMANNED SYSTEMS INTEGRATED ROADMAP], *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA522247> ("Precision Air Drop/Firefighting UAS . . . with autonomous airdrop capability that, if required, can recognize a visual target and self-navigate to the target for precision air drop within 25 meters . . . Precision Acquisition and Weaponized System (PAWS) [currently in research and development stage] . . . Provide tactical UAV with limited collateral damage weapon . . . UAS are evolving into multi-role platforms able to provide both ISR "persistent stare" at targets over a large area and quick reaction strike at targets of opportunity. They can be rapidly and dynamically re-tasked to other areas with a higher priority . . .").

<sup>59</sup> *Id.* at 8 ("In the future, technology will enable mission endurance to extend from hours to days to weeks so that unmanned systems can conduct long endurance persistent reconnaissance and surveillance in all domains.").

<sup>60</sup> Gabe Starosta, *MQ-9 to Provide Full HD Video by 2015 after Two-Phased MTS Upgrade*, INSIDE THE AIR FORCE, Jan. 20, 2012, *available at* <http://defensenewsstand.com/Inside-the-Air-Force/Inside-the-Air-Force-01/20/2012/menu-id-290.html> ("The Air Force expects the targeting systems used by the service's MQ-1 Predators and MQ-9 Reapers to have full high-definition electro-optical imagery capabilities by 2014, and the Reaper should have an additional high-definition infra-red capability just a year later, part of a continuing upgrade on the Raytheon-built Multi-Spectral Targeting System.").

<sup>61</sup> In a letter to then-NATO Sec'y Gen. Javier Solana, Human Rights Watch questioned the lawfulness of NATO's "decision to have most of its pilots fly at high altitudes (above 15,000 feet) to avoid anti-aircraft missiles and fire . . . [which was a decision] to elevate the protection of its pilots over all consideration of the potential

nature of air bombing in Yugoslavia was lawful under *jus in bello* is contentious, but the use of drones would have guaranteed greater compliance with the proportionality test without endangering the safety of NATO pilots. The danger of the battlefield hardly ever jeopardizes the remotely positioned operators, since drones do not have a traceable standardized trajectory.

During the Gulf War, a bunker used as an air-raid shelter for civilians was targeted, causing hundreds of civilian deaths.<sup>62</sup> Despite such an excessive civilian casualty, the bombardment was deemed lawful nonetheless:

The Americans relied on intelligence evidence indicating that the bunker was serving as a command and control center, and denied any knowledge of its concurrent use as an air-raid shelter for civilians. Based on that subjective information, there is scarcely any doubt that the bunker could be considered “a military objective and hence a lawful target.”<sup>63</sup>

Such an aerial attack might have satisfied the proportionality test in the past due to both lack of information and a lower standard, but the advent of UCAVs has forever changed the paradigm. In retrospect, if the United States had used drones to obtain clear intelligence that a significant number of civilians resided in the bunker, and, they were not placed there to protect the target,<sup>64</sup> then the attack could have been disproportionate. The proportionality yardstick for combat drones is set at a higher bar, elevating the applicable standard to a much stricter, yet achievable, level.

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harm to civilians.” Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to Javier Solana, Sec’y Gen., NATO (May 13, 1999), *available at* <http://ess.uwe.ac.uk/Kosovo/Kosovo-Current%20News176.htm>.

<sup>62</sup> Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 ISRAEL Y.B. ON HUM. RTS. 1, 8 (1998) (citing United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 31 I.L.M. 612, 626-27 (1992)).

<sup>63</sup> *Id.*

<sup>64</sup> Jenks, *supra* note 14, at 669 (“To the extent that the ‘civilians’ that the Pakistan Taliban live and operate among are considered voluntary human shields, then they are considered to be directly participating in hostilities. As a result, they could be permissibly targeted outright . . . [hence] not be considered collateral damage.”).

### C. Necessity

Another essential component of *jus in bello* is military necessity. The Hague Rules of Aerial Warfare stipulate that “aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.”<sup>65</sup> Only military targets, as opposed to civilian or neutral buildings, can lawfully be targeted for a perceived military gain. It is not an easy task to determine when an object becomes a lawful target, but the belligerent must act in good faith and “take into account all available information.”<sup>66</sup> For instance, religious sites are not normally considered military objectives, yet “if the church steeple is used by snipers, the same object becomes a military objective by use and the evaluation of military advantage is altered.”<sup>67</sup> UCAVs can spot and respond to such subtle and versatile information.

*In bello* necessity entails a reciprocal duty, first by the belligerent to ascertain within reason that the target remains a military objective, and, second by the besieged to undertake precautionary measures to display signs on protected targets or areas to avoid bombing. Indeed, to err is human, and, similarly, machines are imperfect. The doctrine of military necessity reflects such practical deficiencies by espousing a reasonableness standard:

In case of doubt as to whether an object which is ordinarily dedicated to civilian purposes is being used for military purposes, it may only be attacked if, based on all the information reasonably available to the commander at the

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<sup>65</sup> 1923 Hague Rules of Aerial Warfare, *supra* note 35, art. 24(1); Geneva Protocol I, *supra* note 24, art. 52(2) (“In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution on military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

<sup>66</sup> Oscar Schachter & Frits Kalshoven, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y OF INT’L LAW 39, 44 (1992) (remarks by Frits Kalshoven).

<sup>67</sup> DINSTEN, *supra* note 26, at 8 (citing B. A. Wortley, *Observation on the Revision of the 1949 Geneva “Red Cross” Conventions*, 54 BRITISH Y.B. OF INT’L LAW 143, 154 (1983)).

time, there are reasonable grounds to believe that it has become and remains a military objective.<sup>68</sup>

The aforementioned reasonableness standard for determining when a civilian site has been converted into a military one is very useful in judging the underlying principle of *in bello* necessity. The commander is permitted to make a determination on military necessity “based upon information reasonably available . . . at the time of his decision.”<sup>69</sup> Therefore, in order to promote caution, and, if necessary, to charge legal liability, it is important to relay as much data as possible *ex ante*. The range of feasible precautions are substantially broader for drones than manned military aircraft, which are susceptible to onsite human error resulting from a dearth of information, rushed action, or fatigue.

UCAVs are well-equipped to perform such precautionary measures via visual identification until the target is hit. In fact, UCAVs employ “on-board technology to direct . . . a weapon to a target,”<sup>70</sup> upon visual verification that the target remains a military objective. Up-to-date records of suspicious conduct or vehicle movement and the location of civilians or civilian objects<sup>71</sup> along with other subtle information can be used by drone operators to assess whether targeting is militarily necessary within a reasonable margin of error.

However naïve it is to expect insurgents to abide by the laws of war, *jus in bello* urges the attacked to “take the necessary measures to render the special signs referred to sufficiently visible.”<sup>72</sup> There are internationally recognized emblems for cultural property, hospitals,

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<sup>68</sup> COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 87. This reasonableness standard (for determining when a civilian site has been converted into a military one) is commonly referred to as the Rendulic Rule. See generally Brian J. Bill, *The Rendulic ‘Rule’: Military Necessity, Commander’s Knowledge, and Methods of Warfare*, 12 Y.B. OF INT’L HUMANITARIAN L. 119 (2009).

<sup>69</sup> U. S. ARMY, JUDGE ADVOCATE GENERAL’S OPERATION LAW HANDBOOK 11 (2010).

<sup>70</sup> COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 55.

<sup>71</sup> See *id.* at 54.

<sup>72</sup> 1923 Hague Rules of Aerial Warfare, *supra* note 35, art. 25; see 1907 Hague Convention IV, *supra* note 10, art. 27.



prisoner-of-war camps, civilian internment camps, and NGOs.<sup>73</sup> Although the need to ensure *in bello* necessity does not dissipate simply because of the failure to display such signs, all parties to the conflict have a proactive duty to ensure that non-military objects are identifiable.<sup>74</sup> If terrorists abide by these rules, the belligerent must have adequate means to recognize the signs of neutrality or protected status. Conversely, even when such signs are nonexistent, reasonable precaution is vital to ascertain the lawfulness of the target. UCAVs are uniquely suited to perform their needed task, while enabling the adroit operator to notice deception or perfidy with greater accuracy.<sup>75</sup> Thus, the exceptional capacity of UCAVs in discharging the necessity requirement of *jus in bello* should be emphasized in future warfare.

#### D. Humanity

The fourth facet of LOAC is the prohibition of weapons that cause “superfluous injury or unnecessary suffering.”<sup>76</sup> Humane war is an oxymoron; nonetheless, LOAC seeks to unearth every bit of decency amidst the bloodshed. As a first step, the doctrine of humanity prohibits weapons that are (i) outright banned by various conventions and customary international law<sup>77</sup> and (ii) utilized to “cause injuries that serve no military purpose.”<sup>78</sup> The former deals with weapons that are inherently unlawful and the latter with conduct that causes a weapon to be unlawful. For the majority of weapons falling outside the scope, no objective equation exists to calculate when the suffering becomes illegitimate. Somewhere between regular gunfire and the dropping of a heinous chemical bomb, there is a point in which the conduct of hostility rises to the

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<sup>73</sup> See ROBERTS & GUELFF, *supra* note 44, Appendix I at 731-32.

<sup>74</sup> Geneva Protocol I, *supra* note 24, art. 66.

<sup>75</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 119-26 (2009) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW], available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

<sup>76</sup> Geneva Protocol I, *supra* note 24, art. 35(2).

<sup>77</sup> Examples include the use of poison, certain projectiles, non-detectable fragments, and blinding laser weapons, amongst conventional weapons. In terms of weapons of mass destruction, chemical and biological weapons are strictly prohibited. See DINSTEIN, *supra* note 26, at 67-83.

<sup>78</sup> COMMENTARY ON THE HPCR MANUAL, *supra* note 1, at 66.

level of violating the principle of humanity. There are two preliminary questions relevant to start the assessment: (1) “[i]s a less injurious weapon available?” and (2) “is the alternative sufficiently effective in achieving the intended military purpose?”<sup>79</sup>

Weapons equipped in combat drones—precision-guided munitions, such as Hellfire missiles—are designed to eliminate the enemy within a limited radius in furtherance of the specific military objective. Lockheed Martin Corporation, the manufacturer of a series of AGM-114 Hellfire missiles, emphasizes that the product offers “precision-strike lethality” intended for a single target with anti-armor capability.<sup>80</sup> The multi-purpose warhead is designed for “a highly accurate, low-collateral damage, anti-armor and anti-personnel engagement,” which is suited for precision targeting that minimizes suffering and wide area damage.<sup>81</sup> In other words, the primary purpose and function of PGMs is to accurately take out a limited number of selective targets as opposed to inflicting unnecessary pain or transgenerational genetic damage over a large area. The relatively small warhead intended to conduct laser-guided precision targeting is therefore particularly suited to further the humanity prong of *jus in bello*. Although reckless use could theoretically render these missiles to be inhumane, their intended purpose is undoubtedly humane. True, there could occasionally be a less injurious alternative to achieve the same military objective. Such occasions, nevertheless, do not undermine the lawful nature of the weapon. Rather, the focus should be on how to implement strict rules of engagement to minimize cruelty. When used with discretion, UCAVs, as advanced weapons platforms, are sufficiently capable of satisfying the humanity principle.

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<sup>79</sup> *Id.*

<sup>80</sup> AGM-114R Multi-Purpose HELLFIRE II, LOCKHEED MARTIN, <http://www.lockheedmartin.com/content/dam/lockheed/data/mfc/pc/hellfire-ii-missile/mfc-hellfire-ii-pc.pdf> (last visited Feb. 12, 2014).

<sup>81</sup> See MQ-9 Reaper, *supra* note 40. Hellfire missiles are designed for long-range precision targeting against people hiding behind fixed structure facilities, armored vehicles, or bunkers. See also Press Release, Lockheed Martin, Lockheed Martin’s New Mutli-Purpose HELLFIRE II Missile (Aug. 30, 2010), <http://www.lockheedmartin.com/us/news/press-releases/2010/august/LMsNewMulti-PurposeHELLFI.html>.

### III. THE CASE FOR COMBAT DRONES

The growth of militarily powerful non-state actors engaging in terrorism is a fatal tumor affecting the entire world. In a globalized society, no country is insulated from the terror threat, which warrants a collective effort to address insurgents incubated in the absence of the rule of law. The problem is further amplified by the presence of weapons that can instantaneously inflict mass destruction. While the cost of indecisiveness can be catastrophic, excessive countermeasures can jeopardize individual human rights and the lives of civilians. The Supreme Court of Israel, the highest judicial authority of a country routinely victimized by terrorism, offered a valuable insight when it proclaimed that the act of targeting terrorists is “a necessary means from the military standpoint . . . [despite the] harm and even death to innocent civilians . . . [if] made within the framework of the law.”<sup>82</sup> In addition, Israel maintains the official policy position that targeted killing operations are granted only if there is no reasonable chance of capturing the suspect,<sup>83</sup> which reflects the quandary of ineffective states. Since the use of lethal force to curb terrorism is sometimes inevitable, countries must endeavor to use the least damaging weapon without relinquishing efficacy and lawfulness.

UCAVs are not just lawful, but also offer five critical and effective ways to counter challenges in contemporary war. First, the framework of analysis must reflect the unique features of combat drones in light of maintaining public order against the emergence of asymmetric warfare. Second, insurgents do not abide by the conditions for lawful combatancy. Third, insurmountable force is no longer a deterrent against irrational non-state actors that defy the existing paradigm. Combat drones can supersede or supplement the traditional threat of nuclear deterrence. Fourth, beyond the rubric of law, UCAVs prevent friendly forces from being exposed to IEDs. Finally, drones can provide a substitute for the costly alternative modes of waging a large-scale war against ineffective states where law

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<sup>82</sup> HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel* ¶ 61 [2005], available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf).

<sup>83</sup> Blum & Heymann, *supra* note 8, at 152.

enforcement techniques are futile and there is a growing threat level arising from nuclear terrorism. Such complementary features reinforce the need for UAVs in preserving world order.

### A. *Asymmetric Warfare*

The dawn of U.S. military hegemony, coupled with globalization and technological development, introduced a new form of asymmetric war where insurgents resort to using unprecedented and irregular means, including the attempt to acquire and use weapons of mass destruction (“WMD”), “transcend[ing] the state’s physical as well as virtual borders.”<sup>84</sup> The growth of the military power of ambitious non-state actors became even more evident after the September 11 attacks. These groups are constantly seeking opportune moments to inflict indiscriminate and disproportionate harm against states. Surely, planning effective and lawful countermeasures to protect national security has become one of the most important priorities for exposed countries. In an era of globalized asymmetric warfare, flexible military tactics customized for non-state actors, who often have limited technological resources, are indispensable.

Terrorists engaged in an asymmetric warfare have aggrandized their influence by taking advantage of the nearby

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<sup>84</sup> Uros Svete, *Asymmetrical Warfare and Modern Digital Media*, in THE MORAL DIMENSION OF ASYMMETRICAL WARFARE: COUNTER-TERRORISM, DEMOCRATIC VALUES AND MILITARY ETHICS 381, 386 (Ted A. Baarda & Desiree E. Verweij eds., 2009). Other characteristics of asymmetry include:

[A]cting, organizing, and thinking *differently* than opponents in order to maximize one’s own advantages, exploit an opponent’s weaknesses, attain the initiative, or gain greater freedom of action. It can be *political-strategic, military-strategic, operational*, or a *combination* of these. It can entail different *methods, technologies, values, organizations, time perspectives*, or some *combination* of these. It can be *short-term* or *long-term*. It can be *deliberate* or *by default*. It can be *discrete* or pursued in *conjunction* with symmetric approaches. It can have both *psychological* and *physical* dimensions.

STEVEN METZ & DOUGLAS V. JOHNSON II, ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS1, 5-6 (2001), *available at* <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=223>.

civilian communities, often engaging in concealment tactics.<sup>85</sup> Taliban and Al Qaeda members deliberately hide amongst the civilian population, creating a diversion to complicate targeting by the opponent. As explained earlier, concealment warfare is prone to a high degree of collateral injury without precision targeting accompanied by accurate and persistent surveillance.<sup>86</sup> Terrorists, either defined as unlawful combatants or civilian DPH, are by their nature hardly distinguishable from civilians. UCAVs enable the party to examine belligerent vehicle movements and patterns of conduct to ascertain legitimate targets and minimize civilian casualty.<sup>87</sup>

Accurate intelligence and the ability to immediately react to red flags are essential to defending against terrorism and ensuring national security. The strength of traditional armed forces is futile without such capacity:

In this environment [i.e., asymmetric warfare] . . . [o]perating inside an opponent's OODA [observe-orient-decide-act] loop requires: the ability to locate and accurately identify enemy forces quickly and reliably; weapon systems that are immediately available; sufficient command and control assets to monitor and direct fast-paced, changing engagements; and the capacity to conduct reliable battle damage assessment to determine if restrike is needed. Slowing the enemy's reaction

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<sup>85</sup> "Concealment tactics used by the adversary in Afghanistan [during Operation Enduring Freedom] resulted in a number of collateral damage incidents." Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 41 (2005).

<sup>86</sup> Concealment tactics caused a number of civilian casualties. As many as thirty-five Afghan civilians were killed in the attack of Chowkar-Karez, and twenty-three civilians were killed in Thori, the Hutala bombing by the United States. A-10 attack aircraft led to the death of nine children playing marbles in a field, and the attack by a U.S. AC-130 gunship in a wedding in Deh Rawud killed "dozens" of civilians. *Id.* at 41-42.

<sup>87</sup> See David S. Cloud, *CIA Drones Have Broader List of Targets*, L.A. TIMES, May 6, 2010, available at <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506>.

time and blocking or distorting enemy information further enhances the effects of your own operations.<sup>88</sup>

Combat drones are an effective solution to oppose fleeting targets. Against the extremely mobile and furtive terrorist factions, drones perform surveillance, reconnaissance, and target acquisition services over long periods of time with detection capability that permeates natural barriers, such as smoke, clouds, or haze.<sup>89</sup> When a target is sighted, upon corroboration following a rigorous protocol, Hellfire missiles can swiftly respond. Indeed, terrorists on the so-called “hit list” are time-sensitive targets who are “pos[ing] (or will soon pose) a danger to friendly forces or they are [a] highly lucrative, fleeting target of opportunity.”<sup>90</sup> Unlike the perceptible and concrete system of states with recognizable and well-known physical boundaries and political leaders, terrorist organizations are unfettered by territorial limitations.<sup>91</sup> Therefore, without an immediate and effective response, these groups will quickly vanish and resurface elsewhere. Constant surveillance and speedy targeting by UCAVs are essential to abate the threat of asymmetric warfare.

### *B. UCAVs Check Manifest Disregard of the Law by Terrorists*

Missions against concealment warfare are made even more complex because terrorists flout the canons of warfare. Not only is the line between civilian and terrorist blurry because of the constant switch between roles, but these insurgents also do not follow the established rules of combat. The inherent purpose of terrorism is to intimidate and injure combatants and noncombatants alike.<sup>92</sup>

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<sup>88</sup> Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 8 (2008).

<sup>89</sup> *Id.* at 9 n.22.

<sup>90</sup> Citing a source from the CIA, the *LA Times* reported that a strict procedure, along with constant surveillance through UAVs, exists to ensure only militants who pose a threat to the United States are targeted. Cloud, *supra* note 87; on time-sensitive targets, see JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING, Appendix B (Jan. 17, 2002), available at [http://www.bits.de/NRANEU/others/jp-doctrine/jp3\\_60\(02\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(02).pdf).

<sup>91</sup> W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM J. INT'L L. 82, 86 (2003).

<sup>92</sup> See DINSTEIN, *supra* note 26, at 43.

Bellicose extremists are not wary of rules governing conduct of war to achieve such a vicious objective. Yet, the world cannot resort to lawlessness to fight the unlawful. President Obama recognized these two underlying challenges in his Nobel Peace Prize lecture: “And even as we confront a vicious adversary that abides by no rules, I believe that the United States of America must remain a standard bearer in the conduct of war.”<sup>93</sup> Without the aid of advanced technology, it is difficult to triumph over those who know no restraint.

Customary international law of war, as well as treaty law, stresses seven essentials of lawful combatancy, four of which are “subordination to responsible command, a fixed distinctive emblem, carrying arms openly, and conduct in accordance with the [LOAC].”<sup>94</sup> Terrorists are frequent violators of LOAC given that their members (1) unilaterally plan or instigate an attack, (2) wear civilian clothes, (3) conceal their weapons, and (4) commit indiscriminate attacks. There could be occasions in which terrorists will abide by some of these rules, but in the aggregate, the international community cannot reasonably expect that, among other facets of LOAC, terrorists will wear a uniform. Wearing military uniforms to distinguish oneself is not the purpose; instead, “the point is . . . whether (if observed) they [combatants] are likely to be mixed up with civilians.”<sup>95</sup> Terrorists are virtually indistinguishable because they wear civilian clothing, sometimes deliberately to dissemble. In war against non-state actors, “discerning friend from foe . . . is elusive [due to the lack of distinguishing uniforms].”<sup>96</sup>

Furthermore, terrorists often do not carry arms openly, but suddenly emerge with explosives to perpetrate mass murder. In order to effectively counter such unlawful tactics, advanced weapons

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<sup>93</sup> President Barack Obama, Remarks at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* [http://www.huffingtonpost.com/2009/12/10/obama-nobel-peace-prize-a\\_n\\_386837.html](http://www.huffingtonpost.com/2009/12/10/obama-nobel-peace-prize-a_n_386837.html).

<sup>94</sup> Others include organization, belonging to a belligerent party, and lack of duty of allegiance to the detaining power. *See* DINSTEIN, *supra* note 26, at 43.

<sup>95</sup> *Id.* at 44.

<sup>96</sup> *Al-Marri v. Pucciarelli*, 534 F.3d 213, 334 (4th Cir. 2008).

systems that examine individual faces, record patterns of conduct, survey the surroundings, and follow suspicious individuals are critical to military success. UCAVs can perform all of these tasks with high precision in a limited time frame.

### C. UCAVs Are Deterrents

Unlike states, terrorists engaged in a synallagmatic relationship are undeterred by the constraints in the existing system:

One of the factors that had made the inherited *jus ad bellum* effective was the concentration of weapons in the hands of territorial elites who were subject to the dynamic of reciprocity and retaliation that underlies international law. That dynamic does not operate for non-state actors, for they are neither beneficiaries of nor hostages to the territorial system. As long as non-state actors did not amass significant arsenals, their indifference or even hostility to world public order was inconsequential. . . . [T]he United States, on the morning of September 11, 2001, awoke to a new reality.<sup>97</sup>

This new reality is a combination of powerful non-state actors acting in defiance of the existing order. Physically immobile states, which can be pinpointed for accountability purposes, are the principal actors under the existing order. Thus far, enforcement of international humanitarian law is induced by, *inter alia*, “consideration for public opinion, reciprocal interests of the parties to the conflict, fear of reprisals, [and] liability for compensation.”<sup>98</sup> Unlike rational actors, terrorists purposely project a disobedient persona, discount reciprocity, and are unaffected by the traditional means of reprisal. It is also preposterous to expect reparation from these groups. Terrorists are irrational by their nature.

Above all, nuclear or legal deterrence, principally imposed through the means of reciprocity and retaliation, are inadequate against terrorists. Nuclear retaliation on non-state actors is too

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<sup>97</sup> Reisman, *supra* note 91, at 86.

<sup>98</sup> Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 686 (Dieter Fleck ed., 2nd ed. 2008).



costly and politically risky, or outright unlawful considering the territorial integrity and political independence of the host state. These factors eliminate one principal means to deter attacks on U.S. soil. Additionally, these insurgents are nurtured in ineffective states, mere blind spots on the map where law enforcement is virtually absent or meaningless.<sup>99</sup> The insurgents are not only difficult to locate, but also tough to contain. Non-state actors are dispersed and itinerant; consequently, opportunities for military engagement through traditional means will be scarce.

UAVs cannot eliminate terrorism, yet they can effectively fill the gap created by the breakdown of nuclear deterrence. The current security relationship is centered on nuclear deterrent capability as a fundamental pillar and presumes a state-to-state global structure.<sup>100</sup> In order to account for extremely mobile, scattered, furtive, and robust non-state actors, drones are needed to provide surveillance and an immediate military response within a limited window of opportunity. Such versatility will in due course prove to be an effective deterrent against terrorists, who are essentially liberated from the fear of nuclear attack. In fact, Juan Zarate, a counterterrorism advisor in the Bush Administration, and other supporters of the Predator drone program, argue that drones have had such positive ripple effects because “[s]urviving militants are forced to operate far more cautiously, which diverts their energy from planning new attacks.”<sup>101</sup> Ubiquitous and injudicious use of combat drones, like any other weapon, is inimical to world order. However, when prudently used, UAVs can be an optimal solution to deter non-state actors from pursuing vicious military ambition. Preserving the new world order requires new resources. Drones could reinstate reprisal as an apparatus to deter non-state actors from acting recklessly.

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<sup>99</sup> See Reisman, *supra* note 91, at 86.

<sup>100</sup> *Id.* at 84-85.

<sup>101</sup> Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program*, NEW YORKER, Oct. 26, 2009, [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

*D. Improvised Explosive Devices*

On March 7, 2010, “The Hurt Locker,” a movie portraying an explosive ordinance disposal (“EOD”) team in the Iraq War, won six Academy Awards, including one for Best Picture.<sup>102</sup> It informed the public of the real danger of IEDs in the theater of operation. According to the Defense Manpower Data Center, explosive devices, including IEDs, accounted for 67 percent and 58 percent of all combat casualties in Operation Iraqi Freedom and Operation Enduring Freedom, respectively.<sup>103</sup> EOD squads have become an indispensable element of all troops fighting an asymmetric war, whether employed by national forces, multinational forces, or forces comprising U.N. peacekeeping operations.

UCAVs are an effective countermeasure against IEDs for two main reasons. First, pilots and ground troops are less subject to the danger of the battlefield. The advantages of utilizing UCAVs are apparent considering risks scattered and hidden throughout the battlefield: “Uninhabited systems [i.e. UCAVs] offer the prospect of achieving military objectives without risking the politically unacceptable cost of friendly casualties.”<sup>104</sup> Since UCAVs are remotely controlled, pilot casualty is virtually nonexistent. In addition, UCAVs can excuse ground troops from conducting dangerous assignments. Combat zones are extremely volatile arenas where irrationality abounds. That is, countries must exploit all means at their disposal to protect soldiers, including pilots, from being exposed to unnecessary risks—not just IEDs—but landmines, suicide attacks, snipers, anti-aircraft missiles, etc. If pilots and ground troops are removed from the battlefield, ground-based IEDs become a very manageable threat.

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<sup>102</sup> See John Blake, *Inside the Heads of ‘Hurt Locker’ Bomb Defusers*, CNN (Mar. 5, 2010, 7:12 AM), <http://www.cnn.com/2010/SHOWBIZ/Movies/03/05/real.hurt.locker/>; see also Alan Duke, *‘Hurt Locker’ is Best Picture, Wins Six Oscars*, CNN (Mar. 9, 2010, 3:05 PM), <http://www.cnn.com/2010/SHOWBIZ/Movies/03/07/academy.awards.night/>.

<sup>103</sup> See U.S. DEP’T OF DEF., DEF. MANPOWER DATA CTR., GLOBAL WAR ON TERRORISM CASUALTY SUMMARY BY REASON, OCTOBER 7, 2001 THROUGH MAY 7, 2012 (2012), [http://siadapp.dmdc.osd.mil/personnel/CASUALTY/gwot\\_reason.pdf](http://siadapp.dmdc.osd.mil/personnel/CASUALTY/gwot_reason.pdf).

<sup>104</sup> *Id.*

Second, airborne devices, especially unmanned ones, can protect troops from a plethora of risks without compromising the success of the mission. Due to their cutting-edge visual and sensory technology, drones assist ground troops in detecting and eliminating IEDs. A drone has “great range and loitering capability . . . [u]sing synthetic aperture radar, a ground moving target indicator, and high-resolution electro-optical and infrared sensors, it collects information that is transmitted to users near real-time.”<sup>105</sup> Such long-term surveillance and reconnaissance capacity enables the operator to descry suspicious behaviors and objects. The effectiveness of drones is undeniable. Without drones, the casualties of U.S. troops in the so-called “Global War on Terrorism” from IEDs would have been significantly higher: “[UAVs] have saved countless lives, providing the Warfighter with evidence that IEDs have been planted on convoy routes, warning troops of ambushes, assisting troops in contact, and permanently removing [high value assets] from the battle.”<sup>106</sup> Drones are evolving into a global watchtower that scrutinizes the warzone in advance to eliminate dangers before ground-troops are introduced. Essentially, drones are necessary to safely conduct military missions without jeopardizing the probability of success in the future war.

#### E. *Less Costly*

The U.N. Charter embodies the postwar ambition to eradicate significant military aggression outside the scope of Security Council authorization and self-defense.<sup>107</sup> Despite the U.N.’s effort, a certain degree of force—just enough so it does not rise to the level of significant threat or use of force—is yet a necessary evil to counter the prevalence of illegitimate violence.<sup>108</sup> Maintenance of security

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<sup>105</sup> Schmitt, *supra* note 88, at 9 n. 22.

<sup>106</sup> UNMANNED SYSTEMS INTEGRATED ROADMAP, *supra* note 58, at 37.

<sup>107</sup> U.N. Charter art.2, para. 4.

<sup>108</sup> Without digressing too much into the realm of *jus ad bellum*, a threat or use of force is significant only if it endangers the territorial integrity or political independence of a state, hence a violation of the Article 2(4) of the U.N. Charter. The use of drones strictly against terrorist factions, especially with the consent of the host state, does not rise to the level of significant threat or use of force. When there is consent of the targeted state and the attack is significantly narrow in its scope, territorial integrity or political independence is unaffected.

comes at a cost. Terrorist factions are spread throughout the global theater of operation, thereby making the problem particularly more challenging.<sup>109</sup> The crisis is further amplified by the parasitical presence of terrorist networks in feckless states. If an Al Qaeda affiliate resides in a state where meaningful law enforcement exists, criminal prosecution following arrest or capture would be the least costly remedy. For example, it is absurd to unleash a Hellfire missile in New York City, especially at the risk of producing civilian casualties, because terrorists could be handcuffed by law enforcement with relative ease. *A fortiori*, if a terrorist is pinpointed in a country with a fully functioning legal system, the United States could file a request for extradition to gain jurisdiction and afford due process under the law, instead of resorting to various military tactics.<sup>110</sup>

Unfortunately, terrorists are often beyond the reach of effective police force, difficult to distinguish from civilians, and hard to locate due to geological barriers. Nor do terrorist threats have a definite duration. In the absence of the rule of law, it is futile to expect arrests and subsequent judicial proceedings. Under the doctrine of state responsibility, however, ineffective states have “the

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<sup>109</sup> The broad language of the AUMF is reflective of the difficulty:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

<sup>110</sup> According to W. Michael Reisman, the Myres S. McDougal Professor of International Law at Yale Law School:

International law does not ordinarily distinguish between states that are capable of controlling their territory and those that are not... [But] the issue is not simply what is owed to a state that acts as a haven for terrorists, but what are the international legal consequences and permissible responses when that state violates the obligations that it owes to other states who have theretofore respected and deferred to its sovereignty and are now suffering a consequential injury... [U]nilateral action [against ineffective states] would appear justified, but would, as anywhere else, have to meet the conditions of any lawful use of force.

W. Michael Reisman, *International Legal Responses to International Terrorism*, 22 HOUS. J. INT'L L. 3, 50-54 (1999).

obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war,” and inaction constitutes “a breach of an international obligation of the State.”<sup>111</sup> If these states are incapable of protecting the rights of other states from acts arising within their sovereign territory, other states can proactively and unilaterally seek to claim their right to security through “lawful use of force.”<sup>112</sup> Thus, the United States is entitled to engage in Iraq, Afghanistan, Yemen, and Pakistan to offset the dispersed and burgeoning threats that are not being addressed by those countries’ respective governments.<sup>113</sup>

The national security of the United States depends on its ability to suppress global terrorism, but it is both impractical and too costly in lives and money to wage a full-scale war against all harboring states that are simply unable or unwilling to control non-state actors. Of course, diplomacy and engagement are essential, but could prove to be unproductive. Using UCAVs is a lawful and cost-effective substitute. Terrorism is unlikely to perish in the foreseeable future and nation building to enforce criminal liability for militant insurgents is a time-consuming task. Yet, states are entitled to exploit all necessary and appropriate means to forestall terrorism. Compared to a full-scale war or the use of imprecise outmoded weapons, the combat drone is the lesser of two evils:

Militarily it [a large-scale military invasion] costs lives and is quite expensive. Abroad, it is extremely risky both politically and diplomatically. Legally, it creates the kinds of problems

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<sup>111</sup> The Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (1928); Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23 - June 1, July 2 - Aug. 21, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, art. 2(b) (2001).

<sup>112</sup> Reisman, *supra* note 110, at 54.

<sup>113</sup> According to Thomas M. Franck, the former Murry and Ida Becker Professor of Law at New York University:

Is it lawful for a state to invade its neighbor if that neighbor fails to prevent its territory from being used to launch attacks across the common border? Are illegal attacks across a border by insurgents to be attributed to the state from which they are launched? There may be a growing inclination to answer that question in the affirmative.

Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L. L. 715, 764 (2008).

under international law that were present in debates leading up to the war in Iraq. Because of these limitations, targeted killings against known terrorists have become a real and accepted option within the United States as the only reasonably effective way of reaching a hostile target.<sup>114</sup>

Drones can precisely locate a suspect with the help of an onboard camera, while the loitering capability grants extra time to visually verify the target.<sup>115</sup> Although drones are not immune from non-combatant deaths, the misery is far less severe than military invasion to achieve the inevitable task of battling terrorism. In fact, there are signs that indicate drones are increasingly becoming more discriminate and proportionate: “[T]he incidence of civilian casualties appears to be trending downward; during 2009, only 8.5 percent of the reported casualties were identified as civilians.”<sup>116</sup> According to *The Long War Journal*, this rate decreased to 3 percent from 2010 to 2012.<sup>117</sup> Drones are perhaps the least damaging military solution for transnational terrorism.

#### IV. THE RECENT SUCCESS OF COMBAT DRONES

One of the most vocal critics of drones, Mary Ellen O’Connell, wrote that the successful raid against Osama bin Laden swung the pendulum in favor of capture-and-trial law enforcement standards, instead of relying on drones, as “the legal and effective

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<sup>114</sup> The report moves on to recognize the downside of unrestraint and widespread usage of targeted killing. It suggests targeted killing should be limited to instances in which there is no other reasonable alternative (as a last resort), when the threat is reasonably imminent, and as a preventive measure. These are *ad bellum* concerns and hence beyond the scope of this paper. Philip B. Heymann & Juliette N. Kayyem, *Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, THE NATIONAL MEMORIAL INSTITUTE FOR THE PREVENTION OF TERRORISM 65-66 (2005), [http://belfercenter.ksg.harvard.edu/files/ltls\\_final\\_5\\_3\\_05.pdf](http://belfercenter.ksg.harvard.edu/files/ltls_final_5_3_05.pdf).

<sup>115</sup> See *MQ-9 Reaper*, *supra* note 40; see also *MQ-1B Predator*, *supra* note 40.

<sup>116</sup> Bill Roggio & Alexander Mayer, *Analysis: US Air Campaign in Pakistan Heats Up*, LONG WAR J., (Jan. 5, 2010), [http://www.longwarjournal.org/archives/2010/01/analysis\\_us\\_air\\_camp.php](http://www.longwarjournal.org/archives/2010/01/analysis_us_air_camp.php).

<sup>117</sup> See William Saletan, *Drones are the Worst Form of War, Except for All the Others*, SLATE (Feb. 19, 2013, 10:40 PM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/02/drones\\_war\\_and\\_civilian\\_casualties\\_how\\_unmanned\\_aircraft\\_reduce\\_collateral.html](http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html).

option for dealing with the criminals we call terrorists.”<sup>118</sup> Of course though, bin Laden was killed, not captured.<sup>119</sup> O’Connell seems to conclude that the assassination of a terrorist is lawful and praiseworthy if a highly-trained unit of special forces conducts the killing, whereas a similar task would be unlawful—in fact it would rise to the level of “extra-judicial killing”—if it involves the use of UCAVs.<sup>120</sup> Such a view is misguided in light of abundant reasons vindicating the lawfulness and need for combat drones. Given that the role of UAVs, if any, in the operation to purge bin Laden is still uncertain, one extraordinary episode cannot be the theme of the global counterterrorism policy. Surely it is impractical, if not impossible, to conduct similar operations and maintain effective counterterrorism policy without drones. Nor is it likely that such a high level of care and scrutiny, in which the President himself sat by monitoring the raid,<sup>121</sup> would henceforth be available, especially without incurring friendly casualty. Halting the drone program in favor of the protracted battle against global terrorism is myopic at best. Navy SEAL commando teams are more appropriate in certain circumstances, but their aptness does not undermine other modes of warfare. UCAVs are equally lawful and effective.

Although details of the drone-strike policy, especially the exact number of civilians and militants killed, remain classified or unknown, there are a substantial number of high-profile incidents that attest to the lawfulness and necessity of combat drones. In short, targeted killing eliminated prominent terrorist leaders and “dramatically thinned the ranks of both [Al] Qaeda leaders and cadres.”<sup>122</sup> A series of successful drone strikes has dealt a significant blow to the integrity of terrorist networks. Although adverse

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<sup>118</sup> Mary Ellen O’Connell, *The Death of bin Laden as a Turning Point*, OPINIO JURIS (May 3, 2011, 3:10 PM), <http://opiniojuris.org/2011/05/03/the-death-of-bin-laden-as-a-turning-point/>.

<sup>119</sup> Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, at A1.

<sup>120</sup> See O’Connell, *supra* note 118.

<sup>121</sup> Elisabeth Bumiller, *Raid to Kill Bin Laden Helped U.S., Panetta Says*, N.Y. TIMES, Apr. 28, 2012, at A6.

<sup>122</sup> Marc Sageman, *Confronting al-Qaeda: Understanding the Threat in Afghanistan*, 3 PERSP. ON TERRORISM 1, 23 (2009), <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/79/162>.

consequences on civilian lives were recorded, many more lives were saved. History will in due course evaluate the denouement of advanced technology in curbing threats by non-state actors. Still, the international community has thus far witnessed the death of notorious Al Qaeda and Taliban leaders responsible for, or planning on, undertaking atrocious schemes.<sup>123</sup> These militants are certainly lawful targets under *jus in bello*.<sup>124</sup> There is no systematic method of quantifying the impact of these operations, but the world is a step closer to peace and security due to these terrorists' deaths. To measure success, it is helpful to review some of the recent successes of combat drones targeting various terrorist members.

A. *Abu Laith al-Libi*

On January 29, 2008, a guesthouse in North Waziristan was struck by a drone-launched missile.<sup>125</sup> In the building were thirteen militants, one of whom was Abu Laith al-Libi, the third most senior leader of the Al Qaeda command chain, who was "knowledgeable about how to conduct suicide bombing missions and how to inflict the most civilian casualties."<sup>126</sup> Al-Libi was responsible for initiating the alliance between Al Qaeda and the Salafist Group for Preaching and Combat, and had strategic ties with the Libyan Islamic Fighting Group, which is listed as an affiliate of Al Qaeda and the Taliban by the United Nations.<sup>127</sup>

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<sup>123</sup> See *Counter Terrorism Profiles*, NAT'L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/profiles/> (last visited Feb. 12, 2014) (reporting an official list).

<sup>124</sup> Some of the targets, such as Anwar al-Awlaki, an American citizen, pose additional legal issues. However, whether or not the U.S. government has the authority to kill its citizen without trial is beyond the scope of this paper and irrelevant in assessing the lawfulness of a weapon.

<sup>125</sup> Bill Roggio, *Arab, Asian Al Qaeda Operatives Reported Killed in North Waziristan Raid*, LONG WAR J. (Jan. 31, 2008), [http://www.longwarjournal.org/archives/2008/01/arab\\_asian\\_al\\_qaeda.php](http://www.longwarjournal.org/archives/2008/01/arab_asian_al_qaeda.php).

<sup>126</sup> *Al Qaeda Commander Reportedly Killed*, NY TIMES, Mar. 1, 2008, available at: [http://www.nytimes.com/2008/01/31/world/asia/31iht-31qaeda.9650144.html?\\_r=0](http://www.nytimes.com/2008/01/31/world/asia/31iht-31qaeda.9650144.html?_r=0).

<sup>127</sup> S.C. Res. 1267, 1989 (Aug. 23, 2010), available at <http://www.un.org/sc/committees/1267/NSQE01101E.shtml>.



### B. *Abu Khabab al-Masri*

Under the auspices of the Pakistani government, UCAVs eliminated six men—all identified as militants—at the Afghanistan-Pakistan border on July 28, 2008.<sup>128</sup> One of the victims was Abu Khabab al-Masri, an infamous scientist involved in the chemical and biological weapons development program for Al Qaeda.<sup>129</sup> Al-Masri was known to be one of Al Qaeda's most seasoned experts in developing WMD.<sup>130</sup>

### C. *Abu Jihad al-Masri*

On October 31, 2008, Al Qaeda propaganda and media chief, Abu Jihad al-Masri, was targeted and killed in Pakistan.<sup>131</sup> Ayman al-Zawahiri, one of the highest ranked Al Qaeda leaders, introduced al-Masri in a provocative video with a strong anti-Western message.<sup>132</sup> Al-Masri was suspected of being the chief of Al Qaeda's intelligence branch, in charge of the ideological warfare, and was known to have made incendiary statements against the United States and the Pope.<sup>133</sup> Although the drone bombing killed two other individuals in the vehicle,<sup>134</sup> this attack does not violate *in bello* proportionality even if those individuals were civilians. Two civilian deaths to eliminate a high-value target, albeit unfortunate, would be *in bello* proportionate considering the anticipated military gain.<sup>135</sup>

### D. *Sheik Ahmed Salim Swedan and Usama al-Kini*

Sheik Ahmed Salim Swedan and Usama al-Kini were responsible for the bombing of the Marriott Hotel in Islamabad, as

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<sup>128</sup> See Farhan Bokhari, *Officials: Al Qaeda's Mad Scientist Killed*, CBS NEWS (Sept. 10, 2009, 1:34 PM), <http://www.cbsnews.com/stories/2008/07/28/terror/main4301490.shtml>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *Al-Qaeda Propaganda Chief Killed in Pakistan Strike: Officials*, AFP (Nov. 1, 2008), <http://afp.google.com/article/ALeqM5i-kilo-XOudi-VkBdvQ6Y097hhUQ>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *infra* Part II.B.

well as the 1998 bombings of the U.S. embassies in Kenya and Tanzania.<sup>136</sup> On January 1, 2009, a U.S. Predator drone killed them in South Waziristan close to the Afghan border.<sup>137</sup> An American official stressed that the success of the mission represented a major setback for the terrorist network, or “a significant degradation of [A]l Qaeda’s leadership.”<sup>138</sup>

*E. Mustafa Abu al-Yazid*

Al Qaeda admitted the death of one of its top leader and financial official, Mustafa Abu al-Yazid, who also served as an adviser to Osama bin Laden.<sup>139</sup> Here, the May 21, 2010 drone strike purportedly killed other militants, as well as Yazid’s wife and daughters.<sup>140</sup> Because Yazid was then ranked third in Al Qaeda’s chain of command,<sup>141</sup> and as such was a very important military target, this airstrike, despite causing civilian casualties, probably satisfied the *in bello* proportionality test.

*F. Abu Yahya al-Libi*

Following the death of Osama bin Laden, Abu Yahya al-Libi became Al Qaeda’s deputy and second in command after Ayman al-Zawahri.<sup>142</sup> Due to his conspicuous efforts to promote global terrorism, he had been identified as a high-value target with a \$1 million bounty on his head.<sup>143</sup> He had been described as one of Al Qaeda’s “most experienced and versatile leaders . . . [who] played a critical role in the group’s planning against the West, providing

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<sup>136</sup> Dean Nelson, *Pakistan: Al-Qaeda Leaders Killed in US Strike*, TELEGRAPH (Jan. 9, 2009, 12:20 PM), <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/4207565/Pakistan-Al-Qaeda-leaders-killed-in-US-strike.html>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Katherine Tiedemann, *Daily Brief: Drone Reportedly Kills Qaeda No.3*, FOREIGN POLICY, June 1, 2010, available at [http://afpak.foreignpolicy.com/posts/2010/06/01/daily\\_brief\\_drone\\_reportedly\\_kills\\_qaeda\\_no\\_3](http://afpak.foreignpolicy.com/posts/2010/06/01/daily_brief_drone_reportedly_kills_qaeda_no_3).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Declan Walsh & Eric Schmitt, *Drone Strike Killed No. 2 in Al Qaeda, U.S. Officials Say*, N.Y. TIMES, June 6, 2012, at A1.

<sup>143</sup> *Id.*

oversight of the external operations efforts.”<sup>144</sup> On June 5, 2012, U.S. officials confirmed his death by a drone strike with no civilian injury.<sup>145</sup>

#### G. *Wali ur-Rehman*

On May 30, 2013, Pakistani Taliban spokesman confirmed the death of Wali ur-Rehman, the group’s deputy leader, from a U.S. drone strike.<sup>146</sup> Ur-Rehman had been accused “both of organizing attacks on American troops in Afghanistan and playing a role in the 2009 attack on a C.I.A. base in the eastern part of the country that killed seven agency employees.”<sup>147</sup> In addition, as the main operations leader for the Pakistani Taliban, he had been involved in numerous terrorist attacks both in and out of Pakistan, including the bombing of the Marriott Hotel in Islamabad on September 20, 2008, and the failed Times Square car bombing in New York City on May 1, 2010.<sup>148</sup>

#### H. *Compliance with jus in bello*

The number of fatalities caused by UCAVs varies from count to count, but the overall trend is similar.<sup>149</sup> According to the New America Foundation, the estimated total militant deaths from U.S. drone strikes in Pakistan from 2004 to 2013 ranges from 1,590 to 2,740.<sup>150</sup> The average ratio of civilian deaths to enemy combatant deaths from UCAVs during this time period is approximately 15 percent.<sup>151</sup> Further, it is estimated that between 2010 and 2012, civilian deaths accounted for between just 3 to 6 percent of all U.S.

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Mark Mazzetti & Declan Walsh, *Pakistan Says U.S. Drone Killed Taliban Leader*, N.Y. TIMES, May 29, 2013, at A1

<sup>147</sup> *Id.*

<sup>148</sup> See *id.*; see also Bill Roggio, *Pakistani Taliban Confirm Death of Deputy Emir in Drone Strike*, LONG WAR J. (May 30, 2013), [http://www.longwarjournal.org/archives/2013/05/pakistani\\_taliban\\_cl\\_1.php](http://www.longwarjournal.org/archives/2013/05/pakistani_taliban_cl_1.php).

<sup>149</sup> See Williams, *supra* note 57; see also Mayer, *supra* note 57.

<sup>150</sup> See *Analysis-The Drone War in Pakistan*, NEW AMERICA FOUND., <http://natsec.newamerica.net/drones/pakistan/analysis> (last visited Feb. 12, 2014).

<sup>151</sup> See *id.*

drone attack casualties.<sup>152</sup> While it is impossible to conclusively ascertain when an attack crosses the line of proportionality, 3 to 6 percent collateral damage, especially when many of the militants were time sensitive targets, will in normal circumstances be considered lawful.<sup>153</sup> Even if cynics find the ratio to be disproportionate, the bottom line remains intact: over the years, the drone program is becoming more faithful to *jus in bello* principles.<sup>154</sup> Against the backdrop of UCAVs eminent triumphs and potential, it is impulsive for critics to gainsay the lawfulness and effectiveness of UCAVs. Additionally, up until now, the decade-old drone program was in its nascent form. Future UCAVs, fortified by superior technology, are more likely to better conform to the demands of LOAC.

## V. CONCLUSION

The tragedy of 9/11 ushered in a new era of belligerent non-state actors capable of threatening national security. Within the boundary of law, proactive and innovative measures are warranted to counter hostile non-state actors at all costs. Therefore, technologically sophisticated tools of war that better comply with *jus in bello* must replace indiscriminate weapons. UCAVs clearly fall under that prescribed legal regime.

Scholars and U.S. government officials should articulate their support of combat drones solely on *jus in bello* grounds without conflating the issue with the momentous burden of justifying the war against non-state actors operating in states against which the United

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<sup>152</sup> Saletan, *supra* note 117.

<sup>153</sup> Civilian death rates caused by conventional weapons in previous wars are much higher:

In Vietnam, by some calculations, one civilian died for every two enemy combatants . . . [i]n Afghanistan, the civilian death toll from 2001 to 2011 has been ballparked at anywhere from 60 to 150 percent of the Taliban body count. In Iraq, more than 120,000 civilians have been killed since the 2003 invasion.

*Id.*

<sup>154</sup> Peter Bergen & Katherine Tiedemann, *The Hidden War*, FOREIGN POLICY, Dec. 21, 2010, available at [http://www.foreignpolicy.com/articles/2010/12/21/the\\_hidden\\_war?page=0,5](http://www.foreignpolicy.com/articles/2010/12/21/the_hidden_war?page=0,5).

States has not declared war. *Ad bellum* factors are inappropriate to emphasize the exceptional capability of drones to comply with *jus in bello*. Advanced weapons systems, such as combat drones, offer the ability to comply with the four-pronged LOAC with increasing exactitude.

Furthermore, U.S. officials should highlight the need for drones in modern warfare as well as various procedural mechanisms to maximize their lawfulness, thereby vindicating the Obama Administration's growing reliance on UCAVs. Regardless of whether targeted killing complies with domestic and international *ad bellum* norms, the use of the combat drone is both *in bello* lawful and necessary.<sup>155</sup>

Combat drones are exemplary in their competence to comply with *jus in bello*. Drone operators are, in effect, obliged to heighten the standard of conformity due to greater availability of information. The International Committee of the Red Cross notes that "[e]ach party to the conflict must do everything feasible to verify that targets are military objectives."<sup>156</sup> More precaution is feasible when drones are used. Distinguishing insurgents from civilians using a live visual feed with sufficient time for deliberation allows for fewer civilian casualties than hastily using speculative intelligence to make the distinction. Excluding such technological innovation from the ambit of law is the equivalent of fighting modern war with armaments and military tactics from the distant past.

In addition, UCAVs are necessary to achieve important policy objectives in the modern warfare against mobile terrorists. It is extremely difficult to counter fleeting targets in an asymmetric war without such state-of-the-art weaponry that is capable of prolonged surveillance and accurate targeting. UCAVs are an effective countermeasure against non-state actors, who have a proven track record of behaving recklessly by employing unlawful tactics. Without putting soldiers in harm's way, UCAVs provide a less costly

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<sup>155</sup> This statement is radically different from Harold Koh's implied thesis that because the United States is *jus ad bellum* entitled to exercise the right to self-defense against terrorists, combat drones can be used.

<sup>156</sup> CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 75, at 55.

alternative to other forms of military operations to curb and deter terrorism. Preserving peace and security *vis-à-vis* a globalized theater of war is an overwhelming task that demands extraordinary efforts. Against such a backdrop of instability, combat drones equipped with precision-guided munitions are most likely the least detrimental, and certainly a lawful and necessary, alternative to conventional warfare.





AN IMPERFECT BALANCE:  
ITAR EXEMPTIONS, NATIONAL SECURITY,  
AND U.S. COMPETITIVENESS

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Clinton Long\*

INTRODUCTION

In 2011, Ileana Ros-Lehtinen, Chairman of the House Foreign Affairs Committee, stated that “the main goal of export controls is to keep certain states or non-state actors from developing or acquiring military capabilities that could threaten important [national] U.S. security interests.”<sup>1</sup> By placing limitations on what technology and products leave the United States through a strict licensing regime, the United States can more effectively control these actors’ access to military equipment and technology.<sup>2</sup> The licensing regime that the United States uses to do this is the International Traffic in Arms Regulations (“ITAR”).<sup>3</sup> ITAR stipulates, among many other regulations, that the United States does not issue licenses for exporters to send military equipment and technology to Cuba, China, Iran, North Korea, and Syria, among others.<sup>4</sup> Additionally,

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<sup>1</sup> *Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part 1: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2011) [hereinafter *Foreign Affairs Hearing*] (statement of Ileana Ros-Lehtinen, Chairman, H. Comm. on Foreign Affairs).

<sup>2</sup> See *id.* at 1–2.

<sup>3</sup> The International Traffic in Arms Regulations, 22 C.F.R. §§ 120–130 (2013).

<sup>4</sup> *Id.* § 126.1.

U.S. policymakers want to restrict the availability of certain defense-related items to several non-state actors, such as Hezbollah and Hamas.<sup>5</sup>

Even with strong export controls in place, unauthorized release of military technologies still occurs, which emphasizes the need for such controls in the first place. For example, at a House Foreign Affairs Committee hearing in 2011, Chairman Ros-Lehtinen detailed a significant compromise of military technology due to its unintended export during the raid on Osama bin Laden's Pakistan compound earlier that year.<sup>6</sup> During the raid, one of the helicopters that carried the Navy SEALs encountered difficulties and crashed in the compound.<sup>7</sup> Although the SEALs destroyed most of the helicopter to prevent technology leaks, enough of it survived the attempted demolition "to afford foreign entities significant insight into [U.S.] technology."<sup>8</sup> The U.S. government counted on the Pakistani government to assist with U.S. export control regulations to prevent the unauthorized disclosure of military technologies in the helicopter.<sup>9</sup> This specific desire to comply with U.S. export controls is not particularly controversial: most, if not all, Americans would agree that sensitive U.S. military technology left in Osama bin Laden's backyard should be immediately removed or destroyed. By having such regulations in place, the United States is not only able to ensure that sensitive military technologies are not leaked, but also is able to take remedial steps when accidents and spillage like this occur.

There is no doubt that export controls serve a very important function by preventing dangerous weapons from falling into the wrong hands and also are effective at protecting sensitive national security information. However, some export control situations involve controversial, anticompetitive, and—at times—laughable

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<sup>5</sup> *Foreign Affairs Hearing*, *supra* note 1, at 8 (statement of Brad Sherman, Member, H. Comm. on Foreign Affairs).

<sup>6</sup> *Id.* at 1–2 (statement of Ileana Ros-Lehtinen, Chairman, H. Comm. on Foreign Affairs).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*



outcomes. For example, Zodiac Group is a company that manufactures equipment for military boats and planes.<sup>10</sup> When it attempted to sell a toilet for use in foreign military planes, the company discovered that the toilet would likely be on ITAR's list of items requiring an export license because it was built to military specifications and with a special design.<sup>11</sup>

These are just two examples that illustrate the effects of U.S. export controls. In the Osama bin Laden helicopter scenario, national security is clearly important and regulations should exist to prevent the acquisition of this technology by individuals or groups hostile to U.S. interests. In order for the government to prevent sensitive items and technology from leaving the country and ending up with the wrong states or groups, ITAR requires licenses to securely export and share certain defense articles and technology.<sup>12</sup> However, as with the Zodiac Group's toilet, ITAR becomes controversial when it prevents U.S. companies from seeking business opportunities abroad by selling products that do not pose a significant security threat to the United States.<sup>13</sup>

The State Department, which enforces ITAR, must balance these two competing interests: (1) national security and (2) the competitiveness and sustainability of U.S. businesses that sell defense

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<sup>10</sup> Clif Burns, *Toilet Training*, EXPORT LAW BLOG (May 23, 2007, 4:12 PM), <http://www.exportlawblog.com/archives/date/2007/05>.

<sup>11</sup> *Id.*

<sup>12</sup> *Foreign Affairs Hearing*, *supra* note 1, at 1. A "defense article" is considered anything listed under Part 121 of the ITAR (the U.S. Munitions List) and includes "technical data." 22 C.F.R. § 121.1(a). "Technical data" is defined as: "(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. (2) Classified information relating to defense articles and defense services; (3) Information covered by an invention secrecy order; (4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles." 22 C.F.R. § 120.10(a).

<sup>13</sup> See, e.g., *Earthbound: Gravity Is Not the Main Obstacle for America's Space Business*. *Government Is*, ECONOMIST (Aug. 21, 2008) [hereinafter ECONOMIST], available at <http://www.economist.com/node/11965352>.

products in the global market.<sup>14</sup> One tool that the State Department has at its disposal to help balance ITAR's rival interests is the authority to grant exemptions.<sup>15</sup> As of 2013, the State Department granted exemptions to Australia, Canada, and the United Kingdom, loosening the licensing requirements for these three countries.<sup>16</sup> Consequently, U.S. companies now face fewer requirements and barriers when sending defense products to these countries.<sup>17</sup>

This Article analyzes whether the exemption model that the State Department engages in with Australia, Canada, and the United Kingdom strikes the right balance between national security and U.S. commercial competitiveness abroad. Part I of this Article addresses the origins and provisions of ITAR, including a discussion of the aforementioned competing interests. Part II of this Article addresses the State Department's authority to grant exemptions from ITAR, how that authority is currently used, and the future of that authority. Part II of this Article further analyzes whether these exemptions strike the right balance between national security and U.S. commercial interests. I conclude in Part III that while these exemptions do not achieve a true balance between these competing interests given the delicate nature of national security, the exemption model still provides welcome and valuable assistance that forms a step in the right direction.

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<sup>14</sup> See, e.g., *id.* See also *Foreign Affairs Hearing*, *supra* note 1, at 1 (saying that "United States policy, with respect to the export of sensitive technology, has long been to seek a balance between the U.S. economic interest in promoting exports, and our national security interest . . .").

<sup>15</sup> 22 U.S.C. § 2778(j) (2012). This authority was delegated to the State Department by Exec. Order No. 11,958, 42 Fed. Reg. 4311, 3 C.F.R. 1977 Comp., p. 79 (Jan. 18, 1977). Although President Obama's March 8, 2013, Executive Order supersedes and replaces Executive Order 11,958 of 1977, this new Executive Order primarily re-delegates many of the same authorities present in earlier executive orders. See Exec. Order No. 13,637, 78 Fed. Reg. 16,129 (Mar. 13, 2013).

<sup>16</sup> See 22 C.F.R. § 126.5 for Canadian exemptions, § 126.16 for Australian exemptions, and § 126.17 for the United Kingdom exemptions.

<sup>17</sup> See *Defense Trade Cooperation Treaties with the United Kingdom and Australia*, U.S. DEP'T OF STATE, [http://www.pmddtc.state.gov/treaties/documents/Defense\\_Trade\\_Treaties\\_Fact\\_Sheet.pdf](http://www.pmddtc.state.gov/treaties/documents/Defense_Trade_Treaties_Fact_Sheet.pdf) (last visited Oct. 13, 2013); *Exports to Canada: Guidance on ITAR Exemption Effective May 30, 2001*, U.S. DEP'T OF STATE, [http://www.pmddtc.state.gov/licensing/documents/exports\\_canada.pdf](http://www.pmddtc.state.gov/licensing/documents/exports_canada.pdf) (last visited Oct. 13, 2013).

## I. ITAR

### A. *What Is ITAR?*

In 1976, Congress enacted the Arms Export Control Act (“AECA”) in the midst of the Cold War as the result of years of evolution in U.S. export control law.<sup>18</sup> The purpose of the AECA is to prevent “the United States [from] be[ing] the arms merchant to the world, to discourage the international shipment of arms, and to promote regional disarmament.”<sup>19</sup> One method that lawmakers used to fulfill this purpose was to provide the President with the authority “to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.”<sup>20</sup>

Pursuant to the AECA, the President also holds the statutory authority to create a list of defense-related items—the United States Munitions List (“USML”)—that fall under the purview of the AECA and need special licenses or permission to enter or leave the United States.<sup>21</sup> In preparing the USML, the President is required to take a variety of factors into account, including whether the munitions “would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”<sup>22</sup> The stated purpose of this section is to further “world peace and the security and foreign policy of the United States.”<sup>23</sup>

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<sup>18</sup> See Jonathan Donald Westreich, *Regulatory Controls on United States Exports of Weapons and Weapons Technology: The Failure to Enforce the Arms Export Control Act*, 7 ADMIN. L.J. AM. U. 463, 467–70 (1993) (discussing the background that led to the creation of the Export Control Act of 1949).

<sup>19</sup> *Id.* at 503.

<sup>20</sup> 22 U.S.C. § 2778(a)(1).

<sup>21</sup> See *id.* § 2778(a).

<sup>22</sup> *Id.* § 2778(a)(2).

<sup>23</sup> *Id.* § 2778(a)(1).

ITAR is the set of federal regulations that implements the AECA.<sup>24</sup> The main purpose of ITAR is to ensure that “any person or company who intends to export or to temporarily import a defense article, defense service, or technical data must obtain prior approval from [the Directorate of Defense Trade Controls of the U.S. State Department].”<sup>25</sup>

ITAR offers definitions of important statutory terms such as “defense article,”<sup>26</sup> “export,”<sup>27</sup> “temporary import,”<sup>28</sup> “technical data,”<sup>29</sup> and “license.”<sup>30</sup> The regulations discuss how defense articles are added to the USML,<sup>31</sup> and also include the USML in order for persons to determine if the “defense article” they want to export or to import is contained on the list.<sup>32</sup> The USML covers a wide range of products and divides them into general categories, including, but not limited to, “Firearms, Close Assault Weapons and Combat Shotguns,” “Military Electronics,” and “Toxicological Agents, including Chemical Agents, Biological Agents, and Associated Equipment.”<sup>33</sup>

ITAR governs not only the international trade of actual products, but also the technical data associated with ITAR-controlled products.<sup>34</sup> Any information “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles . . . [including] blueprints, drawings, photographs, plans, instructions or

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<sup>24</sup> See 22 C.F.R. § 120.1(a).

<sup>25</sup> *Licensing*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, <http://www.pmddtc.state.gov/licensing/> (last visited Oct. 13, 2013). See also *Mission*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, <http://www.pmddtc.state.gov> (last visited Oct. 13, 2013).

<sup>26</sup> 22 C.F.R. § 120.6.

<sup>27</sup> *Id.* § 120.17.

<sup>28</sup> *Id.* § 120.18.

<sup>29</sup> *Id.* § 120.10.

<sup>30</sup> *Id.* § 120.20.

<sup>31</sup> *Id.* §§ 120.2–120.3.

<sup>32</sup> 22 C.F.R. § 121.1(a).

<sup>33</sup> *Id.* § 121.1.

<sup>34</sup> The regulations define “defense article” as “any item or *technical data*” listed on the USML. *Id.* § 120.6 (emphasis added).

documentation”<sup>35</sup> and “[c]lassified information relating to defense articles and defense services”<sup>36</sup> also are subject to ITAR.<sup>37</sup>

ITAR prohibits the unlicensed or illegal transfer of these defense articles and pieces of information on the USML to “foreign persons,” defined as:

any natural person who is not a lawful permanent resident . . . [and] any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).<sup>38</sup>

No U.S. person<sup>39</sup> can export any defense article or data to foreign persons without a license.<sup>40</sup> The extensive definition of “export” includes sending items on the USML outside of the country as well as sharing technical data with foreign persons or governments.<sup>41</sup> For example, a professor at a U.S. university sharing restricted technical data with a foreign research assistant would fall under the purview of ITAR restrictions and requirements.<sup>42</sup>

ITAR regulates the registration process of anyone involved in the sale of defense articles and services,<sup>43</sup> as well as the licensing

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<sup>35</sup> *Id.* § 120.10(a)(1).

<sup>36</sup> *Id.* § 120.10(a)(2).

<sup>37</sup> *Id.* § 120.10(a)(3)–(4).

<sup>38</sup> 22 C.F.R. § 120.16.

<sup>39</sup> *Id.* § 120.15. (“*U.S. person* means a person (as defined in § 120.14 of this part) who is a lawful permanent resident as defined by 8 U.S.C. § 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. § 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in § 120.16 of this part.”).

<sup>40</sup> *Licensing*, *supra* note 25.

<sup>41</sup> 22 C.F.R. § 120.17(a)(1), (4)–(5).

<sup>42</sup> See Press Release, Dep’t of Justice, University Professor and Tennessee Company Charged with Arms Export Violations (May 20, 2008), *available at* [http://www.justice.gov/opa/pr/2008/May/08\\_nsd\\_449.html](http://www.justice.gov/opa/pr/2008/May/08_nsd_449.html).

<sup>43</sup> 22 C.F.R. § 122.1.

regime that all persons must go through in order to export or temporarily import defense articles.<sup>44</sup> This licensing process requires documents that, among other things, demonstrate the country of destination<sup>45</sup> and a certification in the “bill of lading, airway bill, or other shipping documents, and the invoice” stating that exported items cannot be sent to a different country.<sup>46</sup> Also required is a “nontransfer and use certificate,” in which the license applicant, the foreign consignee, and the foreign end-user agree that consignee and end-user “will not reexport, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person.”<sup>47</sup>

According to the defense industry, these regulations are “very cumbersome and restrictive.”<sup>48</sup> Testifying before the House Foreign Affairs Committee in 2011, Under Secretary for Arms Control and International Security Ellen Tauscher acknowledged the export licensing process includes “a myriad of paperwork requirements, which in the case of the State Department alone, could be any one of 13 different forms.”<sup>49</sup> In addition, the U.S. Department of Commerce’s Bureau of Industry and Security also plays a role in the licensing process by regulating the exportation of certain “dual-use” items.<sup>50</sup> According to a review commissioned by President Barack Obama to investigate the current export controls licensing system, the lists administered by the State Department and Commerce Department have “fundamentally different approaches to defining controlled products, [and are] administered by two different departments. This has caused significant ambiguity, confusion and

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<sup>44</sup> *Id.* § 123.1.

<sup>45</sup> *Id.* § 123.9(a).

<sup>46</sup> *Id.* § 123.9(b).

<sup>47</sup> *Id.* § 123.10(a).

<sup>48</sup> Lori Solberg, *New US ITAR Regulations Formulate Favored Defense Partners*, DEFENSE UPDATE (Feb. 21, 2012, 8:45 PM), [http://defense-update.com/20120221\\_itar\\_formulates\\_trusted\\_partners.html](http://defense-update.com/20120221_itar_formulates_trusted_partners.html).

<sup>49</sup> *Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part 1: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 112–37 (2011) (statement of Ellen Tauscher, Under Sec’y, Arms Control and Int’l Sec., U.S. Dep’t of State).

<sup>50</sup> *Dual Use U.S. Export Controls and Licenses*, EXPORT.GOV (Sept. 15, 2013), [http://export.gov/exportbasics/eg\\_main\\_018783.asp](http://export.gov/exportbasics/eg_main_018783.asp).

jurisdictional disputes, delaying clear license determinations for months and, in some cases, years . . . .”<sup>51</sup> As one space industry source noted, “[t]he export licensing process is lengthy, unpredictable, and inefficient.”<sup>52</sup>

*B. Debate over ITAR and Competing Interests*

A debate has developed regarding ITAR’s negative impact on U.S. competitiveness abroad because of its restrictions on U.S. exports.<sup>53</sup> Recognizing the debate and the difficulty of finding a balance between national security and industry competitiveness, one analyst notes that:

The [United States] leads the world in most technologies and some of these give it a military advantage. If export rules are too lax, foreign powers will be able to put American technology in their systems, or copy it. But if the rules are too tight, then it will stifle the industries that depend upon sales to create the next generation of technology. It is a difficult balance to strike and critics charge that America has erred on the side of stifling.<sup>54</sup>

Efforts to strike the right compromise between these two national interests have been the source of congressional hearings,<sup>55</sup> discussions by the executive branch,<sup>56</sup> and private sector publications

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<sup>51</sup> Press Release, White House, President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors (Aug. 30, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n>.

<sup>52</sup> *ITAR and the U.S. Space Industry*, SPACE FOUND., [http://www.spacefoundation.org/docs/SpaceFoundation\\_ITAR.pdf](http://www.spacefoundation.org/docs/SpaceFoundation_ITAR.pdf) (last visited Sept. 26, 2013).

<sup>53</sup> *E.g.*, Henry Kenyon, *Export Laws Hurt US Space Competitiveness, Lawmaker Says*, DEFENSE SYSTEMS (Mar. 12, 2012), <http://defensesystems.com/articles/2012/03/12/satellite-2012-outdated-export-laws-space-competition>.

<sup>54</sup> *ECONOMIST*, *supra* note 13.

<sup>55</sup> *See Foreign Affairs Hearing*, *supra* note 1.

<sup>56</sup> *See id.* at 10 (statement of Hon. Ellen Tauscher, Under Sec’y, Arms Control & Int’l Sec., U.S. Dep’t of State).

and events.<sup>57</sup> This task is complex and there is no easy solution.<sup>58</sup> However, as discussed below, the State Department has used the exemption model to bring some balance between these two interests.<sup>59</sup>

C. *ITAR's Detrimental Effect on U.S. Economic Interests and Global Competitiveness*

It is clear that ITAR has had a negative effect on the competitiveness of U.S. companies and entrepreneurs that make defense articles and related items.<sup>60</sup> The recent decline in the space industry is an excellent example.<sup>61</sup> In the 1990s, the United States controlled over 80 percent of the worldwide satellite market<sup>62</sup> and the overall U.S. market share of the space industry was 73 percent.<sup>63</sup> In recent years these numbers have declined to 50 percent<sup>64</sup> and 25

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<sup>57</sup> See, e.g., *Competing for Space: Satellite Export Policy and U.S. National Security*, AEROSPACE INDUS. ASS'N (Jan. 2012) [hereinafter AEROSPACE INDUS. ASS'N], available at <http://www.aia-aerospace.org/assets/CompetingForSpaceReport.pdf>.

<sup>58</sup> See ECONOMIST, *supra* note 13 ("It is a difficult balance to strike . . .").

<sup>59</sup> See *infra* Section III: "The Right Balance?"

<sup>60</sup> See, e.g., ECONOMIST, *supra* note 13.

<sup>61</sup> See Kenyon, *supra* note 53. It should be noted that the State Department currently is in the process of transferring control of many U.S. satellites to the Department of Commerce. See Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of "Defense Service," 78 Fed. Reg. 31,444 (May 24, 2013). This comes as a result of the National Defense Authorization Act for Fiscal Year 2013, which "effectively returned to the President the authority to determine which regulations govern the export of satellites and related articles. With this authority, and pursuant to the President's Export Control Reform effort," the State Department has proposed revisions to the relevant USML category ("Spacecraft Systems and Related Articles"). 78 Fed. Reg. 31,444. This will place certain satellites that "no longer warrant USML control" under the jurisdiction of the Department of Commerce and its regulations. Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 78 Fed. Reg. 31,431 (May 24, 2013).

<sup>62</sup> ECONOMIST, *supra* note 13.

<sup>63</sup> Kenyon, *supra* note 53.

<sup>64</sup> ECONOMIST, *supra* note 13.



percent,<sup>65</sup> respectively. The space industry has lost approximately \$21 billion during these years and “literally thousands of jobs . . . .”<sup>66</sup>

Many attribute this decline to Congress’s transfer of control of the international trade of satellites from a more lenient regime at the U.S. Department of Commerce to the State Department and ITAR.<sup>67</sup> This move was motivated by concerns over the disclosure of satellite information to China.<sup>68</sup> Unsurprisingly, there is a category in the USML for “Spacecraft Systems and Associated Equipment,” which includes various satellites.<sup>69</sup>

ITAR’s restrictions have made maintaining U.S. dominance in the space industry difficult: not only has Congress passed more stringent ITAR prohibitions regarding space articles since the 1990s, but the statutory text may have been interpreted even more broadly than Congress intended.<sup>70</sup> For example, satellite parts currently are covered by ITAR, which means that a satellite stand that is “indistinguishable from a common coffee table” requires ITAR compliance before it may be exported.<sup>71</sup>

While the intent of these measures is to prevent widespread access to defense articles, there is evidence that the restrictions are encouraging innovation and production of these articles in competing markets abroad.<sup>72</sup> Former Defense Secretary Robert Gates explained the results:

Multinational companies can move production offshore, eroding our defense industrial base, undermining our control

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<sup>65</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 2.

<sup>66</sup> Steven Brotherton, *Fall Ushers in Football and (Hopefully) Space Export Control Reform*, FRAGOMEN CONTROLS OBSERVATIONS & UPDATES BLOG (Aug. 17, 2012), <http://www.fragomen.com/exportcontrolsupdates/?entry=72>.

<sup>67</sup> See ECONOMIST, *supra* note 13.

<sup>68</sup> See AEROSPACE INDUS. ASS’N, *supra* note 57, at 2.

<sup>69</sup> The United States Munitions List, 22 C.F.R. § 121.1, Category XV—Spacecraft Systems and Associated Equipment (2003). As discussed *supra* in note 61, the State Department is in the process of transferring jurisdiction over certain satellites to the Department of Commerce. 78 Fed. Reg. 31,444.

<sup>70</sup> See ECONOMIST, *supra* note 13.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

regimes in the process, not to mention losing American jobs. Some European satellite manufacturers even market their products as being not subject to U.S. export controls, thus drawing overseas not only potential customers, but some of the best scientists and engineers as well.<sup>73</sup>

Placing satellites on the USML has not prevented other countries from gaining the technology; it has *encouraged* them to find satellites from other sources and create them on their own.<sup>74</sup> For example, Thales Alenia is a European satellite producer that has greatly benefitted from ITAR, significantly increasing its market share since the late 1990s.<sup>75</sup> The company can offer satellites that are free of U.S. parts or articles, and, therefore, “ITAR-free.”<sup>76</sup> It recently built a satellite for China, which launched in 2012.<sup>77</sup> ITAR was modified to include satellites specifically to prevent such an acquisition by China<sup>78</sup> and yet the restrictions have encouraged foreign companies to fill the void.<sup>79</sup> The consequence of these restrictions is that the United States has lost jobs and market share.<sup>80</sup> Certain satellites currently are being transferred from ITAR back to the Department of Commerce’s jurisdiction.<sup>81</sup> While industry members applaud this move,<sup>82</sup> it is unclear how the U.S. space industry will perform in the future.

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<sup>73</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 3.

<sup>74</sup> ECONOMIST, *supra* note 13.

<sup>75</sup> *Id.*

<sup>76</sup> Stephen Clark, *Chinese Rocket Lifts Off with Communications Satellite*, SPACEFLIGHT NOW (Mar. 31, 2012), <http://www.spaceflightnow.com/news/n1203/31longmarch/>.

<sup>77</sup> *Id.*

<sup>78</sup> ECONOMIST, *supra* note 13.

<sup>79</sup> Clark, *supra* note 76.

<sup>80</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 3.

<sup>81</sup> See *supra* text accompanying note 61.

<sup>82</sup> E.g., Press Release, Satellite Industry Association, The Satellite Industry Association Files Comments Supporting Draft Rules to Reform Satellite Export Controls (July 11, 2013), available at [http://www.sia.org/wp-content/uploads/2013/07/SIA\\_Press\\_Release\\_on\\_Filing\\_ECR\\_Comments\\_2013\\_07\\_11.pdf](http://www.sia.org/wp-content/uploads/2013/07/SIA_Press_Release_on_Filing_ECR_Comments_2013_07_11.pdf).

#### D. ITAR Protects U.S. National Security Interests

Balanced against these economic costs, ITAR and other export controls protect national security by preventing terrorist groups and rogue states from having access to weapons, defense items, and associated technology.<sup>83</sup> Corollary to this are additional, specific U.S. national security interests, such as “maintaining a military advantage over potential adversaries, and denying the spread of technologies that could be used in developing weapons of mass destruction.”<sup>84</sup> When ITAR and other export controls were created in the middle of the Cold War, the adversary was a nation-state, and efforts to keep defense articles from reaching the Soviet Union seemed less complicated.<sup>85</sup> However, today, the United States faces much more difficult challenges in preventing terrorists or states with creative “back door [missile] acquisitions,” or “elicit front companies” funded by either of these groups from acquiring weapons.<sup>86</sup> The globalization of today’s economy means that parts for defense articles come from a number of countries, which makes regulating the products more difficult.<sup>87</sup>

While it is often easy to criticize ITAR and other export control regulations for sometimes seemingly arbitrary and overly inclusive product regulations, the best argument in favor of a strong ITAR is that “it takes only one key piece of cutting edge technology slipping through the cracks to seriously compromise our security.”<sup>88</sup>

## II. THE STATE DEPARTMENT AND ITAR EXEMPTIONS

While these competing interests seem irreconcilable,<sup>89</sup> the State Department may have a partial solution in permitting ITAR exceptions for certain countries. Before explaining the mechanics of exemptions, it is important to give an overview of the State

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<sup>83</sup> See *Foreign Affairs Hearing*, *supra* note 1, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 10 (statement of Hon. Ellen Tauscher, Under Sec’y, Arms Control & Int’l Sec., U.S. Dep’t of State).

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* at 8 (statement of Brad Sherman, Member, H. Comm. on Foreign Affairs).

<sup>89</sup> See *ECONOMIST*, *supra* note 13 (“It is a difficult balance to strike . . .”).

Department's authority to give country-specific exemptions and how it uses this authority.

A. *The State Department's ITAR Country Exemption Authority*

President Ford officially delegated the authority to enforce ITAR to the State Department by an executive order.<sup>90</sup> Included in this delegated authority is the President's ability to grant ITAR exemptions to specific countries as codified by the AECA.<sup>91</sup> This exemption authority can be exercised only through a bilateral agreement with a foreign country.<sup>92</sup> Australia, Canada, and the United Kingdom are the only three exceptions to this requirement, which means that these three countries do not need to reach a bilateral agreement with the United States in order to receive an ITAR exemption.<sup>93</sup> Canada is specifically listed as an exception in the statute,<sup>94</sup> while the United Kingdom and Australia are eligible for exception from the bilateral agreement requirement because of defense trade cooperation treaties ("DTCT") between each of these countries and the United States.<sup>95</sup> Agreeing to a DTCT does not mean that U.S. persons can send any and all defense articles to that country: items such as "complete rocket systems,"<sup>96</sup> "biological agents,"<sup>97</sup> and "defense articles and defense services specific to the design and testing of nuclear weapons,"<sup>98</sup> are excluded from the scope of DTCTs.

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<sup>90</sup> This authority was delegated to the State Department by Exec. Order No. 11,958, 42 Fed. Reg. 4311, 3 C.F.R. 1977 Comp., p. 79 (Jan. 18, 1977). Although President Obama's March 8, 2013, Executive Order supersedes and replaces Executive Order 11,958 of 1977, this new Executive Order primarily re-delegates many of the same authorities present in earlier executive orders. See Exec. Order No. 13,637, 78 Fed. Reg. 16,129 (Mar. 13, 2013).

<sup>91</sup> 22 U.S.C. § 2778(j).

<sup>92</sup> *Id.* § 2778(j)(1).

<sup>93</sup> Australia's exemption is provided for in 22 U.S.C. § 2778(j)(1)(C)(i)(II), Canada's exemption is found in 22 U.S.C. § 2778(j)(1)(B), and the UK's exemption is found in 22 U.S.C. § 2778(j)(1)(C)(i)(I).

<sup>94</sup> 22 U.S.C. § 2778(j)(1)(B).

<sup>95</sup> *Id.* § 2778(j)(1)(C)(i).

<sup>96</sup> *Id.* § 2778(j)(1)(C)(ii)(I).

<sup>97</sup> *Id.* § 2778(j)(1)(C)(ii)(IV).

<sup>98</sup> *Id.* § 2778(j)(1)(C)(ii)(V).

### B. *Exemption for Canada*

The AECA statutory provision regarding Canada says that no bilateral agreement is necessary in order for the State Department to grant Canada an exemption.<sup>99</sup> The State Department exercised this option, giving Canada a new ITAR exemption in 2001.<sup>100</sup> The United States and Canada engaged in significant negotiations in order for each to modify its export controls and comply with the other's requirements.<sup>101</sup> Canada, for example, has incorporated all of the items in the USML into its own export control list.<sup>102</sup> Meanwhile, the United States has significantly expanded the scope of Canada's exemption by relaxing license standards and by listing specific governmental and private recipients of the exempt products.<sup>103</sup> The result is that many Canadian and American "defense articles"—which generally require an ITAR license—can be exported or temporarily imported between the two countries without the need of acquiring a license.<sup>104</sup>

The exemption for Canada, while providing for significantly more arms trade than with any other country, is not an absolute ITAR exemption; many defense articles listed in the USML, such as specific firearms and ammunition, aircraft items, certain chemical agents, and nuclear weapons, still require a license.<sup>105</sup>

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<sup>99</sup> *Id.* § 2778(j)(1)(B).

<sup>100</sup> Amendments to the International Traffic in Arms Regulations: Canadian Exemptions, 66 Fed. Reg. 10,575 (Feb. 16, 2001). Canada had previously received an ITAR exemption, but the U.S. revoked it in 1999 due to a number of concerns. Evelyn L. Ackah, *An Examination of ITAR: The Impact on Canadian Dual National Employees*, HUM. RESOURCES PROFS. MAG., June 2007, at 2, available at <http://spectrumhrlaw.com/assets/Uploads/Evelyn-publications/An-Examination-of-ITAR-The-Impact-on-Canadian-Dual-National-Employees.pdf>.

<sup>101</sup> Amendments to the International Traffic in Arms Regulation: Canadian Exemption, 66 Fed. Reg. at 10,575.

<sup>102</sup> *Id.*

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

<sup>104</sup> 22 C.F.R. § 126.5.

<sup>105</sup> *Id.* § 126.5(b).

### C. *Exemptions for Australia and the United Kingdom*

Over the course of approximately a decade, the United States has negotiated agreements with the United Kingdom and Australia to create an ITAR exemption for both countries.<sup>106</sup> The most significant event leading to the exemptions occurred in 2007, when the United States signed a DTCT with both Australia<sup>107</sup> and the United Kingdom.<sup>108</sup> The stated purpose of the DTCT with each country is the same: “This Treaty provides a comprehensive framework for Exports and Transfers, without a license or other written authorization, of Defense Articles, whether classified or not, to the extent that such Exports and Transfers are in support of the activities identified . . . .”<sup>109</sup> These activities consist of combined operations and research, and situations in which one of the governments is the end user of the approved defense article.<sup>110</sup> The end users and purposes of the exempt articles are therefore not unlimited.

The U.S. Senate approved these treaties in 2010,<sup>111</sup> paving the path for ITAR exemptions to come a few years later. The UK’s ITAR

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<sup>106</sup> Lynn Van Buren & Linda Weinberg, *ITAR License Exemptions for UK and Australia Co-Opted by “Expedited” Licensing Process*, DLA PIPER RUDNICK GRAY CARY, <http://www.mondaq.com/unitedstates/x/29239/IT+Software/ITAR+License+Exemptions+for+UK+and+Australia+CoOpted+by+Expedited+Licensing+Process> (last updated Nov. 2, 2004).

<sup>107</sup> Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, U.S.-Austl., Sept. 5, 2007, S. TREATY DOC. NO. 110-10 [hereinafter *Australia Treaty*], available at <http://www.foreign.senate.gov/download/?id=A19B4D81-8845-4F66-91A6-20D5768F1C7E>.

<sup>108</sup> Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, U.S.-U.K., Jun. 21, 2007, S. TREATY DOC. No. 110-7 [hereinafter *UK Treaty*], available at [http://www.pmddtc.state.gov/treaties/documents/UK\\_Treaty.pdf](http://www.pmddtc.state.gov/treaties/documents/UK_Treaty.pdf).

<sup>109</sup> *Australia Treaty*, *supra* note 107, art. 2; *UK Treaty*, *supra* note 108, art. 2.

<sup>110</sup> See Press Release, U.S. Dep’t of State, Fact Sheet (Sept. 30, 2010), available at [http://www.pmddtc.state.gov/treaties/documents/Defense\\_Trade\\_Treaties\\_Fact\\_Sheet.pdf](http://www.pmddtc.state.gov/treaties/documents/Defense_Trade_Treaties_Fact_Sheet.pdf).

<sup>111</sup> *Id.*

exemption entered into force in 2012,<sup>112</sup> and the exemption for Australia entered into force in 2013.<sup>113</sup> There are relevant regulations governing both exemptions in the Code of Federal Regulations, through which the United States has streamlined ITAR requirements for the exchange of relevant products and ideas with the United Kingdom and Australia.<sup>114</sup> The exemptions provide mechanisms for businesses and end users to become part of an “approved community” to trade some articles without a license.<sup>115</sup> In practice, this means that companies can be registered with the State Department and thus be eligible to trade certain products without a license.<sup>116</sup> However, the export, under both DTCTs, “must be for an end-use specified in the [DTCT] between the United States and . . .” the United Kingdom<sup>117</sup> or Australia.<sup>118</sup> For example, an approved end-use in the DTCT for the United Kingdom and Australia is “cooperative security and defense research, development, production, and [certain identified] support programs . . . .”<sup>119</sup> Furthermore, there are items excluded from the DTCTs that cannot be traded under either exemption.<sup>120</sup> For example, the AECA specifically prohibits exempting a number of defense articles such as

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<sup>112</sup> Announcement of Entry Into Force of the Defense Trade Corporation Treaty Between the United States and the United Kingdom, 77 Fed. Reg. 33,089 (June 5, 2012).

<sup>113</sup> Implementation of the Defense Trade Cooperation Treaty Between the United States and Australia; Announcement of Effective Date for Regulations, 78 Fed. Reg. 32,362 (May 30, 2013).

<sup>114</sup> For the UK exemption, these are located at International Traffic in Arms Regulations, 22 C.F.R. § 126.17 (2012). For the Australia Exemption, these are located at International Traffic in Arms Regulations, 22 C.F.R. § 126.16 (2013).

<sup>115</sup> Edward J. Krauland et al., *US-UK Defense Trade Treaty Implemented in ITAR, Will Soon Lift Certain Licensing Requirements For US Exporters*, STEPTOE & JOHNSON LLP, Mar. 26, 2012, available at <http://www.steptoel.com/publications-newsletter-485.html>.

<sup>116</sup> *How Does the UK Exemption Work*, U.S. DEP'T OF STATE, DIRECTORATE OF DEF. TRADE CONTROLS, <http://www.pmddtc.state.gov/faqs/treaties.html#1> (last updated Mar. 14, 2013).

<sup>117</sup> 22 C.F.R. § 126.17(a)(3)(iv).

<sup>118</sup> *Id.* § 126.16(a)(3)(iv).

<sup>119</sup> Australia Treaty, *supra* note 107, art. 3(1)(b); UK Treaty, *supra* note 108, art. 3(1)(b), cited in *Senate Ratifies Defense Trade Cooperation Treaties with the United Kingdom and Australia*, COVINGTON & BURLING LLP 3 (Oct. 8, 2010), available at <http://www.cov.com/publications> (keyword: senate; date: 10/10).

<sup>120</sup> See 22 C.F.R. §§ 126.16(a)(3)(v), 126.17(a)(3)(v).

“biological agents” through DTCTs.<sup>121</sup> Based on these limitations, any concerns that the DTCTs will completely liberalize the arms trade between these countries are mistaken.

*D. The State Department’s Future Use of This Authority*

Other than the exemptions for Canada, the United Kingdom, and Australia, there is no indication of negotiations to provide an exemption for any other country. Canada, the United Kingdom, and Australia share a special ideological relationship with the United States.<sup>122</sup> The United States does have other ideological allies such as members of the North Atlantic Treaty Organization, Japan, New Zealand, and South Korea,<sup>123</sup> but whether the United States has considered or would find it desirable to invite any of these to such negotiations is unclear. The difficulty of extending these negotiations to other countries is that the export controls of the treaty partner must comply with ITAR.<sup>124</sup> There are significant concerns that terrorists or rogue states could acquire these defense articles from other countries—even those friendly to the United States—that import these goods but do not have the same strict export controls as the United States.<sup>125</sup> It is therefore unclear how the State Department will use its exemption authority in the future.

III. THE RIGHT BALANCE?

As discussed in Parts I and II, there is a significant debate on the subject of export controls’ protection of national security vis-à-vis the restrictions they place on the ability of U.S. companies to sell their products abroad.<sup>126</sup> While the exemption model presents a less

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<sup>121</sup> *Id.* § 2778(j)(1)(C)(ii)(IV).

<sup>122</sup> Maj. Matthew D. Burris, *Tilting at Windmills? The Counterposing Policy Interests Driving The U.S. Commercial Satellite Export Control Reform Debate*, 66 A.F. L. REV. 255, 289-90 (2010).

<sup>123</sup> *Id.* at 290.

<sup>124</sup> *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>125</sup> *Id.* at 289 (citing *The Export Administration Act: A Review of Outstanding Policy Considerations*, Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs, 111th Cong. 6 (2009)).

<sup>126</sup> See *supra* Section I.B: “Debate over ITAR and Competing Interests.”



than optimal solution to the problem, these exemptions are one way for the United States to find some balance between competing interests.

A. *National Security*

Despite the fact that ITAR exemptions loosen restrictions on export controls, the United States has taken steps to ensure protection of national security. First, the United States has carefully selected a limited number of countries to receive exemptions. Canada, the United Kingdom, and Australia are allies of the United States, and they share security ideologies.<sup>127</sup> With a small number of countries, it is much easier to ensure that the regulations are being followed both by the United States and the other countries.<sup>128</sup> Second, there are still restrictions on what can be traded without a license, an approved list of recipients of the goods, and limitations on what can be done with the defense articles after arriving in that country.<sup>129</sup>

Through these measures, the United States has taken adequate steps to ensure that national security is protected even with exemptions in place. While these exemption measures do not strengthen national security efforts, national security does not appear to be compromised. But would that still be true if the United States decided to extend exemptions to more countries?<sup>130</sup>

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<sup>127</sup> See Burris, *supra* note 122, at 290.

<sup>128</sup> The fact that countries' export control laws are not as strict as U.S. law is listed as a reason why, at the time of writing, only Canada had been given an ITAR exemption. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>129</sup> See, e.g., UK Treaty, *supra* note 108, arts. 2–6, 9.

<sup>130</sup> See *infra* Section III.C: "Do the Exemptions Find the Right Balance?" Concerns over other countries' export control laws have been stated as a reason why only Canada, at the time of writing, had been granted an exemption. Burris, *supra* note 122, at 290 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

### B. *Economic Interests*

Loosening the restrictions of ITAR has been welcomed by U.S. industries because it provides them with additional opportunities to sell their defense products with less bureaucracy.<sup>131</sup> However, the benefits of ITAR exemptions to economic interests and the competitiveness of U.S. industries are only marginally useful. First, despite the welcome changes, the exemptions only exist for three countries. While these countries should provide significant opportunities for U.S. defense articles, unless the number of exemptions increases and includes other significant defense markets, there might not be a large enough benefit for many U.S. industries to prevent further loss of market share and competitiveness.

Second, there are still significant restrictions on the international trade of defense articles. The items can only be exported for approved purposes<sup>132</sup> and, as mentioned earlier, not all defense products can be exported.<sup>133</sup> While these ITAR exemptions are helpful for U.S. industries, it is likely these industries will want additional exemptions for other countries and continued loosening of certain restrictions in order to remain competitive in the global defense market.

### C. *Do the Exemptions Find the Right Balance?*

ITAR exemptions have not struck a true balance between economic interests and national security. The ITAR exemption model protects national security, but U.S. industries might only be marginally benefitted because of legitimate security concerns. However, is this model the right path for export control law to find an optimal balance between national security and industry interests? Perhaps, but any additional use of exemptions will likely encounter significant challenges.

The most logical way to help U.S. industries through the ITAR exemption model is to extend exemptions to additional

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<sup>131</sup> See Krauland et al., *supra* note 115.

<sup>132</sup> See, e.g., UK Treaty, *supra* note 108, art. 3.

<sup>133</sup> See, e.g., *id.* art. 3(1)-(2).

countries.<sup>134</sup> By expanding the network of ITAR exemptions, however, the United States might find it difficult to ensure that each partner is abiding by the agreement or treaty.<sup>135</sup> If the expansion of the number of exemptions led to diluted compliance, U.S. national security would suffer because products would be more likely to fall into the wrong hands.<sup>136</sup> It is through countries with weaker export control systems in place that terrorists and rogue states can acquire the weapons and technology they desire, an obviously undesirable result for the United States.<sup>137</sup>

In these situations, there appears to be no true balance that ITAR exemptions can strike.<sup>138</sup> Either national security is compromised or economic interests suffer, and whichever is the priority for lawmakers at any given time when ITAR is modified will win at the end of the day. It is therefore difficult to find a solution to this conundrum, whether through ITAR exemptions or other options.<sup>139</sup> Despite the unlikelihood of any method finding a true balance, the exemption model may potentially become an effective tool of finding some balance. The model can become increasingly successful in finding a useful balance if the United States slowly expands the network of exempt countries, is careful about which countries it chooses to give exemptions, and is strict about ensuring that the international treaties and agreements are closely followed.<sup>140</sup>

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<sup>134</sup> See Burris, *supra* note 122, at 289-90 (discussing why Canada, at the time, was the only country with an ITAR exemption: "This begs the question: why is Canada the only U.S. ally afforded such an exemption?").

<sup>135</sup> See *id.* at 290 (saying that additional allies "have not been exempted from the ITAR because of the AECA requirement that their respective export control regimes be brought in line with the ITAR") (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>136</sup> See *id.* at 289-90 (citations omitted).

<sup>137</sup> See *id.* (citations omitted).

<sup>138</sup> As stated in the *The Economist*, "[i]t is a difficult balance to strike . . . ." *ECONOMIST*, *supra* note 13.

<sup>139</sup> See *id.*

<sup>140</sup> See generally Burris, *supra* note 122, at 289-90 (discussing concerns that violations will occur through countries whose export control laws are weaker than U.S. law, which also has been given as an explanation for, at the time of writing, the fact that only one country (Canada) had an exemption) (citations omitted).

## IV. CONCLUSION

The State Department finds itself in a challenging position in administering ITAR: it has an obligation to protect U.S. national security while at the same time trying to appease commercial industries inasmuch as doing so does not compromise national security.<sup>141</sup> The ITAR exemptions are a step in the right direction, but do not achieve the necessary balance themselves. They are still restrictive of a number of products, and must be in order to protect national security. Only three countries have an exemption, while future similar treaties with new countries are not certain to come to fruition. Although it appears that no perfect balance exists when national security is at stake,<sup>142</sup> the exemption model presents one key possible solution to balancing these competing interests, whereby, time will determine its success.



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<sup>141</sup> ECONOMIST, *supra* note 13 (“[i]t is a difficult balance to strike . . .”).

<sup>142</sup> *Id.* (“There can be a trade-off between trade and security . . .”).



## BOOK REVIEW

### SYMBOLISM AND SECURITY: THE POLITICS OF POST-9/11 INTELLIGENCE REFORM

BLINKING RED: CRISIS AND COMPROMISE IN AMERICAN  
INTELLIGENCE AFTER 9/11. By Michael Allen. Dulles,  
Va.: Potomac Books. 2013. Pp. 250. \$29.95.

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**Reviewed by Genevieve Lester\***

*Blinking Red: Crisis and Compromise in American Intelligence After 9/11* is truly a unique book that provides a legislative history of the period after the 9/11 Commission published and publicized its recommendations, when attention shifted to how to actualize them. While the attacks on 9/11 created a deluge of works focusing on terrorism, decision-making, and the political context of urgency surrounding these issues, few of these contributions offer the sophisticated detail and inside knowledge presented in Allen's book. Allen, with a background that bridges the gap between the executive and legislative branches, provides an intelligent inside look at the knotty problems that developed once intelligence reform was put in motion post-9/11.

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Several major themes emerge from his text. First, the largest intelligence reform since the National Security Act of 1947<sup>1</sup> was beset with political complications, including partisan politics, demands from special interests, and the need to project exceptionally quick policy action on the issue of terrorism to the public, particularly to those most closely affected by the attacks. The core of Allen's work analyzes the legislative development of the Intelligence Reform and Terrorism Prevention Act ("IRTPA"),<sup>2</sup> which most notably created a Director of National Intelligence ("DNI") and the National Counterterrorism Center ("NCTC").<sup>3</sup> Allen also explains how the political dynamics surrounding this key legislation affected its outcome.

Though more than a decade after 9/11, it is still hard to overstate the impact the 9/11 Commission's findings have had on the nation's ability to *frame* the events of that day. The popular American consensus lays blame at the feet of the various intelligence agencies for not sharing information, for failing to appropriately predict and warn about the potential threat, and for failing to "connect the dots" to bring together a clear enough picture of the threat for taking countermeasures.<sup>4</sup>

Despite Congress's 2002 joint inquiry into the 9/11 attacks, there was support for an additional investigatory committee on the attacks based on the impression that the prior congressional investigation had not gone far enough. This second investigatory commission would investigate the criticism already percolating throughout Congress and the intelligence community ("IC")<sup>5</sup> that

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<sup>1</sup> National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in 50 U.S.C. §§ 3001 et. seq.).

<sup>2</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S.C.).

<sup>3</sup> See MICHAEL ALLEN, *BLINKING RED: CRISIS AND COMPROMISE IN AMERICAN INTELLIGENCE AFTER 9/11* xv-xvi (2013).

<sup>4</sup> *Id.* at 10.

<sup>5</sup> "In 2004 the vast majority of Intelligence Community assets resided in the eight Department of Defense intelligence entities: the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Geospatial-Intelligence Agency (NGA), the National Reconnaissance Office (NRO), and the intelligence elements of each of the military services." *Id.* at xvii.

there was a “failure to connect the dots,” failure to share information within and between agencies, and failure drawn from a foreign/domestic divide between the effective cooperative use of foreign intelligence and domestic law enforcement information.<sup>6</sup>

The creation of the Commission itself was political and fraught with demands from a new addition to the political arena—the families of those who perished in the attacks—the 9/11 Families (“9/11 Families”).<sup>7</sup> As Allen points out, this group was considered by one former senator to be “the most powerful lobby group he had ever come across in his career.”<sup>8</sup> Their opinion was clear and their mode of expressing it increasingly impassioned. They also held a strong symbolic position in post-9/11 America that made their fight for some type of recompense for their losses moral and unassailable. As one of them states in the text, “[George Tenet, Director of Central Intelligence for the CIA had] made many mistakes that had cost our husbands their lives, and we wanted people like him held accountable, not heralded as heroes.”<sup>9</sup> Politically, it was incredibly important to be viewed as supportive of the victims’ families.

The political power of the 9/11 Families presented immense and unprecedented political challenges to reform. Allen notes that the Commission viewed the families as a “moral force,” and felt that it was crucial that they support the final outcome of the Commission’s work.<sup>10</sup> Because the public favored the views of the families, acceptance of the Commission’s recommendations by the families would ostensibly ensure its acceptance by the public. As the Commission’s goal was to drastically change the intelligence community, the strategy behind the Commission’s recommendation rollout was unanimity on the recommendations prior to the presidential election, the endorsement of the 9/11 Families, and a visible public release of the recommendations.<sup>11</sup>

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<sup>6</sup> *Id.* at 10-11.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> ALLEN, *supra* note 3, at 23.

<sup>10</sup> *Id.* at 32.

<sup>11</sup> *Id.* at 34.

From this backdrop of the post-9/11 deliberations, Allen presents the core of his book—actualization of the Commission’s recommendations. At root, the recommendations sought the creation of a central authority over the intelligence community—the DNI and the founding of a center for information on counterterrorism to be shared among various agencies.<sup>12</sup> Both reforms were recommended in order to fix the inherent problems in the intelligence community that had led to the failure to prevent the attacks on 9/11. Particularly, the recommendations ostensibly addressed the concern of the failure to share and coordinate intelligence information across the community. These recommendations were endorsed by the 9/11 Families, accepted immediately by presumptive Democratic presidential nominee John Kerry, and quickly thereafter by President George W. Bush.<sup>13</sup> The next step was how to reify them in order to give them force beyond symbolic power.

In the words of Secretary of State Condoleezza Rice:

After the 9/11 Commission comes in, the opponents of a DNI are severely weakened because the 9/11 Commission carries a weight nationally and bureaucratically and to say we are going to reject the recommendation of how to get better intelligence agencies performance after two of the highest mess-ups in modern American intelligence history: you had 9/11 . . . and the intelligence failure on Iraq. By now, you had to go with DNI. I was favorably disposed, anyway.<sup>14</sup>

The above provides the background to Allen’s main narrative—the legislative negotiations that extended from the Commission’s recommendations. Allen points out that three different camps quickly developed around what authorities the new DNI would have. The White House view was that there should be a strong DNI with appropriate budget and appointment authority.<sup>15</sup> A second opinion argued that the Director of Central Intelligence

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<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 49, 58.

<sup>14</sup> *Id.* at 56.

<sup>15</sup> ALLEN, *supra* note 3, at 54.



(“DCI”) should be granted increased authority, even so far as to bolster the DCI’s authority by moving the national-defense intelligence agencies under his authority.<sup>16</sup> Unsurprisingly, a third set of voices—those of Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld—argued against the creation of a DNI and NCTC based on the rationale that it would hinder the Secretary of Defense’s ability to manage the Department of Defense.<sup>17</sup> Beyond the friction between the actual personalities involved in the debate, the relationship between defense and national intelligence has historically been tense, due partially to the Secretary of Defense’s authority over a large portion of the intelligence budget.

Allen outlines the various issues involved in negotiating the bill adopting the Commission’s recommendations, particularly since they created the most significant change within the intelligence community for the first time since 1947. Among those negotiations were the level of budget authority the new DNI would have and whether money would flow from the new DNI to department heads or to department heads directly. According to Allen, the political alignment during the negotiations was unorthodox. Rather than strictly partisan divisions, the cleavages focused on more specific issues, such as immigration and veterans’ affairs. The political divide fell into groups based on considerations such as location (i.e., proximity to the President), budget authority, and staffing authority. Allen describes this process well, explaining how a process that appeared arcane and unimportant from the outside, in actuality determined the overall strength of the new reforms. Access to the President and control over resources are both crucial in terms of the efficacy of any senior position in Washington, but particularly in the case of security, where personal trust between the President and his advisers is fundamental to effective threat management.

Allen’s writing style is engaging and his arguments very persuasive. His comprehensive understanding of the congressional process and the required tradeoffs inherent to producing legislation shines in the sections describing finding compromise between the

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<sup>16</sup> *Id.* at 55.

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

two congressional chambers and the White House. Allen's grasp of the institutions and the individuals involved in this process, while conveying his knowledge with warmth and generosity, is truly remarkable. Further, Allen supports his institutional knowledge with extensive research and interviews from all of the major players in this historic legislative undertaking.

Allen presents a thorough and extremely well-written work; a more explicit conceptual framework, however, could have helped to organize and clarify the various important themes that run through the book, including symbolism, the tension of a changed threat environment, and the discomfort of creating policy quickly in a uniquely charged political context. Like many books authored by expert Washington insiders, the use of acronyms and breezy language—while demonstrating Allen's persuasive fluency in the area—is most likely opaque to those newly arrived at these issues. Having said this, the reader will most likely never have another such opportunity to understand from the inside out the complexities of this type of sensitive policy-making under extreme pressure. Perhaps getting a small dose of the vernacular will allow the reader to understand how arcane the details of these problems can be, but also how complex and important these decisions are.

Allen captures the political and emotional dynamics surrounding the intelligence reform material and demonstrates how the reform itself was the outcome of competing forces.<sup>18</sup> These details have been lost from the public view, as the reforms have become absorbed into the official narrative, seen through a political and emotional lens. This text explores the range of relationships and political interactions that made the changes recommended by the Commission a reality. The book also provides a political context for the entire process, allowing the reader to understand the policymakers' sense of responsibility, political exigencies, and also the overall national feeling of the threat that pervaded this entire period of ongoing negotiations. As the memories fade, it is easy to judge retrospectively. Allen provides a sense of the urgency of the process at that time, but does so with an objectivity remarkable in an

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<sup>18</sup> *Id.* at 168.

individual who himself was so intimately engaged with the proceedings.

The institutional reform described in this book is unique—unique in that it focused a bright light on the usually secret issues of intelligence, and also because it produced major change developed in a compressed and urgent political context. As Allen writes, “[t]he battle for the intelligence system is a case study in American power politics and institutional reform born out of crisis and delivered under compromise.”<sup>19</sup> Allen provides a text that fills a great gap in literature, not only on change in the post-9/11 intelligence community, but also on the crisis politics that framed the national discussion on the meaning of the attacks themselves. This portrait of policy and politics set within the context of the odd, opaque world of intelligence is exceptional—an intellectual page-turner. Allen set out to write the definitive legislative history of this period of intelligence reform; he has succeeded.



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<sup>19</sup> *Id.* at xi.



## BOOK REVIEW

### COUNTER-THREAT FINANCE AND NATIONAL SECURITY: TREASURY'S INIMITABLE AND INDISPENSABLE ROLE

TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF  
FINANCIAL WARFARE. By Juan C. Zarate. New York,  
N.Y.: PublicAffairs. 2013. Pp. 488. \$29.99.

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**Reviewed by Amit Kumar, Ph.D.\***

Juan Zarate's new book, *Treasury's War: the Unleashing of a New Era of Financial Warfare*, is an insightful account of the evolution, development, implementation, and fine-tuning of the United States Department of the Treasury's ("Treasury's") tools of financial warfare in the post-9/11 world, as well as a reinvention of its role in exercising these tools. This interesting account combines Zarate's eye for meticulous detail, zeal, focus, and his powers of cogent argument as a skillful prosecutor with the incomparable expertise and research insights of a scholar, and the vision and foresight of a thinker. In this book, Zarate clearly delineates the threats to national security from rogue actors, terrorist financiers, money launderers, criminals, Weapons of Mass Destruction ("WMD") proliferators, Politically Exposed Persons ("PEPS"), or

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some combination thereof, and delves into detail on how Treasury used its authorities, powers, and its pre-eminent position as the U.S. finance ministry, to insert itself into the national security center stage, thus helping the United States leverage this newly fashioned financial power to tackle the aforementioned threats with remarkable success. At the heart of this blow-by-blow account is Zarate's unique experience garnered through his work as a federal prosecutor investigating terrorism cases at the United States Department of Justice, as a senior official first at Treasury, and later at the National Security Council, and his role in helping to fashion, devise, and use the financial tools of targeted sanctions, regulations, and financial investigations that have since become an integral part of the U.S. national security landscape.

In this book, Zarate very artfully explains the salient role of Treasury and its officials in making the economic security and financial warfare toolkit an effective weapon in the war against varied threats that have confronted and continue to endanger U.S. economic security. Zarate also details the success of Treasury in co-opting the private sector financial institutions and other countries into this war effort. Thanks to the rich factual information contained and the great insights offered into the role of a number of national security and foreign policy officials involved in designing and flexing this financial warfare toolkit, this book is a compelling read for policy makers, academics, students, and practitioners interested in the phenomenon of financial warfare and its use and relevance in today's world of asymmetric threats, stateless actors, and rogue states that imperil U.S. security. In addition, the book is a brilliant exposé of the intricacies of the workings of the national security policy formulation and implementation processes, as well as how interagency policy processes in the national security realm interact with and affect U.S. foreign policy priorities and outcomes.

*Treasury's War* takes the reader into the supercharged days following the tragic events of September 11, 2001, when the world was still reeling from the attacks by Al Qaeda terrorists. Identifying and designating Al Qaeda individuals, associated organizations, and institutions for assets freeze sanctions measures—especially those secretly and/or openly funding Al Qaeda activities—became a crucial

focus of Treasury's Countering the Financing of Terrorism ("CFT") efforts. This was particularly true in the days immediately following September 11, 2001, when the United States was trying to cobble together a CFT coalition, both domestically through the interagency and legislative process as well as internationally through the United Nations Al Qaeda and Taliban Sanctions Regime, and through the extension of the Anti-Money Laundering ("AML") standards instituted by the Financial Action Task Force ("FATF")<sup>1</sup> to cover additional CFT standards. The role of Executive Order 13224<sup>2</sup>, and the passage of the USA Patriot Act Title III,<sup>3</sup> which gave the President authority to block assets of individuals and entities associated with Al Qaeda, as well as an additional set of prosecutorial and regulatory tools to expand the AML powers to cover CFT efforts respectively, are noted by Zarate as landmark achievements in initiating financial warfare against threats to U.S. security. Given the fact that none of these measures would entail the mobilization of military assets, their impact at naming and shaming those believed to be involved in Al Qaeda funding represented the fledgling success of this new kind of warfare.

One of the striking accounts in the book relates to the way in which Treasury adapted to the migration of its enforcement divisions to the newly formed Department of Homeland Security ("DHS") in 2003. This attrition in enforcement capacity coupled with the pressing need to unleash the tools of financial warfare led Treasury to reorganize and reposition itself by establishing the Office of Terrorism and Financial Intelligence ("TFI"). TFI became the nerve

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<sup>1</sup> The FATF is an independent inter-governmental body that "develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction." FATF, <http://www.fatf-gafi.org> (last visited Oct. 27, 2013). Its recommendations are considered as the global AML and CFT standard.

<sup>2</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (2001).

<sup>3</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). Title III of the USA Patriot Act amended the anti-money laundering provisions of the Bank Secrecy Act, codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1959, and 31 U.S.C. §§ 5311-5314 and 5316-5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

center of all efforts to wage financial warfare against illicit actors and threats to U.S. security. Lacking resources as a result of this migration, and already in the process of spearheading the new financial wars, Treasury waged another war against the commonly held perception that it was a bit player in national security as it vied for a greater say in matters of foreign policy and economic security. Despite having fewer resources at its disposal than before, its mission was successful.

A continuous running theme in the book is the description of Treasury's actions to isolate rogue states and illicit actors from the U.S. financial system through explaining to financial institutions that adopting and implementing sound AML/CFT controls were in their best interest. In doing so, financial institutions could avoid or reduce reputational and business risk. By not doing so, they faced the wrath of Treasury and the threat of regulatory and/or enforcement action. A similar strategy of cajoling and convincing foreign jurisdictions to spruce their AML/CFT measures to conform to FATF standards was an essential part of Treasury's financial warfare arsenal.

Complementing the assets freeze designations, according to the book, was the U.S. Government's effort in successfully convincing the Society for Worldwide Interbank Financial Telecommunications ("SWIFT"), a repository for information pertaining to international bank to bank transfers, to share such data with Treasury. This enabled the United States to obtain such specific information pertaining to suspected terrorist financing activity that was instrumental in identifying the critical nodes of terrorist financing, as well as implementing assets freeze and other regulatory and investigatory actions to prevent terrorist attacks. Gaining information concerning terrorist financial activity from SWIFT was the genesis as well as the reflection of the realization that there were two important truisms relating to the financial warfare staple—first, that financial intelligence of the kind obtained from SWIFT-U.S. information sharing would be crucial for CFT efforts, and second, that banks were the ultimate vehicle to move and store funds for terrorist financiers, criminals, money launderers, PEPS, rogue regimes, and other inhabitants of the illicit financing fauna.

Zarate describes the importance of the use of cash couriers in moving terrorist funds and the role of informal value transfers like hawala<sup>4</sup> in moving and laundering terrorist and criminal funds that are eventually placed and moved through banking channels. The book goes into the key role that Zarate and his colleagues at Treasury played in pushing a ninth CFT recommendation dealing with protective measures against cash couriers through FATF, and in making efforts at convincing countries to have registration requirements for hawaladars to protect them from tainted finance that may be connected to terrorists. For those unacquainted with these seemingly abstruse financing phenomena and for those vaguely familiar with them as well, the book offers a short crash-course to speed up the learning curve.

Through all this war-like effort, both against threats to U.S. security abroad and its resource attenuation within, Treasury was singularly focused on the need of the United States to isolate rogue actors, terrorists, and criminals. This effort included what Zarate calls the Bad Bank initiative.<sup>5</sup> Quite innovatively and brilliantly, Treasury began to wield the power to declare institutions, jurisdictions, transactions, and accounts under the power inherent in its arsenal under Section 311 of the USA Patriot Act (“Section 311”).<sup>6</sup> For once, the targets of Treasury action departed from the conventional ones, namely terrorists, terrorist organizations, PEPs, and criminals—and included banks that were found to be tainted with assets, accounts, and money flows that belonged to these illicit actors. Holding banks responsible for their tainted accounts and suspect customers including PEPs became problematic as it seemingly clashed with U.S. diplomatic objectives and methods, but it proved decisive in the war to protect the U.S. financial system from abuse by such tainted banks holding the contagion of illicit funds.

The book gives an exhaustive account of the use of Section 311 regulatory powers against financial institutions used by states and state-owned entities (including central banks) engaged in

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<sup>4</sup> “[H]awala is a trust-based money transfer mechanism. . . .” JUAN C. ZARATE, TREASURY’S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 8 (2013).

<sup>5</sup> *Id.* at 146.

<sup>6</sup> USA Patriot Act § 311.



proliferation financing and funding terrorists and other anti-U.S. actors. The reticence of actors within the U.S. national security establishment to the use of Section 311, and those without, including intended targets of such regulatory action, feeds into an interesting dynamic in the national security process. The choice about which tool to use in its financial toolkit had confounded Treasury since it began using these tools post-9/11. The active role of the U.S. Congress in legislating sanctions against such illicit actors (including measures to sanction foreign banks that engaged in oil-related transactions with the Central Banks of such rogue states) ended up facilitating this choice.

Another notable endeavor on the part of Zarate and his Treasury colleagues, which is fleshed out in great detail in the book, was the recovery of the assets of the deposed Iraqi regime in 2003. This masterful effort entailed the robust use of financial intelligence, and the enforcement prowess of the Internal Revenue Service Criminal Investigation (“IRS-CI”) arm of Treasury.

By pointing to the threats of the future including the exploitation of new payment methods and digital currency by terrorists, criminals, and other suspect actors alike, Zarate displays a keen understanding and appreciation of the importance of U.S. vulnerabilities and the susceptibility of U.S. critical infrastructure, including banking and financial, to threats emanating from these and other threats, including but not limited to cyber espionage and breaches in the global supply chain. Based on this understanding and fine grasp of threats to national security, Zarate offers a profound definition of national economic security as “the ability of the United States to project its power and influence through economic, financial, and commercial means and defend against systemic and specific risks and threats derived from America’s economic vulnerabilities.”<sup>7</sup> In coining this all-encompassing definition, Zarate exhorts the United States to ramp up its efforts to secure itself against a multitude of real and potential threats from both state and non-state actors. Zarate brings home the fact that the same globally interconnected financial system that has helped the

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<sup>7</sup> ZARATE, *supra* note 4, at 413-14.

United States engage in the tools of financial suasion and economic warfare, has, due to its strong potential for exploitation by our adversaries, all the portents of causing disruption to our financial, economic, and security systems.

Zarate clearly states that the tools of financial warfare are only one of a number of tools that need to be employed in the national security and foreign policy toolkit. Diplomatic measures, military intervention, and other elements of hard and soft power should accompany the financial tools of sanctions, investigations, outreach, and regulation. Moreover, Zarate argues that an application of the tools of financial warfare against illicit actors might make them more amenable to diplomatic suasion by isolating them and threatening them with the consequences of not complying with those regulations and standards of legitimate financial conduct that are expected to maintain the integrity of the United States and global financial systems.

A litmus test of sound analysis is the inclusion of three essential elements—the diagnostic, the prescriptive, and the prognostic. *Treasury's War* is replete with all three. It describes the threats the United States has faced from a whole host of illicit actors; it dwells on the measures adopted to tackle those threats; and it offers a forecast of future threats, as well as strategies and measures to deal with them.

To a student of government and governance, Zarate's delineation of key threat finance nodes and relationships, as well as corresponding counter-threat finance networks with distinct role plays for key network players, shows the success of organizational networks and the way they function. It also details how organizational networks fulfill the purpose of their existence, how they create new efficiencies in service delivery, and how well they supplant age-old Weberian top-down bureaucratic models of organizational effectiveness. Also of special interest is the way in which Treasury adapted itself to the evolving threats emanating from terrorist financiers, money launderers, etc., much as a livewire system constantly adapts itself to the changing environment.

For those in the legal profession, the success of financial warfare shows how existing laws, executive orders, and authorities in the national security arena can be used to isolate rogue actors and rogue states from the U.S. financial system; how laws can be implemented; and how regulations can be fine-tuned to address emergent national security needs and requirements. The book serves as a giant repository of numerous real-life case studies that illustrate this success. For lay readers, and policy makers, the success of financial warfare is proof of how policy tools can be honed, fine-tuned, and designed to address pressing national security concerns and achieve critical foreign policy objectives. For scholars, Zarate's discussion of the use of strategic suasion and the role that non-state actors can play in complementing state power may sound intriguing. These may be useful themes to delve into further and build on for future research.

From all accounts, *Treasury's War* is a brilliant account from one of the top scholar-practitioners in the national security arena. There are a few questions, however, that the book leaves unanswered and that would be interesting to explore further. Thus, the book does succeed in stoking much-needed intellectual and scholarly curiosity.

First, it does not appear to focus in-depth on the impact and effectiveness of the tools of financial warfare. Given the severe resource crunch that the United States and its international and private sectors face, it seems natural to make resource allocations to utilize the tools and techniques of financial warfare based on tangible impact and assessment metrics. For example, one kind of impact metric would be whether targeted assets freeze sanctions have really impaired the financing of terrorist organizations. Another effectiveness metric would be more detailed information on the nature and total amount of assets frozen.

Second, the concepts of risk-based AML/CFT and risk-based FATF assessments are neatly intertwined with the effectiveness and impact question. Zarate's definition of economic security very appropriately brings to the fore the concept of risk in the national security equation. It would be interesting to learn more about whether the financial warfare arena has witnessed any debate and

deliberations on risk-based criteria for implementation and assessment.

Third, what are the criteria that propel Treasury to decide on a Section 311 regulatory action versus an assets freeze designation? Is it political feasibility, impact, effectiveness, or some other criteria? Answers to these related questions may further inform the reader's curiosity.

Fourth, what successes have the U.S.'s international partners witnessed in the realm of financial warfare? Zarate sees, and rightly so, a threat of our adversaries and our allies using the instruments of financial warfare against us. But are other countries in the international sphere developing regulatory measures like Section 311, setting up effective dedicated sanctioning units like Treasury's Office of Foreign Assets Control, and possessing the enforcement capacity of an IRS-CI? Or, are they furnishing their own unique laws, organizational structures, and information sharing mechanisms in this respect? Are we imposing our financial warfare techniques on other countries that may not possess the resources, the technical capacity, or the political will to set up the kind of legal, organizational, prosecutorial, and information sharing capacities that we have? If not, is it the sole responsibility of the United States as the pioneer and the inventor of the discipline and the practice of financial warfare to convince and offer assistance to these other countries to establish and implement such capacity? Has U.S. technical assistance to bridge these capacity deficits in other countries really helped to improve their AML/CFT capacity?

Finally, what sort of recourse can the United States and the United Nations take to offset the regional and national court challenges to Al Qaeda designations that are based on questions of procedural due process? What implications do these challenges have for the future of the global Al Qaeda sanctions regime? Are national and supranational sanctions arising out of United Nations Security Council Resolution 1373<sup>8</sup> the ultimate panacea for the problems faced by the Al Qaeda sanctions regime? While, as the book points

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<sup>8</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

out, the assets freeze sanctions measures may have dismantled the financial flows to Al Qaeda Central,<sup>9</sup> are they an answer to the proliferation of the financing and the ever-stronger presence of Al Qaeda affiliates? Do the measures against Al Qaeda Central need to be tweaked or modified to address the unique financing models of Al Qaeda affiliates? What kind of strategies does the United States need to pursue to tackle the existential threat from Al Qaeda and Associated Movements (“AQAM”)? What about the financial and logistical relationships amongst Al Qaeda affiliates? Are the tools in the U.S. financial war chest sufficient to blunt this current threat from AQAM?

The questions posed above are neither easy, nor easily answerable, and may require further inquiry, building on Zarate’s work. Given the fact that the area of financial warfare is not understood, or, at best, misunderstood, *Treasury’s War* is a seminal work that sheds light on the vital role of Treasury’s efforts to address threat financing. Zarate’s holistic understanding of the financial tools, techniques, and strategies employed to curb the menace of terrorist financing and other threats reflects his unique experience as a participant observer in the policy development and implementation of financial warfare. As a prosecutor, policy maker, policy coordinator, and thought leader, Zarate exhibits a strong grasp of the facts and uses his centrality to the whole policy process, as well as his relationships with the key players, to successfully present a real world historical treatise of Treasury’s war against illicit actors that threaten American security. Zarate’s unique portrayal of the central theme of the book, i.e., the evolution of financial warfare and Treasury’s critical role in it, uses a method of storytelling in which incidents and facts are presented in a back and forth manner to provide context and to maintain the continuity in narrative. Zarate’s penchant for explaining complex issues in everyday terminology, and his ability to communicate and articulate the perils, strengths, and vulnerabilities tied to threat financing and corresponding countermeasures makes this book an absorbing read.

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<sup>9</sup> Intelligence analysts commonly refer to Al Qaeda’s core leadership as ‘Al Qaeda Central.’ See Craig Whitlock, *The New Al-Qaeda Central Far From Declining, the Network Has Rebuilt, With Fresh Faces and a Vigorous Media Arm*, WASH. POST, Sept. 9, 2007, at A1.

This book is undoubtedly the best scholarly work produced thus far in this field and should go a long way in enhancing the understanding about this nascent discipline of modern statecraft. Zarate's success in prosecuting the case for the indispensable need and utility of this aspect of national security, and Treasury's inevitable and inimitable role in it, is evident in full measure in this book. This work will hopefully encourage legal scholars and law school students to pursue cutting-edge research that builds on the analysis and rich insight provided by Zarate.





## COMMENT

### NONJUDICIAL PUNISHMENT IN THE MILITARY: WHY A LOWER BURDEN OF PROOF ACROSS ALL BRANCHES IS UNNECESSARY

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**Katherine Gorski\***

#### INTRODUCTION

Envision a United States Navy warship docked at a foreign port for three days during the second month of a six month long deployment.<sup>1</sup> The ship is preparing to set sail at dawn on the fourth day. Before the ship departs from the port, the ship's crew is ordered to Quarters for muster, instruction, and inspection.<sup>2</sup> Once the ship

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\* George Mason University School of Law, J.D. Candidate, May 2014. I would like to thank my dad, retired Capt. Thomas H. Gorski, U.S. Navy, for giving me the inspiration to write this piece with his numerous tales of Captain's Mast, and for allowing me to interview him. I would also like to thank Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps, for answering my questions. Finally, I would like to thank my Notes Editor, Jessica O'Connell, and the current Articles team, for providing helpful commentary that made this piece far better than I could have managed on my own.

<sup>1</sup> Telephone Interview with retired Capt. Thomas H. Gorski, U.S. Navy (Oct. 8, 2012) [hereinafter Gorski Interview]. The following hypothetical is drawn from an actual Captain's Mast and like situations conducted in 1990 by retired Capt. Thomas H. Gorski, U.S. Navy.

<sup>2</sup> *Id.* When the crew is ordered to Quarters, it is a signal to gather in designated areas. Quarters muster is essentially a headcount of all sailors aboard the ship. It is the most important part of this procedure, as it ensures that everyone is aboard and

sets sail, it will not visit port again for over a month and is not scheduled to return to this particular foreign port during its current deployment.

A young enlisted man, in his early twenties, is granted liberty and leaves the ship. He travels through the base, and enters the city to enjoy his free time in port. He does not return to the base until after his liberty expires. While on base, but before returning to the ship, the young man gets into a physical altercation with a civilian. The Shore Patrol, a group of officers acting in a law enforcement capacity in port while sailors are at liberty,<sup>3</sup> quells the fight and, after dealing with the sailor's disrespectful and antagonistic attitude, manages to gain control of him and returns the young man to the ship, well after the expiration of his liberty.

Ship policy requires crewmen arriving after expiration of liberty to submit to a urinalysis test. Per the policy, the Master-at-Arms collects a sample and returns the sailor to his division where the sailor's Chief Petty Officer orders him to attend Quarters. After offering some specific and graphic advice to the Chief about what he could do with his idea of attending Quarters, the sailor instead goes to bed. Meanwhile, the sailor's urine analysis comes back positive for cocaine use.

The young sailor is then written up for several violations of the Articles of the Uniform Code of Military Justice ("UCMJ"),<sup>4</sup> including: absence from unit and place of duty, Quarters; insubordination toward a Navy petty officer; failure to obey a lawful order; wrongful use of a controlled substance; assault and battery of a civilian; and disorderly conduct. The sailor is notified of these violations and his rights regarding nonjudicial punishment. Within days of the ship's departure, the young man attends Captain's Mast ("Mast"), where the Captain determines whether the sailor committed the violations and what will be an appropriate punishment.

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that no one has been left behind, either in port or overboard. The crew then also receives instructions for the upcoming mission and undergoes inspection.

<sup>3</sup> 32 C.F.R. § 700.922 (2013).

<sup>4</sup> The UCMJ is codified in 10 U.S.C. §§ 801–946 (2013).



At the beginning of the Mast, the Captain reads a statement to the accused telling him the offenses he is suspected of committing and advising him of the nonjudicial punishment process:

You do not have to make any statement regarding the offense(s) of which you are accused or suspected and any statement made by you may be used as evidence against you. You are advised that a [Mast] is not a trial and that a determination of misconduct on your part is not a conviction by a court. Further, you are advised that the formal rules of evidence used in trials by court-martial do not apply at [Mast]. You have signed a statement acknowledging that you were fully advised of your legal rights pertaining to this hearing. Do you understand this statement and do you understand the rights explained therein? Do you have any questions about them or do you wish to make any requests?<sup>5</sup>

A number of authority figures aboard the ship attend the Mast and offer testimonials to the Captain regarding the young man's behavior and any extenuating circumstances. The Captain considers these testimonials as well as the Shore Patrol's report and the sailor's own defenses regarding his offenses.

In addition to considering such testimony, the Captain takes into consideration a number of administrative matters regarding not only the offenses, but also whether nonjudicial punishment is appropriate. The ship's departure cannot be delayed to allow for the Shore Patrol or the civilian to be present as witnesses, or to gather additional evidence. Additionally, because the sailor has crucial technical training required for the safe operation of the ship, it is not possible to leave him behind for the base commander to conduct a proceeding. Further, in the interest of swift justice and the maintenance of good discipline, as well as for fiscal reasons, the Mast cannot be delayed until the ship reaches the next port. Because of these considerations, the Captain must serve justice on the open seas.

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<sup>5</sup> Gorski Interview, *supra* note 1. A slight variation, substantively the same, can be found in U.S. DEP'T OF NAVY, NAVAL ACAD. INSTR. 5812.1A, NONJUDICIAL PUNISHMENT PROCEDURES (Nov. 16, 2012).

In determining the sailor's punishment, the Captain considers the sailor's individual circumstances, including any family who might be affected by his punishment, in addition to any prior offenses. This particular sailor has no wife or children depending on his income and has a previous record of Mast's for a variety of offenses, including those involved here: fighting, insubordination, and drug use.

In light of these considerations, the Captain decides that the sailor has committed the offenses with which he is charged and imposes punishment accordingly. The sailor is restricted to the ship for a total of forty-five days, meaning he cannot leave the ship, but can go anywhere onboard the ship. Additionally, the sailor is awarded extra duty, also for forty-five days. He is also fined half a month's pay for two months and reduced in rate<sup>6</sup> from E-2 to E-1,<sup>7</sup> the lowest rate for an enlisted sailor. A record is made of the nonjudicial punishment in the sailor's military record, but he does not receive a criminal conviction that would stay with him beyond his service in the military and into civilian life.

Instances of conduct such as the incident described above can occur in the course of military affairs, and the need for commanders to impose such penalties to maintain order and

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<sup>6</sup> Gorski Interview, *supra* note 1. Rate or grade for enlisted sailors is similar to rank for officers, and a reduction in rate or grade involves a corresponding salary cut. For enlisted, the terms "rate," "grade," and "pay grade" can be used interchangeably.

<sup>7</sup> "E" indicates enlisted personnel while "W" indicates a warrant officer and "O" a commissioned officer. The number following the letter is an indication of the grade, with the lowest being 1 and the highest being 9 for enlisted, 5 for warrant officers, and 10 for commissioned officers. These grades or rates are used for standardization across the services, which each have their different rank titles. For instance, an E-1 in the Army is a Private while in the Navy, he would be a Seaman Recruit. Further, O-4 corresponds to the rank of major in the Army, Marine Corps, and the Air Force but the rank of lieutenant commander in the Navy and the Coast Guard. See *The United States Military Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias> (last visited Aug. 22, 2013); *The United States Military Officer Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias/officers.aspx> (last visited Aug. 22, 2013); *The United States Military Enlisted Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias/enlisted.aspx> (last visited Aug. 22, 2013).

discipline has long been recognized.<sup>8</sup> However, different opinions exist over the methods that should be used in nonjudicial punishment.

Article 15 of the UCMJ allows military commanders to impose nonjudicial punishment on service members under their command.<sup>9</sup> However, neither the UCMJ nor the *Manual for Courts-Martial* specifies the burden of proof required in such proceedings, leaving it up to the different branches of service to decide which standard to use.<sup>10</sup> Some branches, like the Navy, use a preponderance of the evidence standard, while others, like the Army, use the higher beyond a reasonable doubt standard.<sup>11</sup> Some believe that the beyond a reasonable doubt standard should be used across all branches of the military. These critics argue the higher standard offers better protection for service members in a punishment system that allegedly provides insufficient protection for those service members.<sup>12</sup>

This Comment will analyze nonjudicial punishment in the military and the burdens of proof used by the different branches. Part I will address the history of nonjudicial punishment and the institution of the UCMJ and Article 15. Part II will discuss the nature and purpose of nonjudicial punishment and why they negate the necessity for a higher burden of proof. Part III will address the procedural safeguards inherent in nonjudicial punishment procedures, which are designed to promote fairness to the accused. Part IV will argue that, while a higher burden of proof may be feasible in other branches, the unique circumstances aboard a ship make the lower burden of proof more practical for the Navy.

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<sup>8</sup> Capt. Harold L. Miller, U.S. Army, Judge Advocate General Corps, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 38 (1965).

<sup>9</sup> UCMJ art. 15.

<sup>10</sup> LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 155 (2010).

<sup>11</sup> *Id.* at 155-56. For a description of the different burdens of proof see *infra* Part I.C.

<sup>12</sup> See, e.g., Capt. Shane Reeves, U.S. Army, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, 2005-NOV ARMY LAW. 28 (2005).

## I. BACKGROUND

A. *History of Nonjudicial Punishment Prior to Article 15*

The military has a long history of employing nonjudicial punishment to maintain order and discipline within a command, even prior to the enactment of the UCMJ and Article 15.<sup>13</sup> As far back as the Revolutionary War, military commanding officers had the authority to discipline those under their command, even though that disciplinary authority was not officially granted in any laws or regulations.<sup>14</sup> According to one author, “[c]ommanders’ arbitrary punishment power antedated any legal authorization for it.”<sup>15</sup> Many forms of punishments involved humiliation. For example, “[f]or swearing or cursing, a seaman was required to wear a wooden collar or other shameful badge of distinction for as long as his commander judged proper; for drunkenness, he was put in irons until he was sober.”<sup>16</sup> Commanders also forfeited officers’ pay to punish them for similar offenses.<sup>17</sup>

The Articles of War passed by the Continental Congress in 1775 authorized commanders to punish service members for minor offenses by deducting their pay and confining them for short periods of time.<sup>18</sup> The Army’s summary punishment was not given statutory authority until the 1916 Articles of War were enacted, although it had long been the practice for Army commanders to issue punishment in response to disciplinary offenses.<sup>19</sup> Although the Articles of War provided legislative authority for ship commanders to punish their crew, in the Navy “specific legislation was never considered necessary for a ship’s commander to punish his crew. As late as 1963, even after the UCMJ was enacted, the Navy JAG told his lawyers that laws were not the source of [nonjudicial punishment],

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<sup>13</sup> Miller, *supra* note 8, at 38.

<sup>14</sup> *Id.*

<sup>15</sup> WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 122 (1973).

<sup>16</sup> Miller, *supra* note 8, at 38.

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

<sup>18</sup> *Id.*

<sup>19</sup> GENEROUS, *supra* note 15, at 122 (internal quotation marks omitted).

but that the authority was inherent in the disciplinary powers of the [Commanding Officer].”<sup>20</sup> Whether the authority is derived from tradition or laws, nonjudicial punishment is still widely practiced by commanders in the military today.<sup>21</sup>

*B. Enactment of the Uniform Code of Military Justice and Article 15*

The UCMJ was amended in 1962 to provide statutory authority for commanders in the military to use nonjudicial punishment to maintain order and discipline within their commands.<sup>22</sup> Article 15 of the UCMJ allows for use of nonjudicial punishment for minor offenses rather than requiring the longer and more difficult process of a court-martial.<sup>23</sup> Punishments allowed within Article 15 range in severity from admonition to reduction in grade.<sup>24</sup> A commander can issue an admonition or reprimand; impose restriction to specified limits (“Restriction”), arrest in quarters, or correctional custody for a limited number of days; authorize forfeiture or detention of pay; add extra duties; or order a reduction to an inferior grade or rate.<sup>25</sup> There are restrictions for the length and severity of these punishments that differ depending on the rank of the commanding officer as well as the rank or rate of the individual being punished.<sup>26</sup>

*C. The Burden of Proof*

With its silence on the matter, Article 15 allows each individual military branch to determine which burden of proof standard to use in nonjudicial punishment.<sup>27</sup> The Army has traditionally used proof beyond a reasonable doubt, which is the highest available burden of proof and is also used in criminal trials.<sup>28</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> Miller, *supra* note 8, at 46-47.

<sup>22</sup> *Id.* at 37.

<sup>23</sup> UCMJ art. 15(b).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> MORRIS, *supra* note 10, at 155.

<sup>28</sup> *Id.* at 155-56.

The Navy, on the other hand “has set the standard at preponderance of the evidence, a standard used for many administrative proceedings and for some pretrial motions at courts-martial.”<sup>29</sup>

Proof by a preponderance of the evidence “requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.”<sup>30</sup> This standard is often used for monetary disputes.<sup>31</sup> When “important individual interests or rights are at stake,” the slightly higher burden of proof of clear and convincing evidence is used.<sup>32</sup> However, the “imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.”<sup>33</sup>

Proof by clear and convincing evidence is the intermediate burden of proof standard, used to protect important individual interests in civil cases.<sup>34</sup> It is often used when the defendant’s reputation might be at risk, rather than simply a loss of money.<sup>35</sup> Proof beyond a reasonable doubt is the highest burden of proof available. It is required for a criminal conviction in recognition of the fact that such a conviction may result in incarceration and social stigma, and that a man should not be condemned for a crime when there is a reasonable doubt about whether he actually committed it.<sup>36</sup>

## II. THE NATURE OF NONJUDICIAL PUNISHMENT NEGATES THE NECESSITY OF A HIGHER BURDEN OF PROOF

Proof beyond a reasonable doubt is not necessary in nonjudicial punishment for several reasons. First, nonjudicial

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<sup>29</sup> *Id.* at 155.

<sup>30</sup> *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (internal quotation marks omitted).

<sup>31</sup> *Addington v. Texas*, 441 U.S. 418, 423 (1979).

<sup>32</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

<sup>33</sup> *Id.* at 389-90 (citing *United States v. Regan*, 232 U.S. 37, 48-49 (1914), in which the preponderance of the evidence standard was used in a civil suit even though it involved “a penalized or criminal act” that exposed the party to criminal prosecution).

<sup>34</sup> *Id.* at 389.

<sup>35</sup> *Addington*, 441 U.S. at 424.

<sup>36</sup> *In re Winship*, 397 U.S. at 363-64.

punishment is usually only reserved for minor offenses. Second, the punishments imposed by commanders are minimal, and the commander has the authority to mitigate punishment. Finally, the imposition of nonjudicial punishment does not result in a criminal conviction that appears on one's record.

A. *Nonjudicial Punishment is Used for Minor Offenses*

1. *The Manual for Courts-Martial Defines "Minor Offense"*

The UCMJ only allows the use of nonjudicial punishment for minor offenses.<sup>37</sup> According to the *Manual for Courts-Martial*, an executive order establishing rules pertaining to the implementation of the UCMJ,<sup>38</sup> a number of factors determine whether an offense is considered minor: "the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial."<sup>39</sup> Minor offenses are usually restricted to those offenses for "which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than [one] year if tried by general court-martial."<sup>40</sup> This requirement emphasizes that nonjudicial punishment is intended as a disciplinary measure to maintain order within a command.

2. *The Family Analogy*

The *Manual for Courts-Martial* states that nonjudicial punishment is meant to act as a disciplinary measure when administrative corrective measures are inadequate to promote positive behavioral changes and both parties wish to avoid the "stigma of a court-martial conviction."<sup>41</sup> While commanders are given discretion over what constitutes a minor offense, oftentimes it

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<sup>37</sup> UCMJ art. 15(b).

<sup>38</sup> *Id.* art. 36.

<sup>39</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 1e (2012) [hereinafter MCM].

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 1b-d.

is defined by such violations of the UCMJ as tardiness, insubordination, disorderly conduct, and failure to obey orders, as seen in the earlier example.<sup>42</sup>

The use of nonjudicial punishment to correct minor offenses seems far more akin to parents grounding their children for breaking curfew or failing to do their chores than the imposition of a criminal sentence, a notion that parallels the Navy's perception of itself as a family.<sup>43</sup> It is true that sometimes this broad discretion allows commanders to punish offenses that might not ordinarily be considered minor, such as the possession or consumption of drugs;<sup>44</sup> however, nonjudicial punishment also results in far milder penalties than a court-martial would impose,<sup>45</sup> mitigating the loss of the stricter procedural measures of a court-martial.

*B. Nonjudicial Punishment Imposes Lesser Penalties than General Court-Martial*

Some of the offenses for which nonjudicial punishment is often used could warrant up to a year of confinement if tried by general court-martial.<sup>46</sup> Although drug use can warrant a punishment of more than a year of confinement, it still often goes to

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<sup>42</sup> Gorski Interview, *supra* note 1; MCM, *supra* note 39, pt. V, ¶ 1d.

<sup>43</sup> GENEROUS, *supra* note 15, at 114. "The Navy thinks of itself as a family; since families do not ordinarily have to send out for lawyers and judges to help resolve their problems, neither should the Navy."

<sup>44</sup> MORRIS, *supra* note 10, at 150.

<sup>45</sup> See MCM, *supra* note 39, pt. IV, ¶ 37e. The maximum punishment listed for "wrongful use, possession, manufacture, or introduction of a controlled substance," cocaine in this example, under the Punitive Articles of the *Manual for Courts-Martial* is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. For less than 30 grams of marijuana or use of marijuana, the maximum punishment listed is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

<sup>46</sup> *Id.* pt. V, ¶¶ 1e, 5b. The *Manual for Courts-Martial* defines minor offenses as those for "which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial" while the longest available punishment for nonjudicial punishment would be days, not exceeding two months. For instance, disobeying the order of a non-commissioned or petty officer could result in a bad-conduct discharge, forfeiture of all pay and allowances, and a year of confinement. *Id.* pt. IV, ¶ 15e.



nonjudicial punishment rather than court-martial.<sup>47</sup> Possible punishments for nonjudicial punishment, however, include Restriction<sup>48</sup> for up to sixty consecutive days, forfeiture or detention of pay for up to three months, extra duties for up to forty-five consecutive days, or a reduction in pay grade.<sup>49</sup> As mentioned earlier, the punishments available to commanders differ based on the rank or rate of the individual being punished, as well as the rank of the commanding officer.<sup>50</sup>

1. Availability of Punishments Based on Commanding Officer and Accused

Commanding officers can impose nonjudicial punishment on those within their command as long as that punishment is consistent with the kind of punishment that can be imposed on someone of that rank or rate.<sup>51</sup> Commanding officers of higher ranks can impose a broader range of punishments than lower-ranked commanding officers, again, as long as those punishments are consistent with the rank or rate of the accused.<sup>52</sup> Reductions in rate are also dependent upon the promotion abilities of the commanding officer, who must have the ability to promote the accused back to the original rate before such reduction can be imposed.<sup>53</sup>

- a. *Commissioned Officers and Warrant Officers*

Commissioned officers and warrant officers can be restricted to specified limits for no more than thirty consecutive days by any

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<sup>47</sup> See Gorski Interview, *supra* note 1. The example in the beginning included nonjudicial punishment for drug use.

<sup>48</sup> MORRIS, *supra* note 10, at 159 (stating “[r]estriction is perhaps the most common sanction at [nonjudicial punishment]. The imposing commander sets the terms of the restriction—typically to specific limits on an installation. . . . The toughest restrictions are to place of duty, worship, mess hall, and perhaps gym. Less restrictive terms might include freedom to go anywhere on a military installation. . . .”).

<sup>49</sup> UCMJ art. 15.

<sup>50</sup> MCM, *supra* note 39, pt. V, ¶ 5b.

<sup>51</sup> *Id.* ¶¶ 2a, 5b.

<sup>52</sup> *Id.* ¶ 5b.

<sup>53</sup> *Id.*

commanding officer and no more than sixty days by a higher ranking commanding officer.<sup>54</sup> If the officer imposing punishment has general court-martial jurisdiction,<sup>55</sup> he can also impose arrest in quarters for no more than thirty consecutive days and forfeiture of no more than one-half of one month's pay for two months.<sup>56</sup>

*b. Enlisted Sailors*

Enlisted sailors can be punished with confinement on bread and water or diminished rations for no more than three consecutive days, correctional custody for no more than seven days, forfeiture of no more than seven days' pay, reduction to the next inferior grade or rate if the officer imposing punishment has the authority to promote to the original rate, extra duties for no more than fourteen days, and Restriction for no more than fourteen days.<sup>57</sup> If the commanding officer imposing punishment is an O-4, which is a major or lieutenant commander, or higher, the commander has a slightly greater range of punishments at his disposal.<sup>58</sup> The restrictions for confinement on bread and water or diminished rations and forfeiture of pay remain the same.<sup>59</sup> Correctional custody can be imposed for no more than thirty consecutive days instead of seven.<sup>60</sup>

As mentioned above, all commanding officers can reduce sailors to the next inferior grade if they have the authority to promote them back to their starting grade, but only an O-4 or higher can reduce sailors to E-1 or any intermediate grade between that and the inferior grade, with the same restriction of promotion ability.<sup>61</sup> However, enlisted sailors above E-4 cannot be reduced more than

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

<sup>55</sup> Officers of general or flag rank as well as an individual, known as a "Principal Assistant," who has been delegated this authority by either an officer exercising general court-martial jurisdiction or officers of general or flag rank, have the same punishment authority. These are generally the highest-ranking commissioned officers. *Id.* ¶¶ 2c, 5b.

<sup>56</sup> MCM, *supra* note 39, pt. V, ¶ 5b.

<sup>57</sup> *Id.*

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

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

one rate except during certain circumstances.<sup>62</sup> For these sailors, extra duties can be imposed for no more than forty-five consecutive days and Restriction may be imposed for no more than sixty consecutive days, instead of fourteen.<sup>63</sup>

## 2. Common Nonjudicial Punishments

### a. *Restriction to Specified Limits*

While the label “restriction to specified limits” and the length of time for which it can be imposed might make Restriction seem like one of the more severe punishments available, the *Manual for Courts-Martial* actually identifies it as “the least severe form of deprivation of liberty.”<sup>64</sup> In the Navy, Restriction is a common punishment and the specified limits are often designated as the ship, though the commander could also choose to define those limits as, for example, a military base or part of one.<sup>65</sup> As seen in the example in the introduction to this Comment, the Captain in that case chose to impose Restriction to the ship for forty-five days.<sup>66</sup> Since the ship was about to leave port,<sup>67</sup> a substantial portion of those forty-five days would be spent away from port, when the sailor would be limited to the confines of the ship anyway. Such circumstances make the punishment more symbolic than restricting, to demonstrate censure for wrong behavior and dissuade others from committing similar offenses.

The *Manual for Courts-Martial* identifies Restriction as a “moral rather than physical restraint,” sometimes requiring the individual to report to a specified place at a certain time to ensure the punishment is being observed.<sup>68</sup> This punishment is further mitigated by the restrictions placed on its use with regards to the rate of the individual being punished as well as the rank of the officer

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<sup>62</sup> MCM, *supra* note 39, pt. V, ¶ 5b. During times of war or national emergency, the commander may reduce the enlisted sailor by two grades.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* ¶ 5c.

<sup>65</sup> Gorski Interview, *supra* note 1; MORRIS, *supra* note 10, at 159.

<sup>66</sup> Gorski Interview, *supra* note 1.

<sup>67</sup> *Id.*

<sup>68</sup> MCM, *supra* note 39, pt. V, ¶ 5c.

imposing punishment. Any commanding officer can impose this punishment on commissioned or warrant officers for no more than thirty days, and any nonjudicial punishment authority can impose this punishment on enlisted personnel for no more than fourteen days. If the officer imposing punishment has general court-martial jurisdiction, he can impose this punishment on commissioned or warrant officers for no more than sixty days.<sup>69</sup> If the commanding officer is an O-4, that is, of the rank major or lieutenant commander, or higher, he can impose Restriction on enlisted personnel for no more than sixty days.

*b. Arrest in Quarters, Correctional Custody, and  
Confinement on Bread and Water or Diminished  
Rations*

Slightly more severe than Restriction are the punishments of arrest in quarters, correctional custody, and confinement on bread and water or diminished rations.<sup>70</sup> Arrest in quarters may only be imposed on officers, not enlisted crewmen, and only by an officer with general court-martial jurisdiction.<sup>71</sup> Correctional custody can be imposed on enlisted personnel for no more than seven days by anyone exercising nonjudicial punishment authority, and no more than thirty days if the commanding officer is an O-4 or higher.<sup>72</sup> Confinement on bread and water or diminished rations can only be imposed on enlisted crewmen when attached to or embarked in a vessel for no more than three days, and it requires a signed certificate of a medical officer stating that no serious injury will result from the punishment.<sup>73</sup> While these punishments are more severe than Restriction, they may also be coupled with extra duties, allowing the individuals to leave confinement to perform those duties when authorized.<sup>74</sup> If such authorization is not allowed, however, these sorts of punishments might limit crewmen's ability to carry out their

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<sup>69</sup> *Id.* ¶ 5b.

<sup>70</sup> *Id.* ¶ 5c.

<sup>71</sup> *Id.*

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

<sup>73</sup> *Id.*

<sup>74</sup> MCM, *supra* note 39, pt. V, ¶ 5c.

regular duties, making such punishments undesirable for commanders to use.<sup>75</sup>

*c. Reduction in Rate*

Reduction in grade is considered “one of the most severe forms of nonjudicial punishment.”<sup>76</sup> For this reason, the *Manual for Courts-Martial* indicates that “it should be used with discretion,” and only commanders with the ability to grant the rate from which the service member is reduced can impose such punishment.<sup>77</sup> This punishment is also further limited to use against enlisted personnel rather than officers.<sup>78</sup> Any nonjudicial punishment authority can reduce a sailor to the next inferior rate as long as he can also promote to the original rate.<sup>79</sup> If the commanding officer is an O-4 or higher, he can reduce the sailor to E-1, the lowest rate, or any intermediate rate, as long as he can also promote to the original rate.<sup>80</sup> However, if the sailor is above E-4, the commanding officer can only reduce him by one rate.<sup>81</sup> Even though this might seem like a harsh punishment, it is only temporary, as the individual will be able to earn back his previous rate in time.<sup>82</sup>

*C. Nonjudicial Punishment Includes a Mitigation Process*

Though these punishments are, by nature, short and temporary, nonjudicial punishment also includes a process for mitigation of punishment to further lessen the severity of these penalties.<sup>83</sup> In a case like the example in the introduction, in which the sailor has a long history of prior poor conduct, the Captain is less likely to mitigate the punishment imposed.<sup>84</sup> However, if the sailor

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<sup>75</sup> Gorski Interview, *supra* note 1.

<sup>76</sup> MCM, *supra* note 39, pt. V, ¶ 5c(7).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* ¶ 5b.

<sup>79</sup> *Id.* ¶ 5.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* During times of war or national emergency, however, those above E-4 can be reduced by two grades, if circumstances require.

<sup>82</sup> Gorski Interview, *supra* note 1.

<sup>83</sup> UCMJ art. 15(d).

<sup>84</sup> Gorski Interview, *supra* note 1.

doesn't have such a history, and has demonstrated an improvement in his behavior after the punishment was imposed, the Captain may choose to mitigate a more severe punishment like reduction in rate to a less severe punishment like forfeiture or detention of pay, or suspend it in its entirety.<sup>85</sup>

This mitigation process is codified in Article 15 of the UCMJ, which states, "[t]he officer who imposes the punishment . . . may, at any time, suspend probationally any part or amount of the unexpected punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed."<sup>86</sup> Similarly, the *Manual for Courts-Martial* states, "[m]itigation is appropriate when the offender's later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate."<sup>87</sup> Giving the commander such latitude in the execution of these nonjudicial punishments further diminishes the already relatively minor penalties involved in this process.

*D. Nonjudicial Punishment Does Not Result in a Criminal Conviction*

While nonjudicial punishment is recorded in the service member's military record, that punishment does not extend beyond the service member's time within the military because, unlike a court-martial conviction, nonjudicial punishment "does not result in a criminal record, and its sanctions—loss of pay, status, and liberty—are internal to the military."<sup>88</sup> The Supreme Court in *In re Winship* held "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt."<sup>89</sup> The Supreme Court was

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<sup>85</sup> *Id.*; UCMJ art. 15(d).

<sup>86</sup> UCMJ art. 15(d).

<sup>87</sup> MCM, *supra* note 39, pt. V, ¶ 6b.

<sup>88</sup> MORRIS, *supra* note 10, at 156.

<sup>89</sup> As the *Winship* Court explained:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal

quite concerned with the stigma of a criminal conviction and the possibility of a lengthy confinement as a result of that conviction when it held that the higher burden of proof should be used when trying juveniles for criminal acts.

Unlike the process of *In re Winship*, nonjudicial punishment is not an adjudicative process, and thereby bypasses the concerns the Court outlined. First, nonjudicial punishment avoids the stigma of a criminal conviction and instead is a necessary remedy purely insular to the military system. Second, the punishment meted out in nonjudicial punishment, such as Restriction for a period of no more than two months, is far more desirable than subjecting sailors to lengthy confinements. Because using nonjudicial punishment in lieu of a court-martial avoids the “unnecessary stigmatizations”<sup>90</sup> and the lengthy confinements caused by a criminal conviction, it is more desirable than a court-martial.

### III. PROCEDURES USED IN NONJUDICIAL PUNISHMENT TO ENSURE FAIRNESS

Even though nonjudicial punishment is viewed as a disciplinary proceeding rather than a legal proceeding,<sup>91</sup> there are still due process concerns demonstrated by the procedures involved in the hearing process, the restrictions placed on available punishments, the ability to request or demand court-martial, and considerations of double jeopardy.

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prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

*In re Winship*, 397 U.S. at 363.

<sup>90</sup> Miller, *supra* note 8, at 65.

<sup>91</sup> MCM, *supra* note 39, pt. V, ¶ 1b (stating “[n]onjudicial punishment is a disciplinary measure”); MORRIS, *supra* note 10, at 150 (stating “the intent of Article 15 is to correct a soldier—sting her with loss of pay, rank, or liberty, and then put her back to work. . . . [I]t also has the collateral impact of deterring those who might contemplate similar misconduct”); *United States v. Penn*, 4 M.J. 879, 882 (1978) (stating “[n]onjudicial punishment is an administrative method of dealing with minor offenses . . . not a criminal proceeding”).

*A. The Hearing Process*

The accused is notified of his violations and his rights prior to the nonjudicial punishment hearing.<sup>92</sup> This notification provides the accused with time to decide whether to accept nonjudicial punishment, or, unless the accused is “attached to or embarked in a vessel,” demand trial by court-martial.<sup>93</sup> The ability to demand trial by court-martial allows the service member to choose the risk of more severe punishment for the judicial procedures of a court-martial.<sup>94</sup> This notification also presents the accused with an opportunity to decide on the best defense to present to the commander, or even if nonjudicial punishment is the right course for him. The accused usually has the right to consult defense counsel, who can sometimes appear at a nonjudicial punishment hearing.<sup>95</sup> Even when attached to a ship, the accused may be able to contact the Regional Legal Services Office (“RLSO”) to seek advice.<sup>96</sup> In a nonjudicial punishment proceeding, the accused can speak at his own hearing and offer evidence on his behalf, both contesting the charge against him and mitigating any possible punishment.<sup>97</sup>

At a nonjudicial punishment hearing in the Navy, the captain reads a statement again advising the sailor of the charges against him and his rights.<sup>98</sup> The captain reiterates that nonjudicial punishment does not result in a conviction, but also informs the sailor once again that the traditional rules of evidence do not apply.<sup>99</sup> The captain acknowledges that the sailor has signed a statement saying he was advised of his rights, and further confirms this by

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<sup>92</sup> MORRIS, *supra* note 10, at 153-54.

<sup>93</sup> *Id.* at 154; UCMJ art. 15(a).

<sup>94</sup> MORRIS, *supra* note 10, at 153-54.

<sup>95</sup> *Id.* at 154; UCMJ art. 15(a).

<sup>96</sup> E-mail from Katherine Gorski, author, to Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps (Jul. 25, 2013 & Jul. 29, 2013) (on file with author) [hereinafter Price E-mail]; Telephone Interview with Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps (Jul. 31, 2013) [hereinafter Price Interview].

<sup>97</sup> MORRIS, *supra* note 10, at 156-57.

<sup>98</sup> Gorski Interview, *supra* note 1.

<sup>99</sup> *Id.*



asking whether the sailor understands those rights or has any questions.<sup>100</sup>

After the commander has imposed nonjudicial punishment, the service member has the right to appeal the decision to a superior authority if he finds the punishment unjust or disproportionate to the offense.<sup>101</sup> These formalities and the ability to appeal the nonjudicial punishment provide a check on that procedure, further demonstrating a concern for maintaining due process.

### *B. Restrictions on Punishments*

Article 15, as mentioned earlier, provides a finite list of punishments from which commanders can choose from when utilizing nonjudicial punishment.<sup>102</sup> Many of these punishments are restricted by duration and cannot exceed a certain number of consecutive days.<sup>103</sup> For example, Restriction can be imposed for a maximum of sixty days, depending on the rank of the commander imposing punishment and the rate or rank of the accused.<sup>104</sup> The rank of the commanding officer administering punishment and the rank or rate of the accused place limitations on the type and severity of punishment that can be applied.<sup>105</sup>

### *C. Ability to Demand Court-Martial*

Article 15 places a restriction on nonjudicial punishment, giving the accused the right to demand trial by court-martial rather than consent to nonjudicial punishment as long as the accused is not attached to or embarked in a vessel.<sup>106</sup> In *United States v. McLemore*, the military court enforced this restriction when it stated, “the

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<sup>100</sup> *Id.*

<sup>101</sup> UCMJ art. 15(e).

<sup>102</sup> *Id.* art. 15.

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

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* art. 15(a).

accused must exercise or waive his right to trial by court-martial” prior to the imposition of nonjudicial punishment.<sup>107</sup>

Some court cases have even discussed whether such a waiver is proper if the accused did not possess enough information to make an informed decision.<sup>108</sup> For example, the Federal Circuit in *Fairchild v. Lehman* held that a waiver must be “knowing, voluntary, and intelligent.”<sup>109</sup> In this case, the accused was misinformed that he could not receive an adverse administrative discharge, and chose to waive his right to a court-martial as a result.<sup>110</sup> Consequently, the Federal Circuit ruled that the accused did not execute an intelligent waiver of his right to trial because counsel misinformed him as to the consequences of electing nonjudicial punishment.<sup>111</sup> In *U.S. v. Espinosa*, the Eastern District of Virginia held that the waivers of those accused were ineffective because counsel offered inadequate advice regarding the consequences of waiving the right to court-martial and accepting nonjudicial punishment in failing to apprise them of potential civilian prosecution due to a drunk driving offense.<sup>112</sup>

The only time a service member cannot demand a court-martial is when he is on a vessel.<sup>113</sup> In *United States v. Penn*, where the accused argued that his inability to refuse nonjudicial punishment because of his assignment to a ship was discrimination, the military court held that denying the sailor the ability to demand court-martial while attached to a vessel does not also deny him equal protection.<sup>114</sup> The basis for this decision rested on the fact that nonjudicial punishment is administrative, and therefore the relevant

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<sup>107</sup> *U.S. v. McLemore*, 10 M.J. 238, 241 (C.M.A. 1981).

<sup>108</sup> *Fairchild v. Lehman*, 814 F.2d 1555, 1558, 1560 (Fed. Cir. 1987); *U.S. v. Espinosa*, 789 F. Supp. 2d 681, 686, 689-90 (E.D. Va. 2011).

<sup>109</sup> *Fairchild*, 814 F.2d at 1558.

<sup>110</sup> *Id.* at 1559-60.

<sup>111</sup> *Id.* at 1558, 1560.

<sup>112</sup> See *Espinosa*, 789 F. Supp. 2d at 686, 690. If a service member waives court-martial, he could be subject to civilian prosecution. However, if a service member does not submit to nonjudicial punishment, he will go to court-martial, and will be subject the corresponding stigma and potential lengthy confinement.

<sup>113</sup> UCMJ art. 15(a).

<sup>114</sup> *Penn*, 4 M.J. at 882-83.

question was whether there existed “a rational basis for denying . . . service members the option to refuse nonjudicial punishment” when attached to or embarked in a vessel, rather than a question of federal constitutional provisions.<sup>115</sup> The military court cited the unique responsibilities of the ship’s captain to discipline those aboard a ship as a justification for not allowing sailors attached to or embarked in a vessel to demand court-martial.<sup>116</sup>

Additionally, the military court listed the three unattractive alternatives to requiring a sailor to submit to nonjudicial punishment while attached to a vessel, “(1) [l]eaving the accused persons and all witnesses ashore when ships put out to sea; (2) regulating ships’ itineraries around courts-martial; or (3) permitting minor infractions to go unpunished.”<sup>117</sup> The military court’s analysis presents the exact concerns present in the hypothetical in the introduction of this article. In the hypothetical, the sailor had crucial technical knowledge.<sup>118</sup> Expecting the ship to leave the accused behind would be unreasonable, as it could jeopardize the safe and efficient operation of the ship. Even in the absence of specialized knowledge, his Chief Petty Officer was a witness to the sailor’s disregard of the Chief Petty Officer’s order,<sup>119</sup> and it would also be unreasonable to expect the ship to leave behind one of its leaders when that person is needed to perform his duties on the ship.

The second option, “regulating ships’ itineraries around courts-martial,”<sup>120</sup> is not feasible, particularly when a ship’s mission is time sensitive. Finally, permitting minor infractions to go unpunished would only encourage such future infractions, creating a disciplinary problem aboard the ship. Due to the impracticality of these three alternatives, nonjudicial punishment is often the only method of discipline available to ships’ commanding officers.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 883.

<sup>117</sup> *Id.*

<sup>118</sup> See Gorski Interview, *supra* note 1.

<sup>119</sup> *Id.*

<sup>120</sup> *Penn*, 4 M.J. at 883.

Even though the sailor aboard a ship may not demand a court-martial, he may still request one.<sup>121</sup> While circumstances may not always permit a court-martial to be convened, commanders often try to accommodate such a request.<sup>122</sup> Thus, while the court-martial exception for vessels might cause some concern regarding the service member's rights, the ability to still request court-martial and the other limitations on nonjudicial punishment, as well as this concept of "knowing, voluntary, and intelligent"<sup>123</sup> waivers minimize this issue.

#### D. Double Jeopardy Style Protections

The nonjudicial punishment system contains double jeopardy style protections.<sup>124</sup> Within the nonjudicial punishment system a service member may not receive nonjudicial punishment for the same offense more than once, nor may the punishment be increased, even on appeal.<sup>125</sup>

The *Manual for Courts-Martial* also bars trial by court-martial for minor offenses for which service members have already received nonjudicial punishment.<sup>126</sup> This protection does not extend to non-minor offenses, as the *Manual for Courts-Martial* states that nonjudicial punishment is not a bar to trial by court-martial for a non-minor offense and the United States Court of Military Appeals has further established that a service member can be tried by court-martial for a serious offense,<sup>127</sup> even if he has already received nonjudicial punishment.<sup>128</sup> This is very rare, but might occur when it is later discovered that the offense is more serious than initially thought, or a pattern of conduct is discovered.<sup>129</sup> However, in the

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<sup>121</sup> See Gorski Interview, *supra* note 1.

<sup>122</sup> *See id.*

<sup>123</sup> *Fairchild*, 814 F.2d at 1558.

<sup>124</sup> MCM, *supra* note 39, pt. V.

<sup>125</sup> *Id.* ¶ 1f(1).

<sup>126</sup> *Id.* ¶ 1e.

<sup>127</sup> *Id.* ¶ 1e ("[N]onjudicial punishment for an offense other than a minor offense . . . is not a bar to trial by court-martial for the same offense.").

<sup>128</sup> *Id.* ¶ 1e; *U.S. v. Pierce*, 27 M.J. 367, 368-69 (C.M.A. 1989).

<sup>129</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96. For instance, if a service member were to download pornography using a government computer, it

event that a non-minor offense does go to court-martial, the accused may disclose the prior nonjudicial punishment to be used exclusively in sentencing.<sup>130</sup> That nonjudicial punishment is then taken into account, and would likely result in a reduced sentence.<sup>131</sup> However, it is solely up to the accused “whether the prior punishment will be revealed to the court-martial for consideration on sentencing.”<sup>132</sup> These procedural limitations lessen the severity of nonjudicial punishment and negate the need for proof beyond a reasonable doubt.

#### IV. UNIQUE CIRCUMSTANCES ABOARD A SHIP MAKE A LOWER BURDEN MORE PRACTICAL FOR THE NAVY

Circumstances in the Army, as a primarily land-based service, and other branches of the military allow for the higher standard of proof beyond a reasonable doubt, so imposing the lower standard across all the branches may or may not be appropriate.<sup>133</sup> However, the unique circumstances aboard a ship make the lower standard of proof by a preponderance of the evidence more of a practical necessity for the Navy, thereby making the higher burden inappropriate.

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would likely go to nonjudicial punishment. But, if it were later discovered that the downloaded pornography included child pornography, an offense which usually goes to court-martial, that service member could face court-martial for the same conduct. Another instance where a soldier who has faced nonjudicial punishment would likely face court-martial later would be if a male service member entered a female’s barracks room by accident while intoxicated, but, later, it is discovered that he has done this before and is also suspected of sexually assaulting her. In the case of a drug use offense, it is more likely that it would be discovered that the service member is also selling or distributing drugs, for which he would be court-martialed based on the separate conduct, not the drug use that was the subject of nonjudicial punishment.

<sup>130</sup> *Pierce*, 27 M.J. at 369 (stating that nonjudicial punishment “may not be used for any purpose at trial.”).

<sup>131</sup> *Id.* at 369-70; *U.S. v. Hamilton*, 36 M.J. 723, 731 (A.C.M.R. 1992).

<sup>132</sup> *Pierce*, 27 M.J. at 369-70; *Hamilton*, 36 M.J. at 731.

<sup>133</sup> This is beyond the scope of this Comment.

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A. *Limited Availability of Evidence*

Just as the presence of an attorney is not guaranteed when aboard a ship, the availability of evidence and witnesses is also limited.<sup>134</sup> Due to the mobile nature of the ship, there is very limited time to gather evidence against the accused, particularly when the ship's mission is time sensitive.<sup>135</sup> On the other hand, with stationary bases used by other branches of the military, where the offenses have likely taken place on base or within its vicinity, witnesses are more readily available and there is more time to gather evidence.

This limited availability of witnesses and evidence makes it difficult for Navy commanding officers to attain the requisite proof to demonstrate guilt beyond a reasonable doubt. In the example in the introduction, the sailor argued that the civilian witness would have sided with him and claimed there was no assault and battery.<sup>136</sup> However, it is equally likely that the civilian would have corroborated the Shore Patrol's report stating there was an assault and battery. While the Shore Patrol's report and the other evidence against the sailor was sufficient under a preponderance of the evidence standard, it most likely would not have met the proof beyond a reasonable doubt standard without the civilian's testimony, particularly because the sailor contested what the civilian would say.

Leaving the sailor and crew member witnesses ashore for a hearing while the ship left port would have been a huge burden on the ship and her crew. Requiring the civilian and Shore Patrol witnesses to board the ship for a hearing would have been even more onerous and exceedingly impractical for all parties involved. For these reasons, the lower standard of proof is clearly more practical for such situations.

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<sup>134</sup> Gorski Interview, *supra* note 1.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

### B. Legal Contacts Aboard a Ship

On a military base on land, it is easier to consult with an attorney face-to-face.<sup>137</sup> Ships, however, present an understandably different story. Carriers will often have an attorney assigned to them, but the same is often not true of smaller ships.<sup>138</sup> Those aboard a ship would have access by phone or e-mail to an attorney higher up the chain of command, or an attorney with the RLSO, but most ships will not have an attorney physically on board.<sup>139</sup> Instead, they might have a legal officer, a collateral duty given to a sailor with more legal training than the average officer, but still not an attorney.<sup>140</sup>

In criminal trials, the burden of proof may be interpreted by the jury to determine guilt, but the court almost always provides guidance about what that burden means.<sup>141</sup> Even with the possibility of that guidance, however, the burdens of proof are difficult to define. There remains debate even among those with formal legal training over what the burdens of proof actually mean.<sup>142</sup> In comparison to the legally-trained, the average jury member will likely have as much, if not more difficulty defining these burdens.<sup>143</sup> On a ship, the captain is in a similar position, but does not have even the limited guidance offered by the judge to a jury in deciding whether or not the evidence of the sailor's offense meets the particular burden of proof in use.<sup>144</sup> He could, potentially, go up the chain of command or contact the RLSO to speak with an attorney with more

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<sup>137</sup> *Id.*

<sup>138</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

<sup>139</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

<sup>140</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

<sup>141</sup> *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (explaining that the Constitution neither requires nor prohibits an explanation by the court regarding the meaning of beyond a reasonable doubt and that if an instruction is given, it must "correctly convey the concept of reasonable doubt to the jury.").

<sup>142</sup> See generally Hisham M. Ramadan, *The Challenge of Explaining "Reasonable Doubt,"* 40 CRIM. L. BULL. 1 (Winter 2004).

<sup>143</sup> *Id.* at n.4 (noting that different states have provided different definitions of reasonable doubt, comparing California to Virginia and Massachusetts, and explaining survey results indicating a wide array of opinions regarding the percentages necessary for deciding beyond a reasonable doubt).

<sup>144</sup> See Gorski Interview, *supra* note 1.

experience,<sup>145</sup> but that would require either a phone call or an e-mail exchange, lengthening the process of nonjudicial punishment.<sup>146</sup> He could also rely on the legal officer aboard his ship, but again, this individual would not have the same legal training as an attorney or a judge. There are manuals the captain could access that would aid in defining the burden,<sup>147</sup> but a piece of paper might not always be sufficient when dealing with the intricacies of different burdens of proof.

Proof by a preponderance of the evidence “requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence. . . .’”<sup>148</sup> This standard indicates that the majority of the evidence should point to the fact that the sailor committed the offense, which is fairly easy for the layman, untrained in the law, to understand. Proof beyond a reasonable doubt is less clear, raising the questions: what constitutes reasonable doubt and by whose standard? Adding the intermediate clear and convincing standard would cause even more confusion.

Although all commanding officers will receive some training at the Naval Justice School with respect to their rights and responsibilities under the UCMJ and the specialized legal issues a commanding officer is likely to encounter,<sup>149</sup> such brief and broad coverage does not come close to the formal legal training an attorney receives by attending law school for three or four years followed by attendance at the Naval Justice School. When those practicing in the legal field debate over the different burdens of proof, it seems misguided to expect someone with a few weeks of introduction to the law generally to understand something so complicated with such

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<sup>145</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

<sup>146</sup> As I will explain later, quick justice is needed for maintaining order and discipline aboard a ship.

<sup>147</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96. Examples of such manuals are the *Manual for Courts-Martial*, the *Military Judge's Benchbook*, and the *JAG Manual*.

<sup>148</sup> *In re Winship*, 397 U.S. 358, 371 (1970) (citing F. JAMES, CIVIL PROCEDURE 250-51 (1965)).

<sup>149</sup> Price E-mail, *supra* note 96; Price Interview, *supra* note 96. Certain specialized duties, including prospective commanding officers, may require some specialized legal training, usually in the form of a two- or three-week course.



limited guidance. Because there might not always be an attorney aboard a ship to guide the Captain regarding the meaning of those terms, and contacting an attorney would require a phone call or e-mail exchange, proof by a preponderance of the evidence is more practical.

### C. *Isolated Community of Sailors*

It has long been recognized that the ship's captain has a unique responsibility "as the master of a frequently isolated community of sailors. . . ." <sup>150</sup> Because of this unique responsibility, legislation has typically acknowledged "the peculiar vulnerability of this independent society to disorderly practices; and hence the essentiality of affording the captain the authority to swiftly and surely 'discountenance and suppress all dissolute, immoral, and disorderly practices,' and to expeditiously correct those who are guilty of the same." <sup>151</sup> It is for reasons such as this that the vessel exception applies, preventing sailors from refusing nonjudicial punishment when aboard or attached to a vessel.

The same considerations can apply to the burden of proof. Requiring captains to find proof beyond a reasonable doubt would hinder the ability to maintain discipline aboard a ship with this isolated community. Not only might it be difficult for the captain to determine what, exactly, beyond a reasonable doubt entails, but the difficulties of gathering evidence when aboard or attached to a ship would severely hinder the captain's ability to maintain discipline. Many infractions would likely go unpunished, which would only serve to encourage such behavior in the future, because sailors would know they could get away with certain types of misconduct.

## V. CONCLUSION

As the *Manual for Courts-Martial* states, "[c]ommanders are responsible for good order and discipline in their commands." <sup>152</sup> Nonjudicial punishment allows commanders to maintain order and

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<sup>150</sup> *Penn.*, 4 M.J. at 882.

<sup>151</sup> *Id.*

<sup>152</sup> MCM, *supra* note 39, pt. V, ¶ 1d(1).

discipline by punishing minor offenses swiftly without the long, more complicated process of a court-martial, and without burdening the accused with the stigma of a court-martial conviction.

The nature of nonjudicial punishment negates the necessity of the proof beyond a reasonable doubt standard because nonjudicial punishment is used for minor offenses, the punishments imposed are not severe, the commander has the discretion to mitigate punishment, and the imposition of nonjudicial punishment does not result in a criminal conviction. Although nonjudicial punishment is an informal, administrative disciplinary proceeding, there are required procedures governing the hearing process, restrictions placed on available punishments, a requirement that the accused be able to demand court-martial unless attached to or embarked on a vessel, and protections against receiving nonjudicial punishment more than once for the same offense.

Not only is a higher burden of proof unnecessary, but, as compared to other branches of the military, Navy commanders deal with a unique set of circumstances aboard a ship that make a lower burden of proof by a preponderance of the evidence more practical. First, because a ship does not remain in port for an extended period of time while on deployment, the ability to accommodate witnesses or find additional evidence is limited. Second, because there may not be an attorney aboard the ship, the captain is left with limited options from which to seek guidance regarding the higher standard of proof. Due to the nature of nonjudicial punishment, the procedural safeguards, and the difficulties unique to justice at sea, the preponderance of the evidence standard is sufficient and far more practical for the Navy.





## COMMENT

### TAKING CONFUSION OUT OF CRISIS: MAKING SENSE OF THE LEGAL FRAMEWORK FOR FEDERAL AGENCIES TO PROVIDE LAW ENFORCEMENT SUPPORT TO STATE AND LOCAL GOVERNMENTS IN EMERGENCIES

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**Alexander J. Yesnik, CEM\***

#### INTRODUCTION

*First the levees were breached—and then law and order. As Katrina left people scrambling for food, for water, for supplies—for survival—lawlessness and violence, both real and imagined, spread, creating yet another problem for authorities who were burdened enough already.*

– HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE  
PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA<sup>1</sup>

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In August 2005, Hurricane Katrina devastated the Gulf Coast, leaving officials at all levels of government scrambling to figure out how federal agencies could provide law enforcement assistance to affected states and local jurisdictions.<sup>2</sup> No one seemed to have answers to some basic questions about law enforcement resources in a national emergency. *Who is in charge? What is the process to send federal assistance? How can federal agents get the proper authority to enforce state laws?*<sup>3</sup> This confusion over legal and policy matters had real, human consequences. With the delay of law enforcement support, 911 calls went unanswered, residents panicked, and rumors about lawlessness and disorder spread.<sup>4</sup> Some people providing disaster assistance turned back out of fear.<sup>5</sup> Many first responders who remained could not work effectively in a climate of perceived societal breakdown.<sup>6</sup>

In the months after the storm, the White House, the U.S. Senate, and the U.S. House of Representatives all released highly critical reports analyzing the federal government's failures.<sup>7</sup> Congress passed the Post-Katrina Emergency Management Reform Act ("PKEMRA"), designed to strengthen the Federal Emergency Management Agency ("FEMA") and improve federal disaster

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<sup>1</sup> H. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT OF THE HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 260 (2006) [hereinafter HOUSE REPORT].

<sup>2</sup> U.S. ASSISTANT TO THE PRESIDENT FOR HOMELAND SEC. & COUNTERTERRORISM, EXEC. OFFICE OF THE PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 1 (2006) [hereinafter WHITE HOUSE REPORT]; U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL EDUC., EXEC. OFFICE FOR U.S. ATT'YS, CRISIS RESPONSE AND RELATED LITIGATION ix (2009) [hereinafter CRISIS RESPONSE].

<sup>3</sup> CRISIS RESPONSE, *supra* note 2, at ix.

<sup>4</sup> WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>5</sup> See S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 11 (2006) [hereinafter SENATE REPORT]; HOUSE REPORT, *supra* note 1, at 260.

<sup>6</sup> SENATE REPORT, *supra* note 5, at 11.

<sup>7</sup> See BRUCE LINDSAY, CONG. RESEARCH SERV., THE NATIONAL RESPONSE FRAMEWORK: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS 1-2 (2008).

response.<sup>8</sup> But in the law enforcement realm, improvements were slow to materialize.

Three years after Katrina, in the summer of 2008, Hurricanes Gustav and Ike offered the first glimpse of whether the U.S. Department of Justice (“DOJ”) and the U.S. Department of Homeland Security (“DHS”) had learned lessons from Hurricane Katrina and would be prepared to provide effective law enforcement support in a large disaster. There were notable improvements, but Gustav and Ike did not bring nearly the level of devastation or need for law enforcement support as Katrina, and many of the same coordination challenges remained.

Over the last several years, there have been further improvements in the federal government’s ability to provide law enforcement support in an emergency, but this remains a complicated area that is little understood. Although hurricanes are not national security matters per se, these storms show the federal government’s level of preparedness to coordinate the law enforcement response to a large disaster, and, by extension, to provide for the safety and security of the American public amidst the chaos of a national security incident. Many Americans assume the federal government will protect them, especially in times of crisis.<sup>9</sup> However, poor planning and coordination among federal agencies could lead to a failure of the federal government to protect its citizens. Worse, a disorganized or haphazard federal response could even exacerbate an ongoing crisis.<sup>10</sup>

This is a pressing national security issue because effective crisis response is a key aspect of combating terrorism and other national security threats. Simply stated, good incident management makes our nation more resilient. Natural disasters like Katrina, Ike, and Gustav provide a glimpse into how the federal government may respond to a terrorist attack or other large national security incidents on American soil.

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<sup>8</sup> ALAN D. COHN, DOMESTIC PREPAREDNESS: LAW, POLICY, AND NATIONAL SECURITY 70 (2012).

<sup>9</sup> CRISIS RESPONSE, *supra* note 2 at ix.

<sup>10</sup> *Id.*

Over the past decade, despite major changes in U.S. emergency management structures, such as the creation of DHS and the reorganization of FEMA, the federal government has only marginally improved its law enforcement response capabilities for major disasters. This paper examines the risks to U.S. security posed by ill-defined structures for emergency federal law enforcement support, including legal complexities, and then poses some potential solutions.

## I. BACKGROUND

Emergency management in the United States is based on principles of federalism.<sup>11</sup> Incidents are generally managed at the lowest level of government, starting with a city or county.<sup>12</sup> If an incident overwhelms a local jurisdiction, local leaders first request support from neighboring jurisdictions (for example, through mutual aid agreements).<sup>13</sup> If an incident is particularly large or complex, local leaders can request additional help from their state.<sup>14</sup> Finally, if the combined resources of state and local government prove insufficient,<sup>15</sup> the state governor can turn to the federal government for assistance.<sup>16</sup> Over the last century, our nation's emergency management system, which started in communities as neighbors helping neighbors, has grown and evolved into a complex system involving all levels of government.<sup>17</sup>

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<sup>11</sup> WHITE HOUSE REPORT, *supra* note 2, at 11, 17; *see also* COHN, *supra* note 8, at 79-80.

<sup>12</sup> COHN, *supra* note 8, at 4-5.

<sup>13</sup> WHITE HOUSE REPORT, *supra* note 2, at 14.

<sup>14</sup> *Id.*

<sup>15</sup> Generally throughout this paper, the term "state and local government" is used to refer to state, local, territorial, and tribal governments, unless otherwise specified. The federal government has a unique relationship with Indian tribes, which was recently modified by the Sandy Recovery Improvement Act of 2013 (Pub. L. No. 113-2); such discussion is outside the scope of this article.

<sup>16</sup> WHITE HOUSE REPORT, *supra* note 2, at 11.

<sup>17</sup> COHN, *supra* note 8, at 4-5.

### A. *The Evolution of Federal Emergency Management*

Historically, federal emergency preparedness in the United States centered on civil defense and efforts to protect the public from enemy attack.<sup>18</sup> Over time, though, the federal government has played a larger and more formal role in disaster response.<sup>19</sup> From the civil defense era of the 1950s and '60s,<sup>20</sup> to the creation of FEMA in 1979, to the increased terrorist threat in the 1990s, the federal emergency management enterprise has continued to evolve to meet new hazards and threats.<sup>21</sup>

The terrorist attacks of September 11, 2001, led to a more focused national effort to improve federal emergency planning and preparedness.<sup>22</sup> With the Homeland Security Act of 2002,<sup>23</sup> Congress created DHS and gave it responsibility for coordinating national emergency planning and incident management.<sup>24</sup> FEMA, which existed for decades as an independent agency, was merged into DHS.<sup>25</sup>

The federal government is now entangled in several laws that shape emergency management and crisis response activities, including the Robert T. Stafford Disaster Relief and Emergency

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<sup>18</sup> CRISIS RESPONSE, *supra* note 2, at 32; NAT'L PREPAREDNESS TASK FORCE, U.S. DEP'T OF HOMELAND SEC., CIVIL DEFENSE AND HOMELAND SECURITY: A SHORT HISTORY OF NATIONAL PREPAREDNESS EFFORTS (2006) [hereinafter CIVIL DEFENSE HISTORY], available at <http://training.fema.gov/EMIWeb/edu/docs/DHS%20Civil%20Defense-HS%20-%20Short%20History.pdf>; STEPHEN DYCUS, ARTHUR L. BERNY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 1123 (2011).

<sup>19</sup> CRISIS RESPONSE, *supra* note 2, at 32-33; COHN, *supra* note 8, at 4; see also DYCUS ET AL., *supra* note 18, at 1124.

<sup>20</sup> The Civil Defense Act of 1950, ch. 1228, 64 Stat. 1245 (1951), though focused primarily on defending the nation against a nuclear attack, also provided for the federal government to respond to natural disasters. DYCUS ET AL., *supra* note, 18 at 1123-24.

<sup>21</sup> CRISIS RESPONSE, *supra* note 2, at 32-33; CIVIL DEFENSE HISTORY, *supra* note 18; DYCUS ET AL., *supra* note, 18 at 1123-24.

<sup>22</sup> LINDSAY, *supra* note 7, at 1, 3; COHN, *supra* note 8, at 23-24.

<sup>23</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>24</sup> LINDSAY, *supra* note 7, at 3.

<sup>25</sup> WHITE HOUSE REPORT, *supra* note 2, at 16.

Assistance Act (“Stafford Act”), as amended;<sup>26</sup> the Homeland Security Act of 2002;<sup>27</sup> the Insurrection Act;<sup>28</sup> PKEMRA;<sup>29</sup> and the Emergency Federal Law Enforcement Assistance provisions of the Justice Assistance Act of 1984 (“EFLEA”),<sup>30</sup> to name a few.

While all of these laws shape federal emergency response practices, the two pieces of legislation that provide an avenue for the federal government to support state governments during an emergency are the Stafford Act and EFLEA.<sup>31</sup> Both existed long before 9/11, and both created emergency support mechanisms whose underlying structures remain largely unchanged through the post-9/11 homeland security era.<sup>32</sup> Although the Homeland Security Act did a lot to change how the federal government is organized, the Stafford Act and EFLEA still provide the authority for the federal government to provide states with disaster assistance, to include law enforcement support.

This dual legislative framework leaves some fundamental questions unanswered and raises still others. Under what statutory authority are federal officers deployed during a disaster? Under whose authority do they operate? Must federal officers be deputized to enforce state law, and how does that process work? The law governing these questions is ambiguous at best, and there is little legal scholarship to clarify the subject. Many scholars have analyzed the appropriate role the U.S. military should play in domestic law enforcement during emergencies, but little is written on the authority

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<sup>26</sup> 42 U.S.C. §§ 5121-5207 (2012) (amending the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143).

<sup>27</sup> Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44 and 49 U.S.C.).

<sup>28</sup> 10 U.S.C. §§ 331-335 (2012).

<sup>29</sup> Pub. L. No. 109-295, title VI, 120 Stat. 1394.

<sup>30</sup> 42 U.S.C. §§ 10501-10513 (2012).

<sup>31</sup> See generally COHN, *supra* note 8, at 308.

<sup>32</sup> The Disaster Relief Act of 1974 was the forerunner to the modern Stafford Act; FEMA was created in 1979; and EFLEA was established in 1984. COHN, *supra* note 8, at 22-23. The Homeland Security Act of 2002, while it significantly changed how the federal government was organized, did little to change how the federal government could provide disaster assistance.



of federal law enforcement officers to perform state law enforcement functions in times of crisis.

*B. Federal Authority to Enforce State Laws*

As a general rule, federal law enforcement officers cannot enforce state laws.<sup>33</sup> Even in emergencies, states—and not the federal government—have the primary responsibility for maintaining public safety and security.<sup>34</sup> In many ways, emergency management activities represent classic police powers, reserved to the states by the Constitution: evacuating citizens, clearing roads, performing rescue functions, and so on.<sup>35</sup> Federal authority to make an arrest “must be conferred expressly by statute”—and most federal statutes only give federal law enforcement officers the authority to enforce federal law, not state law.<sup>36</sup> Even the authority for federal law enforcement personnel to enforce federal law varies from one agency to the next.<sup>37</sup> The organic federal law enforcement authority of some agencies may not be broad enough to accommodate the range of functions they may need to perform when supporting a state in a disaster environment.<sup>38</sup> Even when federal officers have some authority to enforce state laws, such as through state peace officer statutes, they often do not have authority to police certain misdemeanor offenses, such as looting.<sup>39</sup> Federal law enforcement officers typically need to be cross-deputized by a state or locality to fully enforce state or local laws.<sup>40</sup> Even then, federal law enforcement officers need to rely on some statutory grant of authority for their deputation; state common law is insufficient.<sup>41</sup> How the deputation process works—and how

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<sup>33</sup> State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 35 Op. O.L.C. 1, 3 (Mar. 5, 2012), <http://www.justice.gov/olc/2012/state-local-fleo-stafford-act-deployments.pdf> [hereinafter OLC Memo].

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

<sup>35</sup> See COHN, *supra* note 8, at 79-80.

<sup>36</sup> OLC Memo, *supra* note 33, at 4-5.

<sup>37</sup> *Id.*; see also COHN, *supra* note 8, at 321-22 (describing the comparatively broad authority of the U.S. Marshals Service).

<sup>38</sup> COHN, *supra* note 8, at 321.

<sup>39</sup> OLC Memo, *supra* note 33, at 3.

<sup>40</sup> COHN, *supra* note 8, at 326.

<sup>41</sup> OLC Memo, *supra* note 33, at 3.

the federal government gets the authority to support disaster-stricken states in the first place—is not always straightforward.

## II. ANALYZING THE LEGISLATIVE AND POLICY FRAMEWORK

### A. *Statutory Authority: The Stafford Act*

The Stafford Act is the main authority under which FEMA and the rest of the federal community provide disaster assistance to affected states.<sup>42</sup> Under the Stafford Act, only a state governor may request federal assistance, and only when the resources of his or her state will be insufficient to respond to an incident.<sup>43</sup> The governor's request is forwarded through FEMA to the President, who can then declare an "emergency" or a "major disaster."<sup>44</sup> An emergency or major disaster declaration allows the federal government to provide assistance to the state, which then bears a portion of the associated cost.<sup>45</sup>

For decades, the federal government has relied on the Stafford Act to send personnel, commodities, and other resources to disaster-stricken states. The Stafford Act generally allows federal agencies, under the direction of FEMA, to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster," to include "services essential to saving lives and protecting and preserving property or public health and safety."<sup>46</sup> The Stafford Act sets up a funding pool, the "Disaster Relief Fund," which allows FEMA to reimburse other federal agencies supplying

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<sup>42</sup> LINDSAY, *supra* note 7, at 2; WHITE HOUSE REPORT, *supra* note 2, at 12; OLC Memo, *supra* note 33, at 2.

<sup>43</sup> 42 U.S.C. § 5170 (2012); WHITE HOUSE REPORT, *supra* note 2, at 17. In addition, the Sandy Recovery Improvement Act of 2013 amended the Stafford Act to allow the chief executive of a federally recognized tribe to request federal disaster assistance. FEMA FACT SHEET: SANDY RECOVERY IMPROVEMENT ACT OF 2013, *available at* <http://www.fema.gov/media-library/assets/documents/30822?id=6983>.

<sup>44</sup> WHITE HOUSE REPORT, *supra* note 2, at 12; U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 27-28 (2d ed. 2012).

<sup>45</sup> COHN, *supra* note 8, at 160 (stating federal share of assistance efforts may not be less than 75% of eligible costs after such a declaration is made).

<sup>46</sup> OLC Memo, *supra* note 33, at 2 (quoting 42 U.S.C. § 5170B).

requested federal assistance.<sup>47</sup> The Stafford Act also provides authority for the FEMA Administrator to prepare federal response plans.<sup>48</sup>

The Stafford Act, by itself, provides no authority for federal law enforcement officers to enforce state laws.<sup>49</sup> The Stafford Act does not even mention law enforcement; it merely sets up a general process for the federal government to provide disaster assistance to affected states.<sup>50</sup>

*B. Executive Branch Implementation: The National Response Framework*

Before September 11, 2001, at least five separate plans covered federal emergency response.<sup>51</sup> In 2004, taking direction from Congress and the President, the newly-formed DHS released a consolidated “National Response Plan.”<sup>52</sup> This plan, now known as the National Response Framework (“NRF”),<sup>53</sup> is the guiding interagency document for coordinating disaster response and providing federal support to state and local jurisdictions.<sup>54</sup>

When a large disaster overwhelms the capability of state and local governments to respond, federal assistance typically is coordinated through the processes outlined in the NRF, facilitated by

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<sup>47</sup> COHN, *supra* note 8, at 162; *see also* OLC Memo, *supra* note 33, at 9.

<sup>48</sup> LINDSAY, *supra* note 7, at 2.

<sup>49</sup> OLC Memo, *supra* note 33, at 2 (“[T]he Stafford Act does not expressly grant federal officials *any* arrest authority, much less authority to make arrests for violations of state law.”).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> LINDSAY, *supra* note 7, at 1.

<sup>52</sup> Both the Homeland Security Act of 2002 (Pub. L. No. 107-296), passed by Congress, and Homeland Security Presidential Directive 5 (HSPD-5), issued by the President, directed DHS to develop a single, coordinated response plan for the federal government. *See* LINDSAY, *supra* note 7, at 1; CRISIS RESPONSE, *supra* note 2, at 49; WHITE HOUSE REPORT, *supra* note 2, at 12.

<sup>53</sup> The National Response Plan (“NRP”) was superseded by the National Response Framework (“NRF”) following PKEMRA. LINDSAY, *supra* note 7, at 2, 4.

<sup>54</sup> U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (2008) [hereinafter NRF]; LINDSAY, *supra* note 7, at 1.

FEMA.<sup>55</sup> The NRF guides the federal response to all hazards, whether acts of nature or acts of terrorism.<sup>56</sup> It describes an emergency response process based on an engaged partnership and tiered response,<sup>57</sup> in which officials at all levels of government coordinate planning and preparedness activities, and respond to incidents at the lowest appropriate level of government.<sup>58</sup> True to its name, the NRF does not prescribe specific plans for all types of incidents, but rather presents a general framework for how local, state, and federal government officials should work together to respond to emergencies, based principally on the Stafford Act.<sup>59</sup>

In short, the Stafford Act establishes statutory authority while the NRF sets out implementing processes.<sup>60</sup> However, while the Federal Executive Branch always carries out the Stafford Act using the processes established in the NRF, the NRF does not rely solely on the Stafford Act for authority. As cited in the NRF:

The NRF's structures and procedures address incidents where Federal support to local, state, tribal, territorial, and insular area governments is coordinated under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as well as incidents where Federal departments and agencies exercise other authorities and responsibilities.<sup>61</sup>

The NRF is intended to be the federal government's coordinated way of responding to any disaster, whether it warrants a Stafford Act declaration or not. The NRF would still be used to respond to some other type of non-Stafford Act emergency, such as an oil spill, which is covered by a different set of statutes. Since most large disasters typically involve a Stafford Act declaration, however, it

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<sup>55</sup> LINDSAY, *supra* note 7, at 2-4; *see generally* WHITE HOUSE REPORT, *supra* note 2, at 16-18 (providing a brief history of FEMA and an overview of the agency's role coordinating federal disaster assistance).

<sup>56</sup> NRF, *supra* note 54, at 1, 7.

<sup>57</sup> NRF, *supra* note 54, at 8; LINDSAY, *supra* note 7, at 5.

<sup>58</sup> NRF, *supra* note 54, at 1-2; CRISIS RESPONSE, *supra* note 2, at 51.

<sup>59</sup> CRISIS RESPONSE, *supra* note 2, at 50-51; LINDSAY, *supra* note 7, at 4.

<sup>60</sup> OLC Memo, *supra* note 33, at 1, 5.

<sup>61</sup> NATIONAL RESPONSE FRAMEWORK, 2d ed., *supra* note 44, at 5.

is easy to think of the NRF as the implementing processes for the Stafford Act.

### 1. Supporting Element: Emergency Support Function #13

FEMA typically coordinates the federal response to a disaster overall, but FEMA is a relatively small agency and relies on other federal departments and agencies to take the lead in specific areas.<sup>62</sup> Accordingly, the NRF contains 15 annexes for “Emergency Support Functions,” or “ESFs,” which outline the federal government’s processes to provide emergency support in specific functional areas.<sup>63</sup> For example, ESF #1 is “Transportation,” whereby the U.S. Department of Transportation provides support to state and local transportation agencies on disaster response matters involving public highways, aviation, waterways, and rail networks.<sup>64</sup> ESF #13 is “Public Safety and Security,” whereby DOJ coordinates the process for federal law enforcement agencies to help disaster-stricken state and local jurisdictions provide for the safety and security of the general population.<sup>65</sup> For all the ESFs, FEMA tracks requests for assistance from the states, issues mission

#### Emergency Support Functions

- ESF #1: Transportation
- ESF #2: Communications
- ESF #3: Public Works and Engineering
- ESF #4: Firefighting
- ESF #5: Information and Planning
- ESF #6: Mass Care, Emergency Assistance, Temporary Housing and Human Services
- ESF #7: Logistics
- ESF #8: Public Health and Medical Services
- ESF #9: Search and Rescue
- ESF #10: Oil and Hazardous Materials
- ESF #11: Agriculture and Natural Resources
- ESF #12: Energy
- ESF #13: Public Safety and Security
- ESF #14: Long-Term Community Recovery
- ESF #15: External Affairs

Source: U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (2d ed. 2013).

<sup>62</sup> DYCUS ET AL., *supra* note 18, at 1126.

<sup>63</sup> LINDSAY, *supra* note 7, at 6; WHITE HOUSE REPORT, *supra* note 2, at 15.

<sup>64</sup> NRF, *supra* note 54, at 58.

<sup>65</sup> NRF, *supra* note 54, at 59; U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, CONGRESSIONAL BUDGET SUBMISSION FOR FISCAL YEAR 2013 28 (2012), [hereinafter ATF BUDGET REQUEST], available at <http://www.justice.gov/jmd/2013justification/office/fy13-atf-justification.docx>.

assignments to the responsible departments or agencies to carry out those requests, and then tracks the associated costs.

Originally, under the old National Response Plan, DOJ and DHS shared responsibility for ESF #13.<sup>66</sup> As discussed later, that shared role led to confusion during Hurricane Katrina, so responsibility for ESF #13 now rests solely with DOJ.<sup>67</sup> In turn, DOJ has delegated operational responsibility to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), which executes ESF #13 requests using available resources from law enforcement agencies across the federal government.<sup>68</sup>

The ESF #13 process is part of the NRF and follows the principles of federalism that underlie emergency management policy in the United States, meaning emergency response to an incident is handled at the lowest possible jurisdictional level.<sup>69</sup> If a local police department or sheriff’s office is overwhelmed by an incident—for example, it does not have enough personnel or resources to police the streets of the community after a storm—then that jurisdiction requests mutual aid from neighboring jurisdictions, and then, if needed, from their state.<sup>70</sup> If the state cannot provide adequate assistance from the state police, the governor may deploy the National Guard as a state asset.<sup>71</sup> If the combined resources of state and local jurisdictions are still overwhelmed by the disaster, the state may request federal law enforcement assistance through ESF #13 under the NRF.<sup>72</sup> The NRF alone provides no statutory authority, however, so the typical process requires that the governor has already

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<sup>66</sup> CRISIS RESPONSE, *supra* note 2, at 13; *see also* U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN (2004) (listing both DOJ and DHS as the leads for ESF #13).

<sup>67</sup> CRISIS RESPONSE, *supra* note 2, at 13; NRF, *supra* note 54, at 59; ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>68</sup> OLC Memo, *supra* note 33, at 1; CRISIS RESPONSE, *supra* note 2, at 13; NRF, *supra* note 54, at 59; ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>69</sup> WHITE HOUSE REPORT, *supra* note 2, at 12, 17.

<sup>70</sup> *See* CRISIS RESPONSE, *supra* note 2, at 13.

<sup>71</sup> *Id.*

<sup>72</sup> NRF, *supra* note 54, at 59; *see* CRISIS RESPONSE, *supra* note 2, at 13.

requested, and the President has already approved, an emergency or major disaster declaration as authorized by the Stafford Act.<sup>73</sup>

The entire ESF #13 process is complex and has many moving parts. When ESF #13 is activated, ATF sets up a coordination center at its headquarters, and sends liaison personnel to the FEMA National Response Coordination Center (“NRCC”), the location where the disaster response at large is tracked.<sup>74</sup> Out in the field, an ESF #13 representative is assigned to a Joint Field Office, which is a temporary facility managed by FEMA that serves as the central hub for the federal government to provide assistance to the affected state.<sup>75</sup> At each location, ATF coordinates the ESF #13 requests it receives from FEMA or the affected state, evaluates the requests against available federal law enforcement assets, and deploys federal officers (such as FBI agents, ATF agents, and others) to assist state and local law enforcement.<sup>76</sup> Many different federal agencies may contribute personnel to assist, all coordinated through the ESF #13 process.<sup>77</sup>

In a really large incident, if a local jurisdiction is so overwhelmed that it cannot manage its own law enforcement resources, a Law Enforcement Coordination Center (“LECC”) may be set up upon request to help manage the law enforcement assets in the affected region.<sup>78</sup> Command of the LECC would likely fall to the ATF agent coordinating ESF #13 or a separate position called the Senior Federal Law Enforcement Official.<sup>79</sup>

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<sup>73</sup> OLC Memo, *supra* note 33, at 1-2; NRF, *supra* note 54, at 59; *see* CRISIS RESPONSE, *supra* note 2, at 85.

<sup>74</sup> *See* CRISIS RESPONSE, *supra* note 2, at 13.

<sup>75</sup> OLC Memo, *supra* note 33, at 2.

<sup>76</sup> *Emergency Support Function #13 (ESF #13 – RISC Briefing)*, FED. EMERGENCY MGMT. AGENCY 7, [http://www.fema.gov/media-library-data/20130726-1903-25045-2962/risc\\_meeting\\_esf\\_\\_13\\_briefing\\_\\_01\\_12\\_13.pdf](http://www.fema.gov/media-library-data/20130726-1903-25045-2962/risc_meeting_esf__13_briefing__01_12_13.pdf) (last visited Oct. 13, 2013) [hereinafter *RISC Briefing*].

<sup>77</sup> COHN, *supra* note 8, at 321; OLC Memo, *supra* note 33, at 2.

<sup>78</sup> *RISC Briefing*, *supra* note 76, at 7.

<sup>79</sup> *Id.*

ESF #13 is a relatively new function, created with the National Response Plan in 2004.<sup>80</sup> While the Stafford Act has been used for decades to provide federal disaster assistance to the states, ESF #13 was not previously part of that effort. Accordingly, while the Stafford Act is generally well understood in the emergency management community, there is not as much history to support use of the Stafford Act as the legal basis for providing federal law enforcement assistance under ESF #13.

## 2. Supporting Element: The Senior Federal Law Enforcement Official

If an incident requires a large, centrally-managed federal law enforcement response, the Attorney General may designate a Senior Federal Law Enforcement Official (“SFLEO”).<sup>81</sup> As defined in the NRF:

The SFLEO is an official appointed by the Attorney General during an incident requiring a coordinated Federal response to coordinate all law enforcement, public safety, and security operations with intelligence or investigative law enforcement operations directly related to the incident . . . In the event of a terrorist incident, the SFLEO will normally be a senior FBI official who has coordinating authority over all law enforcement activities related to the incident, both those falling within the Attorney General’s explicit authority . . . and those otherwise directly related to the incident itself.<sup>82</sup>

In the event of a terrorist attack, the FBI would coordinate the ensuing investigation, on behalf of the Attorney General, as well as any other law enforcement activities to “detect, prevent, preempt, and disrupt” another attack.<sup>83</sup> Even in non-terrorist incidents, though, the SFLEO would likely come from the FBI, possibly leading

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<sup>80</sup> Compare the Federal Response Plan (FED. EMERGENCY MGMT. AGENCY, 1999), which does not identify a “public safety and security” function, with the National Response Plan (U.S. DEP’T OF HOMELAND SEC., 2004), which does.

<sup>81</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>82</sup> NRF, *supra* note 54, at 68.

<sup>83</sup> Homeland Security Presidential Directive/HSPD-5 on Management of Domestic Incidents, 39 WEEKLY COMP. PRES. DOC. 280 (Feb. 28, 2003).



to conflict with the local U.S. Attorney, who is the chief federal law enforcement officer for his or her judicial district, and with ATF as the lead agency for coordinating ESF #13.<sup>84</sup>

Few disasters have been large enough to warrant appointment of an SFLEO (and there were actually two SFLEOs in Hurricane Katrina—one from DOJ, and one from DHS),<sup>85</sup> so this position as a single coordinator of the federal law enforcement response is largely untested. The SFLEO is just one more potential element in the complex system of a federal law enforcement response to a disaster.<sup>86</sup>

### C. *Alternative Statutory Authority: EFLEA*

As suggested earlier, the Stafford Act is not the only statute that can provide authority for federal disaster assistance under the NRF. Under EFLEA, the Attorney General can provide federal law enforcement resources to states suffering from a law enforcement emergency.<sup>87</sup> Under EFLEA, the Attorney General can send federal law enforcement personnel if “such assistance is necessary to provide an adequate response to a law enforcement emergency.”<sup>88</sup> Like the Stafford Act, EFLEA requires that requests for assistance come from

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<sup>84</sup> See CRISIS RESPONSE, *supra* note 2, at 14, 55.

<sup>85</sup> HOUSE REPORT, *supra* note 1, at 259.

<sup>86</sup> Yet another DOJ position—the Senior Civilian Representative of the Attorney General, or “SCRAG”—could be involved if military forces were to be used for domestic law enforcement purposes, but such activities are outside the scope of this paper.

<sup>87</sup> 42 U.S.C. § 10501 (2012); CRISIS RESPONSE, *supra* note 2, at 15; *see also* COHN, *supra* note 8, at 322 (recognizing the concurrent nature of EFLEA and the Stafford Act, but noting that assistance under EFLEA is not necessarily limited to emergencies or major disasters declared under the Stafford Act, nor even limited to public safety and security functions under ESF #13).

<sup>88</sup> 42 U.S.C. § 10501(c) (2012); *see also* HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA – IMPLEMENTATION PLAN 157 (2006).

a state governor,<sup>89</sup> and is intended to be used only when states have exhausted their own resources.<sup>90</sup>

Unlike the Stafford Act, where the President approves a general request for disaster relief, EFLEA requires the Attorney General to approve each specific request for assistance, and approvals are based on strict criteria specified in the statute.<sup>91</sup> The statute and the corresponding regulations require a governor to specify, in writing, a description of the problem, exactly what federal resources are needed, and how they will be used.<sup>92</sup> According to the handbook for U.S. Attorneys on crisis response and related legal matters, when federal law enforcement personnel are deployed under EFLEA, it is “prudent to avoid potential authority and liability issues” by having state officials cross-deputize federal officers to enforce state laws.<sup>93</sup> Overall, EFLEA is very specific in its requirements, perhaps reflecting an understanding that, due to the separation of the state and federal criminal justice systems in the United States, providing federal law enforcement personnel to assist a state is unlike providing any other resource or commodity.

Also unlike the Stafford Act, which establishes the Disaster Relief Fund and associated processes for federal-state cost sharing, EFLEA by itself provides no separate, pre-identified funding stream or process for federal agencies to be reimbursed for costs they incur when providing disaster assistance.<sup>94</sup>

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<sup>89</sup> 42 U.S.C. § 10501(b) (2012) (“An application for assistance under this section shall be submitted in writing by the chief executive officer of a State to the Attorney General. . .”).

<sup>90</sup> U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, BJA FACT SHEET: THE EMERGENCY FED. LAW ENFORCEMENT ASSISTANCE PROGRAM 1 (Sept. 1996) [hereinafter BJA FACT SHEET], available at <https://www.ncjrs.gov/pdffiles/eflea.pdf>.

<sup>91</sup> These criteria include, among others, “[T]he nature and extent of the emergency . . . the availability of state and local criminal justice resources to resolve the problem, the cost associated with the increased Federal presence, and the need to avoid unnecessary federal involvement and intervention in matters primarily of State and local concern. . . .” 42 U.S.C. § 10501(c) (2012).

<sup>92</sup> 42 U.S.C. § 10501 (b), (c) (2012); 28 C.F.R. § 65.31 (2011).

<sup>93</sup> CRISIS RESPONSE, *supra* note 2, at 15.

<sup>94</sup> 42 U.S.C. § 10513 authorizes funding for EFLEA—up to \$20 million each fiscal year since 1984—but this money has never been appropriated. 42 U.S.C. § 10513

While the Stafford Act is invoked rather frequently, with FEMA often managing over 50 major disaster declarations each year,<sup>95</sup> EFLEA has been invoked only sporadically throughout history. DOJ provided financial assistance under EFLEA in 1989 to South Carolina for Hurricane Hugo and to California for the San Francisco earthquake; in 1993 to Texas for the Waco standoff; and in 1993 to California for the Rodney King riots, among a handful of other times.<sup>96</sup>

The use of EFLEA during Hurricane Katrina may have been one of the few applications of the statute since the creation of DHS.<sup>97</sup> In fact, the first time the federal government used ESF #13 in a major disaster was for Hurricane Katrina, and the federal government used EFLEA as the underlying legal authority for its disaster response.

#### IV. APPLICATION

##### A. *The Disaster of Katrina*

*DHS and DOJ's confusion about their roles and authorities prevented the Departments from bringing the full weight of their resources to bear until roughly a week after landfall.*

– SENATE COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS<sup>98</sup>

*Calls for help to the city's 911 system went unanswered. . . . [E]ven when police were present to restore law and order, they did not have the resources to arrest, book, and detain suspects . . . Many people originally apprehended for looting were just let go.*

– HOUSE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE  
PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA<sup>99</sup>

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(2012); see also Press Release, Rep. Corrine Brown, Congresswoman Corrine Brown Secures Twenty Million Dollars for Local Law Enforcement Emergencies (May 10, 2012) (on file with author).

<sup>95</sup> *Disaster Declarations by Year*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/disasters/grid/year> (last visited Sept. 21, 2013).

<sup>96</sup> BJA FACT SHEET, *supra* note 90, at 3.

<sup>97</sup> See generally WHITE HOUSE REPORT, *supra* note 2.

<sup>98</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>99</sup> HOUSE REPORT, *supra* note 1, at 246-47.

Hurricane Katrina was a devastating storm—one of the worst disasters in American history.<sup>100</sup> A poor federal response prompted numerous investigations and after-action reports, most notably from the White House, the U.S. Senate, and the U.S. House of Representatives.<sup>101</sup> These three reports all similarly concluded that law enforcement coordination failures and a basic lack of planning contributed to civil unrest and further delayed relief efforts.<sup>102</sup>

Police departments and sheriff's offices across the entire Gulf Coast region were crippled by the storm and struggled to maintain law and order.<sup>103</sup> As the House report described, "[h]undreds of New Orleans Police Department officers went missing—some for understandable reasons and some not—at a time they were needed most."<sup>104</sup> The report continued, "This left the city unable to provide enough manpower and other resources to maintain law and order at shelters and on the streets."<sup>105</sup> Three days into the disaster, New Orleans' major newspaper ran an editorial describing the lawlessness and chaos, stating, "The lack of law enforcement presence is stunning . . . there seems to have been no strategy to get the hundreds of military and law enforcement officers on the ground who were needed to establish order immediately."<sup>106</sup>

Poor law enforcement coordination, and a corresponding inability to assure citizens and first responders of their safety, affected the overall disaster response.<sup>107</sup> Concerns about responder safety delayed search and rescue missions and the restoration of critical communications infrastructure.<sup>108</sup>

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<sup>100</sup> WHITE HOUSE REPORT *supra* note 2, at 5-9 (detailing damage and comparing other storms throughout history).

<sup>101</sup> CRISIS RESPONSE, *supra* note 2, at ix.

<sup>102</sup> *Id.*; see generally WHITE HOUSE REPORT, *supra* note 2.

<sup>103</sup> See WHITE HOUSE REPORT, *supra* note 2, at 40, 57.

<sup>104</sup> HOUSE REPORT, *supra* note 1, at 246.

<sup>105</sup> *Id.* at 246-47.

<sup>106</sup> *Where Is the Cavalry?*, THE TIMES-PICAYUNE (New Orleans), Sept. 1, 2005, available at <http://www.nola.com/katrina/pages/090105/a15.pdf>.

<sup>107</sup> WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>108</sup> See SENATE REPORT, *supra* note 5, at 439; see also WHITE HOUSE REPORT, *supra* note 2, at 40, 57.

The Senate report declared that, in the area of federal law enforcement support to the states, the “initial response fell far short of what the Gulf Coast’s citizens could reasonably have expected.”<sup>109</sup> At least initially, no one at the federal or state level seemed to know the proper channels for federal law enforcement assistance or the underlying authority to invoke. Colonel Henry Whitehorn, the head of the Louisiana State Police, tried to request federal assistance the day after Katrina made landfall.<sup>110</sup> Perhaps not knowing where to turn, on August 30, 2005, he wrote to Robert Mueller, the Director of the FBI:

As you are aware, the city of New Orleans, Louisiana has suffered massive damage caused by Hurricane Katrina. We are currently utilizing all State assets to stabilize the situation; however, looting continues to be a significant problem. As the head of Louisiana State Police, I am requesting any assistance you can provide to this agency to assist with the issue to include deployment of available tactical teams.<sup>111</sup>

The request was passed to DOJ leadership but there was no immediate action.<sup>112</sup> As the Senate discovered, there was a “complete absence of planning—indeed a lack of a basic understanding of the Departments’ roles and obligations—on the part of DOJ and DHS.”<sup>113</sup> The report continues, “[i]n fact, DOJ did not assign anyone to coordinate the DOJ function until September 2,” which was four days after landfall.<sup>114</sup> This lack of planning delayed federal law enforcement support by several days, during which the situation continued to decay.<sup>115</sup> The Governor of Louisiana did not even formally request assistance through EFLEA until September 4.<sup>116</sup>

Confusion between DOJ and DHS over their respective roles and authorities prevented both Departments from responding swiftly

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<sup>109</sup> SENATE REPORT, *supra* note 5, at 440.

<sup>110</sup> *Id.* at 440, 446.

<sup>111</sup> *Id.* at 446.

<sup>112</sup> *Id.* at 440, 446.

<sup>113</sup> *Id.* at 440.

<sup>114</sup> *Id.*

<sup>115</sup> See WHITE HOUSE REPORT, *supra* note 2, at 40.

<sup>116</sup> *Id.* at 41 n.127.

and effectively.<sup>117</sup> At the time, DOJ and DHS shared responsibility for ESF #13,<sup>118</sup> and both Departments appointed a Senior Federal Law Enforcement Official—a DOJ official from the FBI, and a DHS official from Immigrations and Customs Enforcement (“ICE”)—creating confusion as to who was in charge.<sup>119</sup> It took over a week for the federal government to set up a Law Enforcement Coordination Center to manage the law enforcement personnel deployed to the region and coordinate necessary state deputation.<sup>120</sup>

Deputation was a debacle. A wide range of federal law enforcement agencies responded to assist, and each agency seemed to face a different process to get the necessary authority to enforce state law should they need to make arrests outside their federal authority (for example, when encountering looters).<sup>121</sup> Under existing Louisiana state law, FBI agents had qualified immunity only when assisting state officers or responding to a felony committed in their presence.<sup>122</sup> Deputy U.S. Marshals had far greater authority under state law than ATF agents or ICE agents.<sup>123</sup> FBI agents were deputized by the Louisiana Attorney General’s Office, while ICE agents were sworn in by the Louisiana State Police.<sup>124</sup> Border Patrol agents were deputized in Louisiana, but not in Mississippi.<sup>125</sup> In Mississippi, FBI agents were not deputized until September 9, eleven days after landfall.<sup>126</sup>

Even after the deputation processes were completed, communities across the Gulf Coast faced a patchwork of law

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<sup>117</sup> SENATE REPORT, *supra* note 5, at 453.

<sup>118</sup> See WHITE HOUSE REPORT, *supra* note 2, at 102; *see also* HOUSE REPORT, *supra* note 1, at 257.

<sup>119</sup> See SENATE REPORT, *supra* note 5, at 451-54.

<sup>120</sup> *Id.* at 453-54; *see generally* WHITE HOUSE REPORT, *supra* note 2.

<sup>121</sup> WHITE HOUSE REPORT, *supra* note 2, at 58; HOUSE REPORT, *supra* note 1, at 256-57; SENATE REPORT, *supra* note 5, at 452-53.

<sup>122</sup> HOUSE REPORT, *supra* note 1, at 256.

<sup>123</sup> See *id.* at 257; *see also* COHN, *supra* note 8, at 321-22.

<sup>124</sup> HOUSE REPORT, *supra* note 1, at 257.

<sup>125</sup> *Id.*

<sup>126</sup> SENATE REPORT, *supra* note 5, at 452 n.170.

enforcement officers from different agencies and different parts of the country, with varying protocols and little local knowledge.<sup>127</sup>

Overall, coordination failures and a lack of advance planning at all levels led to lawlessness that hindered emergency response efforts. State and local jurisdictions needed to understand the process to request federal law enforcement assistance, and be prepared to provide incoming officers with the appropriate legal authority; federal agencies needed to understand their own roles and responsibilities and the processes to send assistance quickly when asked.

#### 1. Use of EFLEA for Hurricane Katrina

Despite all the problems with the federal response to Hurricane Katrina, one bright spot seemed to be the Attorney General's use of EFLEA to provide federal law enforcement support to the affected states. The Attorney General approved requests for assistance under EFLEA from both Governor Barbour of Mississippi and Governor Blanco of Louisiana.<sup>128</sup> In his response to the Governor of Mississippi, the Attorney General issued a written order, stating:

[Y]our request is approved. . . . In providing this assistance, the [U.S. Marshals Service] personnel will be operating under the supervision of the United States Attorney for the Southern District of Mississippi, and will be coordinating with their state and local counterparts to make all necessary arrangements to ensure appropriate authority to conduct their assistance efforts in the State of Mississippi.<sup>129</sup>

The Attorney General also issued a similar order following a request for federal law enforcement assistance from the Governor of Louisiana:

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<sup>127</sup> WHITE HOUSE REPORT, *supra* note 2, at 58.

<sup>128</sup> CRISIS RESPONSE, *supra* note 2, at 55.

<sup>129</sup> Letter from Att'y Gen. Alberto R. Gonzales to Governor Haley Barbour (Sept. 3, 2005), in H. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: SUPPLEMENTARY REPORT AND DOCUMENT ANNEX, H.R. Rep. No. 109-396, at 275 (Mar. 2006).

Department of Justice law enforcement personnel who are engaged in this mission shall have the authority to enforce the laws of the United States and to assist law enforcement officials in the State of Louisiana to enforce the laws of that State. All such officers engaged in this mission . . . shall be subject to the supervision of the United States Attorney for the Eastern District of Louisiana, who may delegate operational authority to appropriate Department of Justice officials.<sup>130</sup>

These orders showed the Attorney General's involvement in the decision to send federal law enforcement support, helped to clarify the authority of the federal personnel, and also specified that the federal personnel deployed were to operate under the supervision of the local U.S. Attorney. When the White House reviewed the federal response to Hurricane Katrina in the months that followed, it adopted the Attorney General's approach of relying on EFLEA:

(b) DOJ should develop a program to increase States' awareness of the procedures for requesting Federal law enforcement assistance under the Emergency Federal Law Enforcement Assistance Act. . . .

(d) DOJ and DHS should each develop, in coordination with the other, the capability to rapidly deploy a contingent of Federal law enforcement officers to prevent and respond to civil disorder. Consistent with the principle that law enforcement is the responsibility of local and State governments, this force should deploy only in the event that State authorities request Federal assistance pursuant to the Emergency Federal Law Enforcement Assistance Act, or as otherwise directed by the President.<sup>131</sup>

In May 2006, pursuant to these recommendations in the White House *Lessons Learned* report, the Attorney General wrote to all state governors and advised them of the procedures to request federal law enforcement assistance under EFLEA. His letter stated:

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<sup>130</sup> Att'y Gen. Order 2779-2005 (Sept. 4, 2005), available at <http://www.justice.gov/ag/readingroom/order-2779-2005.pdf>.

<sup>131</sup> WHITE HOUSE REPORT, *supra* note 2, at 103.



The Act requires that all requests be made in writing. The regulations, which closely track the statute, set forth information that must be contained in the request, including the nature and extent of the emergency, the availability of state and local criminal justice resources to address the emergency, and a specific statement of the funds, equipment, training, intelligence information, or personnel requested, and the intended use. . . .

In cases in which I direct federal law enforcement personnel to assist in the enforcement of state criminal law, it is prudent to avoid potential authority and liability issues by having the pertinent state and local officials deputize the federal officers to exercise state authority. While some state laws automatically empower certain federal law enforcement officers to act as state peace officers in specified emergency situations, the deputation process is more cumbersome in other states. To facilitate the most rapid response possible in future emergency situations, we strongly encourage states to examine their deputation processes and, if necessary, to seek ways to streamline those processes, through legislation if necessary.<sup>132</sup>

Not only was the use of EFLEA highlighted as an effective solution in Hurricane Katrina, but the Attorney General reiterated to state governors that this would be the procedure the federal government would use in the future to provide law enforcement assistance in a crisis, and he detailed the specific steps states should take to prepare.

## 2. Changes to ESF #13 After Katrina

As mentioned earlier, in Hurricane Katrina, DOJ and DHS shared the responsibility for leading ESF #13, which led to confusion over who was in charge.<sup>133</sup> Transitioning responsibility for ESF #13 solely to DOJ was a key recommendation in the White House *Lessons Learned* report, and became law with the passage of PKEMRA.<sup>134</sup> In

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<sup>132</sup> Letter from Att'y Gen. Alberto R. Gonzales to State Governors (May 31, 2006) (available from the Dep't of Justice Exec. Secretariat).

<sup>133</sup> WHITE HOUSE REPORT, *supra* note 2, at 102; HOUSE REPORT, *supra* note 1, at 257; SENATE REPORT, *supra* note 5, at 453.

<sup>134</sup> ATF BUDGET REQUEST, *supra* note 65, at 27.

a memorandum dated October 16, 2008, the Deputy Attorney General formally designated ATF as the component within DOJ to lead the ESF #13 function.<sup>135</sup> Although designating one clear lead for ESF #13 was a considerable improvement, there remained some ambiguity over the underlying legal authority for carrying out the ESF #13 function.

*B. The Next Test After Katrina: Hurricanes Gustav and Ike*

*“Gustav, FEMA’s biggest test in New Orleans since Katrina.”*

–CNN, September 2, 2008

The second time the federal government used ESF #13 in a major disaster was for Hurricanes Gustav and Ike. Tropical Storm Gustav grew to a hurricane on August 26, 2008, exactly three years after Hurricane Katrina.<sup>136</sup> The City of New Orleans and parishes along the Louisiana coast planned large-scale evacuations.<sup>137</sup> Nearly two million residents evacuated, making this the first time in history that local officials along the entire coastline of Louisiana called for mandatory evacuations.<sup>138</sup>

Gustav made landfall on Monday, September 1, 2008. Torrential rain and high winds caused major damage, and nearly 70% of homes and business lost power.<sup>139</sup> The next morning, Louisiana Governor Bobby Jindal briefed the press from Baton Rouge. In his remarks, he stated:

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<sup>135</sup> ATF informally accepted responsibility for managing ESF #13 starting in 2006, but they were not formally delegated this responsibility in writing until October 2008. CRISIS RESPONSE, *supra* note 2, at 14; *see also* ATF BUDGET REQUEST, *supra* note 65, at 27.

<sup>136</sup> STATE OF LOUISIANA, HURRICANES GUSTAV & IKE AFTER ACTION REVIEW AND PREPAREDNESS PLAN 4-5 [hereinafter LOUISIANA STATE AAR], *available at* [http://www.ohsep.louisiana.gov/plans/Gustav\\_Ike\\_aar.pdf](http://www.ohsep.louisiana.gov/plans/Gustav_Ike_aar.pdf); Press Release, U.S. Dep’t of Justice, Hurricane Gustav – ATF Takes the ESF-13 Lead to Coordinate Federal Law Enforcement Assistance (Sept. 5, 2008) [hereinafter ATF Press Release], *available at* <http://www.atf.gov/press/releases/2008/09/090508-atf-takes-lead-in-hurricane-assistance.html>.

<sup>137</sup> *See* LOUISIANA STATE AAR, *supra* note 136, at 4; *see also* ATF Press Release, *supra* note 136.

<sup>138</sup> LOUISIANA STATE AAR, *supra* note 136, at 4.

<sup>139</sup> *Id.* at 5.

We have activated ESF #13. What that means is last night, I requested from the federal government and they have approved the request, additional federal law enforcement agents. . . . 400 federal law enforcement agents are on their way. They'll be coming to Louisiana. They've approved the request to help us maintain security in many of these areas that have been hit very, very hard.<sup>140</sup>

ATF set up a National Coordination Center to coordinate ESF #13 requests from the state. Personnel from an array of agencies, including the U.S. Marshals Service, Federal Protective Service, U.S. Customs and Border Protection, and ICE, provided support.<sup>141</sup> In total, nearly 400 federal law enforcement personnel deployed.<sup>142</sup>

In Louisiana, the ESF #13 group assigned to the Joint Field Office found themselves in the same former department store in downtown Baton Rouge used during Hurricane Katrina.<sup>143</sup> “We were walking into the same place, and facing a situation that everyone feared would be similar to Katrina,” said Supervisory Special Agent Matt Chapman of the FBI Critical Incident Response Group.<sup>144</sup> Fortunately, the response this time was much smoother, but there were still issues with coordination and deputization.

On the same day that Gustav hit Louisiana, Tropical Storm Ike formed in the Atlantic, becoming a hurricane two days later. Hurricane Ike made landfall at Galveston, Texas, on September 13, 2008, less than two weeks after Gustav.

In both storms, there was initial confusion over who would have to be deputized and how the process would work. Would

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<sup>140</sup> Governor Bobby Jindal, Press Briefing (Sept. 2, 2008) (transcript available at <http://transcripts.cnn.com/transcripts/0809/02/cnr.02.html>).

<sup>141</sup> See FBI Part of Joint Federal Response to Gustav, Fed. Bureau of Investigation (Sept. 5, 2008) [hereinafter FBI News], available at <http://www.fbi.gov/news/stories/2008/september/gustav090508>.

<sup>142</sup> ATF Press Release, *supra* note 136.

<sup>143</sup> See ATF Press Release, *supra* note 136; see also FBI News, *supra* note 141.

<sup>144</sup> See FBI News, *supra* note 141. At the time, ATF only had a few people dedicated to ESF #13, so other DOJ personnel provided support.

federal agents have to be cross-deputized by the state? Would certain federal agents first have to be sworn in as Special Deputy U.S. Marshals?<sup>145</sup> Who had to approve requests for assistance? Did the Attorney General have to sign anything? Could federal agencies provide support directly to a local agency, or did they have to work through the state? And once federal agents arrived to assist a state, who would have operational control over them, and what rules of engagement and use of force policies would they use? Many of the questions that had come up during Hurricane Katrina came up again with Gustav and Ike. They were resolved, but in the midst of the crisis, and with urgent calls back to Washington to make quick policy decisions in the moment.<sup>146</sup> In the end, the Louisiana State Police deputized almost 200 federal law enforcement officers as Special Officers of the Louisiana State Police, granting them state law enforcement authority.<sup>147</sup>

During the storms, no one seemed to know whether the federal law enforcement support to the States of Louisiana and Texas would be provided through the EFLEA provisions, as had been done during Katrina, or whether that support could be provided through the Stafford Act alone. DOJ ultimately decided, as federal officers were about to deploy, that federal law enforcement assistance through ESF #13 would be provided under the Stafford Act. This meant the Attorney General never received a formal written request for law enforcement assistance from the governors of those states, as required by EFLEA, and the Attorney General also never issued an order to approve the federal law enforcement assistance. The assistance was provided as a mission assignment through ESF #13,

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<sup>145</sup> See COHN, *supra* note 8, at 321-22 ("The U.S. Marshals Service . . . is considered to possess the broadest authorities of all federal law enforcement agencies. As a result, federal law enforcement officers assigned to public safety and security functions are typically deputized by the U.S. Marshals Service at the time of their assignment in order to provide them with the broadest possible federal law enforcement authorities.").

<sup>146</sup> U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE FOR THE MIDDLE DISTRICT OF LA., CRITICAL INCIDENT AFTER-ACTION REPORT (Dec. 2008).

<sup>147</sup> Press Release, U.S. Dep't of Justice, Federal Agents Deputized as Special Officers of the Louisiana State Police (Sept. 5, 2008), *available at* <http://www.atf.gov/press/releases/2008/09/090508-doj-federal-agents-deputized.html>.

presumably approved by supervisors at ATF and FEMA, similar to requests for other types of disaster assistance under the Stafford Act.

In 2006, the Attorney General had sent a memorandum to all state governors regarding the appropriate procedures for requesting federal law enforcement support under EFLEA,<sup>148</sup> but then those EFLEA procedures were ignored in favor of the Stafford Act. Presumably this was so agencies deploying personnel could take advantage of funding from the Disaster Relief Fund: under the Stafford Act, federal agencies can be reimbursed by FEMA for providing disaster assistance, but under EFLEA, there is no provision for reimbursement. This decision to use the Stafford Act ran counter to lessons learned from Katrina, however, which highlighted the use of EFLEA as an effective practice.

In the foreword to the *State of Louisiana After-Action Report and Improvement Plan* for Hurricanes Gustav and Ike, the Director of the Louisiana Office of Homeland Security and Emergency Preparedness commented:

The 2008 hurricane season for Louisiana proved to be busy in ways paralleling the 2005 season with Hurricanes Katrina and Rita. . . . The improvements that were recommended and put in place following Hurricanes Katrina and Rita were tested and in most cases proved a success.<sup>149</sup>

There was little mention of law enforcement or ESF #13. That might seem like a success story, but during Gustav and Ike, the affected states and localities perhaps were not stressed to the point that they needed to rely on federal law enforcement support. In Katrina, for example, within the first week after landfall, almost 2,000 officers had deployed from DOJ and DHS combined, rivaling the size of an entire police department for many cities.<sup>150</sup> Eventually, over

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<sup>148</sup> See Letter from Att'y Gen. Alberto R. Gonzales to State Governors, *supra* note 132.

<sup>149</sup> LOUISIANA STATE AAR, *supra* note 136 (statement of Mark Cooper, Dir., Governor's Office of Homeland Security and Emergency Preparedness).

<sup>150</sup> WHITE HOUSE REPORT, *supra* note 2, at 40-41 n.126.

3,500 law enforcement personnel deployed during Katrina; in contrast, Gustav and Ike required a federal force one-tenth the size.<sup>151</sup>

Even then, Gustav and Ike demonstrated problems with coordination, challenges of working within the NRF incident management structure while engaging DOJ leadership, and a need to clarify legal authorities and processes. At the time, few of the recommendations from Hurricane Katrina had actually been implemented.

*C. Comparing Katrina with Ike and Gustav – A Quick Synopsis*

Hurricane Katrina was catastrophic, but one of the bright spots of the response was that DOJ used EFLEA as the legal basis to provide federal law enforcement support to the states. The White House *Lessons Learned* report highlighted that practice, and recommended it for future responses. The reforms following Katrina designated DOJ as the single lead agency for ESF #13, eliminating confusion over duplicative responsibilities and who was in charge.

Hurricanes Gustav and Ike were both smaller storms. In Gustav and Ike, the federal government departed from the recommendations in the White House *Lessons Learned* report, and relied on the Stafford Act, instead of EFLEA, as the legal basis to deploy federal law enforcement personnel under ESF #13. The deployment was far smoother, and funded out of the Stafford Act's Disaster Relief Fund; however, legal questions about deputation still remained.

In sum, under the Stafford Act, a governor requests federal assistance through FEMA; the President declares an emergency or major disaster; and FEMA coordinates the federal response by issuing mission assignments to other federal agencies, reimbursing them out of the Disaster Relief Fund. Under EFLEA, a governor requests federal law enforcement assistance directly from the Attorney General. Although EFLEA still does not authorize federal law enforcement personnel to enforce state laws, the process to

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<sup>151</sup> *Id.* at 188 n.129.

request assistance is more specific, and can prompt the governor to identify legal issues and deputation processes that may be overlooked when using the Stafford Act and treating law enforcement requests like requests for any other resource.

#### *D. An Ongoing Challenge*

The law of federal emergency management continues to evolve as the government incorporates the lessons of each disaster. Just last year, ATF sought a legal opinion from the Justice Department's Office of Legal Counsel regarding whether federal law enforcement officers could legally accept state deputation in an emergency and make state law arrests.<sup>152</sup> If ATF, as the ESF #13 coordinating entity, was unsure about the authority of federal law enforcement officers in an emergency, this seems to be an unsettled area of law. DOJ, FEMA, and all other agencies with a role in ESF #13 still need to come together to work through the complex legal issues surrounding deputation, deployment, and funding.

### III. THE WAY FORWARD

#### *A. Policy Solutions to Legal Complexities*

At first blush, one way to address many legal complexities could be to avoid them altogether, using policy solutions as a workaround to legal problems. For example, from a practical perspective, federal law enforcement officers could be paired with state or local officers who know the local jurisdiction and who could make state arrests without complications. Federal personnel could be used as force multipliers, simply to assist state or local officers, while the state or local officers perform actual arrests. Another practical solution would be for the federal government to facilitate the deployment of teams of local uniformed law enforcement officers from other areas of the country, instead of federal personnel, much like the FEMA National Urban Search and Rescue Response System (which essentially federalizes teams of local firefighters and

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<sup>152</sup> See generally OLC Memo, *supra* note 33.

paramedics to deploy to disaster areas).<sup>153</sup> Such teams still may need to be cross-deputized if they cross state lines, but the process might be more palatable than deputizing federal agents as state officers. Such a system would have the added bonus of bringing in officers who may be more accustomed to the type of police work needed in a post-disaster environment, such as patrolling the streets and making arrests for misdemeanor offenses.

Both approaches, while they may be practical, are incomplete. In a truly catastrophic incident, all of the collective resources from all levels of government may be needed to respond appropriately. There may not be enough state or local officers available to form federal-state teams, and nearby teams of local law enforcement officers may already be engaged in their own response efforts or already deployed through mutual aid agreements. It remains critical to work through the legal issues of providing federal law enforcement officers with the appropriate authority to support state and local efforts to maintain public safety and security in a post-disaster environment.

*B. The Stafford Act, EFLEA, and Attorney General Authorization*

The Stafford Act offers an important mechanism for federal agencies to be reimbursed for costs incurred when providing disaster assistance. However, providing federal law enforcement assistance to a state government is unlike providing food, water, or any other service or commodity.<sup>154</sup> If a state runs out of bottled water, the federal government can deliver more water and share part of the cost with little complication; but if a state's police force is overwhelmed

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<sup>153</sup> See WHITE HOUSE REPORT, *supra* note 2, at 17 ("The operational teams that FEMA is responsible for administering . . . are State and local first responders from around the country that volunteer to be activated, deployed, and reimbursed by FEMA for their help during response activities. FEMA enforces standards, certifications, and qualifications for participation in such programs and provides funding for equipment and training.").

<sup>154</sup> See OLC Memo, *supra* note 33, at 6 (observing that activities specified in the Stafford Act such as "debris removal," "search and rescue," "clearance of roads," and "demolition of unsafe structures" are different in kind than the enforcement of state criminal laws).



by an incident, a federal force moving in to assume basic state law enforcement functions tears at the heart of state police power, raises issues of federalism, and even poses potential constitutional problems. EFLEA sets out a strict process to ensure federal law enforcement assistance is handled carefully and deliberately.

One way to address the legal issues surrounding the deployment of federal law enforcement officers could be to follow the EFLEA process in all cases and require an order from the Attorney General. Normally, when coordinating federal disaster assistance to states, FEMA issues mission assignments to other federal agencies pursuant to the Stafford Act. In the case of federal law enforcement assistance, however, at least in Hurricane Katrina, the Attorney General relied on EFLEA. As discussed earlier, the Attorney General approved requests for assistance under EFLEA from both Mississippi Governor Barbour and Louisiana Governor Blanco, and issued written orders detailing that federal law enforcement personnel deployed to assist the states would be operating under the supervision of the local U.S. Attorney.<sup>155</sup> The process likely prompted all of the parties involved to think through how federal personnel would be used and the related legal issues.

There were no such orders issued for Hurricanes Gustav or Ike, so perhaps the idea of using EFLEA should be revisited. However, EFLEA lacks a mechanism to provide reimbursement to federal agencies for the disaster assistance they provide. Although EFLEA was used well in Hurricane Katrina, and the Attorney General later reminded state officials of the associated procedures, there is still disagreement over whether federal law enforcement support should be approved and coordinated through EFLEA or as part of the overall federal response effort based on the Stafford Act.<sup>156</sup>

However, EFLEA and the Stafford Act are not necessarily mutually exclusive.<sup>157</sup> Federal law enforcement officers could deploy under the Stafford Act, using the associated funding from the

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<sup>155</sup> CRISIS RESPONSE, *supra* note 2, at 55.

<sup>156</sup> *Id.* at at 57; *see also* COHN, *supra* note 8, at 322-24.

<sup>157</sup> *See* COHN, *supra* note 8, at 322 (recognizing the concurrent nature of the Stafford Act and EFLEA).

Disaster Relief Fund, and draw their legal authority from an authorization under EFLEA. The specific requirements in EFLEA could add additional guidance and structure to the Stafford Act process, which, as mentioned earlier, was not originally intended for law enforcement purposes.

Until Congress or the Attorney General settles on a preferred approach, however, DOJ and the federal law enforcement agencies providing support under ESF #13—and, of course, those requesting assistance—will have to be prepared to operate under either of the two legal frameworks.

### *C. Law Enforcement Takes More Than Guns and Badges*

Although DHS, FEMA, the FBI, and ATF all have important roles in emergency response, these agencies alone cannot maintain law and order in a disaster.<sup>158</sup> Providing public safety and security requires “more than deploying officers with guns and badges, assuming arrestees are to be charged, held, tried, convicted, and sentenced.”<sup>159</sup> U.S. Attorneys’ offices and the federal courts play critical roles in the criminal justice process and can help address issues of legal authority unique to their districts.<sup>160</sup> Assuming the federal government upholds the Constitution even in the most catastrophic incident, the criminal justice system requires facilities to house arrestees, prosecutors to screen cases, judges, public defenders, and even access to a grand jury.<sup>161</sup> Supporting these parts of the criminal justice system is not addressed by ESF #13, so it must be addressed through careful advance coordination and planning across agencies.<sup>162</sup>

In addition, since neither the Stafford Act nor EFLEA provides sufficient legal authority for federal law enforcement officers to make state arrests—and since the relevant state deputation

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<sup>158</sup> CRISIS RESPONSE, *supra* note 2, at 5.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 4-5, 11.

<sup>161</sup> *Id.* at 11.

<sup>162</sup> *See* WHITE HOUSE REPORT, *supra* note 2, at 57-58 (describing that pre-event planning and coordination would have improved the response to Katrina).

laws vary from state to state<sup>163</sup>—the U.S. Attorneys’ offices across the country could play a critical role in facilitating deputation processes and assisting with other legal aspects of an ESF #13 deployment in their districts. ESF #13 does not provide for legal advisors in each of the FEMA regions, but there are ninety-four U.S. Attorneys’ offices located throughout all fifty-four U.S. states and territories that could provide critical advice.

Following Hurricane Katrina, Congress took an important step in moving responsibilities for law enforcement functions in a disaster to DOJ, but there is still much work to be done in this area. Although ATF has made great strides in furthering the ESF #13 mission, DOJ overall needs to coordinate this safety and security piece with other law enforcement activities across the Department, including investigative activities of the FBI, the potential role of an SFLEO, and the prosecutory mission of the U.S. Attorneys’ offices, among other considerations. If DOJ does not have the necessary resources, Congress may need to step in to authorize and appropriate funding for a small, high-level law enforcement emergency management coordination office within the Office of the Deputy Attorney General that has a broader mission than ESF #13, that can coordinate across ATF, FBI, the U.S. Marshals Service, and the U.S. Attorneys’ offices in a steady state, and that can interface with the federal courts and other parts of the criminal justice system.<sup>164</sup>

#### IV. CONCLUSION

The federal law enforcement response to hurricanes shows room for improved coordination, and yet the federal response to an

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<sup>163</sup> OLC Memo, *supra* note 33, at 6-7.

<sup>164</sup> Some other federal departments have high-level offices that can coordinate emergency management and crisis response functions across the entire department—for example, the Department of Health and Human Services has an Assistant Secretary for Preparedness and Response, and the Department of Transportation has an Office of Intelligence, Security, and Emergency Response within the Office of the Secretary. See *Public Health Emergency*, U.S. DEP’T OF HEALTH AND HUMAN SERV., <http://www.phe.gov/about/pages/> (last visited Oct. 7, 2013); see also *Intelligence, Security, and Emergency Response*, U.S. DEP’T OF TRANSP., <http://www.dot.gov/mission/administrations/intelligence-security-emergency-response> (last visited Oct. 7, 2013).

act of terrorism would be even more complicated. In the event of a terrorist attack or other man-made incident, there would not be simpler chains of command; if anything, the added dynamic of a national security incident, and the potential for a massive criminal investigation aimed at detecting, deterring, and defeating follow-on attacks, would bring in additional players and further complicate command and control. As history has shown us, when federal support is desperately needed, conflicts between federal agencies and confusion over legal authorities or processes can have disastrous human consequences.

This area of crisis management could potentially benefit from Congressional action to (1) clarify the roles between DOJ and DHS, and update legislation to clearly define respective legal authorities; (2) review whether federal law enforcement support to states should be processed through the Stafford Act or EFLEA, or a combination of both; (3) amend EFLEA to work within the Stafford Act, or add a new provision in the Stafford Act for federal law enforcement support; (4) consider appropriating funding for EFLEA; and/or (5) create a high-level emergency management office in the Department of Justice vested with the appropriate authority to meet the recommendations provided in the Hurricane Katrina after-action reports. The DOJ office also should have authority to interface with DHS on crisis response issues, coordinate federal law enforcement activities across agencies during a crisis, and perform the necessary planning, preparedness, training, and exercise activities between disasters. The challenges of law enforcement coordination during a disaster need to be resolved now, before another large crisis occurs and triggers a disorganized or ineffective federal response.

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#### ADDENDUM: HURRICANE SANDY AND RECENT ORGANIZATIONAL IMPROVEMENTS

DOJ and ATF have made great progress in recent years by adding new staff to work on the ESF #13 function, but the underlying legal complexities outlined in this paper remain.<sup>165</sup>

Hurricane Sandy, which hit the Northeast in late October 2012, was the second-largest Atlantic storm on record; however, no major ESF #13 problems surfaced, and by most accounts, the overall disaster response to the storm went well.<sup>166</sup> Success for ESF #13 was likely due to a number of factors, including the level of preparedness of the affected cities and states, but it was also because ATF was better prepared and better organized to execute the ESF #13 function.

The ESF #13 organization at ATF has matured in the years since Hurricanes Gustav and Ike, and now includes a national staff to work on planning, logistics, and the legal and administrative aspects of the program, as well as an advisory board to provide policy guidance.<sup>167</sup> An interagency steering committee comprised of roughly 85 departments and agencies now meets regularly to coordinate ESF #13 planning and provide input on procedures, operations, and best practices.<sup>168</sup> Also, there is now a designated “Regional Law Enforcement Coordinator” in each of the ten FEMA regions to lead the ESF #13 function and work on preparedness matters during a steady state; each of these regional coordinators is supported by a contractor who can assist with planning.<sup>169</sup> These

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<sup>165</sup> See generally *RISC Briefing*, *supra* note 76.

<sup>166</sup> See *Hurricane Sandy FEMA After-Action Report*, FED. EMERGENCY MGMT. AGENCY i, <http://www.fema.gov/media-library/assets/documents/33772> (last visited Nov. 23, 2013).

<sup>167</sup> *RISC Briefing*, *supra* note 76, at 5.

<sup>168</sup> *Emergency Support Function (ESF) #13 – FEMA Region III Fact Sheet*, FED. EMERGENCY MGMT. AGENCY [http://www.fema.gov/media-library-data/20130726-1903-25045-1174/esf\\_\\_13\\_fact\\_sheet.pdf](http://www.fema.gov/media-library-data/20130726-1903-25045-1174/esf__13_fact_sheet.pdf) (last visited Nov. 23, 2013).

<sup>169</sup> Five of the regional coordinators are ATF agents, and five are from other DOJ law enforcement agencies. *Id.* See also U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, CONGRESSIONAL BUDGET SUBMISSION FOR FISCAL YEAR 2014 46-47 (2013), available at <http://www.justice.gov/jmd/2014justification/pdf/atf-justification.pdf>.

new personnel help give the ESF #13 management team more visibility into FEMA operations, providing a critical link to overall disaster response operations that was previously missing. The regional coordinators can also work during a steady state to identify the legal authorities and deputation issues for the states in their assigned region and put agreements and processes in place before disasters strike.<sup>170</sup> ATF has even identified that one of the key functions of its National Coordination Center during a disaster is to ensure state law enforcement authority is granted to federal officers deployed under an ESF #13 mission.<sup>171</sup>

The underlying legal issues identified in this paper continue to remain, however. EFLEA and the Stafford Act both still provide alternative sources of authority for the federal government to provide law enforcement assistance to disaster-stricken states, but through different processes; federal officers continue to need appropriate state authority to make arrests for state offenses; and effective law enforcement still takes more than deploying agents with guns and badges. In conclusion, while ATF has made great strides to improve ESF #13, there is still room for more robust coordination across DOJ and the rest of the criminal justice community for emergency management issues broader than ESF #13, and this remains an area that would benefit from congressional action.



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<sup>170</sup> *RISC Briefing*, *supra* note 76, at 15.

<sup>171</sup> *Id.* at 8.